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VOLUME 5

TITLE 81

SALES

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CHAPTER 1

THE CONTRACT *

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* **Scope of annotations.** It is not the purpose of the annotations to this chapter to contain cases merely deciding general questions of the law of contracts and of sales. Standard works should be consulted in that regard. There are many cases decided both before and since the adoption of this Uniform Act that announce principles of the law of contracts and sales generally which are not contained herein.

81-1-1. Contracts to Sell and Sales.

(1) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

(2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

(3) A contract to sell or a sale may be absolute or conditional.

(4) There may be a contract to sell or a sale between one part owner and another. (C. L. 17, § 5110; Unif. Act, § 1.)

Comparable provisions.

States that have adopted the Uniform Sales Act are as follows: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin and Wyoming.

States that have adopted the amendments to the Sales Act are as follows: Alabama, California, Delaware, Michigan, New York, Ohio, Pennsylvania, Tennessee, Utah, Vermont and Wisconsin.

Uniform Sales Act, § 1 (identical).

Cross-references.

Interparty agreements; Title 45, conditional sales, 13-0-16.

1. Sale defined.

Sale is ordinarily understood to mean transfer of property for money. Watson v. Odell, 58 U. 276, 198 P. 772, 20 A. L. R. 280.

2. Conditional sale.

If personal property is delivered to buyer, title not to vest until payment of balance of purchase money, sale is a conditional one, and does not vest title until condition is performed. Such transaction is not fraudulent as against third parties claiming through buyer, in absence of showing of bad faith. Shoshonetz v. Campbell, 7 U. 46, 24 P. 672.

3. Executory and executed contracts distinguished.

Whether a contract is one of sale or an executory contract to sell depends always upon what the parties to it intend in regard to the time when the title in the property is to the buyer. Jones v. Commercial Investment Trust, 64 U. 151, 228 P. 896, followed in Harrison v. Auto Securities Co., 70 U. 11, 18, 257 P. 677, 57 A. L. R. 388.

In contract to sell, parties agree to transfer property in goods at some future time, whereas in sale, parties agree to transfer property presently. Middletown v. Evans, 86 U. 306, 45 P.2d 570.

4. Formation of contract.

Where portion of contract relating to terms of payment is left for future determination, contract is incomplete, and no action premised thereon is maintainable. Hi-Way Motor Co. v. Service Motor Co., 68 U. 65, 249 P. 133.

A. L. R. notes.

Assignability of contract to furnish all of buyer's requirement or to take all of seller's output, 39 A. L. R. 1192.

Character and validity of written instrument as a contract for sale of goods as affected by election or option in respect of subject matter, 105 A. L. R. 1100.

Conditional sales, see notes under 81-2-4.

Construction and application of Uniform Sales Act, other than section 4 relating to statute of frauds, as regards distinction between contract of sale and contract for work or labor, 111 A. L. R. 341.

Construction of contract for sale of commodity to the extent of the buyer's requirements, 27 A. L. R. 127.

Contract for sale of goods as entire or divisible, 2 A. L. R. 643.

Deposit of grain without obligation to return identical grain as a bailment or a sale, 54 A. L. R. 1166.

Divisibility of contract for the sale of an outfit, plant, or machinery, 4 A. L. R. 1442.

Express provisions in contract of sale, or for supply of a commodity, for relief from the obligation in certain event, 51 A. L. R. 990.

Mutuality and enforceability of an agreement upon the sale of goods, to give the purchaser an option or the exclusive sale of similar goods without a corresponding obligation on his part, 45 A. L. R. 1197.

Mutuality and enforceability of contract to furnish another with his needs, wants, desires, requirements, etc., of a certain commodity, 24 A. L. R. 1352.

Taking intoxicating liquor from person of defendant as a sale, 3 A. L. R. 1096.

Validity and mutuality of agreement to buy where there is no express agreement to sell, 60 A. L. R. 215.

81-1-2. Capacity—Liabilities for Necessaries.

Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor. "Necessaries" in this section means goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery. (C. L. 17, § 5111; Unif. Act, § 2.)

Comparable provisions.
Uniform Sales Act, § 2 (identical).

Cross-references.
Capacity of children, 14-1.

1. Scope of note.
This note does not purport to deal with the general capacity of persons to contract. General treatises on the law of contracts and sales should be consulted in that regard.

2. Capacity of infants.

3. — in general.
This is covered in another section. See 14-1-2.

4. Disaffirmance of contracts.
No hard and fast rule can be stated regarding precise time within which minor may disaffirm his contract and much depends upon intelligence of minor, his means of knowledge, nature of and his relation to the transaction, and purpose to be attained thereby. Merchants' Credit Bureau v. Kaoru Akiyama, 64 U. 364, 230 P. 1017. See annotations under 14-1-2.

A. L. R. notes.
Civil liability of father for necessaries furnished to child taken from home by mother, 32 A. L. R. 1466; liability of parent for dental services to minor child, 7 A. L. R. 1070.

81-1-3. Form of Contract or Sale.

Subject to the provisions of this title and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties. (C. L. 17, § 5112; Unif. Act, § 3.)

Comparable provisions.
Uniform Sales Act, § 3 (identical; noting, however, that, throughout the statute, use is made of the term "act" in lieu of "title").

Cross-references.
Private seals not required, 104-48-4.

A. L. R. notes.
Acknowledging receipt of order for goods as an acceptance completing the contract, 10 A. L. R. 683.
Acting on order for goods as an acceptance thereof, 29 A. L. R. 1352.
Effect of stipulation for return of deposit or advance payment if the order is not accepted, 1 A. L. R. 1513.
Taking intoxicating liquor from person of defendant as a sale, 3 A. L. R. 1096.
Time and place of consummation of contract on acceptance by telegraph of offer, 47 A. L. R. 159.

81-1-4. Statute of Frauds.

(1) A contract to sell or a sale of any goods or choses in action of the value of $500 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale is signed by the party to be charged, or his agent in that behalf.

(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer, and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods. (C. L. 17, § 5113; Unif. Act, § 4.)

History.

This section was first enacted in 1865, and then in 1884 a provision repugnant thereto was enacted into law. Hudson Furniture Co. v. Freed Furniture & Carpet Co., 10 U. 31, 34, 36 P. 132, applying 2 Comp. Laws 1888, § 3918.

At one time this section was subdivision (4) of the general statute of frauds; and the amount was then $200 instead of $500. 2 Comp. Laws 1888, § 3918; Walker v. Bamberger, 17 U. 239, 54 P. 108.

Comparable provisions.

Uniform Sales Act, § 4 (identical).

Cross-references.

Statute of frauds generally, 33-5.

1. Summary of provisions of section.

This section provides that a contract to sell or a sale of goods or choses in action of the value of $500 or upwards shall be unenforceable, unless: 1, the buyer shall accept part of the goods or choses in action and actually receive the same, or 2, give something in earnest to bind the contract, or in part payment, or 3, unless some note or memorandum of such contract be made in writing and subscribed by the parties to be charged or their agents.

2. Words and phrases defined.

The terms "accept" and "actually receive" in this section, although ordinarily synonymous, do not necessarily mean the same thing in the statute of frauds. James Mack Co. v. Bear River Milling Co., 63 U. 565, 569, 227 P. 1033, 36 A. L. R. 643, discussing at length definitions of these words and phrases.

3. Operation and effect of section.

This section definitely determines what contracts are within and what contracts are without the statute of frauds. Sidney Stevens Implement Co. v. Hintze, 92 U. 264, 269, 67 P.2d 632, 111 A. L. R. 331.

4. Applicability of section.

Statute of frauds applies to transactions involving purchase and sale of stock. Woolley v. Loose, 57 U. 338, 194 P. 908, 14 A. L. R. 372.

Agreement between owner of option for purchase of stock and person who was to sell stock providing for a sharing of profits from stock sales was not a sale, and hence, statute did not apply. Western Securities Co. v. Spiro, 62 U. 623, 221 P. 856.

5. Contract for sale of goods.

Utah has adopted the Massachusetts rule with regard to what constitutes a contract for the sale of goods. Sidney Stevens Implement Co. v. Hintze, 92 U. 264, 268, 67 P.2d 632, 111 A. L. R. 331.

6. What is contract for work, labor and materials.

Oral agreement whereby company agreed to build auto trailer for use in business by cash register salesman which was to weigh one-half of what the finished trailer in fact weighed, held not a sale but a contract for work, labor and materials. Sidney Stevens Implement Co. v. Hintze, 92 U. 264, 67 P.2d 632.

7. Taking transaction out of statute.

8. — acceptance and receipt of goods.

It will be noted that one of the three ways of validating such a contract is that the buyer must both accept and receive the goods. The words are now in the conjunctive, whereas they were formerly in the disjunctive. Therefore, to entitle a person to recover under such an oral contract, both an acceptance and a delivery must be shown. Hudson Furniture Co. v. Freed Furniture & Carpet Co., 10 U. 31, 35, 36 P. 132. It is not necessary, however, for the accepting and receiving to take place at the same time. One may precede the other, but both must have occurred before the seller is entitled to recover the price. Hudson Furniture Co. v. Freed Furniture

& Carpet Co., 10 U. 31, 36, 36 P. 132.

Manual and actual reception of the goods is not, however, required; symbolic, constructive, or implied possession is sufficient. Hudson Furniture Co. v. Freed Furniture & Carpet Co., 10 U. 31, 37, 36 P. 132.

It is a question for jury to determine whether or not defendant is to be deemed to have accepted the goods by his failure to reject them within a reasonable time. Lauer v. Richmond Co-operative Mercantile Institution, 8 U. 305, 31 P. 397, applying 2 Comp. Laws 1888, p. 154, § 2836.

A delivery f. o. b. to a carrier not specially designated by buyer is not such an acceptance and receipt by buyer as will avoid operation of statute, no part of purchase money being paid by buyer, and no note or memorandum of contract being signed by him. To satisfy statute there must be such an act, or such conduct, on part of buyer, as will manifest an intention to accept and receive goods as his own; such an act or such conduct as will supply the place of a written contract. The delivery must be complete delivery, and the acceptance must be final, unconditional and irrevocable, so that the goods will be reduced to the actual possession of the buyer. Hudson Furniture Co. v. Freed Furniture & Carpet Co., 10 U. 31, 36, 36 P. 132.

Contention that certain oral agreement for sale of certain shares of stock and to divide profits was void because it was not in writing was without merit, since statute did not apply where the transaction was fully executed and the seller of stock had received and retained the fruits of the transaction. Western Securities Co. v. Spiro, 62 U. 623, 221 P. 856.

Where buyer was in possession of wheat as bailee and after oral contract for sale thereof was entered into he requested extension of time to pay for wheat, oral contract was taken out of this section. James Mack Co. v. Bear River Milling Co., 63 U. 565, 227 P. 1033, 36 A. L. R. 643.

9. —note or memorandum of contract.

An insufficient memorandum will not be received. Walker v. Bamberger, 17 U. 239, 246, 54 P. 108.

Memorandum of offer to sell, which was only signed by seller, held sufficient within this section. Bailey v. Leishman, 32 U. 123, 89 P. 78, 13 Ann. Cas. 1116. (McCarty, C. J., dissenting.)

10. —subdivision (3).

By the express terms of this subdivision, either words or conduct may be sufficient, though, of course, the inference to be drawn from either should be clear and unequivocal. James Mack Co. v. Bear River Milling Co., 63 U. 565, 572, 227 P. 1033, 36 A. L. R. 643.

11. Part performance.

Where an option, not reduced to writing, on an option, is taken, and all its terms are complied with, the transactions will be taken out of the statute of frauds, and be regarded as valid. Walker v. Bamberger, 17 U. 239, 54 P. 108.

12. Pleading statute.

If answer, in action on contract of sale of goods, admits contract without setting up its invalidity under statute of frauds, merely pleading nonperformance of contract, it was held that defendant could not on the trial plead statute of frauds. Lauer v. Richmond Co-operative Mercantile Institution, 8 U. 305, 31 P. 397.

A. L. R. notes.

Acceptance satisfying statute where purchaser in possession at time of sale, 111 A. L. R. 1312.

Acceptance which will take oral sale or contract for sale of goods out of statute of frauds as affected by cancellation of order or repudiation of contract before goods were shipped or delivered to buyer, 113 A. L. R. 810.

Action for fraud or deceit predicated upon oral contract within the statute of frauds or the transaction of which the oral contract was a part, 104 A. L. R. 1420.

Agreements in relation to exchange or remittance as within statute of frauds, 19 A. L. R. 1140.

Character and validity of written instrument as a contract for sale of goods as affected by election or option in respect of subject matter, 105 A. L. R. 1100.

Check or note as memorandum satisfying statute of frauds, 20 A. L. R. 363.

Construction and application of Uniform Sales Act, other than section 4 relating to statute of frauds, as regards distinction between contract of sale and contract for work or labor, 111 A. L. R. 341.

Contract which violates statute of frauds as evidence of value in action not based on the contract, 49 A. L. R. 1121.

Contracts relating to corporate stock as within provision of statute of frauds dealing with sales of goods, 59 A. L. R. 597.

Dealings between seller and buyer after latter's knowledge of former's fraud as waiver of claim for damages on account of fraud, 106 A. L. R. 172.

Effect of statute of frauds on right to modify by parol agreement required to be in writing, 80 A. L. R. 539.
Extrinsic writing referred to in written agreement as part thereof for purposes of statute of frauds, 73 A. L. R. 1383.
Failure to comply with statute of frauds as to part of contract within statute as affecting enforceability of part not covered by statute, 71 A. L. R. 479.
Lead pencil signature, 8 A. L. R. 1339.
Money or other property in possession of seller, before contract was made, as satisfying condition of part payment which will take oral contract for sale of goods out of statute of frauds, 131 A. L. R. 1252.
Name of principal or authorized agent in body of instrument as satisfying statute of frauds where transaction not conducted by him, 28 A. L. R. 1114.
Necessity and sufficiency of statement in writing of consideration or price for sale of goods or choses in action in order to satisfy statute of frauds, 59 A. L. R. 1422.
Necessity that each of several papers constituting contract be signed by party to be charged, 86 A. L. R. 1184.
One party or his agent as agent of other to sign contract or memorandum within statute, 47 A. L. R. 201.
Oral contract to enter into written agreement as within statute of frauds, 58 A. L. R. 1015.
Place of signature on memorandum to satisfy statute of frauds, 112 A. L. R. 937.
Price or consideration for sale of goods, necessity and sufficiency of statement in writing, 59 A. L. R. 1422.
Reformation of memorandum relied upon to take contract out of statute of frauds, 73 A. L. R. 99.
Relation between doctrines of estoppel and part performance as basis of enforcement of contract not conforming to statute of frauds, 75 A. L. R. 650.
Signature by agent of undisclosed principal as satisfying statute of frauds, 23 A. L. R. 932.
Statute of frauds and conflict of laws, 105 A. L. R. 662.
Statute of frauds as applied to agreements of repurchase or repayment on sale of corporate stock or other personal property, 121 A. L. R. 312.
Terms "bags," "bales," "cars," or other terms indefinite as to quantity or weight, as satisfying statute of frauds, 129 A. L. R. 1230.
Trade custom or usage to explain or supply essential terms in writing required by statute of frauds (or Sales Act) in sale of goods, 29 A. L. R. 1218.
When goods remaining in custody of seller or some third person deemed received by buyer within exception to statute, 4 A. L. R. 902.
Writing between one of the parties to a contract and his agent or a third person as satisfying statute of frauds, 112 A. L. R. 490.

81-1-5. Existing and Future Goods.

(1) The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this title called "future goods."

(2) There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

(C. L. 17, § 5114; Unif. Act, § 5.)

Comparable provisions.
Uniform Sales Act, § 5 (identical).

1. Applicability of section.
This section and 81-6-5, subd. (1) do not expand the law of sales to include a transaction which is not a contract of sale, such as a contract for work, labor and materials. Sidney Stevens Implement Co. v. Hintze, 92 U. 264, 67 P.2d 632.

Oral agreement whereby company agreed to build auto trailer for use in business by cash register salesman, which was to weigh one-half of what the finished trailer in fact weighed, held not a sale but a contract for work, labor and materials. Sidney Stevens Implement Co. v. Hintze, 92 U. 264, 67 P.2d 632.

2. Conditional sale.
Undisclosed intent of seller is not of itself sufficient to make delivery conditional, and in order that there may be conditional sale and title retained by

vendor, the minds of parties must meet, unless contract be executory for article to be manufactured, and then under the Uniform Sales Act title does not pass prior to appropriation of goods to contract, and at time of appropriation to contract, vendor may reserve right of possession or right of property until certain conditions have been fulfilled. Utah Ass'n of Creditmen v. Buller, 57 U. 270, 273, 194 P. 127.

A. L. R. notes.

Substantial performance of contract for manufacture or sale of article, 19 A. L. R. 815; validity and construction of contract for sale of season's output, 23 A. L. R. 574.

81-1-6. Undivided Shares.

(1) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

(2) In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass, and the seller is bound to make good the deficiency from similar goods, unless a contrary intent appears. (C. L. 17, § 5115; Unif. Act, § 6.)

Comparable provisions.
Uniform Sales Act, § 6 (identical).

1. Sale of goods and passage of title.
The fact that sugar under contract of sale was stored in different warehouses used in operation of business did not render inapplicable ordinary rules respecting sale and passage of title to part of fungible property without separation or segregation. United States v. Amalgamated Sugar Co., 72 F.2d 755.

81-1-7. Destruction of Goods Sold.

(1) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

(2) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part, or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale:

(a) As avoided, or,

(b) As transferring the property in all of the existing goods, or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price, if the sale was indivisible, or to pay the agreed price for the goods in which the property passes, if the sale was divisible. (C. L. 17, § 5116; Unif. Act, § 7.)

Comparable provisions.
Uniform Sales Act, § 7 (identical).

81-1-8. Destruction of Goods Contracted to Be Sold.

(1) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part

of the seller or the buyer the goods wholly perish, the contract is thereby avoided.

(2) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer part of the goods perish, or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract:

(a) As avoided, or,

(b) As binding the seller to transfer the property in all of the existing goods, or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price, if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller by the buyer's option is bound to transfer, if the contract was divisible. (C. L. 17, § 5117; Unif. Act, § 8.)

Comparable provisions.
Uniform Sales Act, § 8 (identical).

81-1-9. Definition and Ascertainment of Price.

(1) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

(2) The price may be made payable in any personal property.

(3) Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring, or for promising to transfer, the property in goods, this title shall not apply.

(4) Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case. (C. L. 17, § 5118; Unif. Act, § 9.)

Comparable provisions.
Uniform Sales Act, § 9 (identical).

1. Subdivision (1).
If the price is fixed by the contract, that controls. Halverson v. Walker, 38 U. 264, 112 P. 804.

2. Subdivision (4).
Subdivision (4) constitutes a general rule of the law of sales even in absence of statute, and what constitutes a "reasonable price" is for the jury. Standard Coal Co. v. Stewart, 72 U. 272, 278, 269 P. 1014; Mulliner v. McCormick & Co., 69 U. 557, 257 P. 658.

A. L. R. notes.
Necessity of independent consideration to support a modification of the price in a contract of sale, 34 A. L. R. 511.
Right of purchaser to opportunity to pay in cash where tender has been made in other medium, 23 A. L. R. 630.
Sale agreement fixing price at resale price less specified per cent as indefinite, 57 A. L. R. 747.
Validity and effect of provision of sale contract making price dependent on tariff duties or changes in tariff, 70 A. L. R. 1444.
Validity and enforceability of contract which expressly leaves open terms of payment for future negotiation, 49 A. L. R. 1464.

81-1-10. Sale at a Valuation.

(1) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person, without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or

any part thereof have been delivered to and appropriated by the buyer, he must pay a reasonable price therefor.

(2) Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed in chapters 4 and 5 of this title. (C. L. 17, § 5119; Unif. Act, § 10.)

Comparable provisions.
Uniform Sales Act, § 10 (identical; noting, however, that term "parts" is used in lieu of "chapters").

A. L. R. notes.
Validity and enforceability of contract which expressly leaves open terms of payment for future negotiation, 49 A. L. R. 1464.

81-1-11. Effect of Conditions.

(1) Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale, or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first mentioned party may also treat the nonperformance of the condition as a breach of warranty.

(2) Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligations to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.

(C. L. 17, § 5120; Unif. Act, § 11.)

Comparable provisions.
Uniform Sales Act, § 11 (identical).

A. L. R. notes.
Acceptance of offer with condition which law would imply, 1 A. L. R. 1508; express provisions in contract of sale, or for supply of a commodity, for relief from the obligation in certain event, 51 A. L. R. 990; provision in sale contract to effect that only conditions incorporated therein shall be binding, 133 A. L. R. 1360.

81-1-12. Definition of Express Warranty.

Any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be considered as a warranty.

(C. L. 17, § 5121; Unif. Act, § 12.)

Comparable provisions.
Uniform Sales Act, § 12 (identical).

1. Operation and effect of section.
Much of this section is merely declaratory of pre-existing law. The supreme court of this state has declared what constitutes a warranty in the sale of personal property. Jorgensen v. Gessell Pressed Brick Co., 45 U. 31, 141 P. 460, Ann. Cas. 1917 C 309; Studebaker Bros. Co. v. Anderson, 50 U. 319, 167 P. 663.

This section and 81-5-7 do not change action for rescission from equitable to law action. Summers v. Provo Foundry & Machine Co., 53 U. 320, 178 P. 916.

2. Express warranty.
What constitutes an express warranty in the sale of a new or a secondhand automobile is a matter of general law. Studebaker Bros. Co. v. Anderson, 50 U. 319, 167 P. 663; Rockhill v. Creer, 56 U. 119, 189 P. 668.

Statement in writing that car sold was a 1922 model was express warranty under this section regardless of whether seller was or was not guilty of inten-

tional deceit in delivering a 1021 model to buyer. Stringfellow v. Botterill Auto Co., 63 U. 56, 221 P. 861, 34 A. L. R. 533. (Cherry, J., dissenting.)

3. "Seller's talk."

There are many examples of "puffing" or "trader's talk" which are not actionable. Campbell v. Zion's Co-Op. Home Building & Real Estate Co., 46 U. 1, 14, 148 P. 401.

Statement that Hudson Super-Six motor car would do whatever any other Super-Six would do amounted to express warranty, and not mere "seller's talk," or an expression of opinion. Summers v. Provo Foundry & Machine Co., 53 U. 320, 178 P. 916.

Dealer's statement that stoves would sell like hot cakes, held dealer's talk and not warranty. Detroit Vapor Stove Co. v. J. C. Weeter Lumber Co., 61 U. 503, 215 P. 995, 29 A. L. R. 659.

Rule that representations as to value of goods are mere expressions of opinion did not apply where seller of business represented that goods would inventory at certain price and that seller would guarantee same, and buyer was entitled to recover difference between actual value of goods and inventory price as represented by seller. Beaver Drug Co. v. Hatch, 61 U. 597, 217 P. 695.

4. Rule of caveat emptor.

Where seller of potatoes made no representation whatever as to quality of potatoes, and buyer saw them, examined them, and knew kind of potatoes he was bargaining for, doctrine of caveat emptor applied and grower should not have been barred from recovering purchase price of potatoes on theory that they were expressly warranted as to quality. Baker v. Latses, 60 U. 38, 206 P. 553.

5. Breach of warranty.

False representations of seller as to past earnings of hotel, wherein buyer was to use furniture purchased, was not breach of warranty such as would give buyer lien on property for amount paid on purchase price. Sammis v. Marks, 69 U. 26, 252 P. 270.

6. Pleading.

Allegation that at time of entering into contract for sale of tractor seller falsely represented and warranted to buyer that tractor would pull plows plowing at depth of 10 inches in soil, was not charge of fraud but charge of breach of warranty as defined in this section since knowledge of falsity is necessary to charge of fraud. Anglo-California Trust Co. v. Hall, 61 U. 223, 211 P. 991.

A. L. R. notes.

Construction and effect of affirmative provision in contract of sale by which purchaser agrees to take article in the condition in which it is, 58 A. L. R. 1181.

Construction and effect of express or implied warranty on sale of an article intended for use as an explosive, 62 A. L. R. 1510.

Express or implied warranty on sale for accommodation of buyer, 59 A. L. R. 1541.

Judgment against seller of chattels for breach of warranty as conclusive upon prior warrantor, 8 A. L. R. 667.

Necessity and sufficiency, in complaint or declaration in action for injury or damage due to dangerous condition of automobile or other machine, of allegations as to particular defects, 129 A. L. R. 1274.

Reliance on dealer's or manufacturer's assurance that article is not dangerous as affecting question of contributory negligence, 55 A. L. R. 1047.

Right of retailer to rely upon express or implied warranty by wholesaler or manufacturer where there is an express warranty to the consumer, 59 A. L. R. 1239.

Sale in violation of Sunday law as affecting recovery for personal injury or other collateral consequence of breach of warranty by seller or manufacturer, 44 A. L. R. 128.

Scope and effect of provision of Uniform Sales Act as to effect of express warranty or condition to negative implied warranty or condition, 64 A. L. R. 951.

Seller's advertisements as affecting rights of parties to sale of personal property, 28 A. L. R. 991.

Validity of provision of contract of sale of personal property negativing implied warranties, 117 A. L. R. 1350.

Warranty or misrepresentation as to character of article as new, where seller fails to disclose that article has been used or is secondhand, 104 A. L. R. 551.

81–1–13. Implied Warranties of Title.

In a contract to sell or a sale, unless a contrary intention appears, there is:

(1) An implied warranty on the part of the seller that in the case of a sale he has a right to sell the goods, and that in case of a contract to

sell he will have a right to sell the goods at the time when the property is to pass.

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale.

(3) An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest. (C. L. 17, § 5122; Unif. Act, § 13.)

Comparable provisions.
Uniform Sales Act, § 13 (identical).

A. L. R. notes.
Warranty of title by seller in conditional sale contract, 132 A. L. R. 338.

81-1-14. Implied Warranty in Sale by Description.

Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description, and if the contract or sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample, if the goods do not also correspond with the description. (C. L. 17, § 5123; Unif. Act, § 14.)

Comparable provisions.
Uniform Sales Act, § 14 (identical; noting, however, that, in third line "be" is used in lieu of "is").

1. Applicability of section.
This section does not apply where seed is sold with a nonwarranty notice. Hoover v. Utah Nursery Co., 79 U. 12, 20, 7 P.2d 270.

2. Sales by sample.
Whether sales by sample constitute express or implied warranties is matter of general law. Jorgensen v. Gessell Pressed Brick Co., 45 U. 31, 141 P. 460, Ann. Cas. 1917 C 309.

3. Conditional sale.
Undisclosed intent of seller is not of itself sufficient to make delivery conditional, and in order that there may be conditional sale and title retained by vendor, the minds of parties must meet, unless contract be executory for article to be manufactured, and then under the Uniform Sales Act title does not pass prior to appropriation of goods to contract, and at time of appropriation to contract vendor may reserve right of possession or right of property until certain conditions have been fulfilled. Utah Ass'n of Creditmen v. Buller, 57 U. 270, 273, 194 P. 127.

A. L. R. notes.
Construction and effect of affirmative provision in contract of sale by which purchaser agrees to take article in the condition in which it is, 58 A. L. R. 1181; implied warranty of fitness on sale of article by trade mark, trade name, or other particular description, 90 A. L. R. 410; right of retailer to rely upon express or implied warranty by wholesaler or manufacturer where there is an express warranty to the consumer, 59 A. L. R. 1239.

81-1-15. Implied Warranties of Quality.

Subject to the provisions of this title and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required,

and it appears that the buyer relies on the seller's skill or judgment (whether he is the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he is the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

(5) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(6) An express warranty or condition does not negative a warranty or condition implied under this title, unless inconsistent therewith.

(C. L. 17, § 5124; Unif. Act, § 15.)

Comparable provisions.

Uniform Sales Act, § 15 (identical; noting, however, that "be" is used in lieu of "is" in fourth line of subd. (1), within the parentheses; and in second line of subd. (2)).

1. Subdivision (1).

Subdivision (1) is little more than a mere reaffirmation of the preëxisting law of sales. Wright v. Howe, 46 U. 588, 593, 150 P. 956, L. R. A. 1916 B 1104.

2. Warranty of fitness.

There is no warranty of fitness where buyer orders a specific article for a specific purpose known to seller. Landes & Co. v. Fallows, 81 U. 432, 19 P.2d 389.

Nonwarranty clause of a contract for sale of harvester precluded warranty that machine was fit for and would do work for which it was purchased. Landes & Co. v. Fallows, 81 U. 432, 19 P.2d 389.

Counterclaim in action for price of poultry feed for death of hens alleging that defendant did not know wheat which was sold to him by plaintiff was moldy and relied upon judgment of plaintiff, pleaded implied warranty, and was not subject to demurrer on ground that it sounded in tort not connected with subject of action. Thatcher Milling & Elevator Co. v. Campbell, 64 U. 422, 231 P. 621.

3. Warranty of soundness.

The general law of sales applies in the case of such warranties. M. H. Walker Realty Co. v. American Surety Co. of New York, 60 U. 435, 469, 211 P. 998.

4. Goods sold on inspection.

Where goods are sold on inspection, there is no standard but identity, and no warranty implied other than that the identical goods sold shall be delivered. Landes & Co. v. Fallows, 81 U. 432, 19 P.2d 389.

5. Caveat emptor.

Where seller of potatoes made no representation whatever as to quality of potatoes, and buyer saw them, examined them, and knew kind of potatoes he was bargaining for, doctrine of caveat emptor applied and grower should not have been barred from recovering purchase price of potatoes on theory that they were impliedly warranted as to quality. Baker v. Latses, 60 U. 38, 206 P. 553.

A. L. R. notes.

Admissibility, in action against manufacturer, packer, or bottler for personal injury due to defective or injurious condition of article, of evidence that like products were free from, or were subject to, defective or injurious conditions, 127 A. L. R. 1194.

Construction and effect of affirmative provision in contract of sale by which purchaser agrees to take article in the condition in which it is, 58 A. L. R. 1181.

Construction and effect of express or implied warranty on sale of an article intended for use as an explosive, 62 A. L. R. 1510.

Duty of seller of explosives to guard against improper condition of containers, 55 A. L. R. 194.

Express or implied warranty of quality, condition, or fitness of automobile or truck sold by retail dealer, 43 A. L. R. 648.

Implied condition or warranty of merchantability on sale of goods without particular description or war-

runty, or present opportunity for inspection, 21 A. L. R. 367.
Implied warranty by other than packer of fitness of goods sold in sealed cans, 90 A. L. R. 1269.
Implied warranty by retailer of cosmetics, 131 A. L. R. 123.
Implied warranty of fitness by one serving food, 104 A. L. R. 1033.
Implied warranty of fitness on sale of article by trade mark, trade name, or other particular description, 90 A. L. R. 410.
Implied warranty of merchantability under Uniform Sales Act in case of sale of goods by patent or trade name, 135 A. L. R. 1393.
Implied warranty of quality, condition, or fitness on sale of "job lot," "leftovers," and the like, 103 A. L. R. 1347.
Implied warranty of strength or fitness of chain, cable, or wire, 59 A. L. R. 1235.
Implied warranty upon retail sale of garment for personal wear, 27 A. L. R. 1507.
Joinder of manufacturer or packer and retailer or other middleman as defendants in action for injury to person or damage to property of purchaser or consumer of defective article, 119 A. L. R. 1356.
Liability for injuries by breaking or bursting of container in which goods are sold, 4 A. L. R. 1004.
Liability for injury or death from refrigerating machinery or apparatus, 117 A. L. R. 1425.
Liability of manufacturer or packer of defective article for injury to person or property of ultimate consumer who purchased from middleman, 111 A. L. R. 1229.
Liability of seller of article not inherently dangerous for damages sustained by purchaser on account of the injury or death of third person, 64 A. L. R. 942.
Liability of seller of article not inherently dangerous for personal injuries due to the defective or dangerous condition of the article, 74 A. L. R. 343.
Liability of seller of article not inherently dangerous to third person for injury or death through the dangerous condition of article sold, 60 A. L. R. 371.
Liability of seller of defective or unsafe automobile for injury or damage caused thereby, 122 A. L. R. 997.
Necessity and sufficiency, in complaint or declaration in action for injury or damage due to dangerous condition of automobile or other machine, of allegations as to particular defects, 129 A. L. R. 1274.
Right of retailer to rely upon express or implied warranty by wholesaler or manufacturer where there is an express warranty to the consumer, 59 A. L. R. 1239.
Sale in violation of Sunday law as affecting recovery for personal injury or other collateral consequence of breach of warranty by seller or manufacturer, 44 A. L. R. 128.
Seller's duty to ascertain at his peril that articles of food conform to food regulations, 28 A. L. R. 1385.
Seller's or manufacturer's liability for injuries as affected by peculiar or unusual susceptibility of buyer or user to injury from dye or other ingredient in article sold, 121 A. L. R. 464.
Warranties and conditions upon sale of seed, nursery stock, etc., 62 A. L. R. 451.
Warranty or condition as to kind or quality implied by sale under trade term which by use has become generic, 35 A. L. R. 249.
Warranty or misrepresentation as to character of article as new, where seller fails to disclose that article has been used or is secondhand, 104 A. L. R. 551.

81-1-16. Implied Warranties in Sale by Sample.

In the case of a contract to sell or a sale by sample:

(1) There is an implied warranty that the bulk shall correspond with the sample in quality.

(2) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in 81-3-7 (3).

(3) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample. (C. L. 17, § 5125; Unif. Act, § 16.)

Comparable provisions.

Uniform Sales Act, § 16 (identical; noting that the reference is to § 47, subd. (3); see note under 81-3-7).

CHAPTER 2

TRANSFER OF PROPERTY AND TITLE

81-2-1. No Property Passes Until Goods Are Ascertained.
81-2-2. Property in Specific Goods Passes When Parties so Intend.
81-2-3. Rules for Ascertaining Intention.
81-2-4. Reservation of Right of Possession or Property—When Goods Are Shipped.
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81-2-23. Attachment or Levy Upon Goods for Which a Negotiable Document Has Been Issued.
81-2-24. Creditors' Remedies to Reach Negotiable Documents.

81-2-1. No Property Passes Until Goods Are Ascertained.

Where there is a contract to sell unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 81-1-6.

(C. L. 17, § 5126; Unif. Act, § 17.)

Comparable provisions.
Uniform Sales Act, § 17 (identical; noting that the reference is to § 6; see note under 81-1-6).

81-2-2. Property in Specific Goods Passes When Parties so Intend.

(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

(C. L. 17, § 5127; Unif. Act, § 18.)

Comparable provisions.
Uniform Sales Act, § 18 (identical).

1. When title passes.
Provision as to intention of parties controls passing of title to machinery from corporation to newly organized operational subsidiary. Boston Acme Mines Development Co. v. Clawson, 66 U. 103, 240 P. 165.

2. Determination of nature of contract.
In determining whether a contract is one of sale or one to sell, time when title is intended to pass is controlling. Jones

v. Commercial Investment Trust, 64 U. 151, 228 P. 896.

3. Employee stock purchases.
Where upon becoming employee, he purchased stock of hotel corporation subject to repurchase agreement at agreed price if employee left employment or was discharged, upon discharge title to stock passed to corporation, and upon corporation's refusal to accept and pay for stock when tendered, employee could maintain action for agreed price. Davies v. Semloh Hotel, Inc., 86 U. 318, 44 P.2d 689.

81-2-3. Rules for Ascertaining Intention.

Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule (1) Where there is an unconditional contract to sell specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, is postponed.

Rule (2) Where there is a contract to sell specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done.

Rule (3) (a) When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery; but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

(b) When goods are delivered to the buyer on approval, or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer:

1st, When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction;

2nd, If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule (4) (a) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(b) Where in pursuance of a contract to sell the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 81-2-4. This presumption is applicable although by the terms of the contract the buyer is to pay the price before receiving delivery

of the goods, and the goods are marked with the words "collect on delivery," or their equivalents.

Rule (5) If a contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon. (C. L. 17, § 5128; Unif. Act, § 19.)

Comparable provisions.

Uniform Sales Act, § 19 (identical; except that in Rule 1 "be" is used in lieu of "is" in last line; in Rule 3, subd. (b), 2nd, "then" is inserted so as to read in part: "* * * then if a time has been fixed for the return of the goods * * *"; the reference in Rule 4, subd. (b) is to § 20; see note under 81-2-4).

1. Determination of intention of parties.

Where automobile was delivered to dealer upon agreement that it should be sold for not less than certain price and proceeds of such sale should be applied toward purchase price of new car, title to new car was intended to pass at time old car was sold although delivery was to take place upon payment of balance of purchase price, so that purchaser was entitled to car as against finance company who had title to car and claimed it after dealer's bankruptcy. Jones v. Commercial Investment Trust, 64 U. 151, 228 P. 896.

Where author of book was obligated by contract to purchase certain number of books after they were published, and procured order from book store for some books which publisher delivered to carrier consigned to book store, there was unconditional appropriation of books to contract, and sale was made to author who resold books to book store, as against contention in garnishment proceeding against book store based on judgment against author that sale was made directly to book store, and hence that book store was indebted to publisher rather than to author. Middleton v. Evans, 86 U. 396, 45 P.2d 570.

A. L. R. notes.

Applicability of provision in contract of sale for return of article, where article delivered does not answer to description, 30 A. L. R. 321.

Contracts of sale or return as distinguished from contracts for sale on approval, 52 A. L. R. 589.

Delivery to carrier of quantity of goods greater than that called for by contract as passing title, 38 A. L. R. 1544.

Failure to ship by carrier designated by buyer as affecting passing of title, 31 A. L. R. 955.

F. o. b. provision in sale contract as affecting time or place of passing of title, 101 A. L. R. 292.

Liability for loss of or damage to property delivered on trial or with privilege of return, 31 A. L. R. 1365.

Passing of title to goods by acceptance of draft for purchase price, with warehouse receipt attached, or by transfer of draft with receipt, 55 A. L. R. 1116.

Rule that title passes on delivery to carrier as applicable to shipment in "pool" car for several purchasers, 36 A. L. R. 410.

Time and place of passage of title to goods shipped under bill of lading, with draft attached, consigning them to shipper's order, 60 A. L. R. 677.

What amounts to delivery f. o. b., 16 A. L. R. 597.

What constitutes delivery of goods sold under "c. i. f." contract, 20 A. L. R. 1236.

81-2-4. Reservation of Right of Possession or Property—When Goods Are Shipped.

(1) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or

of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(3) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods, as against the buyer.

(4) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading, if he does not honor the bill of exchange; and if he wrongfully retains the bill of lading, he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful. (C. L. 17, § 5129; Unif. Act, § 20.)

Comparable provisions.
Uniform Sales Act, § 20 (identical).

1. Conditional delivery.
Undisclosed intent of seller is not of itself sufficient to make delivery conditional, and in order that there may be conditional sale and title retained by vendor, the minds of parties must meet, unless contract be executory for article to be manufactured, and then under the Uniform Sales Act title does not pass prior to appropriation of goods to contract, and at time of appropriation to contract vendor may reserve right of possession or right of property until certain conditions have been fulfilled. Utah Ass'n of Creditmen v. Buller, 57 U. 270, 273, 194 P. 127.

Where property was delivered to purchaser, and there was no previous contract retaining title in seller, fact that delivery slip which accompanied the goods contained words, conditional sale, title retained by vendor until paid in full, and was signed by purchaser to prove delivery in good condition could not be held to constitute contract between vendor and vendee, nor to show conditional sale. Utah Ass'n of Creditmen v. Buller, 57 U. 270, 194 P. 127.

2. Repossession by seller.
The right of seller to retake possession may be regulated by terms of contract, which will control. Walker v. Consolidated Wagon & Machine Co., 41 U. 255, 126 P. 308; Franz v. Hair, 76 U. 281, 289 P. 130, 83 A. L. R. 990.

3. Notice of reservation.
Registration constitutes notice of retention of title. Truitt v. Patten, 75 U. 567, 287 P. 175.

4. Assignment for benefit of creditors.
Assignee for benefit of creditors acquires no title to personal property in assignor's possession under contract of conditional sale when, at time of assignment, title has not vested in assignor by performance of condition. Charles Lippincott & Co. v. Rich, 19 U. 140, 56 P. 806.

Assignment for benefit of creditors held void as to seller of personal property in assignor's possession under contract of conditional sale, condition of which was unperformed, since it empowered assignee to sell assigned property on credit. Charles Lippincott & Co. v. Rich, 19 U. 140, 56 P. 806.

5. Relationship between vendor and purchaser.
Buyer on installment plan does not become agent of seller who retains title. State v. Davis, 55 U. 54, 63, 184 P. 161.

6. Estoppel and waiver.
Of course seller may estop himself from asserting retained title. State v. Casperson, 71 U. 68, 76, 262 P. 294.

A. L. R. notes.

Accession to property which is the subject of a conditional sale or chattel mortgage, 68 A. L. R. 1242.

Applicability of protective provisions of Uniform Conditional Sales Act or similar statutes where there has been a novation of the contract, 83 A. L. R. 998.

Assignees for creditors as within protection of statute requiring filing or recording of conditional-sale contract or chattel mortgage, 71 A. L. R. 981.

Bringing action for price as waiver by conditional vendor of right to reclaim property, 113 A. L. R. 653.

Conditional sales in relation to taxation, 110 A. L. R. 1499.

Conflict of laws as to conditional sale of chattels, 87 A. L. R. 1308.

Construction and application of statute requiring conditional sale contract or record thereof to describe all conditions or terms of the sale, 130 A. L. R. 726.

Creditor levying upon subject of unfiled conditional sale contract under prior judgment, 55 A. L. R. 1137.

Damages recoverable by conditional vendee against third person as affected by credit on contract of insurance carried by vendor, 32 A. L. R. 632.

Demand for payment or for possession as a condition of seller's right to retake property or otherwise enforce forfeiture under conditional sale, 59 A. L. R. 134.

Effect of assignment of a conditional sale contract as collateral, 36 A. L. R. 759.

Liability for assault or trespass in forcibly retaking property sold conditionally, 105 A. L. R. 926.

Liability of purchaser under conditional sale contract, or one claiming under him, as for conversion, 73 A. L. R. 799.

Note for price as waiver of reservation of title under conditional sale, 55 A. L. R. 1160.

Priority as between lien for repairs and right of seller under conditional contract, 30 A. L. R. 1227.

Recovery by conditional vendor or vendee against third person for damage to or destruction of property, 38 A. L. R. 1337.

Repossession by conditional seller as affecting his right to recover on a note or other obligation given as a down payment, 83 A. L. R. 992.

Requisites and sufficiency of description of property in conditional sales contract, 65 A. L. R. 714.

Reservation of title by conditional sale of material to manufacturer as affecting articles fabricated or in process of fabrication from the material, 117 A. L. R. 682.

Right of conditional buyer to maintain action for conversion and damages recoverable as affected by defendant's recognition of conditional seller's title or rights, 116 A. L. R. 904.

Right of conditional seller to retake property without judicial aid, 55 A. L. R. 184.

Right of conditional vendor to break and enter for purpose of retaking possession, upon default of the purchaser, 36 A. L. R. 853.

Right of purchaser from party to conditional sale as affected by actual or apparent authority in party to sell property, 88 A. L. R. 109.

Right of receiver of conditional vendee to avail himself of defect in execution, or filing, or failure to file, contract, 61 A. L. R. 975.

Right of seller of fixtures retaining title thereto or lien thereon, as against purchasers or encumbrancers of the realty, 111 A. L. R. 362.

Rights and duties in respect of property as between seller and seller's assignee on conditional sale of property, 65 A. L. R. 783.

Rights as between conditional seller and one claiming under or through sale or mortgage by buyer which is subject to the seller's reservation of title, 87 A. L. R. 941.

Rights as between purchaser or mortgagee from conditional buyer before, and purchaser or mortgagee after, extinguishment of conditional seller's title, 117 A. L. R. 1482.

Rights as between the assignee of a conditional vendor and one who deals with the latter after the return of the property, 3 A. L. R. 242.

Rights of parties to conditional sale as affected by breach of warranty, 130 A. L. R. 753.

Seller of fixtures retaining title or lien, rights of, as against purchasers or encumbrancers of the realty, 23 A. L. R. 805.

Settlement by or recovery against third person in favor of conditional vendee for damage to or conversion of property as affecting conditional vendor, 49 A. L. R. 1458.

Taking possession of property conditionally sold as affecting action previously commenced for purchase price, 23 A. L. R. 1462.

Validity and effect of acceleration clause in conditional sale contract under Uniform Conditional Sales Act, 67 A. L. R. 1554.

Validity and effect of provision in contract of sale with reservation of title, for collection of unpaid purchase money after retaking the property, 43 A. L. R. 1243.

Validity as to creditors of the buyer or consignee of reservation of title to goods delivered under implied or express authority to resell, 63 A. L. R. 356.
Warranty of title by seller in conditional sale contract, 132 A. L. R. 338.
What amounts to a conditional sale, 17 A. L. R. 1421.
What amounts to an attachment or levy within provision of the Uniform Conditional Sales Act avoiding reservation of title by unfiled contract, 54 A. L. R. 269.
What amounts to notice which will subject one's rights to an unrecorded conditional sale contract, 72 A. L. R. 165.
Who bears loss incident to destruction of goods sold conditionally, 38 A. L. R. 1319.

81-2-5. Sale by Auction.

In the case of a sale by auction:

(1) Where goods are put up for sale by auction in lots each lot is the subject of a separate contract of sale.

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale, unless the auction has been announced to be without reserve.

(3) A right to bid may be reserved expressly by, or on behalf of, the seller.

(4) Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself, or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller, or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.

(C. L. 17, § 5130; Unif. Act, § 21.)

Comparable provisions.
Uniform Sales Act, § 21 (identical).

A. L. R. notes.
Effect on auction sale of by-bidding or puffing, 46 A. L. R. 122; liability of auctioneer or clerk of auction to buyer in respect of title, condition, or quality of property sold, 23 A. L. R. 122; modes of making and accepting bids at auctions, 11 A. L. R. 543; regulations affecting auctions or auctioneers, 52 A. L. R. 491.

81-2-6. Risk of Loss.

Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not, except that:

(1) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract, and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.

(2) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

(C. L. 17, § 5131; Unif. Act, § 22.)

Comparable provisions.
Uniform Sales Act, § 22 (identical).

A. L. R. notes.
Liability for loss of or damage to property delivered on trial or with privilege of return, 31 A. L. R. 1365; who bears loss incident to destruction of goods sold conditionally, 38 A. L. R. 1319.

81–2–7. Sale by a Person Not the Owner.

(1) Subject to the provisions of this title, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Nothing in this title, however, shall affect:

(a) The provisions of any factors' acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

(b) The validity of any contract to sell or sale under any special common law or statutory power of sale, or under the order of a court of competent jurisdiction. (C. L. 17, § 5132; Unif. Act, § 23.)

Comparable provisions.
Unform Sales Act, § 23 (identical).

1. Operation and effect of section.
This section is largely declaratory of pre-existing rules of law. Accordingly, one who acquires property by theft, or one who by fraud acquires possession of personal property for a particular purpose with the intention of appropriating the property to his own use, and without an intention on part of owner to transfer title to him, cannot transfer a good title. This doctrine has been applied to a special agent for sale of an automobile on commission, who obtained possession thereof by trick. Swartz v. White, 80 U. 150, 13 P.2d 643.

Even an innocent purchaser for value cannot acquire title to property obtained by seller from the true owner by theft, trickery and the like. Swartz v. White, 80 U. 150, 156, 13 P.2d 643.

2. Waiver and estoppel.
Under subdivision (1) of this section the owner may estop himself from asserting his superior title. But merely delivering possession of automobile to broker to sell same, and at same time delivering to him certificate of ownership signed in blank, does not estop owner as against one buying car from such broker. Swartz v. White, 80 U. 150, 13 P.2d 643.

A. L. R. notes.
Right of purchaser from agent or dealer in possession of article for purpose of demonstration or solicitation, without actual authority to sell, 57 A. L. R. 393; right of purchaser of stolen bonds, 102 A. L. R. 28.

81–2–8. Sale by One Having a Voidable Title.

Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of sale, the buyer acquires a good title to the goods; *provided*, he buys them in good faith, for value, and without notice of the seller's defect of title.
(C. L. 17, § 5133; Unif. Act, § 24.)

Comparable provisions.
Uniform Sales Act, § 24 (identical).

A. L. R. notes.
Right of purchaser from party to conditional sale as affected by actual or apparent authority in party to sell property, 88 A. L. R. 109.

81-2-9. Sale by Seller in Possession of Goods Already Sold.

Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving and paying value for the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

(C. L. 17, § 5134; Unif. Act, § 25.)

Comparable provisions.
Uniform Sales Act, § 25 (identical).

A. L. R. notes.
Delivery of key as satisfying condition of immediate delivery and actual or continued change of possession to uphold sale of personal property against subsequent purchaser or third persons generally, 56 A. L. R. 518.

81-2-10. Creditors' Rights Against Sold Goods in Seller's Possession.

Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact, or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void. (C. L. 17, § 5135; Unif. Act, § 26.)

Comparable provisions.
Uniform Sales Act, § 26 (identical).

Cross-references.
Conditional sales excepted from chattel mortgage title, 13-6-16; sales without change of possession as fraudulent, 33-1-14; fraudulent conveyance as crime, 103-18-5.

1. Effect of sale without change of possession.
Transaction of sale, without delivery or change of possession of things sold, was fraudulent as against creditors of vendor, so as to authorize granting of attachment. Charleston Co-op. v. A. W. Allen & Bros., 40 U. 575, 123 P. 578, Ann. Cas. 1914 D 1092; Johnson v. Emery, 31 U. 126, 86 P. 869, 11 Ann. Cas. 23. See 33-1-14.

2. Who may complain.
One who was not a creditor at the time of the transfer of machinery from debtor corporation to a subsidiary, and who alleged no fraud with relation thereto, but relied upon contention that there was in fact no change of possession at time of sale (33-1-14) has no standing in court to attack validity of sale under this section. Boston Acme Mines Development Co. v. Clawson, 66 U. 103, 240 P. 165.

3. Compliance with section.
This statute must be observed by purchasers; otherwise they take the chances of the enforcement of creditors' claims or those of subsequent purchasers in good faith. Ewing v. Merkley, 3 U. 406, 410, 4 P. 244.

81-2-11. Definition of Negotiable Documents of Title.

A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document, is a negotiable document of title.

(C. L. 17, § 5136; Unif. Act, § 27.)

Comparable provisions.
Uniform Sales Act, § 27 (identical).

81-2-12. Negotiation of Negotiable Documents by Delivery.

A negotiable document of title may be negotiated by delivery:

(1) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the bearer; or,

(2) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person, or subsequent indorsee of the document, has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer, or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee. (C. L. 17, § 5137; Unif. Act, § 28.)

Comparable provisions.
Uniform Sales Act, § 28 (identical; noting, however, the following inserted words indicated by brackets: "* * * and such person or [a] subsequent indorsee of the document has indorsed it in blank or to [the] bearer").

81-2-13. Negotiation of Negotiable Documents by Indorsement.

A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiations may be made in like manner. (C. L. 17, § 5138; Unif. Act, § 29.)

Comparable provisions.
Uniform Sales Act, § 29 (identical).

81-2-14. Negotiable Documents of Title Marked "Not Negotiable."

If a document of title which contains an undertaking by a carrier, warehouseman or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "not negotiable," "nonnegotiable," or the like, such a document may nevertheless be negotiated by the holder, and is a negotiable document of title within the meaning of this title. But nothing in this title contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman or other bailee issuing a document of title or placing thereon the words "not negotiable," "nonnegotiable," or the like. (C. L. 17, § 5139; Unif. Act, § 30.)

Comparable provisions.
Uniform Sales Act, § 30 (identical).

81-2-15. Transfer of Non-negotiable Documents.

A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable document cannot be negotiated, and the indorsement of such a document gives the transferee no additional right. (C. L. 17, § 5140; Unif. Act, § 31.)

Comparable provisions.
Uniform Sales Act, § 31 (identical).

81-2-16. Who May Negotiate a Document.

A negotiable document of title may be negotiated by any person in possession of the same, however such possession may have been acquired, if by the terms of the document the bailee issuing it undertakes to deliver the goods to the order of such person, or if at the time of negotiation the document is in such form that it may be negotiated by delivery. (L. 29, p. 78, § 5141; Unif. Act, § 32.)

Comparable provisions.
Uniform Sales Act, § 32, as amended (identical).

81-2-17. Rights of Person to Whom Document Has Been Negotiated.

A person to whom a negotiable document of title has been duly negotiated acquires thereby:

(1) Such title to the goods as the person negotiating the document to him had, or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had, or had ability to convey to a purchaser in good faith for value; and,

(2) The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

(C. L. 17, § 5142; Unif. Act, § 33.)

Comparable provisions.
Uniform Sales Act, § 33 (identical).

A. L. R. notes.
Passing of title to goods by acceptance of draft for purchase price, with warehouse receipt attached, or by transfer of draft with receipt, 55 A. L. R. 1116.

81-2-18. Rights of Person to Whom Document Has Been Transferred.

A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor. If the document is nonnegotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document. Prior to the notification of such bailee by the transferor or transferee of a nonnegotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee, by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor. (C. L. 17, § 5143; Unif. Act, § 34.)

Comparable provisions.
Uniform Sales Act, § 34 (identical).

A. L. R. notes.
Passing of title to goods by acceptance of draft for purchase price, with warehouse receipt attached, or by transfer of draft with receipt, 55 A. L. R. 1116.

81-2-19. Transfer of Negotiable Document Without Indorsement.

Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. (C. L. 17, § 5144; Unif. Act, § 35.)

Comparable provisions.
Uniform Sales Act, § 35 (identical).

A. L. R. notes.
Passing of title to goods by acceptance of draft for purchase price, with warehouse receipt attached, or by transfer of draft with receipt, 55 A. L. R. 1116.

81-2-20. Warranties on Sale of Document.

A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title, unless a contrary intention appears, warrants:

(1) That the document is genuine;

(2) That he has a legal right to negotiate or transfer it;

(3) That he has knowledge of no fact which would impair the validity or worth of the document; and,

(4) That he has a right to transfer the title to the goods and that the goods are merchantable, or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby. (C. L. 17, § 5145; Unif. Act, § 36.)

Comparable provisions.
Uniform Sales Act, § 36 (identical).

81-2-21. Indorser Not a Guarantor.

The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document, or previous indorsers thereof to fulfill their respective obligations. (C. L. 17, § 5146; Unif. Act, § 37.)

Comparable provisions.
Uniform Sales Act, § 37 (identical).

81-2-22. When Negotiation Not Impaired by Fraud, Mistake or Duress.

The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was deprived of the possession of the same by loss, theft, fraud, accident, mistake, duress or conversion, if the person to whom the document was negotiated, or a person to whom the document was subsequently negotiated, paid value therefor in good faith without notice of the breach of duty, or loss, theft, fraud, accident, mistake, duress or conversion. (L. 29, p. 78, § 5147; Unif. Act, § 38.)

Comparable provisions.
Uniform Sales Act, § 38, as amended (identical).

81-2-23. Attachment or Levy Upon Goods for Which a Negotiable Document Has Been Issued.

If goods are delivered to a bailee by the owner, or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable document of title is issued for them, they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise, or be levied upon under an execution, unless the document is first surrendered to the bailee, or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

(C. L. 17, § 5148; Unif. Act, § 39.)

Comparable provisions.
Uniform Sales Act, § 39 (identical, except that word "upon" is omitted from fifth line, reading in part, "* * * or be levied under an execution * * *").

81-2-24. Creditors' Remedies to Reach Negotiable Documents.

A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document, or in satisfying the claim by means thereof, as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process. (C. L. 17, § 5149; Unif. Act, § 40.)

Comparable provisions.
Uniform Sales Act, § 40 (identical).

CHAPTER 3

PERFORMANCE OF CONTRACT

81-3-1. Seller Must Deliver and Buyer Accept Goods.
81-3-2. Delivery and Payment Are Concurrent Conditions.
81-3-3. Place, Time and Manner of Delivery.
81-3-4. Delivery of Wrong Quantity.
81-3-5. Delivery in Installments.
81-3-6. Delivery to a Carrier on Behalf of the Buyer.
81-3-7. Right to Examine the Goods.
81-3-8. What Constitutes Acceptance.
81-3-9. Acceptance Does Not Bar Action for Damages.
81-3-10. Buyer Is Not Bound to Return Goods Wrongly Delivered.
81-3-11. Buyer's Liability for Failing to Accept Delivery.

81-3-1. Seller Must Deliver and Buyer Accept Goods.

It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale. (C. L. 17, § 5150; Unif. Act, § 41.)

Comparable provisions.
Uniform Sales Act, § 41 (identical).

1. Measure of damages.
The buyer's measure of damages, where seller fails or refuses to deliver goods ordered, is a matter of general law. Schwab Safe & Lock Co. v. Snow, 47 U. 199, 152 P. 171.

A. L. R. notes.
Duty of purchaser on credit to accept seller's offer to deliver for cash, 1 A. L. R. 436.
Effect of premature tender of goods which is refused by the buyer, 47 A. L. R. 193.
Right of seller as condition of delivery to insist on or resort to means not

provided by contract to assure payment, 44 A. L. R. 443.
Substantial performance of contract for manufacture or sale of article, 19 A. L. R. 815.
Variance between description of goods in letter of credit and documents accompanying draft as affecting duty to accept draft, 30 A. L. R. 353.
What amounts to delivery f. o. b., 16 A. L. R. 597.
What constitutes delivery of goods sold under "c. i. f." contract, 20 A. L. R. 1236.

81–3–2. Delivery and Payment Are Concurrent Conditions.

Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

(C. L. 17, § 5151; Unif. Act, § 42.)

Comparable provisions.
Uniform Sales Act, § 42 (identical).

A. L. R. notes.
Authority of agent to receive payment for commodities which he is authorized to sell, or for which he is to find market, 8 A. L. R. 203.
Option to pay purchase price in cash or on terms, 36 A. L. R. 857.
Right of purchaser to opportunity to pay in cash where tender has been made in other medium, 23 A. L. R. 630.
Validity, construction, and effect of provision reserving to seller the right to demand cash or satisfactory security in the event that buyer's credit or financial responsibility becomes impaired, 64 A. L. R. 1117.
Variance between description of goods in letter of credit and documents accompanying draft as affecting duty to accept draft, 30 A. L. R. 353.

81–3–3. Place, Time and Manner of Delivery.

(1) Whether it is for the buyer to take possession of the goods, or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business, if he has one, and if not, his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.

(2) Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer, unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of, and incidental to, putting the goods into a deliverable state must be borne by the seller.

(C. L. 17, § 5152; Unif. Act, § 43.)

Comparable provisions.
Uniform Sales Act, § 43 (identical; noting, however, that in subd. (1), line 5, "have" is used in lieu of "has").

1. Subdivision (1).
Subdivision (1) of this section is largely declaratory of the general law of contracts. United States Bond & Finance Corp. v. National Building & Loan Ass'n of America, 80 U. 62, 12 P.2d 758, aff'd on rehearing 80 U. 70, 17 P.2d 238.

2. What constitutes sufficient delivery.
Delivery to a person appointed by buyer to receive the goods, or to any third person at buyer's request or with his consent, is sufficient delivery to buyer. Holloway v. Wetzel, 86 U. 387, 45 P.2d 565, 98 A. L. R. 1006.

A. L. R. notes.
Buyer's duty to give seller instructions to ship where former has not exercised his option under contract to require shipment before time specified, 119 A. L. R. 1495; effect of premature tender of goods which is refused by the buyer, 47 A. L. R. 193; what amounts to delivery f. o. b., 16 A. L. R. 597; what constitutes delivery of goods sold under "c. i. f." contract, 20 A. L. R. 1236.

81–3–4. Delivery of Wrong Quantity.

(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.

(C. L. 17, § 5153; Unif. Act, § 44.)

Comparable provisions.
Uniform Sales Act, § 44 (identical).

A. L. R. notes.
Estoppel of or waiver by buyer, in respect of shortage in commodity delivered and accepted as in full, as affecting his liability to pay for shortage or his right to recover back amount paid therefor, 113 A. L. R. 684; pro rata distribution by seller to buyers, 74 A. L. R. 996.

81–3–5. Delivery in Installments.

(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by installments.

(2) Where there is a contract to sell goods to be delivered by stated installments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more installments, or the buyer

neglects or refuses to take delivery of, or pay for, one or more installments, it depends in each case on the terms of the contract and the circumstances of the case whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.

(C. L. 17, § 5154; Unif. Act, § 45.)

Comparable provisions.
Uniform Sales Act, § 45 (identical).

A. L. R. notes.
Acceptance of installment of goods as affecting buyer's right to rescind because of defects in that installment, 29 A. L. R. 1517.
Construction of contract for sale of commodity to the extent of the buyer's requirements, 27 A. L. R. 127.
Divisibility of contract for the sale of an outfit, plant, or machinery, 4 A. L. R. 1442.
Divisibility of contract to furnish material for a specific construction, 2 A. L. R. 687.
Right of seller to rescind or refuse further deliveries on buyer's failure to pay for installments, 75 A. L. R. 609.
Right, upon buyer's default in payment of installment due, to recover amount not due, in absence of acceleration clause, 57 A. L. R. 825.
Validity and construction of contract for sale of season's output, 23 A. L. R. 574.

81–3–6. Delivery to a Carrier on Behalf of the Buyer.

(1) Where in pursuance of a contract to sell or a sale the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section 81–2–3, rule (5), or unless a contrary intent appears.

(2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit. (C. L. 17, § 5155; Unif. Act, § 46.)

Comparable provisions.
Uniform Sales Act, § 46 (identical; the reference in subd. (1) is to § 19, Rule 5; see note under 81–2–3).

A. L. R. notes.
Delivery to carrier of quantity of goods greater than that called for by contract as passing title, 38 A. L. R. 1544.
Failure to ship by carrier designated by buyer as affecting passing of title, 31 A. L. R. 955.
Misrouting as affecting duty of the buyer to accept goods, 46 A. L. R. 1120.
Right of shipper or consignee to divert shipment, 61 A. L. R. 1309.
Rule that title passes on delivery to carrier as applicable to shipment in "pool" car for several purchasers, 36 A. L. R. 410.
What amounts to delivery f. o. b., 16 A. L. R. 597.
What constitutes delivery of goods sold under "c. i. f." contract, 20 A. L. R. 1236.

81–3–7. Right to Examine the Goods.

(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them, unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

(3) Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.

(C. L. 17, § 5156; Unif. Act, § 47.)

Comparable provisions.

Uniform Sales Act, § 47 (identical; noting, however, that in subd. (3), line 6, word "the" is omitted, reading in part, "* * * by marking the goods with words 'collect on delivery' * * *").

1. Right of buyer to examine goods.

Where sale was by sample and there was no express warranty upon which buyer could rely, and for breach of which it could recover in proper action, right of inspection must have been intended by parties as condition precedent to passing of title. Wall Rice Milling Co. v. Continental Supply Co., 36 U. 121, 103 P. 242, 140 Am. St. Rep. 815.

In action to recover purchase price of carload of rice, where buyer inspected and in fact accepted rice, it was bound to pay purchase price without right to recoup damages for any defect in quality which might have been discovered after inspection and acceptance. Wall Rice Milling Co. v. Continental Supply Co., 36 U. 121, 103 P. 242, 140 Am. St. Rep. 815.

For contract construed to give buyer right of inspection at point of delivery, see Heichemer v. Peterson, 75 U. 107, 283 P. 435.

A. L. R. notes.

Buyer's right to inspect at destination where goods are delivered to carrier, 27 A. L. R. 524.

81–3–8. What Constitutes Acceptance.

The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. (C. L. 17, § 5157; Unif. Act, § 48.)

Comparable provisions.

Uniform Sales Act, § 48 (identical).

1. Sufficiency of acts of acceptance.

In action to recover purchase price of carload of rice, which were sold by sample without express warranty, where right of inspection was intended as condition precedent to passing of title, it was held that buyer did not accept rice by removing it from car to make inspection. Wall Rice Milling Co. v. Continental Supply Co., 36 U. 121, 103 P. 242, 140 Am. St. Rep. 815.

Where purchaser of stoves placed advertisement in newspapers offering such stoves for sale and naming dates upon which demonstrations would be made upon such stoves, executed trade acceptance for purchase price, and sent letter to seller that it was attempting to settle for stoves and would pay for them as soon as sold, such acts constituted acceptance within meaning of this section.

Detroit Vapor Stove Co. v. Farmers' Cash Union, 61 U. 567, 216 P. 1075.

Transfer of title to machinery from corporation to newly organized operational subsidiary in exchange for all of subsidiary's capital stock was sufficient acceptance of machinery by subsidiary. Boston Acme Mines Development Co. v. Clawson, 66 U. 103, 240 P. 165.

81–3–9. Acceptance Does Not Bar Action for Damages.

In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages, or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor. (C. L. 17, § 5158; Unif. Act, § 49.)

Comparable provisions.

Uniform Sales Act, § 49 (identical).

1. Counterclaim of buyer.

Breach of promise or agreement on part of seller to furnish demonstrator does not defeat the right of seller to recover for goods sold, but saves to the purchaser the right to offset by way of counterclaim for any damages which may have been sustained by reason of the failure of the seller to perform that part of its agreement. Detroit Vapor Stove Co. v. Farmers' Cash Union, 61 U. 567, 216 P. 1075.

A. L. R. notes.

Acceptance after agreed time of delivery as waiver of damages on account of seller's delay, 80 A. L. R. 322.

81–3–10. Buyer Is Not Bound to Return Goods Wrongly Delivered.

Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them. (C. L. 17, § 5159; Unif. Act, § 50.)

Comparable provisions.

Uniform Sales Act, § 50 (identical).

A. L. R. notes.

Duty of purchaser of goods "on trial" or "on approval" regarding notice of rejection, 78 A. L. R. 533.

81–3–11. Buyer's Liability for Failing to Accept Delivery.

When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

(C. L. 17, § 5160; Unif. Act, § 51.)

Comparable provisions.

Uniform Sales Act, § 51 (identical; noting, however, that in eighth line "right" is used in lieu of "rights").

CHAPTER 4

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

81–4–1. Definition of Unpaid Seller.
81–4–2. Remedies of Unpaid Seller.
81–4–3. When Right of Lien May Be Exercised.
81–4–4. Lien After Part Delivery.
81–4–5. When Lien Is Lost.
81–4–6. Seller May Stop Goods on Buyer's Insolvency.
81–4–7. When Goods Are in Transit.
81–4–8. Ways of Exercising the Right to Stop.
81–4–9. When and How Resale May Be Made.
81–4–10. When and How the Seller May Rescind the Sale.
81–4–11. Effect of Sale of Goods Subject to Lien or Stoppage in Transitu.

81–4–1. Definition of Unpaid Seller.

The seller of goods is deemed to be an unpaid seller within the meaning of this title:

(1) When the whole of the price has not been paid or tendered.

(2) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

(3) In this chapter the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.

(C. L. 17, § 5161; Unif. Act, § 52.)

Comparable provisions.
Uniform Sales Act, § 52 (substantially identical).

81–4–2. Remedies of Unpaid Seller.

(1) Subject to the provisions of this title, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has:

(a) A lien on the goods or right to retain them for the price while he is in possession of them.

(b) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them.

(c) A right of resale as limited by this title.

(d) A right to rescind the sale as limited by this title.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to, and coextensive with, his rights of lien and stoppage in transitu where the property has passed to the buyer.

(C. L. 17, § 5162; Unif. Act, § 53.)

Comparable provisions.
Uniform Sales Act, § 53 (identical).

1. Choice of remedies by seller.
These various remedies of the seller existed even in the absence of statute. I. X. L. Stores Co. v. Moon, 49 U. 262, 162 P. 622, reviewing the authorities.

Prior to Uniform Sales Act a conditional vendor could unconditionally repossess himself of the property and retain it, but he was held to waive all

other remedies by so doing. I. X. L. Stores Co. v. Moon, 49 U. 262, 162 P. 622.

2. Employee stock purchase plan.
Where, upon becoming employee, he purchased stock of hotel corporation subject to repurchase agreement at agreed price if employee left employment or was discharged, upon discharge title to stock passed to corporation, and upon corporation's refusal to accept and pay for stock when tendered, employee could maintain action for agreed price. Davies v. Semloh Hotel, Inc., 86 U. 318, 44 P.2d 689.

3. Election of remedies.
What constitutes an election of remedies is a matter of general law. Cook v. Covey-Ballard Motor Co., 69 U. 161, 253 P. 196.

A. L. R. notes.
Right of seller to enforce contract for sale on credit as contract for cash because of buyer's insolvency, 58 A. L. R. 1301; seller's rights in respect of the property, or its proceeds, upon dishonor of draft or check for purchase price, on a cash sale, 54 A. L. R. 526.

81-4-3. When Right of Lien May Be Exercised.

(1) Subject to the provisions of this title, the unpaid seller of goods who is in possession of them, is entitled to retain possession of them, until payment or tender of the price, in the following cases, namely:

(a) Where the goods have been sold without any stipulation as to credit.

(b) Where the goods have been sold on credit, but the term of credit has expired.

(c) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer. (C. L. 17, § 5163; Unif. Act, § 54.)

Comparable provisions.
Uniform Sales Act, § 54 (identical).

A. L. R. notes.
Buyer's insolvency as affecting rights and obligations of parties to sale of goods on credit before delivery thereof, 117 A. L. R. 1105; return of chattel to seller after delivery to buyer as revival of seller's lien, and its effect upon conditions of enforcing lien, 118 A. L. R. 564; right of seller to enforce contract for sale on credit as contract for cash because of buyer's insolvency, 58 A. L. R. 1301; seller's rights in respect of the property, or its proceeds, upon dishonor of draft or check for purchase price, on a cash sale, 54 A. L. R. 526.

81-4-4. Lien After Part Delivery.

Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention. (C. L. 17, § 5164; Unif. Act, § 55.)

Comparable provisions.
Uniform Sales Act, § 55 (identical).

81-4-5. When Lien Is Lost.

(1) The unpaid seller of goods loses his lien thereon:

(a) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof.

(b) When the buyer or his agent lawfully obtains possession of the goods.

(c) By waiver thereof.

(2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods. (C. L. 17, § 5165; Unif. Act, § 56.)

Comparable provisions.
Uniform Sales Act, § 56 (identical).

81-4-6. Seller May Stop Goods on Buyer's Insolvency.

Subject to the provisions of this title, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu; that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession. (C. L. 17, § 5166; Unif. Act, § 57.)

Comparable provisions.
Uniform Sales Act, § 57 (identical).

Cross-references.
Effect of negotiable warehouse receipt outstanding 99-0-49.

A. L. R. notes.
Right of seller to enforce contract for sale on credit as contract for cash because of buyer's insolvency, 58 A. L. R. 1301.

81-4-7. When Goods Are in Transit.

(1) Goods are in transit within the meaning of section 81-4-6:

(a) From the time when they are delivered to a carrier by land, water or air, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee.

(b) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

(2) Goods are no longer in transit within the meaning of section 81-4-6:

(a) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination.

(b) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf, and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(c) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.

(3) If goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier or as agent of the buyer.

(4) If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods. (C. L. 17, § 5167; Unif. Act, § 58.)

Comparable provisions.
Uniform Sales Act, § 58 (identical, except that word "air" is not included in subd. (1), (a); the references in subds. (1) and (2) are to § 57; see note under 81-4-6).

A. L. R. notes.
When right of stoppage in transitu terminates, 7 A. L. R. 1374.

81-4-8. Ways of Exercising the Right to Stop.

(1) The unpaid seller may exercise his right of stoppage in transitu either by obtaining actual possession of the goods, or by giving notice

of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice to be effectual must be given at such time and under such circumstances that the principal by the exercise of reasonable diligence may prevent a delivery to the buyer.

(2) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such delivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver, nor be justified in delivering, the goods to the seller, unless such document is first surrendered for cancellation. (C. L. 17, § 5168; Unif. Act, § 59.)

Comparable provisions.
Uniform Sales Act, § 59 (identical, except that in sixth line of subd. (2) the language varies, reading in part: "* * * shall not be obliged to deliver or justified in delivering * * *").

81-4-9. When and How Resale May Be Made.

(1) Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien, or having stopped the goods in transitu, may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell, or the sale, or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2) Where a resale is made as authorized in this section, the buyer acquires a good title as against the original buyer.

(3) It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods, or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

(4) It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

(5) The seller is bound to exercise reasonable care and judgment in making a resale, and, subject to this requirement, may make a resale either by public or private sale. (C. L. 17, § 5169; Unif. Act, § 60.)

Comparable provisions.
Uniform Sales Act, § 60 (identical).

1. Perishable goods.
Resale of perishable shipment refused by buyer, when made with reasonable care and judgment, is evidence of market value, but under provisions of this section it is doubtful whether market value need be proved. Growers' Exchange v. John A. Eck Co., 66 U. 340, 242 P. 391.

2. Manner of resale.
No particular manner or method of resale is necessary. It may be at public auction or privately. Growers' Exchange v. John A. Eck Co., 66 U. 340, 242 P. 391.

In action by seller to recover for loss on resale of refused shipment, burden was on defendant, under circumstances of case, to prove that resale was not made with reasonable care and judgment, it appearing that buyer was notified of

intention to resell. Growers' Exchange v. John A. Eck Co., 66 U. 340, 242 P. 391.

A. L. R. notes.

Expense of caring for personal property prior to its resale upon failure of sale contract, 29 A. L. R. 61; measure of seller's damages under executory contract as affected by his resale of the property, 119 A. L. R. 1141; resale by buyer where seller has refused to receive the property rejected for breach of warranty, 24 A. L. R. 1445; right of seller to sell property in enforcement of vendor's lien after having sued for the purchase price, 38 A. L. R. 1432.

81-4-10. When and How the Seller May Rescind the Sale.

(1) An unpaid seller, having the right of lien, or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2) The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer, or by some other overt act, an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted. (C. L. 17, § 5170; Unif. Act, § 61.)

Comparable provisions.

Uniform Sales Act, § 61 (identical).

1. Receivership.

In seller's action to recover possession, court, after appointing and subsequently discharging receiver before judgment, may turn property over to seller, under sureties, and such order, being within jurisdiction, is not reviewable by certiorari. Sammis v. Marks, 69 U. 26, 252 P. 270.

A. L. R. notes.

Assignability of right to rescind or of right to return of money or other property as incident of rescission, 110 A. L. R. 849; pecuniary damage as essential to rescission of contract for purchase of real or personal property, 106 A. L. R. 125; repossession of chattels by seller upon their return or abandonment by buyer as effecting mutual rescission or as evidence thereof, 106 A. L. R. 703; seller's rights in respect of the property, or its proceeds, upon dishonor of draft or check for purchase price, on a cash sale, 54 A. L. R. 526.

81-4-11. Effect of Sale of Goods Subject to Lien or Stoppage in Transitu.

Subject to the provisions of this title, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto. If, however, a negotiable document of title has been issued for goods, no sellers' lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotinted, whether such negotiation be prior or subsequent to the notification to the carrier, or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu. (C. L. 17, § 5171; Unif. Act, § 62.)

Comparable provisions.

Uniform Sales Act, § 62 (identical; noting, however, that plural, "negotiations," is used in seventh line).

CHAPTER 5

ACTION FOR BREACH OF THE CONTRACT

81–5–1. Action for the Price.
81–5–2. Action for Damages for Non-acceptance of Goods.
81–5–3. When Seller May Rescind Contract or Sale.
81–5–4. Action by Buyer for Converting or Detaining Goods.
81–5–5. Action for Failing to Deliver Goods.
81–5–6. Specific Performance.
81–5–7. Remedies for Breach of Warranty.
81–5–8. Interest and Special Damages.

81–5–1. Action for the Price.

(1) Where under a contract to sell or a sale the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

(2) Where under a contract to sell or a sale the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part, or an intention not to perform it.

(3) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 81–5–2 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

(C. L. 17, § 5172; Unif. Act, § 63.)

Comparable provisions.

Uniform Sales Act, § 63 (identical; the reference in subd. (3) is to § 64 (4); see note under 81–5–2).

1. Right of action by seller.

If buyer refuses to complete his contract, seller may treat contract as broken and sue at once. Cazier v. Stack, 45 U. 124, 143 P. 133.

Where seller did not have title to salt claimed to have been sold, and agreement of sale was mere attempt on part of seller to authorize buyer to commit trespass on lands of another and take that to which he had no title, and that which was never in his possession, seller could not recover. Thomas v. Farrell, 82 U. 535, 26 P.2d 328.

2. Employee stock purchase plan.

Where, upon becoming employee, he purchased stock of hotel corporation subject to repurchase agreement at agreed price if employee left employment or was discharged, upon discharge, title to stock passed to corporation, and upon corporation's refusal to accept and pay for stock when tendered, employee could maintain action for agreed price. Davies v. Semloh Hotel, Inc., 86 U. 318, 44 P.2d 689.

3. Counterclaim by buyer.

Where demurrer to defendant's counterclaim in action on contract for purchase of stoves, on ground that plaintiff did not assist defendant in disposing of stoves as promised, was sustained, and

defendant sought to amend counterclaim so that it would allege the giving of notice of the failure to perform such promise, court's refusal to allow such amendment was prejudicial error. Detroit Vapor Stove Co. v. J. C. Weeter Lumber Co., 61 U. 503, 215 P. 995, 29 A. L. R. 669.

4. Burden of proof.

One relying upon contract has burden of proving it a complete contract in all its essential terms. Hi-Way Motor Co. v. Service Motor Co., 68 U. 65, 249 P. 133.

Where recovery is sought upon an executory contract to purchase material, and contract is denied, plaintiff is required to prove every element of the contract, but law supplies by implication the necessary promise to pay where it is conceded that material is delivered, accepted and used, and that amount sued for is correct. Davis v. Utah Const. Co., 64 U. 460, 231 P. 816.

5. Measure of damages.

The measure of damages, in action by seller to recover price of goods sold, is a matter of general law. Holland-Cook Mfg. Co. v. Consolidated Wagon & Machine Co., 49 U. 43, 161 P. 922.

6. Waiver and estoppel.

In action by seller of harvesting machine to recover purchase price, wherein defendant contended that machine did not fulfill terms of warranty, seller, having refused to receive machine back upon any conditions, and in constantly claiming full benefit of sale and delivery of harvester and insisting upon payment of full purchase price, waived return of machine. Consolidated Wagon & Machine Co. v. Wright, 56 U. 382, 190 P. 937.

In action by seller of harvesting machine to recover purchase price, wherein defendant contended that machine did not fulfill terms of warranty, held signing of satisfaction card by defendant without reading its contents, on representation of seller's agent that it only contained statement that agent was present, did not estop defendant from denying statement of satisfaction in card. Consolidated Wagon & Machine Co. v. Wright, 56 U. 382, 190 P. 937.

81-5-2. Action for Damages for Non-acceptance of Goods.

(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.

(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

(4) If, while labor or expense, of material amount, are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages. (C. L. 17, § 5173; Unif. Act, § 64.)

Comparable provisions.

Uniform Sales Act, § 64 (identical, except that in subd. (2) the word "estimated" is inserted, so as to read in part: "The measure of damages is the estimated loss * * * ").

1. Measure of damages.

In action by seller of perishable shipment against buyer refusing same, measure of damages is difference between contract price and market value at time of breach, and price obtained upon a

proper resale under 81-4-9, subd. (5) is evidence of market value, but not conclusive. Growers' Exchange v. John A. Eck Co., 66 U. 340, 242 P. 391.

Where purchaser breached contract to purchase automobile, dealer was not limited to difference between contract price and market price but could recover, as damages, the profit he otherwise would have made on the sale. Stewart v. Hansen, 62 U. 281, 218 P. 959, 44 A. L. R. 340. (Gideon, J., dissenting.)

A. L. R. notes.

Anticipatory repudiation of contract for sale of goods by buyer as affecting time as of which damages are to be computed, 34 A. L. R. 114.

Measure of damages for buyer's breach of contract to purchase article of dealer, 120 A. L. R. 1192.

Measure of damages for buyer's repudiation of or failure to accept goods under executory contract, 108 A. L. R. 1482.

Presumption and burden of proof as to market price or value of goods in action by seller against buyer who refuses to accept goods, 130 A. L. R. 1336.

Stipulation as to damages in case of breach of contract for purchase of goods to be manufactured by other party, as penalty or liquidated damages, 79 A. L. R. 188.

81-5-3. When Seller May Rescind Contract or Sale.

Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

(C. L. 17, § 5174; Unif. Act, § 65.)

Comparable provisions.

Uniform Sales Act, § 65 (identical).

A. L. R. notes.

Necessity, as condition of action at law, or a defense thereto, based on rescission of contract, of return or tender before action, of securities, commercial paper, or documents evidencing property or contractual rights received as consideration, 105 A. L. R. 1003; pecuniary damage as essential to rescission of contract for purchase of real or personal property, 106 A. L. R. 125; repossession of chattels by seller upon their return or abandonment by buyer as effecting a mutual rescission or as evidence thereof, 106 A. L. R. 703.

81-5-4. Action by Buyer for Converting or Detaining Goods.

Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

(C. L. 17, § 5175; Unif. Act, § 66.)

Comparable provisions.

Uniform Sales Act, § 66 (identical).

1. Remedies of buyer.

Where seller failed to deliver piano, it breached contract providing that piano would be delivered upon demand, and purchaser could sue for restitution, specific performance, or damages. Mollerup v. Daynes-Beebe Music Co., 82 U. 299, 24 P.2d 306.

Automobile dealer agreeing to sell customer's car, and credit price on new car to be sold customer under contract incomplete as to terms of payment, cannot maintain action against another dealer for conversion of customer's car where customer authorized said dealer to repossess car for subsequent deal, notwithstanding first dealer had been given possession of car and had found buyer for it, since terms of contract were incomplete and no action for breach thereof nor for conversion was maintainable. Hi-Way Motor Co., v. Service Motor Co., 68 U. 65, 249 P. 133.

A. L. R. notes.

Mere detention of or failure to deliver chattels after demand as conversion, 120 A. L. R. 638; negative conduct as basis of claim of conversion, 116 A. L. R. 870.

81-5-5. Action for Failing to Deliver Goods.

(1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the

buyer may maintain an action against the seller for damages for nondelivery.

(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

(C. L. 17, § 5176; Unif. Act, § 67.)

Comparable provisions.
Uniform Sales Act, § 67 (identical).

1. Remedies of buyer.
Where seller failed to deliver piano, it breached contract providing that piano would be delivered upon demand, and purchaser could sue for restitution, specific performance, or damages. Mollerup v. Daynes-Beebe Music Co., 82 U. 299, 24 P.2d 306.

2. Measure of damages.
Under this section, the measure of damages for failure of seller to deliver the goods is difference between contract price and market price at delivery, and fact that total sum is specified in the contract does not obviate necessity of showing market value of product, nor take case out of foregoing general rule. Monaghan v. Alexander, 76 U. 81, 287 P. 908.

Where defendant, in action for breach of contract to deliver hay, breached contract as of the date upon which delivery should have been made, but subsequent negotiations were entered into between the parties, and defendant agreed to make delivery on a future date, measure of damages for such nondelivery was the difference between the contract price and the market price on the date when delivery was refused as agreed upon in subsequent negotiations. Teuscher v. Utah-Idaho Flour & Grain Co., 63 U. 76, 221 P. 1096.

A. L. R. notes.
Duty of purchaser on credit to accept seller's offer to deliver for cash, 1 A. L. R. 436; liability of a seller of a commodity manufactured or produced by a third person to obtain the same from the latter as a defense to an action by the buyer for breach of the contract, 80 A. L. R. 1177; loss of anticipated profits as damages for breach of seller's contract as to machine for buyer's use, 32 A. L. R. 120.

81-5-6. Specific Performance.

Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise as to the court may seem just. (C. L. 17, § 5177; Unif. Act, § 68.)

Comparable provisions.
Uniform Sales Act, § 68 (identical, except that there is inserted the phrase "if it thinks fit," so as to be worded in part, "* * *a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer * * *").

1. Equitable remedies of buyer.
Where seller failed to deliver piano, it breached contract providing that piano would be delivered upon demand, and purchaser could sue for restitution, specific performance, or damages. Mollerup v. Daynes-Beebe Music Co., 82 U. 299, 24 P.2d 306.

81-5-7. Remedies for Breach of Warranty.

(1) Where there is a breach of warranty by the seller, the buyer may, at his election:

(a) Accept or keep the goods, and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price;

(b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;

(c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty; or,

(d) Rescind the contract to sell or the sale, and refuse to receive the goods, or, if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

(2) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

(3) Where the goods have been delivered to the buyer he cannot rescind the sale, if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

(4) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 81–4–2.

(6) The measure of damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events from the breach of warranty.

(7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(C. L. 17, § 5178; Unif. Act, § 69.)

Comparable provisions.

Uniform Sales Act, § 69 (identical; noting, however, that the concluding word "or" is omitted from subd. (1), (c); the reference in subd. (5) is to § 53; see note under 81–4–2).

1. Scope of note.

It is not the purpose of this note to enter into a general discussion of the law of breach of warranties in sales of personal property, or actions for the breach thereof. This is a matter of the general law of sales, rescission, etc., and standard works should be consulted in that regard.

2. Choice of remedies.

Instead of suing for breach of either an express or implied warranty of quality, buyer may bring action for damages for the tort or wrong. Wright v. Howe, 46 U. 588, 150 P. 956, L. R. A. 1916 B 1104.

Though on breach of warranty of an automobile the buyer might have sued for the difference between the value of the car in the condition warranted and its value in the condition in which it was sold, he might rescind instead and recover back the purchase price. Studebaker Bros. Co. v. Anderson, 50 U. 319, 167 P. 663.

3. Rescission.

This section and 81-1-12 do not change action for rescission from equitable to law action. Summers v. Provo Foundry & Machine Co., 53 U. 320, 178 P. 916.

Buyer must strictly comply with terms of contract before he may exercise right of rescission. If place of return of goods is stipulated, this must be complied with. Advance-Rumely Thresher Co., Inc., v. Stohl, 75 U. 124, 140, 283 P. 731.

Buyer must exercise his right of rescission within a reasonable time. Smith v. Columbus Buggy Co., 40 U. 580, 123 P. 580.

The return of property in substantially same condition in which it was received is condition precedent to rescission, unless changed condition be result of breach of warranty. Summers v. Provo Foundry & Machine Co., 53 U. 320, 178 P. 916; Advance-Rumely Thresher Co., Inc. v. Stohl, 75 U. 124, 283 P. 731.

Upon rescission, buyer is entitled to return of all payments made. Heichemer v. Peterson, 75 U. 107, 283 P. 435.

4. Notice of breach of warranty.

Notice of breach of warranty must be given in manner provided by contract, as it is condition precedent to reliance on warranty. Notice to agent was held not to be notice to seller. Consolidated Wagon & Machine Co. v. Barben, 46 U. 377, 150 P. 949, followed in Advance-Rumely Thresher Co., Inc. v. Stohl, 75 U. 124, 283 P. 731.

Where seller of machine through its experts takes whole matter of assembling and trying it out into its own hands and superintends and directs operation of machine, notice provided for in warranty in case machine fails to fulfill warranty need not be given by buyer. Consolidated Wagon & Machine Co. v. Wright, 56 U. 382, 190 P. 937. And see Advance-Rumely Thresher Co., Inc. v. Stohl, 75 U. 124, 283 P. 731.

5. Buyer's lien.

Buyer has no lien on goods for amount of purchase price paid thereon unless there has been a breach of warranty (express or implied) on the part of the seller. Sammis v. Marks, 69 U. 26, 252 P. 270.

False representations of seller as to past earnings of hotel, wherein buyer was to use furniture purchased, was not breach of warranty such as would give buyer lien on property for amount paid on purchase price. Sammis v. Marks, 69 U. 26, 252 P. 270.

6. Measure of damages.

Subdivision (6) has been applied in case where brick was sold by sample, constituting express warranty. This subdivision merely announces ordinary rule as to general damages. Jorgensen v. Gessell Pressed Brick Co., 45 U. 31, 141 P. 460, Ann. Cas. 1916 C 309.

The measure of damages for selling unregistered sheep is according to the general rule. Duggins v. Colby, 45 U. 335, 145 P. 1042.

7. Defense of breach of warranty.

It is elementary that stipulations in warranties are conditions precedent to reliance upon breach in action by seller for purchase price. Stipulations with regard to return of article must be complied with. Consolidated Wagon & Machine Co. v. Barben, 46 U. 377, 150 P. 949, reviewing authorities at some length.

In action by seller of harvesting machine to recover purchase price, contention that defendant gave machine more than five days' trial, and for that reason breached terms of warranty, was not tenable, where it appeared that harvester was not operated after seller's employees had left defendant's ranch, and if trial of harvester was continued for more than during period of five days, it was through seller's own efforts and by its consent. Consolidated Wagon & Machine Co. v. Wright, 56 U. 382, 190 P. 937.

Substantial change of condition not due to breach of warranty is complete, and not pro tanto, defense to action by purchaser for rescission of contract and recovery of purchase price. Summers v. Provo Foundry & Machine Co., 53 U. 320, 178 P. 916.

8. Answer and counterclaim of buyer.

Buyer, instead of bringing independent action for breach of warranty, may inter-

pose counterclaim in action by seller for purchase price. Detroit Vapor Stove Co. v. J. C. Weeter Lumber Co., 61 U. 503, 215 P. 995, 29 A. L. R. 659; Detroit Vapor Stove Co. v. Farmers' Cash Union, 61 U. 567, 216 P. 1075.

Fact that, in seller's action for balance of purchase price due under contract of sale, buyer went to trial and was awarded judgment on basis of rescission of contract by him, although he had not pleaded rescission thereof, held not to have defeated his right, on new trial ordered by supreme court on its reversal of judgment, to amend his answer and counterclaim so as to ask damages for contract's violation. Detroit Heating & Lighting Co. v. Stevens, 20 U. 241, 58 P. 193.

9. Waiver.

Of course, buyer may waive his right to rescind by conduct inconsistent with exercise of such right. Advance-Rumely Thresher Co., Inc. v. Stohl, 75 U. 124, 283 P. 731.

A buyer did not waive his right to rescind the purchase of an automobile for breach of warranty that it would run by repeatedly taking it back for adjustment and repairs, where nothing more was intended than to offer the seller ample opportunity to put the car in condition so that it would run. Studebaker Bros. Co. v. Anderson, 50 U. 319, 167 P. 603.

Further as to waiver and estoppel, see 81–5–1.

A. L. R. notes.

Acceptance of installment of goods as affecting buyer's right to rescind because of defects in that installment, 29 A. L. R. 1517.

Breach of warranty as to title as within statutory provision requiring notice of breach of warranty on sale of goods, 114 A. L. R. 707.

Construction, application, and effect of statutory provisions requiring notice of breach of warranty on sale of goods, 71 A. L. R. 1149.

Liability of seller for special damages based on resale by buyer, as affected by his knowledge or ignorance of the resale, 88 A. L. R. 1439.

Liability of seller of article not inherently dangerous for damages sustained by purchaser on account of the injury or death of third person, 64 A. L. R. 942.

Liability of seller of article not inherently dangerous for personal injuries due to the defective or dangerous condition of the article, 74 A. L. R. 343.

Liability of seller of defective or unsafe automobile for injury or damage caused thereby, 122 A. L. R. 997.

Liability of seller of serum or vaccine matter for use on livestock for breach of warranty or negligence, 39 A. L. R. 399.

Loss of anticipated profits as damages for breach of seller's contract as to machine for buyer's use, 32 A. L. R. 120.

Loss of or damage to crop as element of damages for breach of contract of sale or warranty of agricultural machinery or fertilizer, 69 A. L. R. 748.

Loss of profits by boarding-house keeper, restaurateur, or hotel keeper as damages for breach of warranty as to food, 79 A. L. R. 982.

Promissory estoppel, 115 A. L. R. 152.

Right of buyer of chattels to lien upon the property where he rescinds the contract, 7 A. L. R. 993.

Right of dealer against his vendor in case of breach of warranty as to article purchased for resale and resold, 64 A. L. R. 883.

Sufficiency of buyer's attempt to rescind as affected by his apparent recognition of or insistence upon continuance of seller's obligation under the contract, 118 A. L. R. 530.

Time for rescission by purchaser of chattel for fraud or breach of warranty, 72 A. L. R. 726.

Use of article by buyer as waiver of right to rescind for fraud, breach of warranty, or failure of goods to comply with contract, 77 A. L. R. 1165.

Validity, construction, and application under Uniform Sales Act of express provision of contract limiting obligation in case of breach of warranty to replacing defective article or part, 106 A. L. R. 1466.

81–5–8. Interest and Special Damages.

Nothing in this title shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

(C. L. 17, § 5179; Unif. Act, § 70.)

Comparable provisions.

Uniform Sales Act, § 70 (identical).

1. Election of remedies.

Purchaser of automobile on installment contract involving trading in of old car,

if defrauded, may elect to affirm contract and sue for damages or he may repudiate or rescind contract and sue to recover old car or what he has paid out on contract, but he cannot do both, since remedies are alternate and inconsistent, and commencement of action, with knowledge of facts, is conclusive of election notwithstanding remedy chosen may prove unsatisfactory. Cook v. Covey-Ballard Motor Co., 69 U. 161, 253 P. 196.

2. Action for money paid.

Automobile dealer repudiating contract for sale of new car, in so far as it related to trade-in allowance on customer's old car, was subject to suit in quasi-contract for reasonable value of old car traded to dealer, but attorney's fee and rental value of car, while retained by dealer, were not recoverable by customer in such action. Jordan v. Madsen, 69 U. 112, 252 P. 570.

3. Interest in case of installment contracts.

In action by plaintiff to recover purchase price in which defendant buyer interposed counterclaim, interest should be allowed defendant only from date that last payment on installment contract with his customers fell due. Schwab Safe & Lock Co. v. Snow, 47 U. 199, 207, 152 P. 171.

A. L. R. notes.

Loss of anticipated profits as damages for breach of seller's contract as to machine for buyer's use, 32 A. L. R. 120; loss of profits as elements of damages for fraud of seller, as to quality of goods purchased for resale, 28 A. L. R. 354; opportunity of buyer of personal property to ascertain facts as affecting claim of fraud on part of seller in misrepresenting property, 61 A. L. R. 492.

CHAPTER 6

INTERPRETATION AND DEFINITIONS

81-6-1. Variation of Implied Obligations.
81-6-2. Rights May Be Enforced by Action.
81-6-3. Rule for Cases Not Provided for by This Title.
81-6-4. Provisions Not Applicable to Mortgages.
81-6-5. Definitions.

81-6-1. Variation of Implied Obligations.

Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement, or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale. (C. L. 17, § 5180; Unif. Act, § 71.)

Comparable provisions.
Uniform Sales Act, § 71 (identical).

1. Applicability of section.

This section does not apply where "course of dealing" consists of a single transaction in the sale of nonwarranty seed. Notices of nonwarranty constitute refusal to warrant and exclude implied warranties. Hoover v. Utah Nursery Co., 79 U. 12, 20, 7 P.2d 270.

2. Interpretation and construction of act.

Under former statute (Comp. Laws 1917, § 5183) providing that the act should be construed so as to give effect to its purpose to make uniform laws of states which enact it, it was held that it was duty of supreme court to follow construction of court of last resort of any state in which the act was in force. Stewart v. Hansen, 62 U. 281, 218 P. 959, 44 A. L. R. 340.

81-6-2. Rights May Be Enforced by Action.

Where any right, duty or liability is declared by this title, it may, unless otherwise by this title provided, be enforced by action. (C. L. 17, § 5181; Unif. Act, § 72.)

Comparable provisions.
Uniform Sales Act, § 72 (identical).

81–6–3. Rule for Cases Not Provided for by This Title.

In any case not provided for in this title the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent, and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods. (C. L. 17, § 5182; Unif. Act, § 73.)

Comparable provisions.
Uniform Sales Act, § 73 (identical).

A. L. R. notes.
Assignability of contract to furnish all of buyer's requirement or to take all of seller's output, 39 A. L. R. 1192.
Assignability of sales agency, 10 A. L. R. 653.
Construction of contract for sale of commodity to the extent of the buyer's requirements, 27 A. L. R. 127.
Construction or provision for letter of credit in contract of sale, 38 A. L. R. 608.
Contract for sale of goods as entire or divisible, 2 A. L. R. 643.
Duty and liability respecting return or transportation of empty containers, 35 A. L. R. 21.
Duty of principal to fill orders under sales-agency contract, 52 A. L. R. 557.
Effect of agent's agreement to repurchase property sold by him, 31 A. L. R. 607.
Effect of delay of principal in disapproving or rejecting orders for goods taken by agent subject to approval, 7 A. L. R. 1686.
Mutuality and enforceability of an agreement upon the sale of goods, to give the purchaser an option or the exclusive sale of similar goods without a corresponding obligation on his part, 45 A. L. R. 1197.
Mutuality and enforceability of contract to furnish another with his needs, wants, desires, requirements, etc., of a certain commodity, 24 A. L. R. 1352.
Necessity and sufficiency of notice of termination of authority of agent to purchase goods for mercantile business to charge one who has previously dealt with him, 43 A. L. R. 1219.
Notice to salesman as chargeable to principal, 43 A. L. R. 745.
Recovery by commission salesman given exclusive territory where employer breaches contract of employment, 41 A. L. R. 1175.
Relief from contract of sale because of mistake as to amount of commodity which it calls for, 31 A. L. R. 384.
Right of agent with exclusive agency to commission on sales made out of his territory to persons residing or having a place of business therein, 33 A. L. R. 641.
Right of buyer and seller inter se as affected by invalidity of, or subsequent changes or developments with respect to, tax, 132 A. L. R. 706.
Right of one selling on commission as affected by principal's refusal to fill order, 12 A. L. R. 150.
Right of seller to enforce contract for sale on credit as contract for cash because of buyer's insolvency, 58 A. L. R. 1301.
Rights and remedies of purchaser under seller's agreement to assist him in reselling the goods, 29 A. L. R. 666.
Salesman's authority to agree contemporaneously with sale to return of goods by buyer, 55 A. L. R. 380.
Validity and construction of contract for sale of season's output, 23 A. L. R. 574.
Validity and effect of provision in contract of sale which, in effect, guarantees the buyer against decline in prices, 29 A. L. R. 112.
Validity of contract executed under duress exercised by third person, 62 A. L. R. 1477.
Validity of contract negotiated by agent acting for both parties, 48 A. L. R. 917.

81–6–4. Provisions Not Applicable to Mortgages.

The provisions of this title relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge or other security. (C. L. 17, § 5184; Unif. Act, § 75.)

Comparable provisions.
Uniform Sales Act, § 75 (identical).

81-6-5. Definitions.

(1) In this title, unless the context or subject matter otherwise requires:

"Action" includes counterclaim, set-off, and suit in equity.

"Buyer" means a person who buys or agrees to buy goods, or any legal successor in interest of such person.

"Defendant" includes a plaintiff against whom a right of set-off or counterclaim is asserted.

"Delivery" means voluntary transfer of possession from one person to another.

"Divisible contract to sell or sale" means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

"Document of title to goods" includes any bill of lading, dock warrant, warehouse receipt, or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods as proof of the possession or control of the goods, or authorizing, or purporting to authorize, the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document.

"Fault" means wrongful act or default.

"Fungible goods" means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit.

"Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale.

"Goods" includes all chattels personal, other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

"Order," in sections of this title relating to documents of title, means an order by indorsement on the documents.

"Person" includes a corporation or partnership, or two or more persons having a joint or common interest.

"Plaintiff" includes defendant asserting a right of set-off or counterclaim.

"Property" means the general property in goods, and not merely a special property.

"Purchaser" includes mortgagee and pledgee.

"Purchases" includes taking as a mortgagee or as a pledgee.

"Quality of goods" includes their state or condition.

"Sale" includes a bargain and sale as well as a sale and delivery.

"Seller" means a person who sells or agrees to sell goods, or any legal successor in the interest of such person.

"Specific goods" means goods identified and agreed upon at the time a contract to sell or a sale is made.

"Value" is any consideration sufficient to support a simple contract. An antecedent preëxisting claim, whether for money or not, constitutes value where goods or documents of title are taken either in satisfaction thereof or as security therefor.

(2) A thing is done "in good faith" within the meaning of this title when it is in fact done honestly, whether it is done negligently or not.

(3) A person is insolvent within the meaning of this title who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not.

(4) Goods are in a "deliverable state" within the meaning of this title when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

(C. L. 17, § 5185; Unif. Act, § 76.)

Comparable provisions.

Uniform Sales Act, § 76 (identical; noting, however, that in definition of "value," the word "or" is inserted, so as to be worded in part: " * * * An antecedent or preëxisting claim"; the plural "titles" is also used therein, so as to read " * * * or documents of titles * * * ").

1. Contract for work, labor and materials.

This section and 81-1-5 do not expand the law of sales to include a transaction which is not a contract of sale, such as a contract for work, labor and materials. Sidney Stevens Implement Co. v. Hintze, 92 U. 264, 67 P.2d 632.

TITLE 82

SECURITIES COMMISSION

Chapter 1. In General.
Chapter 2. Real Estate Brokers.

CHAPTER 1

IN GENERAL *

82-1-1. Commission — Personnel — Meetings — Seal — Director.
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82-1-3. Witnesses and Subpoena.
82-1-4. Definitions.
82-1-5. Securities Exempted from Chapter.
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82-1-7. Registration of Securities—Necessary Before Sale.
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82-1-10. Id. How Registered—Suspension — Hearing — Fee.
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82-1-12. Issuers to Constitute Director Process Agent—Service of Process.
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82-1-16. Dealers to Notify Commission of Intended Sales.
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82-1-18. Dealers to Keep Books of Account.
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82-1-23. Securities Issued for Intangible Consideration — Escrow.
82-1-24. Enjoining Fraudulent Practices.
82-1-25. Sales in Violation of Chapter — Remedies — Liability — Limitation of Action.
82-1-26. Reregistration of Dealers, Salesmen and Agents After Revocation.
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82-1-37. Violation of Commission's Orders—Penalty.
82-1-38. Penalties — Omnibus Provision.
82-1-39. Perjury and False Statements—Penalty.
82-1-40. Budget.
82-1-41. Review by Courts of Commission's Ruling.

* **Purpose of Blue Sky Law.** The purpose of our Blue Sky Law was to prevent fraud in the sale of securities (Harper v. Tri-State Motors, Inc., 90 U. 212, 214, 58

P.2d 18, rehearing denied 90 U. 225, 63 P.2d 1056), and to protect purchasers of securities against fraud perpetrated in violation of act. Mayer v. Rankin, 91 U. 193, 63 P.2d 611, 110 A. L. R. 837.

Scope and operation of act. This act operates only upon such persons and transactions as are expressly, or by necessary implication, included within its provisions. Andrews v. Chase, 89 U. 73, 57 P.2d 702, aff'g on rehearing 89 U. 51, 49 P.2d 938.

Interpretation and construction of act. The Blue Sky Law, being penal, is to be strictly construed, and not extended by implication. Miller v. Stuart, 69 U. 250, 258, 253 P. 900; Guaranty Mortg. Co. v. Wilcox, 62 U. 184, 193, 218 P. 133, 30 A. L. R. 1324.

In view of the severe penalties and serious consequences imposed by the act for its violation, a particular transaction ought not to be and will not be held in violation thereof unless it clearly and satisfactorily appears to contravene the spirit and letter of the law. Penalties and forfeitures will not be implied or adjudged on doubtful grounds. The statute, being penal, is to be strictly construed, and not extended by implication. Miller v. Stuart, 69 U. 250, 253 P. 900; Guaranty Mortg. Co. v. Wilcox, 62 U. 184, 194, 218 P. 133, 30 A. L. R. 1324.

However, too liberal construction and application of Blue Sky Law may defeat its own purpose. Guaranty Mortgage Co. v. Wilcox, 62 U. 184, 128 P. 133, 30 A. L. R. 1324.

82-1-1. Commission—Personnel—Meetings—Seal—Director.

The state securities commission shall consist of the three members of the commission of business regulation. The commission shall appoint one of its members to be the chairman, and two members of the commission shall constitute a quorum. The commission shall have its offices in the state capitol, furnished by the state, where all of its records shall be kept. It shall hold weekly meetings on such dates as it may fix, and may hold special meetings upon the call of the chairman. It shall keep a complete record of the business it transacts, and shall prepare all blanks necessary in the conduct of its business. It shall adopt and use a seal and file a description and impression thereof in the office of the secretary of state. With the approval of the governor it may employ a director at a salary to be fixed by it according to standards established by the department of finance and such other assistants as shall be necessary. The director shall qualify by taking the constitutional oath of office and by giving bond to the state in such form and in such amount as shall be determined by the department of finance, conditioned for the faithful performance of his duties. The director shall hold office during the pleasure of the commission.

(L. 29, p. 126, § 1.)

History.

As amended by L. 41, 1st Spec. Sess., ch. 29, eff. July 1, making material changes in text.

Comparable provisions.

Iowa Code 1939, § 8581.01 ("Iowa Securities Law"); § 8581.02 (vesting administration in commissioner of insurance, and requiring him to appoint superintendent in charge of securities department; may also appoint assistants, and employ such other officers, attorneys, clerks and employees as are necessary for administration of the statute).

Cross-references.

Constitutional oath, Art. IV, § 10; official oaths and bonds, Title 65.

1. Nature of commission.

The commission is not a court, although exercising quasi-judicial functions, but is an administrative board exercising on behalf of the state the regulatory powers authorized by the act. In re Deseret Mortuary Co., 78 U. 393, 400, 3 P.2d 267.

82-1-2. Annual Report to Governor.

On or before the 1st day of October of each year the commission shall file in the office of the governor a report containing an accurate

statement of its work for the preceding fiscal year ending June 30, which report shall contain a schedule of all registrations of securities, dealers, issuers and salesmen, pending, made, revoked, denied, enjoined or suspended, a statement of the receipts and disbursements of the commission, and such other facts as may be necessary to a complete understanding of its work. (L. 29, p. 126, § 1.)

82-1-3. Witnesses and Subpoena.

The commission may issue subpoenas compelling the attendance of witnesses and the production of books and papers, and any member may administer oaths, and do such other things as may be necessary in the investigation of matters properly coming before it.

(L. 29, p. 126, § 1.)

Cross-references.
Contempt, 104-45-16.

82-1-4. Definitions.

When used in this chapter the following terms shall, unless the context otherwise indicates, have the following respective meanings:

(1) "Security" shall include any note, stock, treasury stock, bond, debenture or evidence of indebtedness; certificate of interest or participation or certificate of interest in a profit-sharing agreement; certificate of, contract for, or any conveyance or other instrument conveying, representing, or purporting to convey or represent, an interest or any right in, to or under any oil, gas or mining lease or permit; collateral trust certificate, preorganization certificate, or preorganization subscription; any transferable share, investment contract, service certificate, burial certificate or burial contract; investment-trust certificates, shares or units, or beneficial interest in or title to property, profits or earnings; certificate of membership in, contract or agreement given, made or issued by, any corporation, association or organization wherein a discount, reduction in price or other advantage, privilege or right in or to the purchase of merchandise are held out or agreed to be given or made; and any other instrument commonly known as a security, including any plan or scheme wherein townsites, town lots, or acreage, or any other land division in fee or in leasehold shall be used in connection with the gift or sale of any security as herein defined.

(2) "Person" shall include a natural person, a corporation created under the laws of this or any other state, country, sovereignty, or political subdivision thereof, a partnership, an association, a joint stock company, a trust and any unincorporated organization. As used herein the term "trust" shall include a common law trust, but shall not include a trust created by will, or by a court, or any public charitable trust.

(3) "Sale" shall include every disposition, or attempt to dispose, of a security or interest in a security for value. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing shall be conclusively presumed to constitute a part of the subject of such purchase, and to have been sold for value. "Sale" shall also include an exchange, an attempt to sell, an option to purchase, a solicitation of a sale, a subscription or an offer to sell, directly or by an agent, or by a circular, letter, advertisement or otherwise.

(4) "Dealer" shall include every person, other than a salesman, who in this state engages, either for all or part of his time, directly or through an agent, in the business of selling any securities issued by another person, or of purchasing or otherwise acquiring such securities from another for the purpose of reselling them, or of offering them for sale to the public, or of offering, buying, selling or otherwise dealing or trading in securities as agent or principal for a commission or at a profit, or who deals in futures or differences in market quotations of prices or values of any securities, or accepts margins on purchases or sales or pretended purchases or sales of such securities; *provided*, that the word "dealer" shall not include a person having no place of business in this state who sells or offers to sell securities exclusively to brokers or dealers actually engaged in buying and selling securities as a business, or to a person not engaged in the regular business of dealing in stocks, bonds or other securities for himself or for a corporation, if there is no participation in a commission either by division or through reduction.

(5) "Issuer" shall mean and include every person who proposes to issue, has issued or shall hereafter issue any security as hereinbefore defined, including any person who sells or offers for sale any security taken in payment of any mining claim, oil or gas lease, permit or contract, town lots or acreage, or any patent either issued or applied for, and any natural person who acts as a promoter for and on behalf of a corporation, trust or unincorporated association or partnership of any kind.

(6) "Salesman" shall include every natural person, other than a dealer or agent, employed, appointed or authorized by an issuer, or employed, appointed or authorized by a dealer, to sell securities in any manner in this state. The partners of a partnership and the executive officers of a corporation or other association registered as a dealer shall not be deemed salesmen within the meaning of this definition.

(7) "Agent" shall mean and include every person, other than a dealer or salesman, who sells or offers for sale any security as herein defined that is being, has been or may be offered by an issuer, including the partners of a partnership and the executive officers of a corporation or other association that shall sell or offer for sale any security as herein defined.

(8) "Commission" shall mean the state securities commission.

(L. 29, p. 126, § 2.)

Comparable provisions.

Cal. Gen. Laws, Act 3814, § 1 ("Corporate Securities Act"); § 2 (defining terms used in the act).

Iowa Code 1939, § 8581.03 (subd. 1 is similar to subd. (1) herein; subd. 2 is substantially identical with subd. (2) herein; subd. 3 includes provision substantially identical with subd. (3) herein; subd. 4 includes provision substantially identical with subd. (4) herein, except that the concluding four lines are omitted, the subdivision thus concluding with the words: "* * *actually engaged in buying and selling securities as a business"; "issuer" includes every person who proposes to issue, has issued, or shall hereafter issue any security, as well as any natural person who acts as promoter; subd. 6 is substantially the same as subd. (6) herein).

See also Mich. Stats. Ann. § 19.741 et seq.

1. "Sale."

Subdivision (3) does not include a gift of stock, because of the use of the words "for value." Therefore an agreement

with a statistician to promote the disposition of such stock is not in violation of this section of the Blue Sky Law. And fact that it was understood at time of gift that there would be an assessment, does not transform transaction into sale, where donees were not liable to pay said assessment. Andrews v. Chase, 89 U. 51, 49 P.2d 938, rehearing denied 89 U. 73, 57 P.2d 702.

Agreement to subscribe for part of increase in stock held purchase and sale within former act, notwithstanding that agreement was called a subscription agreement, so that where going investment corporation had not secured permission or license, it could not recover on note given for purchase of such stock. Guaranty Mortgage Co. v. Wilcox, 62 U. 184, 128 P. 133, 30 A. L. R. 1324.

Where sugar corporation inaugurated a stock-selling campaign confined to beet growers, fact that subscriptions were limited to such growers did not take such transactions out of category of sales. National Bank of the Republic v. Price, 65 U. 57, 234 P. 231.

2. "Dealer."

Allegations in suit to hold surety on bond of securities dealer liable for fraud of dealer in sale of stock were sufficient to characterize transaction complained of as having been made by dealer while acting as a dealer within meaning of Blue Sky Law. Mayer v. Rankin, 91 U. 193, 63 P.2d 611, 110 A. L. R. 837.

3. Gifts of securities.

Subdivisions (4) and (5) of this section do not apply to securities which are given away. And even though it was understood that there would be an assessment on the stock, this would not make the transaction a sale, where donees were not liable to pay assessment. Andrews v. Chase, 89 U. 51, 49 P.2d 938, rehearing denied 89 U. 73, 57 P.2d 702.

4. "Investment company."

Investment company under former statute held one that sold its own stock and did not engage in business of stock selling as dealer did. National Bank of the Republic v. Price, 65 U. 57, 234 P. 231. And see Guaranty Mortg. Co. v. Wilcox, 62 U. 184, 193, 218 P. 133, 30 A. L. R. 1324.

Decisions from other jurisdictions.

— Federal.

Corporate securities acts, which are framed as is the California law, are not in violation of the equal protection clause of the Federal Constitution. Burnhill v. Young, 46 F.2d 804.

Percentage royalty assignments were held to be "securities"; and also to have been "issued," both in the popular and legal senses of that term. Cecil B. De Mille Productions, Inc. v. Woolery, 61 F.2d 45.

— California.

Corporate Securities Act is not unconstitutional. People v. Yant, 26 Cal. App. 2d 725, 80 P.2d 506.

Jury was warranted in finding that corporation was simply a means used, by those in control thereof, to assist them in selling worthless stock to the public; and, under circumstances such as were disclosed by the evidence, a sale of stock without permit violated the Corporate Securities Act. People v. Allen, 47 Cal. App. 2d 735, 118 P.2d 927.

The element of selling or issuing a security plays no part in the statutory definition of a security. People v. Marvin, 48 Cal. App. 2d 180, 119 P.2d 413.

— Iowa.

Shares of capital in a common-law trust held "stock" within meaning of Blue Sky Law. Wagner v. Kelso, 195 Iowa 959, 193 N. W. 1.

A. L. R. notes.

Blue sky laws, 87 A. L. R. 42.

82–1–5. Securities Exempted from Chapter.

Except as hereinafter otherwise expressly provided, the provisions of this chapter shall not apply to any of the following classes of securities:

(1) Any security issued or guaranteed by the United States or any territory or insular possession thereof, or by the District of Columbia, or by any state or political subdivision or agency thereof.

(2) Any security issued or guaranteed by any foreign government with which the United States is, at the time of sale or offer of sale thereof, maintaining diplomatic relations, or by any state, province, or political subdivision thereof having the power of taxation or assessment.

(3) Any security issued by a national bank or by any federal land bank or joint stock land bank or national farm loan association under

the provisions of the Federal Farm Loan Act of July 17, 1916, or by any corporation created or acting as an instrumentality of the government of the United States pursuant to authority granted by the congress of the United States; *provided*, that such corporation is subject to supervision or regulation by the government of the United States.

(4) Any security issued, or guaranteed either as to principal, interest or dividends, by a corporation owning or operating a railroad or any other public service utility, provided that such corporation is subject to regulation or supervision as to the issue of its own securities by a public commission, board or officer of the government of the United States, or of any state, territory or insular possession thereof, or of any municipality located therein, or of the District of Columbia, or of the Dominion of Canada or any province thereof; also equipment notes or bonds based on chattel mortgages, leases, or agreements for conditional sale, of cars, motive power or other rolling stock mortgaged, leased or sold to, or furnished for the use of or upon, a railroad or other public service corporation; and also equipment trust certificates or equipment notes or bonds where the ownership or title of such equipment is pledged or retained in accordance with the provisions of the laws of the United States or of any state or of the Dominion of Canada to secure the payment of such equipment trust certificates, bonds or notes; also bonds, notes or other evidences of indebtedness issued by a holding corporation and secured by collateral consisting of any securities hereinabove in this subdivision described, provided the collateral securities equal in fair value at least one hundred twenty-five per cent of the par value of the bonds, notes or other evidence of indebtedness so secured.

(5) Any security issued by a corporation organized exclusively for educational, benevolent, fraternal, charitable or reformatory purposes and not for pecuniary profit, no part of the net earnings of which inures to the benefit of any private stockholder or individual.

(6) Any security issued by a state bank, trust company or savings institution incorporated under the laws of, and subject to the examination, supervision and control of, any state or territory of the United States or of any insular possession thereof.

(7) Negotiable promissory notes or commercial paper; *provided*, such notes or commercial paper matures in not more than twelve months from date of issue and shall be issued within three months after the date of sale.

(8) Any security, other than common stock, outstanding and in the hands of the public for a period of not less than five years, upon which no default in payment of principal, interest or dividends exists, and upon which no such default has occurred for a continuous immediately preceding period of five years.

(9) Securities appearing in any list of securities dealt in on any recognized and responsible stock exchange which has been previously approved by the commission, if such securities have been so listed pursuant to official authorization by such exchange, and also all securities senior to any securities so listed, and evidences of indebtedness guaranteed by companies any stock of which is so listed; such securities to be exempt only so long as such listing shall remain in effect; *provided*,

that the state securities commission at any time within its discretion may suspend or revoke this exemption in so far as it may have application to any particular security or securities, and to that end any and all securities coming exclusively within the provisions of this subdivision shall for all purposes of suspension, revocation or prohibition be deemed a registered security as provided for under section 82–1–9.

(L. 29, p. 126, § 3.)

Comparable provisions.

Cal. Gen. Laws, Act 3814, § 2 (subd. b, 1 is similar to subd. (1) herein; subd. b, 2 includes provision identical with subd. (2) herein, but coupled with following: "which security is recognized at the time it is offered or sold in this state as a valid obligation by such foreign government or by such state, province, or political subdivision thereof issuing the same; subd. b, 3 is similar to subd. (3) herein; other exempted securities are, inter alia, those issued by or representing an interest in or direct obligation of a state bank, trust company, or savings institution incorporated under laws of California; securities whose issuance has been authorized by California railroad commission or by interstate commerce commission; securities issued by building and loan association subject to supervision of building and loan commissioner; securities issued by insurance companies subject to jurisdiction of insurance commissioner).

Iowa Code 1939, § 8581.04, as amended by Laws of 1941 (enumerating securities to which the provisions of the statute do not apply).

1. Applicability of law.

Provision of former statute that act should not apply to commercial paper due not more than three years from date did not apply to notes in favor of a corporation for stock, but rather applied to notes issued and sold and negotiated by a corporation. National Bank of the Republic v. Price, 65 U. 57, 234 P. 231.

Decisions from other jurisdictions.

— Iowa.

German state of Hamburg held not a "foreign government" within the meaning of the provision of the Blue Sky Law that such law shall not apply to securities of any foreign government. Zapf v. Ridenour, 198 Iowa 1006, 200 N. W. 618.

Provision of Securities Law, exempting securities "issued or guaranteed" by federal or state governments or any political subdivision or agency thereof must be construed in disjunctive as exempting any such securities either issued or guaranteed by government or political subdivision. Ballard-Hassett Co. v. Miller, 219 Iowa 1066, 260 N. W. 65.

A. L. R. notes.

Tax or fee on or in respect of federal land bank's loans or securities, 29 A. L. R. 4.

82–1–6. Sales Exempted from Chapter.

Except as hereinafter expressly provided, the provisions of this chapter shall not apply to the sale of any security in any of the following cases:

(1) Sales at any judicial, executor's, administrator's, guardian's or conservator's sale, or at any sale by a receiver or trustee in insolvency or bankruptcy.

(2) Sales by or for the account of a pledge holder or mortgagee selling or offering for sale or delivery in the ordinary course of business, and not for the purpose of avoiding the provisions of this chapter, to liquidate a bona fide debt, a security pledged in good faith as security for such debt.

(3) An isolated transaction in which any security is sold, offered for sale, subscription or delivery by the owner thereof, or by his representative for the owner's account; such sale or offer for sale, subscription or delivery not being made in the course of repeated and successive transactions of a like character by such owner or on his account by such representative, and such owner or representative not being the underwriter of such security. The provisions of this subdivision shall

not apply in any case of sale where the issuer shall have taken the entire stock of a company in payment for mining claims, patent rights, copyrights, trade-marks, process, lease, formula, oil lease, good will or any other property right or any other tangible or intangible asset which may be construed as a promotion interest, or where funds received from the sale of such security may be used directly or indirectly for development purposes.

(4) The distribution by a corporation, actively engaged in the business authorized by its charter, of capital stock, bonds or other securities to its stockholders or other security holders as a stock dividend or other distribution out of earnings or surplus; or the issue of securities to the security holders or other creditors of a corporation in the process of a bona fide reorganization of such corporation made in good faith and not for the purpose of avoiding the provisions of this chapter, either in exchange for the securities of such security holders or claims, patent rights, copyrights, trade-marks, partly in exchange for the securities or claims of such security holders or creditors; or the issue of increased capital stock of a corporation sold or distributed by it entirely among its own stockholders, where no commission or other remuneration is paid or given directly or indirectly in connection with the sale or distribution of such increased capital stock.

(5) The sale, transfer or delivery to any bank, savings institution, trust company or insurance company, or to any corporation or to any broker or dealer; *provided*, that such broker or dealer is actually engaged in buying and selling securities as a business.

(6) The transfer or exchange between corporations of their own securities in connection with a consolidation or merger of such corporations.

(7) Sales of bonds or notes secured by mortgage upon real estate, where the entire mortgage together with all the bonds or notes secured thereby are sold to a single purchaser at a single sale, the purchaser not being an underwriter or dealer, or purchasing for an immediate redistribution to the public.

(8) Sales of stock of domestic corporations to enforce payment of delinquent assessments thereon, where such sales are made by the domestic corporation which has issued the stock being sold and where such sales are made exclusively at public auction pursuant to the delinquent stock-assessment laws of this state, in good faith, in the ordinary course of business and not for the purpose of evading the provisions of this chapter.

(9) The sale, assignment, transfer or exchange by a natural person of any security issued and delivered by a corporation which at the time of such issue is lawfully qualified to do business in this state and at the time of such sale, assignment, transfer or exchange is in actual bona fide existence and actually engaged in the transaction of the principal business provided for by its articles of incorporation, if such natural person is a resident citizen of this state and the bona fide owner of such security and it has been continuously since the time of its issuance outstanding in the hands of the public; *provided*, that any such sale, assignment, transfer or exchange shall be instituted and consummated only by the owner thereof without the intervention of any agent

other than an agent duly registered by the commission at the time of such sale, assignment, transfer or exchange; *and provided further*, that the commission at any time within its discretion may suspend or revoke this exemption in so far as it may have application to any particular security, and to that end any and all securities coming exclusively within the provisions of this section shall for all purposes of suspension, revocation or prohibition be deemed a registered security as provided for in sections 82–1–9 and 82–1–10. (L. 29, p. 126, § 4.)

Comparable provisions.

Cal. Gen. Laws, Act 3814, § 2 (subd. c, 1 is identical with subd. (1) herein except that conservator's sale is not mentioned; subd. c, 2 is substantially identical with subd. (2) herein; subd. c, 3 is similar to the first sentence in subd. (3) herein).

Iowa Code 1939, § 8581.05, as amended by Laws of 1941 (enumerating sales to which the provisions of the statute do not apply).

1. **Subdivision (3).**

The supreme court is not bound by the findings of the trial court that the sale came under subdivision (3) of this section, where there is no competent evidence to support them, although if there is evidence to support such a finding, reviewing court will accept it. Harper v. Tri-State Motors, Inc., 90 U. 212, 222, 58 P.2d 18, rehearing denied 90 U. 226, 63 P.2d 1056.

2. **Subdivision (4).**

If it is claimed that the transaction came under subdivision (4) of this section, it must be shown that corporation was distributing shares to its stockholders as a stock dividend out of earnings or surplus, or that it was increasing its capital stock as therein provided. Harper v. Tri-State Motors, Inc., 90 U. 212, 221, 58 P.2d 18, rehearing denied 90 U. 226, 63 P.2d 1056.

Decisions from other jurisdictions.

— Iowa.

In prosecution under indictment charging defendant with sale of stock to named person in violation of Securities Act, defendant's contention that Securities Act placed upon defendant burden of proving that sale was exception to act, and that the state should have had the burden of negativing such exception, was without merit, where trial court gave instruction which emphasized fact that isolated transaction would not be a violation of law, and general instructions given in reference to burden of proof, reasonable doubt, etc., clearly placed upon state the burden of proving that sale to person mentioned in indictment was not an isolated transaction and did not come within exemptions provided in act. State v. Dunley, 227 Iowa 1085, 290 N. W. 41.

A. L. R. notes.

Constitutionality, construction and application of statutes which forbid or otherwise regulate compensation for organizing corporation, procuring subscription for stock or selling its securities, 115 A. L. R. 1362; legal aspects of transactions in securities "when issued" or "when, as and if" issued, 88 A. L. R. 311; market manipulation of securities, 115 A. L. R. 271.

82–1–7. Registration of Securities—Necessary Before Sale.

No securities, except of a class exempt under any of the provisions of section 82–1–5 or unless sold in any transaction exempt under any of the provisions of section 82–1–6, shall be sold within this state unless such securities shall have been registered by notification or by qualification as hereinafter defined. (L. 25, p. 171, § 5.)

Comparable provisions.

Iowa Code 1939, § 8581.06 (includes substantially the same provision, except that word "notification" is not used, thus reading in part: " * * * unless such securities shall have been registered by qualification as hereinafter defined").

1. **Foreign contracts.**

This section does not apply to contract made and entered into in another state. United States Bond & Finance Corp. v. National Building & Loan Ass'n of America, 80 U. 62, 64, 12 P.2d 758, rehearing denied 80 U. 70, 17 P.2d 238.

2. **Co-operative associations.**

A corporation in nature of a co-operative organization, organized primarily to grow beets and manufacture beet sugar, in which no one could acquire capital stock unless agreeing to raise sugar beets for company, had no right to sell stock except by authority of securities commission and under its supervision and in accordance with its regula-

tions. National Bank of the Republic v. Price, 65 U. 57, 234 P. 231.

3. Unlicensed agent.

Sale of securities by unlicensed agent does not render sale of licensed securities invalid, since act does not require licensing of agents but merely payment of fee by them (82–1–17), there being no prohibition against nor penalty provided for sale by unlicensed agent. Miller v. Stuart, 69 U. 250, 253 P. 900, overruling National Bank of the Republic v. Price, 65 U. 57, 234 P. 231.

4. Sale of bonds by unlicensed agent.

Sale of bonds licensed upon condition that they would be full collateral for any unpaid portion of notes given in payment is not void where note is given by buyer making him personally and unconditionally liable, if license is still in effect, though such conduct may provide grounds for its revocation. Miller v. Stuart, 69 U. 250, 253 P. 900.

82–1–8. Record of Registrations.

A record of the registration of securities shall be kept in a register of securities to be kept in the office of the commission, and in such register shall also be recorded any orders entered by the commission with respect to such securities. Such register and all information with respect to the securities registered therein shall be open to public inspection. (L. 25, p. 171, § 5.)

Comparable provisions.

Iowa Code 1939, § 8581.06 (includes substantially identical provision; term "commissioner of insurance" used in lieu of "commission").

82–1–9. Registration by Notification—Securities Entitled to.

The following classes of securities shall be entitled to registration by notification in the manner provided in the next succeeding section:

(1) Securities issued by a corporation, partnership, association, company, syndicate or trust owning a property, business or industry which has been in continuous operation not less than three years and has shown during a period of not less than two years nor more than ten years next prior to the close of its last fiscal year preceding the offering of such securities average annual net earnings, after deducting all prior charges not including the charges upon securities to be retired out of the proceeds of sale as follows:

(a) In the case of interest-bearing securities, not less than one and one-half times the annual interest charge thereon and upon all other outstanding interest-bearing obligations of equal rank.

(b) In the case of preferred stock, not less than one and one-half times the annual dividend requirements on such preferred stock and on all other outstanding stock of equal rank.

(c) In the case of common stock, not less than six per cent on all outstanding common stock of equal rank, together with the amount of common stock then offered for sale reckoned upon the price at which such stock is then offered for sale or sold.

(2) Bonds or notes secured by a first mortgage upon agricultural lands used and valuable principally for agricultural purposes (not including oil, gas or mining property or leases), or upon city or town real estate or leaseholds situated in any state or territory of the United States or in the District of Columbia or in the Dominion of Canada as follows:

(a) When the mortgage is a first mortgage upon such agricultural lands and the aggregate face value of such bonds or notes, not in-

cluding interest notes or coupons, secured thereby does not exceed fifty per cent of the then fair market value of said lands plus fifty per cent of the value of any improvements thereon.

(b) When the mortgage is a first mortgage upon city or town real estate and the aggregate face value of such bonds or notes, not including interest notes or coupons, secured by such real estate does not exceed fifty per cent of the then fair market value of such mortgaged real estate, including any improvements appurtenant thereto, and when said mortgaged property is used principally to produce through rental a net annual income, or has an established rental value, after deducting operating expenses and taxes, at least equal to the annual interest plus not less than three per cent of the principal of said mortgage indebtedness. The term "mortgage" shall include a deed of trust to secure a debt. (L. 29, p. 126, § 6.)

82-1-10. Id. How Registered—Suspension—Hearing—Fee.

Securities entitled to registration by notification shall be registered by the filing by the issuer, or by any registered dealer interested in the sale thereof, in the office of the commission of a statement with respect to such securities containing the following:

(1) Name of issuer.

(2) A brief description of the security including amount of the issue.

(3) Amount of securities to be offered in this state.

(4) A brief statement of the facts which show that the security falls within one of the classes in section 82-1-9 defined.

(5) The price at which the securities are to be offered for sale.

In the case of securities falling within the class defined by subsection (1) of section 82-1-9, if the circular to be used for the public offering is not filed with the statement, a copy of such circular shall be filed in the office of the commission within two days thereafter or within such further time as the commission shall allow.

In the case of securities falling within the class defined by subsection (2) of section 82-1-9, the circular to be used for the public offering shall be filed with the statement.

The filing of such statement in the office of the commission and the payment of the fee hereinafter provided shall constitute the registration of such security. Upon such registration such securities may be sold in this state by any registered dealer giving notice in the manner hereinafter provided in section 82-1-16, subject, however, to the further order of the commission as hereinafter provided.

If at any time in the opinion of the commission the information contained in the statement or circular filed is misleading, incorrect, inadequate or incomplete, or the sale or offering for sale of the security may work or tend to work a fraud, the commission may require from the person filing such statement such further information as may in its judgment be necessary to establish the classification of such security as claimed in said statement or to enable the commission to ascertain whether the sale of such security would be fraudulent, or would result in fraud; and the commission may also suspend the right to sell such security pending further investigation by entering an order specifying

the grounds for such action, and by notifying personally, by mail, telephone or telegraph, the person filing such statement and every registered dealer who shall have notified the commission of an intention to sell such security. The refusal to furnish information required by the commission, within a reasonable time to be fixed by the commission, shall be a proper ground for the entry of such order of suspension. Upon the entry of any such order of suspension no further sales of such security shall be made until the further order of the commission.

In the event of the entry of such order of suspension, the commission shall upon request give a prompt hearing to the parties interested. If no hearing is requested within a period of twenty days from the entry of such order, or if upon such hearing the commission shall determine that any such security does not fall within a class entitled to registration under section 82-1-9 or that the sale thereof would be fraudulent or would result in fraud, it shall enter a final order prohibiting sales of such security, with its findings with respect thereto; *provided*, that if the finding with respect to such security is that it is not entitled to registration under section 82-1-9, the applicant may apply for registration by qualification by complying with the requirements of section 82-1-11. If, however, upon such hearing the commission shall find that the security is entitled to registration under section 82-1-9 and that its sale will neither be fraudulent nor result in fraud, it shall forthwith enter an order revoking such order of suspension, and such security shall be restored to its status as a security registered under said section 82-1-9 as of the date of such order of suspension.

At the time of filing such statement the applicant shall pay to the commission a fee of $1. (L. 29, p. 126, § 6.)

1. **Words and phrases defined.**
The word "hearing" as used in this section does not signify a trial as that word is ordinarily understood, but is an investigation and is so styled in the act. In re Deseret Mortuary Co., 78 U. 393, 400, 3 P.2d 267.

82-1-11. Registration by Qualification—Fee.

All securities required by this chapter to be registered before being sold in this state, and not entitled to registration by notification, shall be registered only by qualification in the manner provided by this section.

The commission shall receive and act upon applications to have securities registered by qualification and may prescribe forms on which it may require such applications to be submitted. Applications shall be in writing, signed by the applicant and sworn to by any person having knowledge of the facts, and filed in the office of the commission, and may be made either by the issuer of the securities or by any registered dealer desiring to sell the same within this state.

The commission may require the applicant to submit to the commission the following information respecting the issuer, and such other information as it may in its judgment deem necessary to enable it to ascertain whether such securities shall be registered pursuant to the provisions of this section:

(1) The names and addresses of the directors, trustees and officers, if the issuer is a corporation or association, or trust organized or

existing under the common law, as hereinbefore defined, of all partners, if the issuer is a partnership, and of the issuer, if the issuer is an individual.

(2) The location of the issuer's principal business office, and principal office in this state, if any.

(3) The purposes of incorporation, if incorporated, and the general character of the business actually to be transacted by the issuer, and the purpose of the proposed issue.

(4) A statement of the capitalization of the issuer; a balance sheet showing the amount and general character of its assets and liabilities on a day not more than sixty days prior to the date of filing such balance sheet; a detailed statement of the plan upon which the issuer proposes to transact business; a copy of the security for the registration of which application is made: and a copy of all circulars, prospectuses, advertisements or other descriptions of such securities then prepared by or for such issuer, or by or for such applicant, if the applicant shall not be the issuer, to be used for distribution or publication in this state.

(5) A statement of the amount of the issuer's income, expenses and fixed charges during the last fiscal year, or, if in actual business less than one year, for such time as the issuer has been in actual business.

(6) A statement showing the price at which such security is proposed to be sold, together with the maximum amount of commission or other form of remuneration to be paid in cash or otherwise, directly or indirectly, for or in connection with the sale or offering for sale of such securities.

(7) A detailed statement showing the items of cash, property, services, patents, good will and any other consideration for which such securities have been or are to be issued in payment.

(8) The amount of capital stock which is to be set aside and disposed of as promotion stock, and a statement of all stock issued from time to time as promotion stock.

(9) If the issuer is a corporation, there shall be filed with the application a certified copy of its articles of incorporation with all amendments, and of its existing by-laws, if not already on file in the office of the secretary of state. If the issuer is a trustee, there shall be filed with the application a copy of all instruments by which the trust is created or declared and in which it is accepted and acknowledged. If the issuer is a partnership or an unincorporated association, or joint stock company, or any other form of organization whatsoever, there shall be filed with the application a copy of its articles of partnership or association and all other papers pertaining to its organization, if not already on file in the office of the secretary of state.

All of the statements, exhibits and documents of every kind required by the commission under this section, except properly certified public documents, shall be certified by the oath of the applicant or of the issuer in such manner and form as may be required by the commission.

With respect to securities required to be registered by qualification under the provisions of this section, the commission may by order duly

recorded fix the maximum amount of commission or other form of remuneration to be paid in cash or otherwise, directly or indirectly, for or in connection with the sale or offering for sale of such securities.

At the time of filing the foregoing information the applicant shall pay to the commission a fee of one-tenth of one per cent of the aggregate par value of the securities to be sold in this state, but in no case shall such fee be less than $10 nor more than $200. In case of stock having no par value, the price at which such stock is to be offered to the public shall be deemed to be the par value of such stock.

If upon examination of any application the commission shall find that the sale of security referred to therein would not be fraudulent or tend to work a fraud upon the purchaser, and that the enterprise or business of the issuer is not based upon unsound business principles, it shall, upon the payment of the fee provided in this section, record the registration of such security in the register of securities, and thereupon such security so registered may be sold by the issuer, by any registered agent or any registered dealer who has notified the commission of his intention so to do in the manner provided in section 82-1-16, subject, however, to the further order of the commission as hereinafter provided. Such registrations shall be valid for a period of one year from the date of entry in the register of securities, unless sooner canceled, suspended or revoked by the commission for good cause after notice to the issuer of the security. (L. 29, p. 126, § 7.)

Comparable provisions.

Iowa Code 1939, § 8581.07, as amended by Laws of 1941 (all securities required by statute to be registered before being sold in Iowa shall be registered only by qualification in manner provided herein).

Cross-references.

False reports as crime, 103-12-6.

1. Scope and operation of act.

This section clearly indicates a legislative intent to make its provisions applicable only to offers to sell and sales made within the State of Utah; the statute can have no extraterritorial effect. United States Bond & Finance Corp. v. National Building & Loan Ass'n of America, 80 U. 62, 12 P.2d 758, aff'd on rehearing 80 U. 70, 17 P.2d 238.

Decisions from other jurisdictions.

— Iowa.

Secretary of state may refuse registration of security if, in his opinion, it is unfair, unjust or inequitable, and it is not essential that it be fraudulent; thus standards may be established upon which to base opinion, such as his order fixing limit of "loading charge" upon a security. Independence Fund of North America v. Miller, 226 Iowa 1101, 285 N. W. 629.

82-1-12. Issuers to Constitute Director Process Agent—Service of Process.

Upon any application for registration by notification made by an issuer, and upon any application for registration by qualification made by an issuer or registered dealer, where the issuer is not domiciled in this state, there shall be filed with such application the irrevocable written consent of the issuer that actions growing out of the violation of any provision of this chapter may be commenced against the issuer in the proper court of any county in this state in which a cause of action may arise, or in which the plaintiff may reside, by the service of any process or pleading authorized by the laws of this state on the director of the state securities commission, said consent stipulating and agreeing that such service of such process or pleadings on such director shall be

taken and held in all courts to be as valid and binding as if due service had been made upon the issuer personally. Such written consent shall be authenticated by the seal of the issuer, if a corporation having a seal, and by the acknowledged signature of a member of a copartnership or company, or by the acknowledged signature of any officer of an unincorporated association, if it is such an association. It shall be duly authorized by resolution of the board of directors, trustees or managers of such corporation or association, and shall in such case be accompanied by a duly certified copy of the resolution of the board of directors, trustees or managers of the corporation or association authorizing the officers to execute the same. In case any process or pleading mentioned in this chapter is served upon the director, it shall be by duplicate copies, one of which shall be filed in the office of the commission and the other immediately forwarded by registered mail to the person against whom such process or pleading is directed.

(L. 25, p. 171, § 8.)

Comparable provisions.

Iowa Code 1939, § 8581.09 as amended by Laws of 1941 (commences with the following quoted amendatory language: "Upon any application for registration under this Chapter where the issuer functions or intends to function as a dealer in the manner permitted by Section 8581.11 and such issuer is not domiciled in this state, there shall be filed with such application the irrevocable written consent"; the remainder of the section is substantially identical with the Utah provision).

Cross-references.

Constitutional requirements, Const. Art. XII, § 9.

82-1-13. Revocation of Registration—Grounds.

The commission may revoke the registration of any security by entering an order to that effect, with its findings in respect thereto, if upon examination into the affairs of the issuer of such security it shall appear:

(1) That the issuer is insolvent; or,

(2) That the issuer has violated any of the provisions of this chapter, or any order of the commission of which such issuer has had notice; or,

(3) That the issuer has been or is engaged or is about to engage in fraudulent transactions; or,

(4) That the issuer is in any other way dishonest, or has made any fraudulent representations in any prospectus or in any circular or other literature that has been distributed concerning the issuer or its securities; or,

(5) That the issuer is of bad business repute; or,

(6) That the issuer does not conduct his business in accordance with law; or,

(7) That the affairs of the issuer are in an unsound condition; or,

(8) That the enterprise or business of the issuer is not based upon sound business principles. (L. 25, p. 171, § 9.)

Comparable provisions.

Iowa Code 1939, § 8581.10 (includes substantially the same provision; "The commissioner of insurance may refuse or revoke the registration of any security * * * ").

1. Words and phrases defined.

Certainly the issuer mentioned in this section would be regarded as a "person directly affected and aggrieved" within the meaning of 82-1-41. See In re Deseret Mortuary Co., 78 U. 393, 400, 3 P.2d 267.

2. Evidence.
In action to rescind sale of corporate stock on ground of fraudulent representations as to condition of company, report of state auditor or audit made by state banking department was not admissible in evidence on theory that they were public records. Wilson v. Guaranteed Securities Co., 82 U. 224, 231, 23 P.2d 921.

82–1–14. Id. Right of Visitation and Inquisition in Commission.

In making such examination the commission shall have access to, and may compel the production of, all the books and papers of such issuer, and may administer oaths to and examine the officers of such issuer or any other person connected therewith relating to its business and affairs, and may also require a balance sheet exhibiting the assets and liabilities of any such issuer or its income statement, or both, to be certified to by a public accountant either of this state or of any other state where the issuer's business is located, approved by the commission.

Whenever the commission may deem it necessary, it may also require such balance sheet or income statement, or both, to be made more specific in such particulars as the commission shall point out, or to be brought down to the latest practicable date.

If any issuer shall refuse to permit an examination to be made by the commission, the refusal shall be proper ground for cancellation of registration.

If the commission shall deem it necessary, it may enter an order suspending the right to sell securities pending an investigation. Such order shall state the commission's grounds for taking such action.

Notice of the entry of such order shall be given personally or by telephone, telegraph or mail to the issuer and every registered dealer who shall have notified the commission of an intention to sell such security. (L. 25, p. 171, § 9.)

Comparable provisions.
Iowa Code 1939, § 8581.10 (includes substantially the same provision; refusal to permit examination to be made by commissioner of insurance is "proper ground for refusal or cancellation of registration").

1. Evidence.
In action to rescind sale of corporate stock on ground of fraudulent representations as to condition of company, report of state auditor or audit made by state banking department was not admissible in evidence on theory that they were public records. Wilson v. Guaranteed Securities Co., 82 U. 224, 231, 23 P.2d 921.

82–1–15. Registration of Dealers and Salesmen.

No dealer or salesman shall engage in business in this state as such dealer or salesman, or sell any securities, including securities exempted in section 82–1–5, except in transactions exempt under section 82–1–6, unless he has been registered as a dealer or salesman in the office of the commission pursuant to the provisions of this section.

Every dealer before engaging in business in this state shall file in the office of the commission an application for registration, in writing in such form as the commission may prescribe, duly verified by oath, which shall state the principal office of the applicant wherever situated, and the location of the principal office and all branch offices in this state, if any, the name or style of doing business, the names, residence

and business addresses of all persons interested in the business as principals, copartners, officers or directors, specifying as to each his capacity and title, the general plan and character of business and the length of time the dealer has been engaged in business. The commission may also require such additional information as to the applicant's previous history, record and association as it may deem necessary to establish the good repute in business of the applicant.

Every dealer shall file with his application an irrevocable written consent to the service of process upon the director of the state securities commission in actions against such dealer, in manner and form as provided in section 82-1-12.

Every dealer shall also file with his application a bond in the sum of $5,000 running to the state of Utah in such form as the commission may designate, such bond to be conditioned upon the faithful compliance with the provisions of this chapter by said dealer and by all salesmen registered by him. Such bond shall be executed by good and sufficient sureties, not less than two in number, accepted by the commission, or by some surety company authorized to do business in this state. If the commission shall find that the applicant is of good repute and has complied with the provisions of this section, including the payment of the fee hereinafter provided, it shall register such applicant as a dealer.

Upon the written application of a registered dealer and general satisfactory showing as to good character and the payment of the proper fee the commission shall register as salesmen of such dealer such natural persons as the dealer may request.

The names and addresses of all persons approved for registration as dealers or salesmen and all orders with respect thereto shall be recorded in a register of dealers and salesmen kept in the office of the commission, which shall be open to public inspection. Every registration under this section shall expire on the 31st day of December in each year, but new registrations for the succeeding year shall be issued upon written application and payment of the fee as herein provided without the filing of further statements or furnishing any further information, unless specifically required by the commission. Applications for renewals must be made not less than thirty nor more than sixty days before the first day of the ensuing year; otherwise they shall be treated as original applications. The fee for such registration and for each annual renewal shall be $25 in case of dealers, and $1 each, in case of salesmen.

Changes in registration occasioned by changes in the personnel of a partnership, or in the principals, copartners, officers or directors of any dealer may be made from time to time by written application setting forth the facts with respect to such change. (L. 29, p. 126, § 10.)

Comparable provisions.

Iowa Code 1939, § 8581.11 (requiring registration as dealer or salesman in office of commissioner of insurance); § 8581.18 (stating the conditions of dealer's bond).

Cross-references.

False reports as crime, 103-12-6.

1. Bond of dealer.

Blue Sky Law and bond therein required are for protection of purchasers

of securities against fraud perpetrated in violation of act, and not solely for protection of state. Mayer v. Rankin, 91 U. 193, 63 P.2d 611, 110 A. L. R. 837.

Decisions from other jurisdictions.

— Iowa.

Stockbroker's bond held to have conformed to the terms and provisions of the Blue Sky Law and to have inured to the benefit of any person who suffered damage by reason of the stockbroker's violation of such law. Zapf v. Ridenour, 198 Iowa 1006, 200 N. W. 618.

Bond, under terms of which responsibility was undertaken for default of dealer in securities upon failure to pay judgment that might be obtained against her for fraudulent sale thereof, was neither surety, nor strictly speaking, indemnity bond, but was collateral undertaking in nature of guaranty. Kellogg v. Bell, 222 Iowa 510, 268 N. W. 534.

A. L. R. notes.

Effect of repledge by one who at time holds property under tentative agreement for pledge which is subsequently consummated, 24 A. L. R. 433.

Liability of broker as for conversion for failure, on closing customer's transactions, to account for margins which he has repledged or deposited with correspondent, 47 A. L. R. 1113.

Presumption and burden of proof as to loss from failure of pledgee to sell or collect choses in action pledged, 53 A. L. R. 1075.

Ratification by customer of stockbroker's wrongful purchase or sale of securities on his account, or failure to comply with instructions, 87 A. L. R. 794.

Relation between customer and broker receiving bonds or other securities for sale or exchange, 52 A. L. R. 501.

Right of broker to repledge customer's securities, 24 A. L. R. 462.

Right to commission or other agreed compensation for procuring contracts or making stock sales without complying with blue sky laws, 67 A. L. R. 716.

Scope and effect of "stop order" by customer to stockbroker, 35 A. L. R. 971.

Title to securities in possession of broker (or his pledgee) who has purchased them for or sold them to customer, 41 A. L. R. 1258.

82-1-16. Dealers to Notify Commission of Intended Sales.

Every registered dealer who intends to offer any security of any issue, registered or to be registered, shall notify the commission in writing of his intention so to do. The notice shall contain the name of the dealer and shall state the name of the security to be offered for sale. Whenever a dealer shall have prepared such notice and shall have forwarded the same by registered mail, postage prepaid and properly addressed, to the commission, such dealer as to the contents of such notice and the filing thereof shall be deemed to have complied with the requirements of this section. (L. 29, p. 126, § 10.)

82-1-17. Registration of Agents.

No person shall engage in business in this state as agent to sell any securities of an issuer unless he has paid a fee of $5 and has been registered as an agent in the office of the commission. Every agent before selling, offering to sell, or advertising the sale of, any security of an issuer shall file in the office of the commission an application for registration in writing in such form as the commission may prescribe, duly verified by oath, which shall state the office or principal place of business of the issuer and the character of the security to be sold. If the commission shall find that the applicant is of good repute and has complied with the provisions of this section, it shall register such applicant as an agent. (L. 29, p. 126, § 10x.)

Comparable provisions.

Cal. Gen. Laws, Act 3814, § 6 (no person or company may act as agent or broker without first applying for and securing a certificate from commissioner of corporations).

Idaho Code, 1940 Supp., § 25-1607 (investment company may appoint one

or more agents; no such agent may do business for investment company in Idaho until he registers with department of finance as agent for such company).

Mont. Rev. Codes, § 4040 (investment company or stockbroker, holding permit issued by investment commissioner, may appoint one or more agents; agent must register with investment commissioner and must deliver to him a bond in sum of $1,000).

1. Unlicensed agents.

Sale of securities authorized by commission is not invalid because made by unlicensed agent, since act does not require licensing of agents but merely payment of fee by them, there being no prohibition against nor penalty provided therein for sale by unlicensed agent. Miller v. Stuart, 69 U. 250, 253 P. 900, overruling National Bank of the Republic v. Price, 65 U. 57, 234 P. 231.

A. L. R. notes.

Right to commission or other agreed compensation for procuring contracts or making stock sales without complying with blue sky laws, 67 A. L. R. 716.

82-1-18. Dealers to Keep Books of Account.

Every dealer registered under the provisions of this chapter shall keep at his office or principal place of business true and complete books of account showing all of his assets, liabilities, transactions and business. (L. 25, p. 171, § 11.)

Comparable provisions.

Cal. Gen. Laws, Act 3814, § 11 (requiring company to keep complete set of books, records and accounts of sales of securities).

82-1-19. Id. Commission to Prescribe Form—Examination.

The commission shall have power to prescribe the manner and form in which every registered dealer's books of account shall be kept and to examine the same at all times, and to require the dealer and his agents and employees to produce for its examination all other papers and records relating to the dealer's transactions and business, and in general shall have the same powers of examination and regulation of the transactions and business of registered dealers as the state bank commissioner has with respect to banks and other financial institutions of this state. The examinations made in accordance with the provisions of this section shall be performed without notoriety or public display, and no fact determined from any such examination shall be disclosed or used in any manner, unless the same is introduced as evidence at a hearing in a court or other tribunal authorized to take evidence. (L. 25, p. 171, § 12.)

Comparable provisions.

Cal. Gen. Laws, Act 3814, § 11 (requiring company to make and file in office of commissioner a report as to securities sold by it); § 12 (requiring broker to make and file in office of commissioner a true and correct statement of its business).

Cross-references.

Powers of bank commissioner, 7-1-9.

82-1-20. Dealers to Furnish Customers with Sales Memo.

Every registered dealer shall, within twenty-four hours after demand, furnish to any customer or principal for whom such dealer has executed any order for the purchase or sale of any securities or commodities, either for immediate or future delivery, a written statement showing the time when, the place where, and the price at which, the same were bought and sold. (L. 25, p. 171, § 13.)

82-1-21. Refusal and Cancellation of Registration of Dealers, Salesmen and Agents—Grounds.

Registration under sections 82-1-15 and 82-1-17 may be refused, or any registration granted may be canceled, by the commission, if after a reasonable notice and a hearing the commission determines that such applicant or registrant so registered:

(1) Has violated any provision of this chapter or any regulation made hereunder; or,

(2) Has made a material false statement in the application for registration; or,

(3) Has been guilty of a fraudulent act in connection with any sale of securities, or has been or is engaged, or is about to engage, in making fictitious or pretended sales or purchases of any securities, or has been or is engaged, or is about to engage, in any practice or sale of securities which is fraudulent or in violation of law; or,

(4) Has demonstrated his unworthiness to transact the business of dealer, salesman or agent; or,

(5) Is insolvent.

Pending the hearing the commission shall have the power to order the suspension of such dealer's, salesman's or agent's registration, and such order shall state the cause for such suspension.

In the event the commission determines to refuse or to cancel a registration as hereinabove provided, it shall enter a final order to that effect with its findings on the register of dealers and salesmen.

It shall be sufficient cause for refusal or cancellation of registration in case of a partnership, or of a corporation or unincorporated association, if any member of the partnership, or any officer or director of the corporation or association, has been guilty of any act or omission which would be cause for refusing or canceling the registration of an individual dealer or salesman. (L. 29, p. 126, § 14.)

Comparable provisions.

Iowa Code 1939, § 8581.14 (enumerating the grounds upon which registration may be refused or revoked by commissioner of insurance, after reasonable notice and hearing).

82-1-22. Pleadings in Civil and Criminal Actions Under Chapter.

It shall not be necessary to negative any of the exemptions or classifications in this chapter provided in any complaint, information or indictment or in any writ or proceedings laid or brought under this chapter, and the burden of proof of any such exemption shall be upon the party claiming the benefit of such exemption or classification. (L. 25, p. 171, § 15.)

1. Negativing exemptions.

In suit to hold surety on bond of securities dealer liable for fraud of dealer in sale of stock, plaintiff, even though otherwise required to negative exemptions, was not required to allege facts showing that stock and sale thereof did not fall within exemptions of Blue Sky Law. Mayer v. Rankin, 91 U. 193, 63 P.2d 611, 110 A. L. R. 837.

82-1-23. Securities Issued for Intangible Consideration—Escrow.

If the statement containing information as to securities as provided for in section 82-1-11 shall disclose that any such securities shall

have been, or shall be intended to be, issued for any patent right, copyright, trade-mark, process, lease, formula or good will, or for promotion fees or expenses, or for other intangible assets, the amount and nature thereof shall be fully set forth, and the commission may require that such securities so issued in payment of such patent right, copyright, trade-mark, process, lease, formula or good will, or for promotion fees or expenses, or for other intangible assets, shall be delivered in escrow to the commission under an escrow agreement that the owners of such securities shall not be entitled to withdraw them from escrow until all other stockholders who have paid for their stock in cash shall have been paid a dividend or dividends aggregating not less than fifteen per cent of the cash price for which the stock was issued, shown to the satisfaction of the commission to have been actually earned on the investment in any common stock so held, and in case of dissolution or insolvency during the time such securities are held in escrow, that the owners of such securities shall not participate in the assets until after the owners of all other securities shall have been paid in full upon the basis of the cash price for which the stock was issued.

(L. 25, p. 171, § 16.)

82-1-24. Enjoining Fraudulent Practices.

Whenever in the issuance, sale, promotion, negotiation, advertisement or distribution of any securities within this state, including any security exempted under the provisions of section 82-1-5, or in any transaction exempted under the provisions of section 82-1-6, any person, as defined in this chapter, shall have employed or employs or is about to employ any device, scheme or artifice to defraud, or for obtaining money or property by means of any false pretense, representation or promise, or whenever any such person shall have made, makes or attempts to make in this state fictitious or pretended purchases or sales of securities, or shall have engaged in or engages in or is about to engage in any practice or transaction or course of business relating to the purchase or sale of securities which is fraudulent or in violation of law or which has operated or which would operate as a fraud upon the purchaser—any one or all of such devices, schemes, artifices, fictitious or pretended purchases or sales of securities, practices, transactions and courses of business are hereby declared to be, and are hereinafter referred to as, fraudulent practices, and the commission may investigate, and whenever it shall believe from evidence satisfactory to it that any such person has engaged in, is engaged in or is about to engage in any of the practices or transactions heretofore referred to as and declared to be fraudulent practices, it may in addition to any other remedies bring an action in the name and on behalf of the state of Utah against such person and any other person or persons theretofore concerned in or in any way participating in or about to participate in such fraudulent practices to enjoin such person and such other person or persons from continuing such fraudulent practices or engaging therein or doing any act or acts in furtherance thereof.

(L. 25, p. 171, § 17.)

82-1-25. Sales in Violation of Chapter—Remedies—Liability—Limitation of Action.

Every sale or contract for sale made in violation of any of the provisions of this chapter shall be voidable at the election of the purchaser, and the person making such sale or contract for sale and every director, officer or agent of or for such seller who shall have participated or aided in any way in making such sale shall, upon tender to the seller of the securities sold or of the contract made, be jointly and severally liable to such purchaser for the full amount paid by him; *provided*, that no action shall be brought for the recovery of the purchase price after two years from the date of such sale or contract for sale; *and provided further*, that no purchaser otherwise entitled shall claim or have the benefit of this section who shall have refused or failed within a reasonable time to accept the voluntary offer of the seller to take back the security in question and to refund the amount paid by such purchaser, together with interest on such amount for the period from the date of payment by such purchaser down to the date of repayment, such interest to be computed:

(1) In case such securities consist of interest-bearing obligations, at the same rate as provided in such obligations; and,

(2) In case such securities consist of other than interest-bearing obligations, at the rate of six per cent per annum; less, in every case, the amount of any income from such securities that may have been received by such purchaser. (L. 29, p. 126, § 18.)

1. Actions.

2. —right of action.

A right of action is saved notwithstanding repeal of section under which action was brought before commencement thereof, and this saving is effected not only by 88-2-5, but is also "within the protection of the Constitution and could not be destroyed by legislation." Buttrey v. Guaranteed Securities Co., 78 U. 39, 50, 300 P. 1040. And see Wilson v. Guaranteed Securities Co., 73 U. 157, 272 P. 946.

3. —assignability of cause of action.

Cause of action for fraud of dealer in sale of securities was assignable, where defrauded party had rescinded contract before assignment was made. Mayer v. Rankin, 91 U. 193, 63 P.2d 611, 110 A. L. R. 837.

Even though allegations in original complaint indicated that causes of action were in nature of suits for rescission of contract of sale, where it was clear in amended complaint that causes assigned to plaintiff were merely for return of money paid to securities dealer on sale of stock, claimed to have been fraudulent, such causes of action were assignable. Mayer v. Rankin, 91 U. 193, 63 P.2d 611, 110 A. L. R. 837.

4. —parties to action.

Blue Sky Law and bond therein required are for protection of purchasers of securities against fraud perpetrated in violation of act, and not solely for protection of state, and purchaser of securities could maintain action on bond. Mayer v. Rankin, 91 U. 193, 63 P.2d 611, 110 A. L. R. 837.

5. —statute of limitations, laches and estoppel.

Where corporation which transferred mining lease in consideration for stock in mining corporation delayed 19 months before seeking rescission of such lease on ground that stock had been issued without complying with state securities act, it was held that it was barred by laches, and also estopped, in view of expenditures which transferee corporation had made to develop mine. Bassett v. Utah Copper Co., 219 F. 811.

Action to recover bonds which were exchanged for stock on ground that securities act of state in which exchange was made was not complied with, was action for fraud or mistake within 104-2-24 limiting time within which to bring such actions to three years. Gillespie v. Blood, 81 U. 306, 17 P.2d 822.

See in this connection 104-2-26.

6. Pleading.

A complaint does not state facts sufficient to constitute a cause of action unless it alleges that defendants "participated or aided" in the sale. Buttrey v. Guaranteed Securities Co., 78 U. 39, 49, 300 P. 1040.

In suit against securities dealer and surety on his bond for fraud of dealer in sale of stock, in absence of allegation that contract of sale was consummated within state, complaint was fatally defective. Mayer v. Rankin, 91 U. 193, 63 P.2d 611, 110 A. L. R. 837.

Even though plaintiff, in suit against securities dealer and surety on his bond for fraud of dealer in sale of stock, failed to allege that contract of sale was consummated within state, amended complaint alleged sufficient facts to support judgment against dealer independent of Securities Act. Mayer v. Rankin, 91 U. 193, 63 P.2d 611, 110 A. L. R. 837.

In suit against securities dealer and surety on his bond for fraud of dealer in sale of stock, where complaint alleged sufficient facts to support judgment against dealer independent of Securities Act, surety was a proper party to such proceedings. Mayer v. Rankin, 91 U. 193, 63 P.2d 611, 110 A. L. R. 837.

7. — Issues, proof and variance.

In action by receiver of foreign corporation for stockholder's assessment, answer held not to raise issue with respect to invalidity of sale because foreign corporation had violated this section. Chandler v. Cullimore, 87 U. 407, 49 P.2d 422.

8. — evidence and nonsuit.

In action to recover purchase price of shares, in which defendant corporation defended on ground that stock sold was owned by secretary of corporation, evidence held to make prima facie case that shares sold belonged to corporation so that court erred in nonsuiting plaintiff, and fact that notes in payment for stock were payable to secretary held not to conclusively show that shares belonged to secretary. Hansen v. Abraham Irr. Co., 82 U. 361, 25 P.2d 76.

In action to rescind sale of corporate stock on ground of fraudulent representations as to condition of company, report of state auditor or audit made by state banking department was not admissible in evidence on theory that they were public records. Wilson v. Guaranteed Securities Co., 82 U. 224, 231, 23 P.2d 921.

9. Void and voidable sales and transactions.

Formerly such contracts of sale were void and not merely voidable. Wilson v. Guaranteed Securities Co., 73 U. 157, 272 P. 946, quoting Laws 1919, and 1925 amendment thereof.

Formerly the contract of sale by an unlicensed person was "unlawful and void." Buttrey v. Guaranteed Securities Co., 78 U. 39, 46, 300 P. 1040. And see Miller v. Stuart, 69 U. 250, 259, 253 P. 900, overruling National Bank of the Republic v. Price, 65 U. 57, 234 P. 231.

Note which was void because of violation of Blue Sky Law was not void in hands of innocent purchaser for value. National Bank of the Republic v. Price, 65 U. 57, 234 P. 231.

Note given for stock subscription under agreement whereby farmers agreed to raise sugar beets for corporation in connection with sale of stock was void where contract with farmers was indivisible and some of subscription contracts were secured by unlicensed agents. National Bank of the Republic v. Price, 65 U. 57, 234 P. 231.

10. Joint and several liability of officers, agents, etc.

The legislature intended by this section that directors, officers, and agents of corporations shall be personally liable to purchasers of blue sky securities which are sold in violation of the law, provided, of course, they "participated or aided in any way in making such sale." But knowledge concerning the license is not a requisite to personal liability of corporate officials and agents. Buttrey v. Guaranteed Securities Co., 78 U. 39, 47, 300 P. 1040.

A corporate officer who took no part in transaction, did not participate therein, or have any knowledge thereof, sale of stock being made without his knowledge, consent or participation, is not liable. Harper v. Tri-State Motors, Inc., 90 U. 226, 63 P.2d 1056, amending on rehearing order entered in 90 U. 212, 58 P.2d 18.

11. What law governs.

The lex loci contractus governs the validity of a contract entered into in another state. United States Bond & Finance Corp. v. National Building & Loan Ass'n of America, 80 U. 62, 69, 12 P.2d 758, rehearing denied 80 U. 70, 17 P.2d 238.

A. L. R. notes.

Right to commission or other agreed compensation for procuring contracts or making stock sales without complying with blue sky laws, 67 A. L. R. 716.

82-1-26. Reregistration of Dealers, Salesmen and Agents After Revocation.

No dealer, salesman or agent whose registration has been revoked shall be reregistered within six months from the date of such revocation. (L. 29, p. 126, § 18.)

82–1–27. Prosecutions for Violation of Chapter.

The director shall at once lay before the county attorney of the proper county any evidence which shall come to his knowledge of violations of this chapter. In the event of the neglect or refusal of such county attorney to prosecute such violations, the director shall submit such evidence to the district attorney, who shall proceed therein with all the rights, privileges and powers conferred by law upon county attorneys. (L. 29, p. 126, § 18.)

Comparable provisions.

Cal. Gen. Laws, Act 3814, § 20 (commissioner may certify a record to the district attorney of county in which acts, complained of, have occurred, following upon investigation thereof by commissioner).

82–1–28. False Advertising, a Felony.

Any person who knowingly makes or publishes in any way whatever, or permits to be so made or published, any book, prospectus, notice, report, statement, exhibit or other publication of or concerning the affairs, financial condition or property of any corporation, joint-stock association, copartnership or individual which shall contain any statement which is false or willfully exaggerated, or which is intended to give, or which shall have a tendency to give, a less or greater apparent value to the securities or property, or any part thereof, of said person, or of any dealer or issuer, than such securities or property, or any part thereof, shall really and in fact possess is guilty of a felony.

(L. 25, p. 171, § 20.)

A. L. R. notes.

Statute or ordinance in relation to advertising as interference with interstate commerce, 57 A. L. R. 105.

82–1–29. Stock Exchanges to Obtain Sanction—Penalty.

No organization of one or more individuals shall organize or conduct a stock exchange for the purpose of buying and selling stocks and bonds, with or without the payment of commission or brokerage, without first obtaining the sanction of the commission, and the commission shall have full power to impose reasonable conditions and regulations for its operation. Violation of this section renders the individual or individuals operating such exchange without the authority of the commission liable to a fine of $100 for each and every day that it is operated without such sanction. (L. 25, p. 171, § 21.)

82–1–30. Asserting False Claim of Registration Forbidden.

No person, issuer, dealer, agent or salesman, and no person acting in behalf thereof, shall in any manner or by any means, printed or oral, in connection with, or at the time of, or for the purpose of, making any offer, advertisement, sale, disposition, exchange, solicitation or subscription of securities registered under the provisions of this chapter, falsely publish or make any reference to any security or security transaction, or to any dealer, issuer, agent, salesman or person as being registered or bonded pursuant to the provisions of this chapter.

(L. 25, p. 171, § 22.)

82-1-31. Commission and Employees Forbidden to Recommend Securities or Accept Gratuities.

It shall be unlawful for any member of the securities commission, the director or any person connected with the commission to issue or cause to be issued any letter or other writing of recommendation or indorsement to any person, issuer, dealer, agent or salesman that has been or may be granted registration to sell securities in this state, or to accept any gift of stock, bonds, certificates or other securities or any other gratuity. Any employee of the commission who violates any provision of this section shall forfeit his office or employment, and is guilty of a misdemeanor. (L. 25, p. 171, § 23.)

82-1-32. Expense of Investigations to Be Advanced.

Every issuer, dealer, salesman or agent applying to the securities commission for registration to conduct any business in this state which is subject to examination shall be required to advance funds sufficient to grantee [guarantee] the expenses connected therewith before an order of such examination will be issued. Such moneys shall be deposited in a special fund to the credit of the commission and shall be withdrawable upon an order or check signed by at least two members of the commission. The person making the examination shall render a detailed statement of his expenses in duplicate, one copy of which shall be filed with the state board of examiners and the other copy with the person examined. Any excess, after travel, hotel and other necessary expenses and fees or fixed charges of examination are deducted, shall be returned to the person examined. (L. 25, p. 171, § 24.)

82-1-33. Fees.

The commission may also charge and collect the following fees:

For any examination, audit or investigation, not to exceed $10 per day or fraction thereof.

For copies of papers and records not required to be certified to or otherwise authenticated by the commission, 20 cents for each folio.

For certified copies of official documents, orders and other papers filed, and for transcripts, 20 cents for each folio and $1 for each certificate under seal.

For certificate of serving and mailing process served upon the commission in any action or proceeding commenced or prosecuted in this state against any person, issuer or dealer that shall have appointed the director of the commission its agent as provided in section 82-1-12 and 82-1-15, $2.

No fees shall be charged or collected for copies of papers, records or official documents furnished to public officers for use in their official capacity, or for the reports of the commission in the ordinary course of distribution; but the commission may fix a reasonable charge for publications issued under its authority. (L. 25, p. 171, § 24.)

82-1-34. Id. Disposition of.

All fees and charges collected by the commission, accompanied by a detailed statement thereof, shall be paid into the state treasury each

month and credited to the state securities commission fund, which is hereby created a permanent fund. All moneys remaining to the credit of the state securities commission fund at the end of each biennial period in excess of $5,000 shall be covered into the general fund. The state securities commission fund, or so much thereof as shall be necessary, shall be applied to the payment each month of salaries for services rendered and necessary traveling and administration expenses incurred hereunder, upon vouchers therefor duly presented by the commission to, and approved by, the state board of examiners. (L. 25, p. 171, § 25.)

82–1–35. Sales by Unauthorized Persons and Fraudulent Practices, a Felony.

Any person, issuer, dealer or agent who publishes an advertisement by or on behalf of any person, issuer, dealer or agent not registered under the provisions of this chapter, wherein any securities neither exempt nor registered pursuant to the provisions of this chapter are described, offered for sale, or assignment, trade, transfer or hypothecation in any manner is guilty of a felony. (L. 25, p. 171, § 26.)

1. Stock subscriptions.
Solicitation and procurement of stock subscriptions by unauthorized persons does not vitiate all subscriptions, which were conditioned upon obtaining a certain number, where more than minimum number of valid subscriptions were obtained. National Bank of the Republic v. Beckstead, 68 U. 421, 250 P. 1033.

82–1–36. Sales of Unauthorized Securities, a Felony.

Any person, issuer, dealer, agent or salesman, who, not being at the time exempt or registered pursuant to the provisions of this chapter, in any manner or by any means issues, sells, assigns or transfers, or negotiates or offers to negotiate for the issuance, sale, assignment or transfer of, any securities neither exempt nor registered pursuant to the provisions of this chapter at the time of such issuance, sale, assignment or transfer, is guilty of a felony. Any person committing fraudulent practices as defined in section 82–1–24 is guilty of a felony. (L. 25, p. 171, § 27.)

1. Applicability of section.
This section does not apply to a gift of a security. Andrews v. Chase, 89 U. 51, 49 P.2d 938, rehearing denied 89 U. 73, 57 P.2d 702.

A. L. R. notes.
Right to commission or other agreed compensation for procuring contracts or making stock sales without complying with blue sky laws, 67 A. L. R. 716.

82–1–37. Violation of Commission's Orders—Penalty.

Any person who violates any lawful order entered by the commission, of which he has notice, other than an order of denial or suspension of registration of any character, is guilty of a misdemeanor and shall be fined not less than $50 nor more than $1,000. (L. 25, p. 171, § 27.)

82–1–38. Penalties—Omnibus Provision.

Any person guilty of a felony as defined in any of the provisions of this chapter shall be punished by a fine of not less than $100 nor more than $10,000, or by imprisonment in the state prison for a term of not

more than ten years, or by both such fine and imprisonment. Any person guilty of a misdemeanor as provided for by any of the provisions of this chapter shall be punished by a fine of not less than $50 nor more than $1,000. (L. 25, p. 171, § 27.)

82-1-39. Perjury and False Statements—Penalty.

Any person who for the purpose of, or in connection with, the procuring of registration of an issuer, dealer, agent, salesman or security shall knowingly commit perjury or misrepresent material facts, shall be punished by a fine of not less than $100 nor more than $10,000, or by imprisonment in the state prison for not more than ten years, or by both such fine and imprisonment. (L. 25, p. 171, § 27.)

82-1-40. Budget.

The securities commission shall prepare and submit to the governor to be included in his budget to the legislature a budget of the requirements for salaries and wages, office expense, travel, equipment and repairs of the securities commission for the biennium next following the convening of the legislature. (L. 27, p. 93, § 1.)

82-1-41. Review by Courts of Commission's Ruling.

Any person directly affected and aggrieved by any final order of the commission made under any of the provisions of this title may, within 30 days after notice of such order, institute an action in the district court of the county at the seat of government against the commission, setting out his grievance and right to complain. In its answer the commission may set out any matter in justification; and the court shall determine the issues on both questions of law and fact, and may affirm, set aside or modify the order complained of. (Code Report.)

Comparable provisions.

Cal. Gen. Laws, Act 3814, § 15, as amended by Laws of 1941 (orders, decisions, permits or other official acts of commissioner are subject to review, mandamus or prohibition).

Idaho Code, § 25-1702 (appeal may be taken from action of commissioner of finance in refusing to grant investment company permission to do business in Idaho, or in revoking license of agent).

1. Who may appeal.

Formerly only "persons interested" were given right to appeal from final order of commission. However, even under the changed language of this section it is unlikely that mere competitors of applicant, or members of the public desiring that no unworthy securities be placed before the public, would be considered persons "directly affected and aggrieved." See In re Deseret Mortuary Co., 78 U. 385, 402, 3 P.2d 267.

It is likely that the words "directly affected and aggrieved," as used in this section, will be given the same construction as was formerly given to the words "interested parties," and will be held to refer to persons who are touched in their property or person by the order complained of. See In re Deseret Mortuary Co., 78 U. 393, 402, 3 P.2d 267.

2. Appealable judgments, orders and decrees.

An appeal is allowed by this section from any final order of the commission. No other order is appealable. Formerly it was held that no appeal would lie from an order registering a security and that "final order" of commission was order of revocation or refusal of registration of securities. In re Deseret Mortuary Co., 78 U. 393, 3 P.2d 267.

CHAPTER 2

REAL ESTATE BROKERS

82-2-1. License Required.
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82-2-3. "Real Estate Salesman" Defined.
82-2-4. [Real Estate Broker or Salesman] — One Act for Compensation Sufficient to Constitute.
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82-2-15. Colonization Projects — Reports on.
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82-2-17. Penalty for Violation of Chapter.

82-2-1. License Required.

It shall be unlawful for any person, copartnership or corporation to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this state without first obtaining a license under the provisions of this chapter.

(L. 21, p. 304, § 1.)

History.

As amended by L. 39, ch. 106, eff. May 9, adding "copartnership or corporation" after "person" in first line and adding matter at end of second line.

Comparable provisions.

Cal. Gen. Laws, Act 112, § 1 (identical, except that concluding words are as follows: " * * * without first obtaining a license from the State Real Estate Division").

Idaho Code, § 53-2205. Mont. Rev. Codes, § 4060 (unlawful for any person to engage in business, or act in capacity of, real estate broker without first obtaining license).

Iowa Code 1939, § 1905.20 (requiring procurement of license from Iowa real estate commissioner).

Cross-references.

Statute of frauds, brokers' contracts as within, 33-5-4, subd. (5).

Decisions from other jurisdictions.

— Iowa.

Written contract of exclusive agency for the sale of real estate held not to be construed as preventing the owner from making a sale without liability for a commission. Hedges Co. v. Shanahan, 195 Iowa 1302, 190 N. W. 957.

Employment of broker to sell real estate is not a renunciation or abdication of owner's right to sell as an incident of his ownership. Reeve v. Shoemaker, 200 Iowa 983, 205 N. W. 742, 43 A. L. R. 839.

The existence of a contract of employment is essential to the right of a broker to a commission. Reeve v. Shoemaker, 200 Iowa 983, 205 N. W. 742, 43 A. L. R. 839.

A broker suing for commissions for making a land sale has the burden of proving (1) the contract of employment, (2) that he produced a purchaser ready, able and willing to purchase on terms satisfactory to defendant, (3) that plaintiff was efficient moving cause of sale, and (4) the implied contract to pay commission for services. Wareham v. Atkinson, 215 Iowa 1096, 247 N. W. 534.

A. L. R. notes.

Constitutionality of statute or ordinance requiring real estate brokers to procure a license, 59 A. L. R. 1501.

82-2-2. "Real Estate Broker"—"Real Estate" Defined.

The term "real estate broker" within the meaning of this chapter shall include all persons, partnerships, associations and corporations,

foreign and domestic, who for another and for a fee, commission or other valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting a fee, commission or other valuable consideration, sells, exchanges, purchases, rents or leases or negotiates the sale, exchange, purchase, rental or leasing of or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises, who buys or offers to buy, sells or offers to sell or otherwise deals in options on real estate or the improvements thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate or who advertises or holds himself, itself or themselves out as engaged in the business of selling, exchanging, purchasing, renting or leasing real estate or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing or renting of any real estate. The term "real estate broker" shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary or upon a commission or upon a salary and commission basis or otherwise to sell such real estate or any parts thereof in lots or other parcels and who shall sell or exchange or offer or attempt or agree to negotiate the sale or exchange of any such lot or parcel of real estate.

The provisions of this chapter shall not apply to any person, partnership, association or corporation who as owner or lessor shall perform any of the acts aforementioned with reference to property owned or leased by such person, partnership, association or corporation nor to isolated transactions by persons holding a duly executed power of attorney from the owner nor shall this chapter be construed to include in any way the services rendered by an attorney at law in performing his duties as such attorney at law nor shall it apply to a receiver, trustee in bankruptcy, administrator, or executor, or any person acting under order of any court nor to a trustee under a deed of trust of a will nor to their employees.

It is expressly provided that a real estate broker shall have the right to fill out and complete such statutory or securities commission approved forms of legal documents that may be necessary to any real estate transaction to which the said broker is a party as principal or agent.

The term "real estate" as used in this chapter shall include leaseholds and other interests less than leaseholds. (L. 29, p. 121, § 2.)

History.

As amended by L. 39, ch. 106, eff. May 9, making material changes in text and adding all matter after "real estate" in eighth line from end of first paragraph.

A. L. R. notes.

Authority of real estate broker to bind employer by representations to purchaser as to the character or condition of the property, 57 A. L. R. 111.

Broker from out of state as within application and effect of statute relating to real estate brokers, 86 A. L. R. 640.

Broker's lien to secure his compensation for procuring sale of real estate, 58 A. L. R. 1497.

Duration of real estate broker's contract which specifies no time, 28 A. L. R. 893.

Duty of broker to inform principal of enhanced value of property, 53 A. L. R. 136.

Failure of title as fault or default of

owner within exception in contractual provision denying broker's right to commissions if sale is not closed, 56 A. L. R. 913.
Liability of broker to purchaser for overstating lowest price at which owner is willing to sell, 8 A. L. R. 1383.
Liability of real estate agent or broker to employer because of unfit character of purchaser or tenant procured by him, 60 A. L. R. 1379.
Real estate broker's rights and remedies in respect of property or proceeds for payment or security of his compensation, 125 A. L. R. 921.
Right of real estate broker to commissions where he was unable to procure an offer of the owner's price from one whom he interested, and who subsequently, without his intervention, purchased at that price, 9 A. L. R. 1194.
Right of real estate broker to list competing properties of different owners, 71 A. L. R. 699.
Skill and care required of real estate broker, 62 A. L. R. 1367.
Who is real estate agent, salesman, or broker within meaning of statute, 56 A. L. R. 480.

82-2-3. "Real Estate Salesman" Defined.

The term "real estate salesman" shall mean and include any person employed or engaged by or on behalf of a licensed real estate broker to do or to deal in any act or transaction set out or comprehended by the definition of a real estate broker in section 82-2-2 for compensation or otherwise. (L. 29, p. 121, § 2.)

History.
As amended by L. 39, ch. 106, eff. May 9, rewriting text of entire section.

82-2-4. [Real Estate Broker or Salesman]—One Act for Compensation Sufficient to Constitute.

One act, for compensation or valuable consideration, of buying, selling, leasing or exchanging real estate for another, or of offering for another to buy, sell, lease or exchange real estate, except as herein specifically excepted, shall constitute the person, firm, association or corporation performing, offering or attempting to perform any of the acts enumerated herein a real estate broker or a real estate salesman within the meaning of this chapter. (L. 29, p. 121, § 3.)

A. L. R. notes.
That sale is of both real and personal property as affecting necessity for real estate broker's license, 88 A. L. R. 1422.

82-2-5. Securities Commission to Enforce Chapter.

It shall be the duty of the state securities commission to administer and provide for the enforcement of all the provisions of this chapter. (L. 25, p. 153, § 4.)

82-2-6. License—Application for—Bond—Recommendation.

All applications for license shall be made in writing to the commission. Every application for a broker's license shall be accompanied by a bond in the sum of $1,000, running to the state of Utah, executed by two good and sufficient sureties, to be approved by the commission, or by a surety company duly authorized to do business in this state, said bond to be in form approved by the commission and conditioned that the applicant shall conduct his business in accordance with the requirements of this chapter. Every applicant for a license shall furnish a sworn statement setting forth his present address, both business and

residence, the names of all places where he formerly resided, or was engaged in business, or acted as a real estate salesman, for a period of sixty days or more during the preceding five years, and the length of such residence, together with the name of at least one real estate owner in each of the counties where he may have resided, engaged in business or acted as a salesman. Every application for a broker's license shall also state the name of the applicant and the location of the places for which such license is desired, and shall set forth the period of time, if any, which the applicant has been engaged in the business. Every real estate broker shall be a resident of, and maintain a place of business in, this state. In case a real estate broker maintains more than one place of business within this state, a duplicate license shall be issued to him for each office so maintained. Each duplicate license shall be issued for a fee of $1. Every applicant for salesman's license shall, in addition to the above requirements, set forth the period of time, if any, during which he has been engaged in the business, stating the name of his last employer, and the name and the place of business of the person then employing him, or whose employ he is to enter. The application shall be accompanied by a written statement by the person whose employ he is to enter stating that in his opinion the applicant is honest, truthful and of good reputation, and recommending that the license be granted to the applicant. The commission shall have the right to prescribe the form of application for all licenses, and may require and procure satisfactory evidence of the honesty, truthfulness, reputation and competency of any applicant prior to the issuance of any license. The commission may make, prescribe and enforce such rules and regulations connected with the application for any license as shall be deemed necessary to administer and enforce the provisions of this chapter.

(L. 29, p. 121, § 6.)

82-2-7. Id. Form—Posting—Pocket Cards.

The commission shall issue to each licensee a license showing the name and address of the licensee, and, in case of a real estate salesman's license, showing the name of the real estate broker by whom he is employed. Each license shall have impressed thereon the seal of the commission, and in addition to the foregoing shall contain such matter as shall be prescribed by the commission. The license of each real estate salesman shall be delivered or mailed to the real estate broker by whom such real estate salesman is employed, and shall be kept in the custody and control of such broker. It shall be the duty of each real estate broker to conspicuously display his license in his place of business. Notice in writing shall be given to the commission by each licensee of any change of principal business location; whereupon the commission shall issue a new license for the unexpired period for a fee of $1. A change of business location without notification to the commission and without the issuance by it of a new license shall automatically cancel the license theretofore issued. The commission shall prepare and deliver to each licensee a pocket card, not larger than two and one-fourth inches in width and three and three-fourths inches in length, which shall contain an impression of the seal of the commission

and shall show that the person whose name appears thereon is a licensed real estate salesman or real estate broker, as the case may be.

(L. 29, p. 121, § 7.)

Comparable provisions.
Iowa Code 1939, §§ 1905.32, 1905.33, 1905.34 and 1905.35 (similar).

82–2–8. Termination of Salesman's Employment—Notice—Return of License and Card.

When any real estate salesman shall be discharged or shall terminate his employment with the real estate broker by whom he is employed, it shall be the duty of such real estate broker to immediately deliver or mail by registered mail to the commission such real estate salesman's license. The real estate broker shall at the time of mailing such license to the commission address a communication to the last known residence address of such real estate salesman advising him that his license has been delivered or mailed to the commission. A copy of such communication to the real estate salesman shall accompany the license when mailed or delivered to the commission. It shall be unlawful for any real estate salesman to perform any of the acts contemplated by this chapter, either directly or indirectly, under authority of said license from and after the date of its receipt from the broker by the commission. Another license shall not be issued to such real estate salesman until he shall return his former pocket card to the commission or shall satisfactorily account to it for the same. Not more than one license shall be issued to any real estate salesman for the same period of time.

(L. 21, p. 304, § 8.)

82–2–9. Brokers' License—Fee—Carries Right to Salesman's License—Expiration—Renewal—Revocation.

The first annual fee of such real estate broker's license shall be $20 and the renewal fee shall be $10. The first annual fee for each real estate salesman's license shall be $3 and the renewal shall be $2. Each real estate broker's license which may be granted to an individual shall entitle such individual to perform all of the acts contemplated by this chapter without any further application upon his part and without payment of any fee other than the real estate broker's annual fee. Each real estate broker's license granted to any firm, partnership or association consisting of more than one person, or to a corporation, shall entitle such real estate broker to designate one of its officers or members, who upon compliance with the terms of this chapter shall, without the payment of any further fee, upon issuance of said broker's license, be entitled to perform all of the acts of a real estate salesman contemplated by this chapter. The person so designated, however, must make application for a salesman's license, accompanying the application of the real estate broker. If in any case the person so designated by a real estate broker shall be refused a license by the commission, or in case such person ceases to be connected with such real estate broker, the broker shall have the right to designate another person, who shall make application as in the first instance. Every application for a license under the provisions of this chapter shall be accompanied by the license fee herein prescribed and every license shall expire on the 31st

day of December of each year. In the absence of any reason or condition which might warrant the refusal of the granting of a license, the commission shall issue a new license for each ensuing year upon receipt of the written request of the applicant and the annual fee therefor as herein required. The revocation of a broker's license shall automatically suspend every real estate salesman's license granted to any person by virtue of his employment by the broker whose license has been revoked, pending a change of employer and the issuance of a new license. Such a license shall be issued without charge, if granted during the same year in which the original license was granted.

(L. 21, p. 304, § 9.)

82-2-10. Salesman's Right to Commission Restricted.

It shall be unlawful for any real estate salesman to accept a commission or valuable consideration for the performance of any of the acts herein specified from any person, except his employer, who must be a licensed real estate broker. (L. 21, p. 304, § 10.)

82-2-11. Revocation or Suspension of License—Grounds.

The commission may upon its own motion, and shall upon the verified complaint in writing of any person, investigate the actions of any real estate broker or real estate salesman, or any person who shall assume to act as such, within this state, and may suspend or revoke any license issued under the provisions of this chapter at any time where the licensee has by false or fraudulent representation obtained a license, or where the licensee in performing or attempting to perform any of the acts mentioned in this chapter is found to be guilty of:

(1) Making any substantial misrepresentation; or,

(2) Making any false promises of a character likely to influence, persuade or induce; or,

(3) Pursuing a continued and flagrant course of misrepresentation, or of making false promises through agents or salesmen or advertising or otherwise; or,

(4) Acting for more than one party in a transaction without the knowledge of the other party thereto; or,

(5) Representing or attempting to represent a real estate broker other than the employer, without the knowledge and consent of the employer; or,

(6) Failing, within a reasonable time, to account for or to remit any moneys coming into his possession which belongs to others; or,

(7) Paying a commission or valuable consideration to any person not licensed under the provisions of this chapter; or,

(8) Being unworthy or incompetent to act as a real estate broker or salesman in such manner as to safeguard the interests of the public; or,

(9) Any other conduct whether of a similar or of a different character to that hereinbefore specified which constitutes dishonest dealing; or,

(10) Failing to keep an accurate and complete record of all transactions made; such record to be subject to inspection by a duly designated representative of the commission.

This section shall not be construed to relieve any person from civil liability or criminal prosecution under the general laws of this state.
(L. 29, p. 121, § 11.)

Comparable provisions.
Iowa Code 1939, § 1905.45 (enumerating the grounds upon which license may be suspended or revoked).

1. Breach of confidence.
Broker, holding deed in escrow and declining purchasers' offer of $25 to procure reduction of contract purchase price of $4,700 and stating vendors would accept no less, where broker had agreement with sellers that all over $4,000 would be paid to him as commission, was guilty of no breach of confidence or duty in accepting said $700 as commission. Nelson v. Ashton-Jenkins Co., 66 U. 351, 242 P. 408.

82-2-12. Hearing Before Revocation or Suspension.

Before denying any application for license or revoking any license the commission shall, at least five days prior to the date set for the hearing, give a notice in writing to the applicant or licensee, which notice shall contain a statement of the charges made and the date and place of the hearing. It may be served by delivery of the same personally to the applicant or licensee or by mailing the same by registered mail to his last known business address. If such licensee is a salesman, the commission shall also notify the broker employing him of the charge by mailing notice by registered mail to the broker's last known business address. The hearing of such charges shall be at such time and place as the commission shall prescribe. If the commission shall determine that any applicant is not qualified to receive a license, a license shall not be granted to him, and if the commission shall determine that any licensee is guilty of a violation of any of the provisions of this chapter, the license shall be suspended or revoked as the commission may determine. (L. 29, p. 121, § 12.)

Comparable provisions.
Iowa Code 1939, § 1905.46 (hearing must be granted prior to denial, suspension or revocation of license).

82-2-13. Violation of Chapter Ground for Revocation.

Any unlawful act, or violation of any of the provisions of this chapter, upon the part of any real estate salesman or of any employee or officer or member of a licensed real estate broker, shall be cause for the revocation of the license of such real estate broker.
(L. 21, p. 304, § 13.)

82-2-14. List of Licensees to Be Published and Distributed.

The commission shall at least semiannually publish a list of the names and addresses of all persons licensed by it under the provisions of this chapter, and of all persons whose licenses have been suspended or revoked within one year, together with such other information relative to the enforcement of the provisions of this chapter as it may deem of interest to the public. One of such lists shall be mailed to the county clerk in each county of the state and shall be held by him as a public record. Such lists shall also be mailed by the commission to any person in the state upon request, and to each person holding a broker's or salesman's license. (L. 21, p. 304, § 14.)

82-2-15. Colonization Projects—Reports on.

The commission upon its own initiative, or upon written application of the owner of any agricultural lands being offered for sale, or proposed to be offered for sale, for colonization purposes or for farm acreage subdivision, or for rural settlement, or for townsite purposes, may investigate and make public report upon such colonization, or farm acreage subdivision, or rural settlement enterprise or townsite, with reference to the condition and titles to such lands and the methods of sale being used or proposed to be used in effecting the sale thereof, and, in case such land is represented to have a water supply or to be sold with water right, with reference to the truthfulness of such representation. The person proposing to sell or offer for sale any such lands for colonization purposes, for farm acreage subdivisions, rural settlement or townsites, shall bear all reasonable expense of making such investigation and report. (L. 25, p. 153, § 14a.)

82-2-16. Id. Prerequisite to Sales.

It shall be unlawful for any person to issue, circulate or publish any advertisement, pamphlet or circular concerning any agricultural lands being offered for sale, or proposed to be offered for sale, for colonization purposes, or for farm acreage subdivision, for rural settlement or townsites, without first securing from the commission the report mentioned in the preceding section and a permit to sell such lands. It shall be unlawful to mention such report or permit in any advertisement, pamphlet or circular concerning any agricultural lands being offered for sale, or proposed to be offered for sale, for the purposes herein mentioned, unless the substance of said report shall be clearly set forth in said advertisement, pamphlet or circular.

(L. 25, p. 153, § 14b.)

82-2-17. Penalty for Violation of Chapter.

Any person violating any of the provisions of this chapter is guilty of a misdemeanor, and if a natural person or a member of a firm or association, shall be punished by a fine of not less than $50 nor more than $299, or by imprisonment in the county jail not to exceed 6 months, or by both such fine and imprisonment; and if a corporation, by a fine of not less than $100 nor more than $299. (L. 29, p. 121, § 16.)

TITLE 82A

SOIL CONSERVATION

L. 1937, ch. 116; eff. Mar. 23.

SOIL CONSERVATION DISTRICTS

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L. 1937, ch. 116; eff. Mar. 23.

SOIL CONSERVATION DISTRICTS

AN ACT declaring the necessity of creating governmental subdivisions of the state, to be known as "soil conservation and flood control districts," to engage in conserving soil resources and preventing and controlling soil erosion; to establish the state soil conservation committee, and to define its powers and duties; to provide for the creation of soil conservation districts; to define the powers and duties of soil conservation districts, and to provide for the exercise of such powers, including the power to acquire property by purchase, gift, and otherwise; to empower such districts to adopt programs and regulations for the discontinuance of land use practices contributing to soil wastage and soil erosion, and the adoption and carrying out of soil conserving land use practices, and to provide for the enforcement of such programs and regulations; to provide for establishing boards of adjustment in connection with land use, regulations, and to define their functions and powers; to provide for financial assistance to such soil conservation districts, and making an appropriation for that purpose; to declare an emergency requiring that this act take effect from the date of its passage, and for other purposes.

Be it enacted by the Legislature of the State of Utah:

82A-0-1. Short Title.

This act may be known and cited as the Soil Conservation Districts Law. (Sec. 1.)

Comparable provisions.

Cal. Pub. Res. Code, § 9000 et seq. (pertaining to soil conservation).

Idaho Code, 1940 Supp., § 22-2501, Iowa Code 1939, § 2603.02, Mont. Rev. Codes, § 3649.18 ("Soil Conservation Districts Law").

See also Ill. Rev. Stats. 1941, Ch. 5, § 106 et seq.; Mich. Stats. Ann. § 13.1781 et seq.; McKinney's N. Y. Consol. Laws, Soil Conservation Districts Law, § 1 et seq.; Wis. Stats. § 92.01 et seq.

Cross-references.

County flood control and special improvement districts, 19-6a.

82A-0-2. Policy of Act—Conserving Soil Resources and Preventing Soil Erosion Declared a Necessity.

It is declared, as a matter of legislative determination—(a) That the farm and grazing lands of the state of Utah are among the basic assets of the state and that the preservation of these lands is necessary to protect and promote the health, safety, and general welfare of its people; that improper land-use practices have caused and have contributed to, and are now causing and contributing to, a progressively more serious erosion of the farm and grazing lands of this state by wind and water; that the breaking of natural grass, plant and forest cover have interfered with the natural factors of soil stabilization, causing loosening of soil and exhaustion of humus, and developing a soil condition that favors erosion, that the topsoil is being blown and washed out of fields and pastures; that there has been an accelerated washing of sloping fields; that these processes of erosions by wind and water speed up with removal of absorptive topsoil, causing exposure of less absorptive and less protective but more erosive subsoil; that failure by any land occupier to conserve the soil and control erosion upon his lands causes a washing and blowing of soil and water from his lands onto other lands and makes the conservation of soil and control of erosion on such other lands difficult or impossible.

(b) That the consequences of such soil erosion in the form of soil-blowing and soil-washing are the silting and sedimentation of stream channels, reservoirs, dams and ditches; the piling up of soil on lower slopes, and its deposit over alluvial plains; the reduction in productivity or outright ruin of rich bottom lands by overwash of poor subsoil material, sand and gravel swept out of the hills, deterioration of soil and its fertility, deterioration of crops grown thereon, and declining acre yields despite development of scientific processes for increasing such yields; loss of soil and water which causes destruction of food and cover for wildlife; a blowing and washing of soil into streams which silts over spawning beds, and destroys water plants, diminishing the food supply of fish; a diminishing of the underground water reserve, which causes water shortages, intensifies periods of drought, and causes crop failures; an increase in the speed and volume of rainfall run-off, causing severe and increasing floods, which bring suffering, disease, and death; impoverishment of families attempting to farm eroding and eroded lands; damage to roads, highways, railways, farm buildings and other property from floods and from dust storms; and losses in hydro-electric power, municipal water supply, irrigation developments, farming and grazing.

(c) That to conserve soil resources and control and prevent soil erosion, it is necessary that land-use practices contributing to soil

wastage and soil erosion be discouraged and discontinued and appropriate soil-conserving land-use practices be adopted and carried out; that among the procedures necessary for widespread adoption, are the carrying on of engineering operations such as the construction of terraces, terrace outlets, check-dams, dikes, ponds, ditches, and the like; the utilization of strip cropping, lister furrowing, contour cultivating, and contour furrowing; land irrigation; seeding and planting of waster, sloping, abandoned or eroded lands to water-conserving and erosion-preventing plants, trees and grasses; forestation and reforestation; rotation of crops; soil stabilization with trees, grasses, legumes and other thick-growing, soil-holding crops; retardation of run-off by increasing absorption of rainfall; and retirement from cultivation of steep, highly erosive areas and areas now badly gullied or otherwise eroded.

(d) It is declared to be the policy of the legislature to provide for the conservation of the soil and soil resources of this state, and for the control and prevention of soil erosion, and thereby to preserve natural resources, control floods, prevent impairment of dams and reservoirs, preserve wildlife, protect the tax base, protect public lands, and protect and promote the health, safety and general welfare of the people of this state. (Sec. 2.)

Comparable provisions.

Cal. Pub. Res. Code, § 9000 (legislative declaration as to soil conservation's importance to prosperity and welfare of people of the state, and enumeration of purposes for which this division of the Code was enacted).

Idaho Code, 1940 Supp., § 22–2502, Mont. Rev. Codes, § 3649.19 (substantially identical).

Iowa Code 1939, § 2603.03 (declaration of policy of legislature to provide for restoration and conservation of soil and soil resources, for control and prevention of soil erosion, for control of floods, maintenance of navigability of rivers and harbors, preservation of wildlife, protection of tax base, protection of public lands, promotion of health and safety and public welfare of the people of the state).

82A–0–3. Definitions.

Wherever used or referred to in this act, unless a different meaning clearly appears from the context:

(1) "District" or "soil conservation district" means a governmental subdivision of this state, and a public body corporate and politic, organized in accordance with the provisions of this act, for the purposes, with the powers, and subject to the restrictions hereinafter set forth.

(2) "Supervisor" means one of the members of the governing body of a district, elected or appointed in accordance with the provisions of this act.

(3) "Committee" or "state soil conservation committee" means the agency created in section 4 of this act.

(4) "Petition" means a petition filed under the provisions of subsection (a) of section 5 of this act for the creation of a district.

(5) "Nominating petition" means a petition filed under the provisions of section 6 of this act to nominate candidates for the office of supervisor of a soil conservation district.

(6) "State" means the state of Utah.

(7) "Agency of this state" includes the government of this state and any subdivision, agency or instrumentality, corporate or otherwise, of the government of this state.

(8) "United States" or "agencies of the United States" includes the United States of America, the soil conservation service of the United States department of agriculture, and any other agency or instrumentality, corporate or otherwise, of the United States of America.

(9) "Government" or "governmental" includes the government of this state, the government of the United States, and any subdivision, agency or instrumentality, corporate or otherwise, of either of them.

(10) "Land occupier" or "occupier of land" includes any person, firm or corporation who shall hold title to, or shall be in possession of, any lands lying within a district organized under the provisions of this act, whether as owner, lessee, renter, tenant or otherwise.

(11) "Due notice" means notice published at least twice, with an interval of at least 7 days between the two publication dates, in a newspaper or other publication of general circulation within the appropriate area, or if no such publication of general circulation be available, by posting at a reasonable number of conspicuous places within the appropriate area, such posting to include, where possible, posting at public places where it may be customary to post notices concerning county or municipal affairs generally. At any hearing held pursuant to such notice, at the time and place designated in such notice, adjournment may be made from time to time without the necessity of renewing such notice for such adjourned dates. (Sec. 3.)

Comparable provisions.

Idaho Code, 1940 Supp., § 22-2503 (substantially identical, except that subd. 10 defines "landowner" in lieu of "land occupier," and is worded as follows: "(10) 'Landowner' includes any person, firm, or corporation who shall hold title to any lands lying within a district organized under the provisions of this act. A buyer on contract, who is the occupier of land, shall be construed as landowner"; subd. 12 is added, defining "qualified elector").

Iowa Code 1939, § 2603.04 (this section contains definitions substantially identical with those herein, but bearing in mind that, by amendment of 1941, Ch. 119, § 1, regular session laws, the words "supervisor" and "supervisors" were stricken from the statute wherever they appeared therein, and word "commissioner" or "commissioners" inserted in lieu thereof; definition of "landowner" was amended so as to be now worded: "'Landowner' includes any person, firm or corporation who shall hold title to three or more acres of land lying outside incorporated cities or towns and within a proposed district or a district organized under the provisions of this chapter"; a definition of "qualified elector" was stricken; section 12, renumbered section 11 by amendment, requires an interval of at least six days between the two publication dates).

Mont. Rev. Codes, § 3649.20 (substantially identical, except that subd. 11 requires interval of at least 14 days between the two publication dates).

82A-0-4. Soil Conservation Committee.

(a) There is established, to serve as an agency of the state and to perform the functions conferred upon it in this act, the state soil conservation committee. The committee shall consist of five members, one of whom shall be designated as chairman. The director of the state extension service at Logan, Utah, and a member of the state board of agriculture and the state engineer shall be ex officio members of said committee. One member shall be appointed by the governor. All members of said committee shall be residents of the state of Utah. The committee may invite the secretary of agriculture of the United States of America to appoint the fifth member to serve with the above mentioned members as a member of the committee. The committee shall keep a record of its official actions, shall adopt

a seal and file a description and impression thereof in the office of the secretary of state, which seal shall be judicially noticed. The committee may perform such acts, hold such public hearings, and promulgate such rules and regulations as may be necessary for the execution of its functions under this act.

Personnel.

(b) With the approval of the state board of agriculture the state soil conservation committee may employ an administrative officer and such technical experts and such other agents and employees, permanent and temporary, as it may require, and shall prescribe their qualifications and duties. The compensation of such administrative officer, technical expert and other agents shall be fixed by the state board of agriculture in accordance with standards adopted by the department of finance. The committee may call upon the attorney general for such legal services as it may require. It shall have authority to delegate to its chairman, to one or more of its members, or to one or more agents or employees, such of its powers and duties as it may deem proper. It shall be supplied with suitable office accommodations at the seat of the state government, and shall be furnished with the necessary supplies and equipment. Upon request of the committee, for the purpose of carrying out any of its functions, the supervising officer of any state agency, or of any state institution of learning shall, insofar as may be possible under available appropriations, and having due regard to the needs of the agency to which the request is directed, assign or detail to the committee members of the staff or personnel of such agency or institution of learning, and make such special reports, surveys, or studies as the committee may request.

Chairman—Record—Annual Audit.

(c) The committee shall designate its chairman, and may, from time to time, change such designation. A member of the committee shall hold office so long as he shall retain the office by virtue of which he shall be serving on the committee. A majority of the committee shall constitute a quorum, and the concurrence of a majority in any matter within their duties shall be required for its determination. The chairman and members of the committee shall receive no compensation for their services on the committee, but shall be paid their actual and necessary expenses incurred in the performance of their official duties on the committee when approved by the department of finance. The committee shall provide for the execution of surety bonds for all employees and officers who shall be entrusted with funds or property in such sum and in such amount as to be determined by the department of finance; shall provide for the keeping of a full and accurate record of all proceedings and of all resolutions, regulations and orders issued or adopted; and shall provide an annual audit of the accounts of receipts and disbursements.

Additional Powers and Duties.

(d) In addition to the duties and powers hereinafter conferred upon the state soil conservation committee, it shall have the following duties and powers:

(1) To offer such assistance as may be appropriate to the supervisors of soil conservation districts, organized as provided hereinafter, in the carrying out of any of their powers and programs.

(2) To keep the supervisors of each of the several districts organized under the provisions of this act informed of the activities and experience of all other districts organized hereunder, and to facilitate an interchange of advice and experience between such districts and coöperation between them.

(3) To coördinate the programs of the several soil conservation districts organized hereunder so far as this may be done by advice and consultation.

(4) To secure the coöperation and assistance of the United States and any of its agencies, and of agencies of this state, in the work of such districts.

(5) To disseminate information throughout the state concerning the activities and programs of the soil conservation districts organized hereunder, and to encourage the formation of such districts in areas where their organization is desirable. (Sec. 4.)

History.

As amended by L. 41, 1st Spec. Sess., ch. 30, eff. July 1, making material changes in text except in subd. (d).

Comparable provisions.

Cal. Pub. Res. Code, § 9030 (creating state conservation commission).

Idaho Code, 1940 Supp., § 22–2504, Iowa Code 1939, § 2603.05 (substantially the same, except that clause "With the approval of the state board of agriculture" is omitted from subd. b; the soil conservation commission or committee determines qualifications, duties, and compensation of administrative officer, agents and other employees; the Iowa Statute makes use of term "committee," and Idaho uses term "commission"; Idaho statute also provides as to employment of "technical experts"; the Iowa provision was amended in 1941, so as to be worded, in part, in subd. 3 as follows: "The committee shall determine the number of days for which any committee member may draw per diem compensation, but the total number of days for which per diem compensation is allowed for the entire committee shall not exceed one hundred fifty days per year").

Mont. Rev. Codes, § 3649.21 (similar; committee consists of seven members).

82A–0–5. Soil Conservation Districts—Petitions to Create.

(a) Any twenty-five occupiers of land lying within the limits of the territory proposed to be organized into a district may file a petition with the state soil conservation committee asking that soil conservation district be organized to function in the territory described in the petition. Such petition shall set forth:

(1) The proposed name of said district.

(2) That there is need, in the interest of the public health, safety and welfare for a soil conservation district to function in the territory described in the petition.

(3) A description of the territory proposed to be organized as a district, which description shall not be required to be given by metes and bounds or by legal subdivisions, but shall be deemed sufficient if generally accurate.

(4) A request that the state soil conservation committee duly define the boundaries for such district; that a referendum be held within the territory so defined on the question of the creation of a soil conservation district in such territory; and that the committee determine that such a district be created.

Where more than one petition is filed covering parts of the same territory, the state soil conservation committee may consolidate all or any such petitions.

Hearings—Notice of and Determination of Committee.

(b) Within thirty days after such a petition has been filed with the state soil conservation committee, it shall cause due notice to be given of a proposed hearing upon the question of the desirability and necessity, in the interest of the public health, safety and welfare of the creation of such district, upon the question of the appropriate boundaries to be assigned to such district, upon the propriety of the petition and other proceedings taken under this act, and upon all questions relevant to such inquiries. All occupiers of land within the limits of the territory described in the petition, and of lands within any territory considered for addition to such described territory, and all other interested parties, shall have the right to attend such hearings and to be heard. If it shall appear upon the hearing that it may be desirable to include within the proposed district territory outside of the area within which due notice of the hearing has been given, the hearing shall be adjourned and due notice of further hearing shall be given throughout the entire area considered for inclusion in the district, and such further hearing held. After such hearing, if the committee shall determine, upon the facts presented at such hearing and upon such other relevant facts and information as may be available, that there is need, in the interest of the public health, safety and welfare for a soil conservation district to function in the territory considered at the hearing, it shall make and record such determination, and shall define, by metes and bounds or by legal subdivisions, the boundaries of such district. In making such determination and in defining such boundaries, the committee shall give due weight and consideration to the topography of the area considered and of the state, the composition of soils therein, the distribution of erosion, the prevailing land-use practices, the desirability and necessity of including within the boundaries the particular lands under consideration and the benefits such lands may receive from being included within such boundaries, the relation of the proposed area to existing watersheds and agricultural regions, and to other soil conservation districts already organized or proposed for organization under the provisions of this act, and such other physical, geographical and economic factors as are relevant, having due regard to the legislative determinations set forth in section 2 of this act. The territory to be included within such boundaries need not be contiguous. If the committee shall determine after such hearing, after due consideration of the said relevant facts, that there is no need for a soil conservation district to function in the territory considered at the hearing, it shall make and record such determination and shall deny the petition. After 6 months shall have expired from the date of the denial of any such petition, subsequent petitions covering the same or substantially the same territory may be filed as aforesaid and new hearings held and determinations made thereon.

Referendum—Ballots.

(c) After the committee has made and recorded a determination that there is need, in the interest of the public health, safety and welfare for the organization of a district in a particular territory and has defined the boundaries thereof, it shall consider the question whether the operation of a district within such boundaries with the powers conferred upon soil conservation districts in this act is administratively practicable and feasible. To assist the committee in the determination of such administrative practicability and feasibility, it shall be the duty of the committee, within a reasonable time after entry of the finding that there is need for the organization of the proposed district and the determination of the boundaries thereof, to hold a referendum within the proposed district upon the proposition of the creation of the district, and to cause due notice of such referendum to be given. The question shall be submitted by ballots upon which the words "for creation of a soil conservation district of the lands below described and lying in the county(ies) of....., ... and ....." and "against creation of a soil conservation district of the lands below described and lying in the county(ies) of..... and ....." shall be printed, with a square before each proposition and a direction to insert an X mark in the square before one or the other of said propositions as the voter may favor or oppose creation of such district. The ballot shall set forth the boundaries of such proposed district as determined by the committee. All occupiers of lands lying within the boundaries of the territory, as determined by the state soil conservation committee, shall be eligible to vote in such referendum. Only such land occupiers shall be eligible to vote.

Hearings and Referenda—Committee to Pay Expenses and Make Regulations Governing.

(d) The committee shall pay all expenses for the issuance of such notices and the conduct of such hearings and referenda, and shall supervise the conduct of such hearings and referenda. It shall issue appropriate regulations governing the conduct of such hearings and referenda, and providing for the registration prior to the date of the referendum of all eligible voters, or prescribing some other appropriate procedure for the determination of those eligible as voters in such referendum. No informalities in the conduct of such referendum or in any matters relating thereto shall invalidate said referendum or the result thereof if notice shall have been given substantially as herein provided and said referendum shall have been fairly conducted.

Practicability and Feasibility of Operation of District—Committee to Determine.

(e) The committee shall publish the result of such referendum and shall thereafter consider and determine whether the operation of the district within the defined boundaries is administratively practica-

ble and feasible. If the committee shall determine that the operation of such district is not administratively practicable and feasible, it shall record such determination and deny the petition. If the committee shall determine that the operation of such district is administratively practicable and feasible, it shall record such determination and shall proceed with the organization of the district in the manner hereinafter provided. In making such determination the committee shall give due regard and weight to the attitudes of the occupiers of lands lying within the defined boundaries, the number of land occupiers eligible to vote in such referendum who shall have voted, the proportion of the votes cast in such referendum in favor of the creation of the district to the total number of votes cast, the approximate wealth and income of the land occupiers of the proposed district, the probable expense of carrying on erosion-control operations within such district, and such other economic and social factors as may be relevant to such determination, having due regard to the legislative determination set forth in section 2 of this act; *provided, however*, that the committee shall not have authority to determine that the operation of the proposed district within the defined boundaries is administratively practicable and feasible unless at least a majority of the votes cast in the referendum upon the proposition of creation of the district shall have been cast in favor of the creation of such district.

Organization—Appointment of Supervisors—Recording Applications and Statements—Certificate of Organization.

(f) If the committee shall determine that the operation of the proposed district within the defined boundaries is administratively practicable and feasible, it shall appoint two supervisors to act, with the three supervisors elected as provided hereinafter, as the governing body of the district. Such district shall be a governmental subdivision of this state and a public body corporate and politic, upon the taking of the following proceedings:

The two appointed supervisors shall present to the secretary of state an application signed by them, which shall set forth, and such application need contain no detail other than the mere recitals: (1) that a petition for the creation of the district was filed with the state soil conservation committee pursuant to the provisions of this act, and that the proceedings specified in this act were taken pursuant to such petition; that the application is being filed in order to complete the organization of the district as a governmental subdivision and a public body, corporate and politic, under this act; and that the committee has appointed them as supervisors; (2) the name and official residence of each of the supervisors, together with a certified copy of the appointments evidencing their right to office; (3) the term of office of each of the supervisors; (4) the name which is proposed for the district; and (5) the location of the principal office of the supervisors of the district. The application shall be subscribed and sworn to by each of the said supervisors before an officer authorized by the laws of this state to take and certify oaths, who shall certify upon the application that he personally knows the supervisors and knows them to be the officers as affirmed in the application, and that

each has subscribed thereto in the officer's presence. The application shall be accompanied by a statement by the state soil conservation committee, which shall certify, and such statement need contain no detail other than the mere recitals, that a petition was filed, notice issued, and hearing held as aforesaid; that the committee did duly determine that there is need, in the interest of the public health, safety and welfare for a soil conservation district to function in the proposed territory and did define the boundaries thereof; that notice was given and a referendum held on the question of the creation of such district, and that the result of such referendum showed a majority of the votes cast in such referendum to be in favor of the creation of the district; that thereafter the committee did duly determine that the operation of the proposed district is administratively practicable and feasible. The said statement shall set forth the boundaries of the district as they have been defined by the committee.

The secretary of state shall examine the application and statement and, if he finds that the name proposed for the district is not identical with that of any other soil conservation district of this state or so nearly similar as to lead to confusion or uncertainty, he shall receive and file them and shall record them in an appropriate book of record in his office. If the secretary of state shall find that the name proposed for the district is identical with that of any other soil conservation district of this state, or so nearly similar as to lead to confusion and uncertainty, he shall certify such fact to the state soil conservation committee, which shall thereupon submit to the secretary of state a new name for the said district, which shall not be subject to such defects. Upon receipt of such new name, free of such defects, the secretary of state shall record the application and statement, with the name so modified, in an appropriate book of record in his office. When the application and statement have been made, filed, and recorded, as herein provided, the district shall constitute a governmental subdivision of this state and a public body corporate and politic. The secretary of state shall make and issue to the said supervisors a certificate, under the seal of the state, of the due organization of the said district, and shall record such certificate with the application and statement. The boundaries of such district shall include the territory as determined by the state soil conservation committee as aforesaid, but in no event shall they include any area included within the boundaries of another soil conservation district organized under the provisions of this act.

Subsequent Petitions After Denial.

(g) After six months shall have expired from the date of entry of a determination by the state soil conservation committee that operation of a proposed district is not administratively practicable and feasible, and denial of a petition pursuant to such determination, subsequent petitions may be filed as aforesaid, and action taken thereon in accordance with the provisions of this act.

Petitions to Include Additional Territory.

(h) Petitions for including additional territory within an existing district may be filed with the state soil conservation committee, and the proceedings herein provided for in the case of petitions to organize

a district shall be observed in the case of petitions for such inclusion. The committee shall prescribe the form for such petitions, which shall be as nearly as may be in the form prescribed in this act for petitions to organize a district. Where the total number of land occupiers in the area proposed for inclusion shall be less than 25, the petition may be filed when signed by a majority of the occupiers of such area, and in such case no referendum need be held. In referenda upon petitions for such inclusion, all occupiers of lands lying within the proposed additional area shall be eligible to vote.

Certificates of Organization Admissible as Evidence.

(i) In any suit, action or proceeding involving the validity or enforcement of, or relating to, any contract, proceeding or action of the district, the district shall be deemed to have been established in accordance with the provisions of this act upon proof of the issuance of the aforesaid certificate by the secretary of state. A copy of such certificate duly certified by the secretary of state shall be admissible in evidence in any such suit, action or proceeding and shall be proof of the filing and contents thereof. (Sec. 5.)

Comparable provisions.

Cal. Pub. Res. Code, § 9060 (authorizing formation of soil conservation district for control of run-off and prevention or control of soil erosion).

Idaho Code, 1940 Supp., § 22–2505 (substantially the same, except as follows: word "owners" is used in lieu of "occupiers" throughout the statute; term "commission" is used in lieu of "committee" throughout the statute; in subd. h it is provided that, where total number of landowners in area proposed for inclusion is less than 25, petition may be filed when signed by two-thirds majority of the owners; subd. i is omitted).

Iowa Code 1939, § 2603.06, as amended by Laws of 1941 (any 25 owners, but in no case less than 20 per cent of owners of land lying within limits of territory proposed to be organized into district may file petition).

Mont. Rev. Codes, § 3649.22 (substantially the same, except that any ten occupiers of land may file petition; in subd. c it is provided that committee shall not have authority to determine that operation of proposed district is practicable and feasible unless at least 65 per cent of votes cast in referendum shall have been cast in favor of creation of such district; in subd. h it is provided that where total number of land occupiers is less than ten, petition may be filed when signed by majority of occupiers of such area).

82A–0–6. Nomination and Election of Supervisors.

Within thirty days after the date of issuance by the secretary of state of a certificate of organization of a soil conservation district, nominating petitions may be filed with the state soil conservation committee to nominate candidates for supervisors of such district. The committee shall have authority to extend the time within which nominating petitions may be filed. No such nominating petition shall be accepted by the committee, unless it shall be subscribed by twenty-five or more occupiers of land lying within the boundaries of such district. Land occupiers may sign more than one such nominating petition to nominate more than one candidate for supervisor. The committee shall give due notice of an election to be held for the election of three supervisors for the district. The names of all nominees on behalf of whom such nominating petitions have been filed within the time herein designated, shall be printed, arranged in the alphabetical order of the surnames, upon ballots, with a square before each name and a direction to insert an X mark in the square before any three

names to indicate the voter's preference. All occupiers of land lying within the district shall be eligible to vote in such election. Only such land occupiers shall be eligible to vote. The three candidates who shall receive the largest number, respectively, of the votes cast in such election shall be the elected supervisors for such district. The committee shall pay all the expenses of such election, shall supervise the conduct thereof, shall prescribe regulations governing the conduct of such election and the determination of the eligibility of voters therein, and shall publish the results thereof. (Sec. 6.)

Comparable provisions.
Idaho Code, 1940 Supp., § 22–2506 (substantially identical).
Mont. Rev. Codes, § 3649.23 (substantially identical, except that nominating petition may not be accepted unless subscribed by ten or more occupiers of lands).

82A–0–7. Supervisors—Records and Reports—Salary—Assistants.

The governing body of the district shall consist of five supervisors, elected or appointed as provided hereinabove. The two supervisors appointed by the committee shall be persons who are by training and experience qualified to perform the specialized skilled services which will be required of them in the performance of their duties hereunder.

The supervisors shall designate a chairman and may, from time to time, change such designation. The term of office of each supervisor shall be three years, except that the supervisors who are first appointed shall be designated to serve for terms of 1 and 2 years, respectively, from the date of their appointment. A supervisor shall hold office until his successor has been elected or appointed and has qualified. Vacancies shall be filled for the unexpired term. The selection of successors to fill an unexpired term, or for a full term shall be made in the same manner in which the retiring supervisors shall, respectively, have been selected. A majority of the supervisors shall constitute a quorum and the concurrence of a majority in any matter within their duties shall be required for its determination.

Supervisors shall receive per diem compensation of $4.00 each, total of which shall not exceed $25 per year, including traveling expenses, which shall be paid by the state auditor out of the funds appropriated for the purpose of administering this act.

The supervisors may employ a secretary, technical experts, and such other officers, agents and employees, permanent and temporary, as they may require, and shall determine their qualifications, duties and compensation. The supervisors may call upon the attorney-general of the state for such legal services as they may require, or may employ their own counsel and legal staff. The supervisors may delegate to their chairman, to one or more supervisors, or to one or more agents, or employees such powers and duties as they may deem proper. The supervisors shall furnish to the state soil conservation committee, upon request, copies of such ordinances, rules, regulations, orders, contracts, forms and other documents as they shall adopt or employ, and such other information concerning their activities as it may require in the performance of its duties under this act.

The supervisors shall provide for the execution of surety bonds for all employees and officers who shall be entrusted with funds or prop-

erty; shall provide for the keeping of a full and accurate record of all proceedings and of all resolutions, regulations and orders issued or adopted; and shall provide for an annual audit of the accounts of receipts and disbursements. Any supervisor may be removed by the state soil conservation committee upon notice and hearing, for neglect of duty or malfeasance in office, but for no other reason.

The supervisors may invite the legislative body of any municipality or county located near the territory comprised within the district to designate a representative to advise and consult with the supervisors of the district on all questions of program and policy which may affect the property, water supply or other interests of such municipality or county. (Sec. 7.)

History.
As amended by L. 41, ch. 88, eff. May 13, rewriting third paragraph of text.

Comparable provisions.
Idaho Code, 1940 Supp., § 22-2507. Mont. Rev. Codes, § 3649.24 (substantially the same, except for the following sentence: "A supervisor shall receive no compensation for his services, but he shall be entitled to expenses, including traveling expenses, necessarily incurred in the discharge of his duties").

82A–0–8. Districts Are Bodies Politic—General Powers.

A soil conservation district organized under the provisions of this act shall constitute a governmental subdivision of this state and a public body corporate and politic, exercising public powers, and such district, and the supervisors thereof, shall have the following powers, in addition to others granted in other sections of this act.

To Conduct Surveys, Investigations and Researches.

(1) To conduct surveys, investigations, and research relating to the character of soil erosion and the preventive and control measures needed, to publish the results of such surveys, investigations, or research, and to disseminate information concerning such preventive and control measures; *provided, however*, that in order to avoid duplication of research activities, no district shall initiate any research program except in coöperation with the government of this state or any of its agencies, or with the United States or any of its agencies.

To Conduct Projects.

(2) To conduct projects within the district on lands owned or controlled by this state or any of its agencies, with the coöperation of the agency administering and having jurisdiction thereof, and on any other lands within the district upon obtaining the consent of the occupier of such lands or the necessary rights or interests in such lands, in order to demonstrate by example the means, methods, and measures by which soil and soil resources may be conserved, and soil erosion in the form of soil blowing and soil washing may be prevented and controlled.

To Carry Out Preventive and Control Measures.

(3) To carry out preventive and control measures within the district including, but not limited to, engineering operations, methods of cultivation, the growing of vegetation, changes in use of land, and the measures listed in subsection C of section 2 of this act, on lands owned

or controlled by this state or any of its agencies, with the coöperation of the agency administering and having jurisdiction thereof, and on any other lands within the district upon obtaining the consent of the occupier of such lands or the necessary rights or interests in such lands.

To Enter Into Coöperative Agreements.

(4) To coöperate, or enter into agreements with, and within the limits of appropriations duly made available to it by law, to furnish financial or other aid to, any agency, governmental or otherwise, or any occupier of lands within the district, in the carrying on of erosion-control and prevention operations within the district, subject to such conditions as the supervisors may deem necessary to advance the purpose of this act.

To Acquire Property.

(5) To obtain options upon and to acquire, by purchase, exchange, lease, gift, grant, bequest, devise or otherwise, any property, real or personal, or rights or interest therein; to maintain, administer and improve any properties acquired, to receive income from such properties and to expend such income in carrying out the purposes and provisions of this act; and to sell, lease or otherwise dispose of any of its property or interests therein in furtherance of the purposes and the provisions of this act.

To Make Available Material and Equipment to Assist Land Occupiers.

(6) To make available, on such terms as it shall prescribe, to land occupiers within the district, agricultural and engineering machinery and equipment, fertilizer, seeds, and seedlings, and such other material or equipment, as will assist such land occupiers to carry on operations upon their lands for the conservation of soil resources and for the prevention and control of soil erosion.

To Maintain Structures.

(7) To construct, improve and maintain such structures as may be necessary or convenient for the performance of any of the operations authorized in this act.

To Develop and Publish Plans.

(8) To develop comprehensive plans for the conservation of soil resources and for the control and prevention of soil erosion within the district, which plans shall specify in such detail as may be possible, the acts, procedures, performances and avoidances which are necessary or desirable for the effectuation of such plans, including the specification of engineering operations, methods of cultivation, the growing of vegetation, cropping programs, tillage practices, and changes in use of land; and to publish such plans and information and bring them to the attention of occupiers of lands within the district.

To Take Over or Manage Projects of the United States or This State and to Accept Contributions, etc.

(9) Upon request of the United States government to take over, by purchase, lease or otherwise, and to administer, any soil-conservation,

erosion-control, or erosion-prevention project located within its boundaries undertaken by the United States or any of its agencies, or by this state or any of its agencies; to manage, as agent of the United States or any of its agencies, or of this state or any of its agencies, any soil-conservation, erosion-control, or erosion-prevention project within its boundaries; to act as agent for the United States, or any of its agencies, or for this state or any of its agencies, in connection with the acquisition, construction, operation or administration of any soil-conservation, erosion-control or erosion-prevention project within its boundaries; to accept donations, gifts and contributions in money, services, materials or otherwise, from the United States or any of its agencies, or from this state or any of its agencies, and to use or expend such moneys, services, materials or other contributions in carrying on its operations.

General Corporate Powers.

(10) To sue and be sued in the name of the district; to have a seal, which seal shall be judicially noticed; to have perpetual succession unless terminated as hereinafter provided; to make and execute contracts and other instruments, necessary or convenient to the exercise of its powers; to make, and from time to time amend and repeal, rules and regulations not inconsistent with this act, to carry into effect its purposes and powers.

To Enter Into Agreements with Land Occupiers.

(11) As a condition to the extending of any benefits under this act to, or the performance of work upon, any lands now owned or controlled by this state or any of its agencies, the supervisors may require contributions in money, services, materials or otherwise to any operations conferring such benefits, and may require land occupiers to enter into and perform such agreements or covenants as to the permanent use of such lands as will tend to prevent or control erosion thereon.

General Provisions of Law Respecting Property Not Applicable.

(12) No provisions with respect to the acquisition, operation, or disposition of property by other public bodies shall be applicable to a district organized hereunder unless the legislature shall specifically so state. (Sec. 8.)

Comparable provisions.

Idaho Code, 1940 Supp., § 22-2508. Mont. Rev. Codes, § 3649.25 (substantially identical; but from subd. 9 there is omitted the clause "Upon request of the United States government").

Iowa Code 1939, § 2603.09, as amended by Laws of 1941 (substantially the same, except that it contains no subdivision equivalent to subd. (9) herein; a provision is included, authorizing acceptance of donations, gifts, and contributions from United States or its agencies; a subdivision is added, making participation purely voluntary, after formation of district).

Cal. Pub. Res. Code, § 9250 (this section and subsequent sections of the Code enumerate powers of district; these are to the effect (§ 9251) that, inter alia, directors may execute necessary contracts, employ agents, officers and employees, prescribe their duties and fix their compensation; (§ 9252) may acquire necessary lands and property; (§ 9253) may take conveyances, leases, contracts or other assurances for property acquired by district; (§ 9254) directors may sue and be sued in name of district; (§ 9255) may enter on lands and make surveys; (§ 9256) directors may coöperate and enter into contracts or agreements with State of California, United States, county, soil conservation district or other public district in state; (§ 9262) may take over, by purchase,

lease, or otherwise, projects undertaken by United States or its agencies, or by State of California or its agencies; (§ 9263) may manage such projects as agents of United States or State of California, or their agencies; (§ 9425) directors may formulate land-use regulations).

82A–0–9. Land-Use Regulations—Referendum—Amendments and Repeal—Uniformity of Application.

The supervisors of any district shall have authority to formulate regulations governing the use of lands within the district in the interest of conserving soil and soil resources and preventing and controlling soil erosion. The supervisors may conduct such public meetings and public hearings upon tentative regulations as may be necessary to assist them in this work. The supervisors shall not have authority to enact such land-use regulations into law until after they shall have caused due notice to be given of their intention to conduct a referendum for submission of such regulations to the occupiers of lands lying within the boundaries of the district for their indication of approval or disapproval of such proposed regulations, and until after the supervisors have considered the result of such referendum. The proposed regulations shall be embodied in a proposed ordinance. Copies of such proposed ordinance shall be available for the inspection of all eligible voters during the period between publication of such notice and the date of the referendum. The notices of the referendum shall recite the contents of such proposed ordinance, or shall state where copies of such proposed ordinance may be examined. The question shall be submitted by ballots, upon which the words "for approval of proposed ordinance No. ....., prescribing land-use regulations for conservation of soil and prevention of erosion" and "against approval of proposed ordinance No. ....., prescribing land-use regulations for conservation of soil and prevention of erosion" shall be printed, with a square before each proposition and a direction to insert an X mark in the square before one or the other of said propositions as the voter may favor or oppose approval of such proposed ordinance. The supervisors shall supervise such referendum, shall prescribe appropriate regulations governing the conduct thereof, and shall publish the result thereof. All occupiers of lands within the district shall be eligible to vote in such referendum. Only such land occupiers shall be eligible to vote. No informalities in the conduct of such referendum or in any matters relating thereto shall invalidate said referendum or the result thereof if notice thereof shall have been given substantially as herein provided and said referendum shall have been fairly conducted.

The supervisors shall not have authority to enact such proposed ordinance into law unless at least a majority of the votes cast in such referendum shall have been cast for approval of the said proposed ordinance. The approval of the proposed ordinance by a majority of the votes cast in such referendum shall not be deemed to require the supervisors to enact such proposed ordinance into law. Land-use regulations prescribed in ordinances adopted pursuant to the provisions of this section by the supervisors of any district shall have the force and effect of law in the said district and shall be binding and obligatory upon all occupiers of lands with such district.

Any occupier of land within such district may at any time file a petition with the supervisors asking that any or all of the land-use regulations prescribed in any ordinance adopted by the supervisors under the provisions of this section shall be amended, supplemented, or repealed. Land-use regulations prescribed in any ordinance adopted pursuant to the provisions of this section shall not be amended, supplemented, or repealed except in accordance with the procedure prescribed in this section for adoption of land-use regulations. Referenda on adoption, amendment, supplementation, or repeal of land-use regulations shall not be held more often than once in six months.

The regulations to be adopted by the supervisors under the provisions of this section may include:

(1) Provisions requiring the carrying out of necessary engineering operations, including the construction of terraces, terrace outlets, check dams, dikes, ponds, ditches and other necessary structures.

(2) Provisions requiring observance of particular methods of cultivation, including contour cultivating, contour furrowing, lister furrowing, sowing, planting, strip cropping, seeding and planting of lands to water-conserving and erosion-preventing plants, trees and grasses, forestation and reforestation.

(3) Specifications of cropping programs and tillage practices to be observed.

(4) Provisions requiring the retirement from cultivation of highly erosive areas or of areas on which erosion may not be adequately controlled if cultivation is carried on.

(5) Provisions for such other means, measures, operations and programs as may assist conservation of soil resources and prevent or control soil erosion in the district, having due regard to the legislative findings set forth in section 2 of this act.

The regulations shall be uniform throughout the territory comprised within the district except that the supervisors may classify the lands within the district with reference to such factors as soil type, degree of slope, degree of erosion threatened or existing, cropping and tillage practices in use, and other relevant factors, and may provide regulations varying with the type or class of land affected, but uniform as to all lands within each class or type. Copies of land-use regulations adopted under the provisions of this section shall be printed and made available to all occupiers of lands lying within the district. (Sec. 9.)

82A-0-10. Right of Inspection—Penalty for Violation of Regulations —Damages.

The supervisors shall have authority to go upon any lands within the district to determine whether land-use regulations adopted under the provisions of section 9 of this act are being observed. Any person, firm or corporation who shall violate any of such regulations shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than $100, and not more than $500 for each such offense, at the discretion of the court. The supervisors are further authorized to provide by ordinance that any land occupier who shall sustain damages from any violation of such regulations by any other land occupier

may recover damages at law from such other land occupier for such violation. (Sec. 10.)

Comparable provisions.
Mont. Rev. Codes, § 3649.27 (supervisors may go upon lands after complaint is filed with them charging violation of land-use regulations).

82A–0–11. Failure to Comply with Regulations—Petition to District Court—Judgment for Costs and Expenses, a Lien.

Where the supervisors of any district shall find that any of the provisions of land-use regulations prescribed in an ordinance adopted in accordance with the provisions of section 9 hereof are not being observed on particular lands, and that such nonobservance tends to increase erosion on such lands and is interfering with the prevention or control of erosion on other lands within the district, the supervisors may present to the district court of the county wherein the major portion of the land is located a petition, duly verified, setting forth the adoption of the ordinance prescribing land-use regulations, the failure of the defendant land occupier to observe such regulations, and to perform particular work, operations or avoidances as required thereby, and that such nonobservance tends to increase erosion on such lands and is interfering with the prevention or control of erosion on other lands within the district, and praying the court to require the defendant to perform the work, operations or avoidances within a reasonable time and to order that if the defendant shall fail so to perform the supervisors may go on the land, perform the work or other operations or otherwise bring the condition of such lands into conformity with the requirements of such regulations, and recover the costs and expenses thereof, with interest, from the occupier of such land. Upon the presentation of such petition, the court shall cause process to be issued against the defendant, and shall hear the case. If it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence, or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may dismiss the petition; or it may require the defendant to perform the work, operations or avoidances, and may provide that upon the failure of the defendant to initiate such performance within the time specified in the order of the court, and to prosecute the same to completion with reasonable diligence, the supervisors may enter upon the lands involved and perform the work or operations or otherwise bring the condition of such lands into conformity with the requirements of the regulations and recover the costs and expenses thereof, with interest at the rate of five per centum per annum, from the occupier of such lands. In all cases where the person in possession of lands, who shall fail to perform such work, operations or avoidances shall not be the owner, the owner of such lands shall be joined as party defendant.

The court shall retain jurisdiction of the case until after the work has been completed. Upon completion of such work pursuant to such order of the court the supervisors may file a petition with the court, a

copy of which shall be served upon the defendant in the case, stating the costs and expenses sustained by them in the performance of the work and praying judgment therefor with interest. The court shall have jurisdiction to enter judgment for the amount of such costs and expenses, with interest at the rate of five per centum per annum until paid, together with the costs of suit, including a reasonable attorney's fee to be fixed by the court. The supervisors shall have further authority to certify to the county treasurer of the county wherein the major portion of the land is located the amount of such judgment, which shall be a lien upon such lands, and shall be collected as are general taxes upon real estate. The procedure for collection of delinquent general taxes upon real estate shall be applicable to the collection of such judgments. When such judgment shall be paid or collected, the proceeds shall be paid over to the district within the boundaries of which the lands shall lie. (Sec. 11.)

82A–0–12. Boards of Adjustment.

(a) Where the supervisors of any district organized under the provisions of this act shall adopt an ordinance prescribing land-use regulations in accordance with the provisions of section 9 hereof, they shall further provide by ordinance for the establishment of a board of adjustment. Such board of adjustment shall consist of three members, each to be appointed for a term of three years, except that the members first appointed shall be appointed for terms of 1, 2, and 3 years, respectively. The members of each such board of adjustment shall be appointed by the state soil conservation committee, with the advice and approval of the supervisors of the district for which such board has been established and shall be removable, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other reason, such hearing to be conducted jointly by the state soil conservation committee and the supervisors of the district. Vacancies in the board of adjustment shall be filled in the same manner as original appointments, and shall be for the unexpired term of the member whose term becomes vacant. Members of the state soil conservation committee and the supervisors of the district shall be ineligible to appointment as members of the board of adjustment during their tenure of such other office. The members of the board of adjustment shall receive compensation for their services at the rate of five dollars per diem for time spent on the work of the board, in addition to expenses, including traveling expenses, necessarily incurred in the discharge of their duties. The supervisors shall pay the necessary administrative and other expenses of operation incurred by the board, upon the certificate of the chairman of the board.

To Adopt Rules—Meetings Public—Records of Proceedings.

(b) The board of adjustment shall adopt rules to govern its procedures, which rules shall be in accordance with the provisions of this act and with the provisions of any ordinance adopted pursuant to this section. The board shall designate a chairman from among its members, and may, from time to time, change such designation. Meetings of the board shall be held at the call of the chairman and at such other

times as the board may determine. Any two members of the board shall constitute a quorum. The chairman, or in his absence such other member of the board as he may designate to serve as acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public. The board shall keep a full and accurate record of all proceedings, of all documents filed with it, and of all orders entered, which shall be filed in the office of the board and shall be a public record.

Petition to Authorize Variance from Regulations—Hearings—Determination of Board.

(c) Any land occupier may file a petition with the board of adjustment alleging that there are great practical difficulties or unnecessary hardship in the way of his carrying out upon his lands the strict letter of the land-use regulations prescribed by ordinance approved by the supervisors, and praying the board to authorize a variance from the terms of the land-use regulations in the application of such regulations to the lands occupied by the petitioner. Copies of such petition shall be served by the petitioner upon the chairman of the supervisors of the district within which his lands are located and upon the chairman of the state soil conservation committee. The board of adjustment shall fix a time for the hearing of the petition and cause due notice of such hearing to be given. The supervisors of the district and the state soil conservation committee shall have the right to appear and be heard at such hearing. Any occupier of lands lying within the district who shall object to the authorizing of the variance prayed for may intervene and become a party to the proceedings. Any party to the hearing before the board may appear in person, by agent, or by attorney. If, upon the facts presented at such hearing, the board shall determine that there are great practical difficulties or unnecessary hardship in the way of applying the strict letter of any of the land-use regulations upon the lands of the petitioner, it shall make and record such determination and shall make and record findings of fact as to the specific conditions which established such great practical difficulties or unnecessary hardship. Upon the basis of such findings and determination, the board shall have power by order to authorize such variance from the terms of the land-use regulations, in their application to the lands of the petitioner, as will relieve such great practical difficulties or unnecessary hardship and will not be contrary to the public interest, and such that the spirit of the land-use regulations shall be observed, the public health, safety and welfare secured, and substantial justice done.

Power of Districts Restricted.

(d) In order to safeguard existing property rights and to prevent the imposition of practical difficulties and unnecessary hardships upon existing occupiers, soil conservation districts as herein provided shall not have the authority under this act to:

(1) Impose financial requirements upon occupiers in an amount greater than the amount of five per cent of the fair value of the property immediately subject to soil conservation regulations and loss suf-

fered, as determined by a committee composed of the occupier, one member appointed by the board of adjustment and a party selected by these two;

(2) Dispossess or remove occupiers without payment of property damage and loss suffered by said occupier as determined in (1) above; or

(3) Establish game or wild life regulations or other regulations not in keeping with the intent and purposes to effect soil conservation as provided in this act.

Petition to Review Orders of Board.

(e) Any petitioner aggrieved by an order of the board granting or denying, in whole or in part, the relief sought, the supervisors of the district, or any intervening party, may obtain a review of such order in the district court of the county wherein the major portion of the land is located by filing in such court a petition praying that the order of the board be modified or set aside. (Sec. 12.)

Comparable provisions.
Mont. Rev. Codes, § 3649.28 (supervisors, when adopting ordinance prescribing land-use regulations, must also provide by ordinance for establishment of board of adjustment).

82A–0–13. Districts May Coöperate.

The supervisors of any two or more districts organized under the provisions of this act may coöperate with one another in the exercise of any or all powers conferred in this act. (Sec. 13.)

Comparable provisions.
Iowa Code 1939, § 2603.10 (identical; term "chapter" used in lieu of "act").
Mont. Rev. Codes, § 3649.29 (identical).

82A–0–14. Publicly Owned Lands.

Agencies of this state which shall have jurisdiction over, or be charged with the administration of, any state-owned lands, and of any county, or other governmental subdivision of the state, which shall have jurisdiction over, or be charged with the administration of, any county-owned or other publicly owned lands, lying within the boundaries of any district organized hereunder shall coöperate to the fullest extent with the supervisors of such districts in the effectuation of programs and operations undertaken by the supervisors under the provisions of this act. The supervisors of such districts shall be given free access to enter and perform work upon such publicly owned lands. The provisions of land-use regulations adopted pursuant to section 9 of this act shall have the force and effect of law over all such publicly owned lands, and shall be in all respects observed by the agencies administering such lands. (Sec. 14.)

Comparable provisions.
Iowa Code 1939, § 2603.11 (state agencies may coöperate with district supervisors; 1941 amendment substituted term "commissioners" for "supervisors").
Mont. Rev. Codes, § 3649.30 (substantially identical).

82A–0–15. Termination of Existence—Certificates of Dissolution—Contracts Continued.

At any time after five years after the organization of a district under the provisions of this act, any twenty-five (25) occupiers of land

lying within the boundaries of such district may file a petition with the state soil conservation committee praying that the operations of the district be terminated and the existence of the district discontinued. The committee may conduct such public meetings and public hearings upon such petition as may be necessary to assist it in the consideration thereof. Within sixty days after such a petition has been received by the committee it shall give due notice of the holding of a referendum, and shall supervise such referendum, and issue appropriate regulations governing the conduct thereof, the question to be submitted by ballots upon which the words "for terminating the existence of the .... (name of the soil conservation district to be here inserted)" and "against terminating the existence of the .....(name of the soil conservation district to be here inserted)" shall be printed, with a square before each proposition and a direction to insert an X mark in the square before one or the other of said propositions as the voter may favor or oppose discontinuance of such district. All occupiers of lands lying within the boundaries of the district shall be eligible to vote in such referendum. Only such land occupiers shall be eligible to vote. No informalities in the conduct of such referendum or in any matters relating thereto shall invalidate said referendum or the result thereof if notice thereof shall have been given substantially as herein provided and said referendum shall have been fairly conducted.

The committee shall publish the result of such referendum and shall thereafter consider and determine whether the continued operation of the district within the defined boundaries is administratively practicable and feasible. If the committee shall determine that the continued operation of such district is administratively practicable and feasible, it shall record such determination and deny the petition. If the committee shall determine that the continued operation of such district is not administratively practicable and feasible, it shall record such determination and shall certify such determination to the supervisors of the district. In making such determination the committee shall give due regard and weight to the attitude of the occupiers of lands lying within the district, the number of land occupiers eligible to vote in such referendum who shall have voted, the proportion of the votes cast in such referendum in favor of the discontinuance of the district to the total number of votes cast, the approximate wealth and income of the land occupiers of the district, the probable expense of carrying on erosion control operations within such district, and such other economic and social factors as may be relevant to such determination, having due regard to the legislative findings set forth in section 2 of this act; *provided, however,* that the committee shall not have authority to determine that the continued operation of the district is administratively practicable and feasible unless at least a majority of the votes cast in the referendum shall have been cast in favor of the continuance of such district.

Upon receipt from the state soil conservation committee of a certification that the committee has determined that the continued operation of the district is not administratively practicable and feasible, pursuant

to the provisions of this section, the supervisors shall forthwith proceed to terminate the affairs of the district. The supervisors shall dispose of all property belonging to the district at public auction and shall pay over the proceeds of such sale to be covered into the state treasury. The supervisors shall thereupon file an application, duly verified, with the secretary of state for the discontinuance of such district, and shall transmit with such application the certificate of the state soil conservation committee setting forth the determination of the committee that the continued operation of such district is not administratively practicable and feasible. The application shall recite that the property of the district has been disposed of and the proceeds paid over as in this section provided, and shall set forth a full accounting of such properties and proceeds of the sale. The secretary of state shall issue to the supervisors a certificate of dissolution and shall record such certificate in an appropriate book of record in his office.

Upon issuance of a certificate of dissolution under the provisions of this section, all ordinances and regulations theretofore adopted and in force within such districts shall be of no further force and effect. All contracts theretofore entered into, to which the district or supervisors are parties, shall remain in force and effect for the period provided in such contracts. The state soil conservation committee shall be substituted for the district or supervisors as party to such contracts. The committee shall be entitled to all benefits and subject to all liabilities under such contracts and shall have the same right and liability to perform, to require performance, to sue and be sued thereon, and to modify or terminate such contracts by mutual consent or otherwise, as the supervisors of the district would have had. Such dissolution shall not affect the lien of any judgment entered under the provisions of section 11 of this act, nor the pendency of any action instituted under the provisions of such section, and the committee shall succeed to all the rights and obligations of the district or supervisors as to such liens and actions.

The state soil conservation committee shall not entertain petitions for the discontinuance of any district nor conduct referenda upon such petitions nor make determinations pursuant to such petitions in accordance with the provisions of this act, more often than once in five years. (Sec. 15.)

Comparable provisions.

Cal. Pub. Res. Code, § 9310 (district may be dissolved by board of supervisors of principal county).

Idaho Code, 1940 Supp., § 22-2511 (substantially the same, except that the next-to-last subdivision concludes with the sentence, "The state soil conservation commission shall be substituted for the district or supervisors as party to such contracts").

Iowa Code 1939, § 2603.12, as amended by Laws of 1941 (pertains to discontinuance of district; first paragraph is substantially the same as first paragraph herein; contains paragraph substantially the same as fourth paragraph herein, but the amendment of 1941 struck therefrom the concluding sentence, beginning, "Such dissolution shall not affect the lien of any judgment * * *"; also contains paragraph identical with concluding paragraph herein).

Mont. Rev. Codes, § 3649.31 (substantially the same, except that ten occupiers of land may file petition; the final paragraph herein is omitted).

82A–0–16. Appropriation.

For the purpose of carrying out the provisions of this act and to administer the same, there is hereby appropriated out of the general

fund not otherwise appropriated the sum of $6,000, for the biennium ending July 1st, 1938. (Sec. 16.)

82A–0–17. Partial Invalidity—Saving Clause.

If any provisions of this act, or the application of any provision to any person or circumstance, is held invalid, the remainder of the act, and the application of such provision to other persons or circumstances, shall not be affected thereby. (Sec. 17.)

82A–0–18. Conflicting Acts.

In so far as any of the provisions of this act are inconsistent with the provisions of any other law, the provisions of this act shall be controlling. (Sec. 18.)

82A–0–19. Effective Date.

This act shall take effect upon approval.

Approved March 23, 1937. (Sec. 19.)

TITLE 82B

SPECIAL POLICE

L. 1941, 2nd Spec. Sess., ch. 34; eff. June 5, 1942.

SPECIAL POLICEMEN FOR PROTECTION OF PUBLIC PROPERTY OR IN WHICH THE PUBLIC HAS AN INTEREST

82B-0-1. Purpose of Act—Declaration of Public Policy.
82B-0-2. Authority to Appoint Special Policemen — Application.
82B-0-3. Qualifications—To Be Investigated — Certificate —Oath.
82B-0-4. Powers and Duties.
82B-0-5. Employee of State—Liability for Acts or Omissions.
82B-0-6. Termination or Revocation of Appointment — Exercise of Powers After Revocation—Misdemeanor.
82B-0-7. Rules and Regulations Governing Special Policemen or Guards.
82B-0-8. Act Not to Restrict Additional Safeguards and Protection of Property.
82B-0-9. Effective Date.

L. 1941, 2nd Spec. Sess., ch. 35; eff. Aug. 12.

SPECIAL POLICEMEN FOR PROTECTION OF PUBLIC PROPERTY OWNED BY ANOTHER STATE OR IN WHICH IT HAS AN INTEREST

82B-0-10. Authority to Appoint Special Policemen.
82B-0-11. Application—Contents.
82B-0-12. Certificate of Appointment to Be Issued.
82B-0-13. Special Policemen Must Be Approved—Oath.
82B-0-14. Powers and Duties.
82B-0-15. Employee of State—Compensation — Additional Compensation Prohibited —Acceptance a Felony.
82B-0-16. Liability for Acts or Omissions.
82B-0-17. Termination or Revocation of Appointment—Exercise of Powers After Revocation—Misdemeanor.
82B-0-18. Rules and Regulations Governing Special Policemen.
82B-0-19. Governor Authorized to Apply for Appointment of Special Policemen in Other States — Compensation — Act Not to Restrict Additional Safeguards and Protection of Property.
82B-0-20. Partial Invalidity of Act—Saving Clause.
82B-0-21. Inconsistent Acts Repealed.

L. 1941, 2nd Spec. Sess., ch. 34; eff. June 5, 1942.

SPECIAL POLICEMEN FOR PROTECTION OF PUBLIC PROPERTY OR IN WHICH THE PUBLIC HAS AN INTEREST

AN ACT authorizing the appointment of and prescribing the powers and duties of special policemen for the protection and preservation of public property within the state of Utah or which the public has an interest in and prescribing the qualifications of such special policemen.

Be it enacted by the Legislature of the State of Utah:

82B-0-1. Purpose of Act—Declaration of Public Policy.

As a guide to interpretation and application of this act, the public policy of the state is declared to be as follows:

The present national emergency proclaimed by the president necessitates the appointment of additional and special police officers for the protection of public and private property employed and used in and essential to the national and state defense program in the continuation of their functions both as they relate to the civil and military program, and the governor being the chief enforcement and executive officer and the highest responsible authority within the state, it is the desire and intent of the legislature to broaden his powers to the extent that he may enter into coöperative agreements with individuals, corporations, political subdivisions or associations for the protection of the people of this state in the guarding of the production, assembling, transportation or storage of articles necessary in our program of defense vital to the state or nation, and in the safeguarding and protection of properties, commodities, supplies and articles necessary for the continued health, welfare, and well-being of residents and citizens of this state. It is further declared by the legislature that in the enactment of this act it is not their intent to repeal or modify existing laws but to add additional safeguards to the existing laws upon its statutes occasioned by the emergency now existing. The legislature further declares that in enacting this measure that it is their express desire that the state highway patrol, county sheriffs, and police departments of the political subdivisions of this state be enrolled as an advisory council to the governor in order to accomplish with the greatest rapidity sufficient protection to the citizenry, private or public. (Sec. 1.)

Comparable provisions.
Cal. Gen. Laws, Act 6011b, § 12 (describing, as an urgency measure, this statute, which is substantially identical with Ch. 35, Utah Laws of 1941, 2nd Special Session; see notes under 82B-0-10 et seq.).

82B-0-2. Authority to Appoint Special Policemen—Application.

Upon the application of the county or city commissioners of any county within this state owning or having an interest in any property situated wholly or partly in such county or upon the application of any responsible citizen or group of citizens, the governor of this state or any officer which he may delegate his powers and duties to under this act hereinafter referred to as the appointing authority, may appoint and deputize as special policemen with the powers and duties hereinafter prescribed. Such number of persons designated in the application as may be deemed necessary for the protection of public or private property where such property is of such a nature as to be essential to the public welfare and well-being of the citizens of this state.

(Sec. 2.)

82B-0-3. Qualifications—To Be Investigated—Certificate—Oath.

The governor or such authority as he may appoint shall issue a certificate of appointment to each person appointed hereunder in such form as he may prescribe. Such certificate shall constitute the appointees authority for exercising the powers and carrying out the duties conferred and imposed upon him by this act. Each person appointed under this act shall within ten days after his certificate of appointment has been issued and before entering upon the duties of his office, take and subscribe the constitutional oath of office and file

it with the governor or other authority designated by him. No person shall be appointed as a special policeman under this act unless he is a citizen of the United States and has been a resident of the state of Utah for one year, and has good moral character and has not been previously convicted of a felony, and the appointing authority shall require as a prerequisite to the appointment of any individual as an official guard or special policeman under this act, that the sheriff of the county or the police department of the city, or other law enforcement agency in the county or locality where such individual resides or has resided during the year previous to his appointment, shall make a thorough investigation with respect to his reputation, moral character and fitness, and shall certify to the appointing authority the findings and results of such investigation. (Sec. 3.)

82B-0-4. Powers and Duties.

Each person appointed as a special policeman under this act shall be charged with the duty of protecting and preserving the property described in the application for his appointment. He shall have power to arrest all persons trespassing or committing offenses or crimes thereon. He shall have and may exercise the powers of a peace officer, but only upon the property, or in connection with the property described in the application for his appointment. When on duty he shall wear an appropriate metallic badge upon which shall be inscribed the words "special policeman." He shall have power to possess and carry such firearms and other weapons while on duty as may be prescribed by the appointing authority. Whenever he shall change his residence address, he shall forthwith give notice of his new address to the appointing authority. (Sec. 4.)

82B-0-5. Employee of State—Liability for Acts or Omissions.

Each person appointed as special policeman or guard for the protection of property under this act, or who is now employed as a special policeman or guard shall for all purposes be deemed to be an employee of this state; *provided, however,* that neither this state nor any political subdivision of this state, nor any department, officer, board, bureau or other agency of either the state or any political subdivision thereof shall be liable or accountable in any civil action or otherwise for or on account of the appointment of any such special policeman or for or on account of any act or omission on his part in connection with his powers and duties under this act. (Sec. 5.)

82B-0-6. Termination or Revocation of Appointment—Exercise of Powers After Revocation—Misdemeanor.

The appointment of any special policeman under this act shall terminate and his authority shall cease upon an issuance of proclamation by the governor that the present emergency has ceased to exist. The governor or other authority to whom he may delegate appointing power shall also have the power on his own motion and at any time, for any reason or cause, to revoke the appointment of any special policeman

by filing a revocation thereof in the office in which the certificate of appointment was issued and by mailing a notice of such revocation to the person whose appointment is revoked, at his residence address as the same appears in the application for appointment or the latest statement thereof on file. If such person thereafter knowing of such revocation or having in any manner received notice thereof, exercises or attempts to exercise any of the powers granted him under this act, he shall be guilty of a misdemeanor and the filing and mailing of such notice to his last known address shall be presumptive evidence that such person knew of the revocation. (Sec. 6.)

82B–0–7. Rules and Regulations Governing Special Policemen or Guards.

Every special policeman or guard appointed under this act shall at all times be subject to the rules and regulations of the governor or such other law enforcement department as he may designate insofar as it relates to the supervision and control of such person or persons or property within this state as the governor or his delegated authority may deem proper. Any and every person now employed as a special policeman or guard either for the protection of any public property or for the protection of private property which may be affected with a public interest shall be subject to an investigation by the sheriff or other law enforcement agency in the county in which he resides with respect to his moral character or fitness and shall from and after the effective date of this act be subject to the rules and regulations of the governor or such other law enforcement department as he may designate and shall also be subject to the supervision and control of the governor or other law enforcement department to whom the governor may delegate authority for the purpose of this act. (Sec. 7.)

82B–0–8. Act Not to Restrict Additional Safeguards and Protection of Property.

Nothing in this act shall be deemed to restrict the governor under existing law or laws which may be enacted by the legislature to require any political subdivision of this state or any corporation, either private or public or other persons either individually or collectively owning or having an interest in property, the continued use and operation of which is vital to the welfare of the citizens of this state and nation, to continue all present safeguards and special police protection and to provide at their own expense such safeguards and such protection as in the opinion and judgment of the governor they have the ability to perform with respect to such property held and operated by them and which would ordinarily be required of them as their duty; *provided, however*, that any individual now employed or hereafter appointed by any such person, firm or corporation to guard and protect such property shall possess the qualifications as set forth in paragraph 3 hereof and shall be subject to the requirements and provisions of paragraph 9. (Sec. 8.)

82B–0–9. Effective Date.

This act shall take effect upon proclamation of the governor. (Sec. 9.)

L. 1911, 2nd Spec. Sess., ch. 35; eff. Aug. 12.

SPECIAL POLICEMEN FOR PROTECTION OF PUBLIC PROPERTY OWNED BY ANOTHER STATE OR IN WHICH IT HAS AN INTEREST

AN ACT authorizing the appointment of and prescribing the powers and duties of special policemen for the protection and preservation of public property.

Be it enacted by the Legislature of the State of Utah:

82B–0–10. Authority to Appoint Special Policemen.

Upon the application of the governor of any state owning or having an interest in, or any of whose political subdivisions, departments, agencies, or districts, or owns or has an interest in any property situated wholly or partly in this state, the governor of this state or any officer, council, or agency to whom or which he may delegate his powers and duties under this act, hereinafter referred to as the appointing authority, may appoint and deputize as special policemen, with the powers and duties hereinafter prescribed, such number of persons designated in the application as may be deemed necessary for the additional protection of such property. (Sec. 1.)

Comparable provisions.
Cal. Gen. Laws, Act 6011b, § 1 (identical).

82B–0–11. Application—Contents.

Applications under this act shall be made in writing upon forms prescribed by the appointing authority and shall contain the name, age, nationality and residence address of each person for whom an appointment as special policeman is sought and such other information concerning such person as the appointing authority may require. (Sec. 2.)

Comparable provisions.
Cal. Gen. Laws, Act 6011b, § 2 (identical).

82B–0–12. Certificate of Appointment to Be Issued.

The appointing authority shall issue a certificate of appointment to each person appointed hereunder in such form as it may prescribe. Such certificate shall constitute the appointee's authority for exercising the powers and carrying out the duties conferred and imposed upon him by this act. (Sec. 3.)

Comparable provisions.
Cal. Gen. Laws, Act 6011b, § 3 (identical).

82B–0–13. Special Policemen Must Be Approved—Oath.

Each person appointed under this act, shall within fifteen days after his certificate of appointment has been issued, and before entering

upon the duties of his office, take and subscribe the (constitutional) oath of office, and file it in the office of the appointing authority. No person shall be appointed a special policeman under this act unless he be approved by the regularly constituted law enforcement agency from the political subdivision where he resides, is a citizen of the United States, and a resident of the state for not less than one year and of good moral character, and has not previously been convicted of a felony. (Sec. 4.)

Comparable provisions.
Cal. Gen. Laws, Act 6011b, § 4 (similar).

82B–0–14. Powers and Duties.

Each person appointed as a special policeman under this act shall be charged with the duty of protecting and preserving the property described in the application for his appointment. He shall have power to arrest all persons trespassing or committing offenses or crimes thereon. He shall have and may exercise the powers of a peace officer, but only upon the property or in connection with the property described in the application for his appointment. When on duty he shall wear an appropriate metallic badge upon which shall be inscribed the words "special policeman." He shall have power to possess and carry such firearms and other weapons while on duty as may be prescribed by the appointing authority. Whenever he shall change his residence address, he shall forthwith give notice of his new address to the appointing authority. (Sec. 5.)

Comparable provisions.
Cal. Gen. Laws, Act 6011b, § 5 (identical).

82B–0–15. Employee of State—Compensation—Additional Compensation Prohibited—Acceptance a Felony.

Each person appointed as special policeman under this act shall for all purposes be, and be deemed to be, the employee of the state, political subdivision, department, agency or district requesting his appointment. His compensation shall be fixed in such amount as may be agreed upon between him and such state, political subdivision, department, agency or district, as the case may be, and the latter shall be liable for the payment thereof. Any person offering or accepting any gift, salary or emolument other than that paid by the political subdivision, for services as a special policeman as provided in this act, shall be guilty of a felony. (Sec. 6.)

Comparable provisions.
Cal. Gen. Laws, Act 6011b, § 6 (identical, except that concluding sentence herein is omitted).

82B–0–16. Liability for Acts or Omissions.

Neither this state nor any political subdivision of this state, nor any department, officer, board, bureau or other agency of either the state or any political subdivision thereof shall be liable or accountable in any way for or on account of the appointment of any such special

policeman or for or on account of any act or omission on his part in connection with his powers and duties under this act. (Sec. 7.)

Comparable provisions.
Cal. Gen. Laws, Act 6011b, § 7 (identical).

82B-0-17. Termination or Revocation of Appointment—Exercise of Powers After Revocation—Misdemeanor.

The appointment of any special policeman under this act shall terminate, and his authority thereunder shall cease, whenever the governor of the state requesting his appointment shall file a notice in the office of the appointing authority in such form as the latter may prescribe to the effect that his services are no longer required. The appointing authority shall also have power on its own motion and at any time, for any reason or cause deemed by it sufficient, to revoke the appointment of any such special policeman by filing a revocation thereof in its office and mailing a notice of such filing to the governor of the state requesting his appointment, and also to the person whose appointment is revoked, at his residence address as the same appears in the application for appointment or the latest statement thereof on file. If such person thereafter, knowing of such revocation or having in any manner received notice thereof, exercises or attempts to exercise any of the powers of a special policeman under this act, he shall be guilty of a misdemeanor; and the filing and mailing of such notice, as above provided, shall be presumptive evidence that such person knew of the revocation. (Sec. 8.)

Comparable provisions.
Cal. Gen. Laws, Act 6011b, § 8 (identical).

82B-0-18. Rules and Regulations Governing Special Policemen.

Every special policeman appointed under this act shall at all times be subject to the rules and regulations of the appointing authority and to the supervision and control of such person or persons as the governor of this state may from time to time designate. (Sec. 9.)

Comparable provisions.
Cal. Gen. Laws, Act 6011b, § 9 (identical).

82B-0-19. Governor Authorized to Apply for Appointment of Special Policemen in Other States—Compensation—Act Not to Restrict Additional Safeguards and Protection of Property.

The governor of this state is authorized, in his discretion, to make application to the governor of any other state for the appointment of special policemen for the additional protection of any property situated wholly or partly in such other state, owned by this state, or any political subdivision thereof, or by any department or agency of either, or any tax or special district therein, or in which any of the foregoing has any interest. The state, political subdivision, department, agency or district owning or having an interest in the property

for the protection of which any such special policeman is appointed shall be liable for the compensation and expenses of such policeman and shall have full power and authority to provide or otherwise arrange for the payment of such compensation and expenses. Nothing contained in this section shall be construed to relieve the state or the political subdivision thereof in which such property or any part thereof is situated from its duty to furnish for such property or part thereof such normal police protection as it ordinarily and customarily provides for other property situated therein. (Sec. 10.)

Comparable provisions.
Cal. Gen. Laws, Act 6011b, § 10 (identical; noting that word "hereby" is inserted, so as to be worded, in part, "The Governor of this State is hereby authorized * * *").

82B–0–20. Partial Invalidity of Act—Saving Clause.

If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable. (Sec. 11.)

Comparable provisions.
Cal. Gen. Laws, Act 6011b, § 11 (identical).

82B–0–21. Inconsistent Acts Repealed.

All acts and parts of acts inconsistent with the provisions of this act and not expressly repealed herein are repealed. (Sec. 12.)

TITLE 82C

STATE AFFAIRS IN GENERAL

Chapter 1. DEPARTMENT OF ENGINEERING.
Chapter 2. DEPARTMENT OF FINANCE.
Chapter 3. DEPARTMENT OF PUBLICITY AND INDUSTRIAL DEVELOPMENT.
Chapter 4. CONSERVATION AND RESEARCH FOUNDATION.
Chapter 5. STATE COUNCIL OF DEFENSE.
Chapter 6. STATE OFFICE BUILDING.
Chapter 7. INTERSTATE COÖPERATION.
Chapter 8. CENTENNIAL OBSERVANCE.

CHAPTER 1

DEPARTMENT OF ENGINEERING

L. 1941, 1st Spec. Sess., ch. 9; eff. July 1.
82C-1-1. Department of Engineering Created.
82C-1-2. Engineering Commission — Membership — Terms — Salary.
82C-1-3. Id. Vacancies—How Filled.
82C-1-4. Id. Commissioners Not to Hold Other Office—Exceptions.
82C-1-5. Id. Meetings.
82C-1-6. Id. Offices.
82C-1-7. Id. Official Seal—May Administer Oaths.
82C-1-8. Engineering Advisory Council — Appointment — Number.
82C-1-9. Id. Terms — Confirmation —Vacancies.
82C-1-10. Id. Meetings — Chairman — Secretary — Quorum.
82C-1-11. Id. Duty and Function.
82C-1-12. Commission — Duties and Powers — Shall Constitute Aeronautics Commission.
82C-1-13. Id. May Create Other Divisions.
82C-1-14. Id. To Appoint Necessary Personnel.
82C-1-15. Governor—To Designate.
82C-1-16. Department of Engineering to Maintain All Public Buildings.
82C-1-17. Biennial Reports.
82C-1-18. Budget.
82C-1-19. Division of Water and Irrigation.
82C-1-20. Effective Date.

L. 1941, 1st Spec. Sess., ch. 9; eff. July 1.

AN ACT creating the department of engineering, providing for the administration thereof, the appointment of an engineering commission, prescribing the powers, duties and functions thereof, fixing their compensation; and providing for the appointment of an advisory council.

Be it enacted by the Legislature of the State of Utah:

82C-1-1. Department of Engineering Created.

There is created a department of engineering of the state of Utah. (Sec. 1.)

Cross-references.
State engineer, 100-2.

82C-1-2. Engineering Commission—Membership—Terms—Salary.

The administration of the department of engineering shall be under the supervision, direction and control of a commission which shall be known as the engineering commission. The commission shall be composed of three members appointed by the governor by and with the consent of the senate whose terms of office shall be six years except as further provided in this section. Of the members first appointed, the term of one shall expire March 1, 1943, the term of one shall expire March 1, 1945, and the term of one shall expire March 1, 1947, and their successors shall be appointed for a term of six years. Each commissioner shall hold office until his successor is appointed and qualified. Not more than two members of the commission shall belong to the same political party. One member of the commission shall be designated by the governor as chairman and any two commissioners may constitute a quorum. Any member of the commission may be removed for cause by the governor. Each member of the engineering commission shall qualify by taking the constitutional oath of office and shall receive an annual salary of $4,000 payable monthly and in addition thereto, he may be allowed actual traveling and other expenses necessarily incurred in attending to official business. (Sec. 2.)

82C-1-3. Id. Vacancies—How Filled.

Vacancies in the engineering commission, occurring by reason of death, resignation or other cause, or by rejection by the senate, shall be filled by the appointment of another person by the governor, which appointment shall be submitted by him to the senate for confirmation or rejection at the first session thereof after the appointment, or, if made while the senate is in session, at that session. (Sec. 3.)

82C-1-4. Id. Commissioners Not to Hold Other Office—Exceptions.

Each member of the engineering commission shall devote his full time and attention to his official duties and shall not hold any other office under the laws of this state, except ex officio such offices or titles as may be conferred upon him by law. No member shall hold office under the laws of any other state or under the government of the United States, but this provision shall not be construed to prevent any member from holding such nominal position or title as may be required by law as a condition to participation by the state in any appropriation or allotment of any money, property or service which may be made or allotted for any of the functions of the department. Each member shall act as the head or chief of such division or divisions of the department as shall be determined by the commission, except as hereinafter provided, but no additional compensation shall be paid to any member of the commission holding such office. (Sec. 4.)

82C-1-5. Id. Meetings.

Meetings of the engineering commission shall be held at the offices of the commission wherever within the state they may be established. (Sec. 5.)

82C–1–6. Id. Offices.

The engineering commission shall keep its principal offices at the state capitol, but may with the approval of the department of finance establish and maintain such branch or division offices within the state as may be necessary for the prompt and efficient performance of its duties. (Sec. 6.)

82C–1–7. Id. Official Seal—May Administer Oaths.

The engineering commission shall adopt and use an official seal, and file an impression and a description thereof in the office of the secretary of state. Copies of its records and proceedings and copies of documents and papers in its possession may be authenticated with the seal of the commission, attested by its chairman or by any member thereof or by its secretary and when so authenticated shall be received in evidence to the same extent and with the same effect as the originals. Each member of the commission shall have power to administer oaths for all purposes required in the discharge of the duties of the department. (Sec. 7.)

82C–1–8. Engineering Advisory Council—Appointment—Number.

In order more accurately to ascertain the needs and wishes of the people of the state in connection with the performance of any of the duties of the engineering commission, there is created an engineering advisory council consisting of six individuals, taxpayers and electors of the state, no more than four of whom shall be members of the same political party. The members of the advisory council shall be appointed by the governor by and with the consent of the senate. They shall serve without pay or compensation but shall be paid their actual and necessary expenses incurred in attending meetings of the council. Each member of the advisory council shall be chosen with due regard to his intelligence and ability and his knowledge and interest in the functions and duties of the commission. (Sec. 8.)

82C–1–9. Id. Terms—Confirmation—Vacancies.

The term of office of each member of the engineering advisory council shall be six years and until his successor shall have been appointed and has qualified; *provided, however,* that during the year 1941 the governor shall appoint one member for the term expiring March 1, 1942, one for a term expiring March 1, 1943, one for a term expiring March 1, 1944, one for a term expiring March 1, 1945, one for a term expiring March 1, 1946 and one for a term expiring March 1, 1947. In February 1942 and in February of each year thereafter the governor shall appoint a member for the full term of six years commencing on the second day of March next to succeed the member whose term has then expired. Each appointment shall be submitted for confirmation or rejection by the senate during the session being held at the time of the appointment or, if none is then being held, at the next session of the senate. Unless rejected at the session to which the appointment is first submitted the appointment shall be deemed confirmed. Vacan-

cies occurring in the membership of the advisory council shall be filled by the governor for the remainder of the term of the vacant membership, subject to subsequent confirmation or rejection by the senate. Nothing herein shall be construed to disqualify a member for reappointment. (Sec. 9.)

82C-1-10. Id. Meetings—Chairman—Secretary—Quorum.

The members of the engineering advisory council shall meet at the earliest convenient date in the month of March of each year at the office of the engineering commission at the state capitol at the call of the chairman of the commission. At its first meeting the council shall elect a chairman from its membership who shall serve until the next annual meeting of the council, and the council may at any time elect such other officers from its membership as it shall deem necessary. The commission shall assign one of its employees to act as secretary of the council without additional compensation therefor, and shall furnish the council with such stationery, supplies and facilities as may be reasonably necessary. Meetings of the council may be held at any time or place and upon call of the governor or of the commission or of the chairman of the council upon notice of the time, place and purpose of the meeting given by mail, telegraph or telephone to each of the members of the council not less than two days prior to the date fixed for such meeting. A majority of the members present at any meeting shall constitute a quorum for the transaction of business. (Sec. 10.)

82C-1-11. Id. Duty and Function.

It shall be the duty and function of the engineering advisory council to make suggestions to and to advise the engineering commission with respect to the policies, rules or regulations of the commission, the conduct of its business and of its employees, and the needs and wishes of the public with respect to any of the functions of the commission. It shall be the duty of the commission to receive and consider the suggestions and advice of the council, but nothing herein contained shall be construed to require the commission to adopt the same or to conform its practices thereto. (Sec. 11.)

82C-1-12. Commission—Duties and Powers—Shall Constitute Aeronautics Commission.

The engineering commission or its several members shall exercise and perform the powers, duties and functions heretofore exercised and performed by the state road commission and such other departments as may be prescribed by law. Within the department of engineering the Utah state building board shall exercise and perform the powers and duties heretofore performed by the Utah state building commission. The members of the engineering commission shall constitute the Utah state aeronautics commission. With the approval of the governor, the engineering commission may appoint such administrative officers as may be necessary efficiently and economically to perform the functions of the department of engineering. It shall make, adopt, and enforce

such rules and regulations not in conflict with law, which it may deem necessary or advisable to perform all of its duties and functions. (Sec. 12.)

Comparable provisions.

Cal. Polit. Code, § 363e (except as otherwise provided in the article, of which this section constitutes a portion, the department of public works succeeds to and is vested with duties, powers, purposes, responsibilities and jurisdiction of state engineer, state highway engineer, department of engineering, and advisory board to department of engineering, inter alia).

Cross-references.

Aeronautics commission, 4-0-20 et seq.; building commission, 10-0-1 et seq.; state road commission, 36-2.

82C-1-13. Id. May Create Other Divisions.

The engineering commission shall create, with the approval of the governor, other divisions in addition to those required by law as it may deem desirable or necessary adequately and economically to administer, exercise and perform its duties, powers and functions or to conform to the laws and requirements of the federal government now in force or which may hereafter be enacted by the congress of the United States. (Sec. 13.)

82C-1-14. Id. To Appoint Necessary Personnel.

The engineering commission may appoint and employ, with the approval of the department of finance, such subordinates, technicians, assistants and personnel as shall be necessary fully and completely to administer, exercise, and perform all of its duties, powers and functions, and shall fix their compensation according to salary standards adopted by the department of finance. (Sec. 14.)

82C-1-15. Governor—To Designate.

The governor may, whenever circumstances shall require, designate some person in the department of engineering to act in the place of the engineering commission in the event of the absence or incapacity of all the members of the commission. (Sec. 15.)

82C-1-16. Department of Engineering to Maintain All Public Buildings.

The department of engineering shall maintain and repair all public buildings and structures, including the Utah state sanatorium buildings, buildings under the control of the department of agriculture and buildings under the control of highway and district engineers where the cost of such maintenance and repairs does not exceed three thousand dollars, and shall maintain and repair all automotive equipment belonging to the state, except where the maintenance and repair of any of said buildings and equipment are by law assigned to other departments and agencies of the state. (Sec. 16.)

82C-1-17. Biennial Reports.

The engineering commission shall prepare and render to the governor biennially, and oftener if required, full and true reports of its work relating to the matters and duties developing upon it, which re-

ports shall be delivered to the governor on or before the first day of October of the year preceding regular sessions of the legislature. (Sec. 17.)

82C-1-18. Budget.

The engineering commission shall prepare and submit to the department of finance, for inclusion in the governor's budget to be submitted to the legislature, a budget of its requirements for salaries and wages, office expense, travel, equipment and repairs necessary for the operation of each of the divisions of the department of engineering for the biennium next following the convening of the legislature. (Sec. 18.)

82C-1-19. Division of Water and Irrigation.

Within the department of engineering there shall be a division to be known as the division of water and irrigation, which division shall be under the direction and control of the state engineer, who shall perform all the duties and exercise all of the powers relating to water and water rights as provided for in Title 100, of the Revised Statutes of Utah, 1933, as the same has been or may be hereafter amended, in the performance of which duties he shall not be subject to the commission, but in all other respects shall be subject to the supervision and control of the commission of engineering. (Sec. 19.)

82C-1-20. Effective Date.

This act shall take effect at 12:01 A. M. July 1, 1941, or upon proclamation of the governor prior to that date. (Sec. 20.)

CHAPTER 2

DEPARTMENT OF FINANCE

L. 1941, 1st. Spec. Sess., ch. 10; eff. July 1.

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L. 1941, 1st Spec. Sess., ch. 10; eff. July 1.

AN ACT relating to the financial activities of the state and the administration thereof, creating the department of finance, providing for a commission of finance, its membership, qualifications, terms of office, salaries, powers, duties and functions and providing for an advisory council, and for a purchasing standardization committee, making certain acts a felony and repealing Sections 90-0-1, 90-0-4, 90-0-5, 90-0-6 and 90-0-7, Revised Statutes of Utah, 1933, and Sections 90-0-2 and 90-0-3, Revised Statutes of Utah, 1933, as amended by Chapter 78, Laws of Utah, 1933.

Be it enacted by the Legislature of the state of Utah:

82C-2-1. Department of Finance—Created.

There is created a department to be known as the department of finance which shall perform such duties and functions as may be prescribed by law. (Sec. 1.)

Comparable provisions.
Cal. Polit. Code, § 654 (creating department of finance).
Idaho Code, 1940 Supp., § 65-2601 (enumerating the powers of the department of finance); 1940 Supp., § 65-2602 (enumerating the powers of the governor through, and as chief officer of, bureau of public accounts).

82C-2-2. Id. Commission of Finance—Members of—Terms—Salaries.

The administration of the department shall be under the supervision, direction and control of a commission which shall be known as the

commission of finance. The commission of finance shall be composed of three members who shall be appointed by the governor by and with the consent of the senate, whose terms of office shall be six years except as further provided in this section. Of the members first appointed, the term of one shall expire March 1, 1943, the term of one shall expire March 1, 1945, and the term of one shall expire March 1, 1947, and their successors shall be appointed for a term of six years. Each commissioner shall hold office until his successor is appointed and qualified. Not more than two members of the commission shall belong to the same political party. One member of the commission shall be designated by the governor as chairman and any two commissioners may constitute a quorum. Any member of the commission may be removed for cause by the governor. Each member of the finance commission shall qualify by taking the constitutional oath of office and shall receive an annual salary of $4,000 payable monthly and in addition thereto, he may be allowed actual traveling and other expenses necessarily incurred in attending to official business. (Sec. 2.)

Comparable provisions.

Cal. Polit. Code, § 655 (creating office of director of finance; department of finance to be conducted under control of this executive officer; appointed by governor, and holds office at latter's pleasure).

82C-2-3. Id. Vacancies—How Filled.

Vacancies in the office of commissioner of finance occurring by reason of death, resignation or other cause, or by rejection by the senate, shall be filled by the appointment of another person by the governor which appointment shall be submitted by him to the senate for confirmation or rejection in the first session thereof after the appointment, or, if made while the senate is in session, at that session. (Sec. 3.)

82C-2-4. Id. Not to Hold Other Office—Exceptions—No Additional Compensation.

Each member of the commission shall devote his full time and attention to his official duties and shall not hold any other office under the laws of this state, except ex officio such offices or titles as may be conferred upon him by law. No member shall hold office under the laws of any other state or under the government of the United States, but this provision shall not be construed to prevent any member from holding such nominal position or title as may be required by law as a condition to participation by the state in any appropriation or allotment of any money, property or service which may be made or allotted for any of the functions of the department. This provision shall not be construed to prevent any member of the commission from acting as budget officer or purchasing agent, or as head or chief of such division or divisions of the department as shall be determined by the commission but no additional compensation shall be paid to any member of the commission holding such office or offices. (Sec. 4.)

82C-2-5. Id. Meeting to Be Public—Secretary.

Meetings of the commission of finance shall be open to the public and may be held at the offices of the commission wherever within the state they may be established. The commission shall be deemed in

continuous session for the purpose of meetings. The commission shall elect a secretary who may or may not be a member of the commission. (Sec. 5.)

82C-2-6. Id. Place of Principal Office—Branches.

The commission of finance shall keep its principal offices at the state capitol, but may with the approval of the board of examiners establish and maintain such branch or division offices within the state as may be necessary for the prompt and efficient performance of its duties. (Sec. 6.)

82C-2-7. Id. Official Seal—Authentication of Records.

The commission of finance shall adopt and use an official seal and file an impression and a description thereof in the office of the secretary of state. Copies of its records and proceedings and copies of documents and papers in its possession may be authenticated with the seal of the commission, attested by its chairman or by its secretary and when so authenticated shall be received in evidence to the same extent and with the same effect as the originals. (Sec. 7.)

82C-2-8. Advisory Council—Membership—To Be Paid Expenses.

In order to more accurately ascertain the needs and wishes of the people of the state in connection with the performance of any of the duties of the commission of finance, there is created an advisory council of the department of finance consisting of the state treasurer and six individuals, taxpayers and electors of the state, not more than four of whom shall be members of the same political party. The members of the advisory council other than the state treasurer shall be appointed by the governor by and with the consent of the senate. They shall serve without pay or compensation but shall be paid their actual and necessary expenses incurred in attending meetings of the council. Each member of the advisory council shall be chosen with due regard to his intelligence and ability and his knowledge and interest in the functions and duties of the commission. (Sec. 8.)

82C-2-9. Id. Terms—Vacancies.

The term of office of each appointive member of the council of the department of finance shall be six years and until his successor shall have been appointed and shall have qualified, *provided however*, that during the year 1941 the governor shall appoint one member for the term expiring March 1, 1942, one for a term expiring March 1, 1943, one for a term expiring March 1, 1944, one for a term expiring March 1, 1945, one for a term expiring March 1, 1946, and one for a term expiring March 1, 1947. In February 1942 and in February of each year thereafter the governor shall appoint a member for the full term of six years commencing on the second day of March next, to succeed the member whose term has then expired. Each appointment shall be submitted for confirmation or rejection by the senate during the session being held at the time of the appointment, or, if none is then being held, at the next session of the senate. Unless rejected at the session to which the appointment is first submitted the appointment

shall be deemed confirmed. Vacancies occurring in the membership of the advisory council shall be filled by the governor for the remainder of the term of the vacant membership, subject to the subsequent confirmation or rejection by the senate. Nothing herein shall be construed to disqualify a member for reappointment. (Sec. 9.)

82C-2-10. Id. Meetings—Chairman—Vice-Chairman—Quorum.

The members of the advisory council of the department of finance shall meet at the earliest convenient date in the month of March of each year at the office of the commission of finance at the state capitol at the call of the chairman of the commission. The state treasurer shall be the chairman of the council. At its first meeting the advisory council shall elect a vice chairman from its membership who shall serve until the next annual meeting of the council and the council may at any time elect such other officers from its membership as it shall deem necessary. The commission shall assign one of its employees to act as secretary of the council without additional compensation therefor, and shall supply the council with such stationery, supplies and facilities as may be reasonably necessary. Meetings of the advisory council may be held at any time or place and upon call of the governor, the chairman of the commission or of the chairman or vice chairman or any four members of the council upon notice of the time, place and purpose of the meeting given by mail, telegraph or telephone to each of the members of the council not less than two days prior to the date fixed for such meeting. A majority of the members present at any meeting shall constitute a quorum for the transaction of business. (Sec. 10.)

82C-2-11. Id. Duty and Function.

It shall be the duty and function of the advisory council of the department of finance to make suggestions to and to advise the commission of finance with respect to the policies, rules or regulations of the commission the conduct of its business and of its employees, and the needs and wishes of the public with respect to any of the functions of the commission. It shall be the duty of the commission to receive and consider the suggestions and advice of the advisory council but nothing herein contained shall be construed to require the commission to adopt the same or to conform its practices thereto. (Sec. 11.)

82C-2-12. Commission of Finance to Be State Land Board—Control Puhlic Lands.

The members of the commission of finance shall be the state land board and shall have supervision and control over the public lands of the state of Utah and of the laws relating thereto, and shall perform such other functions and duties as may be provided by law. With the approval of the governor, the commission of finance shall appoint a budget officer, a purchasing agent and such other administrative officers as may be necessary to efficiently and economically perform the functions of the department of finance, any of whom may or may not be members of the commission. The commission may also employ such other assistants as may be necessary. (Sec. 12.)

82C-2-13. Id. To Fix Schedule of Salaries for All State Offices.

The commission of finance shall prescribe and fix a schedule of salaries for the officers, clerks, stenographers and employees of state offices, departments, boards and commissions, except where such salaries are fixed by statute or by appropriation; and such schedule of salaries shall have the force of law in all state offices, departments, boards and commissions, and shall in no case be exceeded without the express approval of the commission of finance. (Sec. 13.)

82C-2-14. Id. To Approve or Disapprove All Requests for Personnel or New Positions.

The commission of finance shall examine all requests for personnel and shall approve or disapprove the same and no new position shall be created and no vacancy shall be filled until the commission has certified to the department requesting the creation of a new position or the filling of the vacancy that the position is necessary to carry on the work of such department in an efficient and business-like manner and that the necessary funds therefor are available to the department. The commission shall investigate the need for every existing position in every department and shall report its findings to the board of examiners with its recommendations for the most effective means of discontinuing unnecessary positions. (Sec. 14.)

82C-2-15. Id. To Establish Mileage Schedule for All State Employees.

The commission of finance shall establish mileage and travel expense schedules and set up rules and regulations for travel of all state employees and such schedules shall have the force of law in all departments and no voucher or claim for travel expense shall be paid until the same has been approved by the commission. (Sec. 15.)

82C-2-16. Id. To Collect All State Securities—Deeds—Abstracts of Title, etc.

The commission of finance shall collect and deposit with the state treasurer all stocks, evidences of indebtedness, bonds and securities of every kind and nature. The state treasurer shall keep a complete record of the same and credit each to the proper fund or account and the state treasurer shall release the same only upon the order of the commission. Deeds, abstracts of title and all other documents evidencing title to or interest in property belonging to the state or any department thereof shall be deposited with the commission of finance. (Sec. 16.)

82C-2-17. Id. To Designate Employees Who Shall Give Bonds—Amounts.

The commission of finance shall designate the officers and employees of the state who shall give bonds for the faithful performance of their official duties, such bonds shall be at the expense of the state and shall be in such form and in such amounts and with such surety or sureties as the commission shall from time to time determine. Such surety bonds in the discretion of the commission shall be obtained as

the result of competitive bidding. This provision shall not apply to officers or employees whose bonds are otherwise specifically provided for by law. (Sec. 17.)

82C-2-18. Id. To Appoint a Budget Officer—Budgetary Control Over State Departments—State Budget.

The commission of finance with the approval of the governor shall appoint a budget officer who shall prepare and submit to the governor biennially not later than the 1st Monday in January preceding the convening of the legislature a state budget conforming with section 87-2-7, Revised Statutes of Utah, 1933. The budget officer shall also perform under the supervision of the commission all the duties required by law to be performed by it in connection with budgetary control over state departments and the allotment of appropriations thereto, and the budget officer shall perform such other duties as shall be required of him by law or by the commission. (Sec. 18.)

82C-2-19. [Id.] To Maintain Budget Control System.

The commission of finance shall maintain a budget control system, recording the constituent elements of the general fund and of each special fund in their proper relationship to each other and shall keep all accounts in balance; shall furnish to the governor monthly (and to the legislature when requested) reports showing the condition of the general fund and each special fund of the state; the available cash resources of the general fund and each special fund of the state and as to each such fund the estimated revenue and anticipated time of collection, the current incumbrances, future obligations and estimated date they accrue, appropriation, obligations, quarterly allotments, unincumbered allotments, reserves and surplus; as well as the capital assets and liability accounts of the state, and the valuation account of all other state property, and shall require the head of each department to submit to the commission statements containing such information and data as will enable it to furnish to the governor the reports above prescribed. (Sec. 19.)

History.
As amended by L. 41, 2nd Spec. Sess., ch. 27, eff. July 1, making no material changes in text.

82C-2-20. Id. Budgetary Control Over All State Departments—Departmental Work Program.

The commission of finance shall exercise budgetary control over all state departments and agencies. The commission shall require the head of each department to submit to it and to the governor not later than May 15th of each year, a work program for the ensuing fiscal year and may at any time require any department to submit a work program for any other period. Such program shall include all appropriations and other funds from any source whatsoever made available to said department for its operation and maintenance and shall show the requested allotments of said appropriations or other funds by quarterly periods for the ensuing or current fiscal year. The budget officer shall

review under the direction of the governor the requested allotments with respect to the work program of each department and shall, if the governor deems necessary, revise, alter, decrease or change such allotments before approving the same; or, may proceed to make independent allotments which shall be binding on the said department when a work program is not furnished by any said department as required by this section. The aggregate of such allotments shall not exceed the total appropriations or other funds from any source whatsoever made available to said department for the fiscal year in question. The budget officer shall transmit a copy of the allotments when approved by the governor to the head of the department concerned and also a copy to the auditor of the state. The commission of finance shall thereupon permit all expenditures to be made from the appropriations or other funds from any source whatsoever on the basis of such allotments and not otherwise, unless such allotments or any part thereof are subsequently revised or changed by the governor. (Sec. 20.)

History.
As amended by L. 41, 2nd Spec. Sess., ch. 27, eff. July 1, making only minor changes in text.

Comparable provisions.
Cal. Polit. Code, § 677.5, as amended by Laws of 1939 (requiring submission to department of finance, for approval, complete and detailed budget, setting forth all proposed expenditures and estimated revenues for ensuing fiscal year).

82C-2-21. Id. To Examine All Requisitions, Pre-audit Claims, Prescribe Forms.

The commission of finance shall exercise accounting control over all state departments and agencies and prescribe the manner and method of certifying that funds are available and adequate to meet all contracts and obligations. The commission shall examine and approve, or disapprove, all requisitions and proposed expenditures of the several departments, except salaries or compensation of officers fixed by law, and no requisition of any of the departments shall be allowed nor shall any obligation be created without the approval and certification of the commission. The commission of finance shall pre-audit all claims against the state. The commission of finance shall, with the approval of the state auditor as to the adequacy of such documents in facilitating the post-audit of public accounts, prescribe all forms of requisitions, receipts, vouchers, bills or claims to be used by the several departments and the forms, procedures, and records to be maintained by all departmental, institutional or agency store rooms and exercise inventory control over such store rooms. (Sec. 21.)

History.
As amended by L. 41, 2nd Spec. Sess., ch. 27, eff. July 1, making material changes in text.

Cross-references.
Approval of claims by board of examiners, Title 26; duties and activities of state auditor, 87-4, public funds and accounts, Title 74.

82C-2-21a. [Id.] To Establish State Accounting System, May Require Departmental Cost Accounting System.

The commission of finance shall establish a comprehensive state accounting system and shall, with the approval of the governor, ap-

point a chief accountant who shall supervise and administer the state accounting system. Accounting systems may be maintained by offices, departments, agencies, and institutions of the state only with the approval of the commission of finance, and such systems shall be prescribed and controlled by the department of finance. The commission of finance may, with the approval of the governor, require any department of [or] institution to install and maintain a cost accounting system such as will disclose the unit cost of material or service produced or performed by such department. (Sec. 21a.)

History.
Added by L. 41, 2nd Spec. Sess., ch. 27, eff. July 1.

Comparable provisions.
Cal. Polit. Code, § 677 (requiring department of finance to devise, install and supervise a modern and complete accounting system).

Idaho Code, 1940 Supp., § 65-2602, subd. 4 (authorizing governor, as chief officer of bureau of public accounts, to prescribe and require uniform system of bookkeeping, accounting and reporting for the several departments and public institutions of the state and political subdivisions thereof).

82C-2-22. Id. Appoint a State Purchasing Agent—Powers—Duties.

The commission of finance with the approval of the governor shall appoint a state purchasing agent who under the supervision of the commission shall exercise the powers and perform the duties of the commission relating to the purchase of all supplies, materials, equipment and services required in the administration of any department of the state, the administration of a central purchasing and store system for the departments of the state and the exercise of inventory control over all departments. (Sec. 22.)

82C-2-23. Id. Shall Require Bond from Purchasing Agent—Amount.

The commission of finance shall require of the state purchasing agent a surety bond to the state in the sum of $10,000 conditioned for the faithful performance of his duties. It shall be the duty of the state purchasing agent to attend meetings of the governing bodies of the various departments of the state in a visitorial capacity as frequently as the commission of finance deems necessary in order to acquaint the state purchasing agent and the commission of finance with the policies, problems, needs and methods of the various departments. (Sec. 23.)

82C-2-24. Purchasing Standardization Committee—Membership—Authority.

There shall be within the department of finance a purchasing standardization committee which shall be composed of the secretary of state, the state auditor, the state treasurer, the superintendent of public instruction, the chairman of the engineering commission, the chairman of the public welfare commission, the chairman of the state board of agriculture, the chairman of the commission of business regulation, the chairman of the commission of publicity and industrial development, the chairman of the tax commission, the chairman of the industrial commission, the chairman of the liquor control commission, and the chairman of the commission of finance. The members of said committee shall serve without additional compensation. The state purchasing

agent shall be secretary of the committee and the committee shall have authority:

(a) To formulate and declare the purchasing policy of the state.

(b) To classify supplies, materials and equipment required by the various departments of the state government.

(c) To adopt standards of quantity and quality to control purchases of supplies, materials and equipment required for the state and its various departments.

(d) To prepare, adopt and promulgate specifications of such standards and to formulate a system of cataloging and accounting for all real and personal property purchased for the use of the state or of any of its departments. (Sec. 24.)

82C-2-25. Id. To Adopt Specifications for Commodities.

The purchasing standardization committee shall seek the advice, assistance and coöperation of all state departments as to their particular requirements in the preparation or revision of any standard or specification adopted by it and shall ascertain the precise requirements of each department. Each specification adopted for any commodity shall insofar as practicable satisfy the requirements of the majority of the departments having use for the commodity. After its adoption each standard or specification until revised or rescinded shall control in the purchase of every commodity to which it applies; *provided, however,* that the state purchasing agent with the approval of the governor may purchase commodities not complying with such specifications or standards when required to meet the particular needs of any department. (Sec. 25.)

82C-2-26. Id. Chairman—Meetings—Quorum.

The chairman of the commission of finance shall be the chairman of the purchasing standardization committee. The committee shall meet upon the call of the governor or of its chairman or any seven members upon two days notice to each of the members thereof. Seven members shall constitute a quorum for the transaction of business. (Sec. 26.)

82C-2-27. Commission to Make Uniform Rules for Purchases—Requisitions, etc.

The commission of finance shall make and enforce rules and regulations to make effective the standards and specifications controlling state purchases adopted by the purchasing standardization committee. The commission shall also make uniform rules relating to the advertisements for proposals, the opening of bids and the making of awards; keep a catalog of prices current, and analyze and tabulate prices paid and the quantities purchased by it, and require periodical reports of supplies on hand and estimates of future needs of the various departments. The commission of finance shall make and enforce rules and regulations governing requisitions for, and purchases, exchanges, transfers, leases and sales of property and supplies for and by the several departments and the distribution of the proceeds of any disposition of the same; *provided, however,* that all leases prior to acceptance shall be approved as to form by the attorney general and a

copy thereof shall be kept on file in the office of the commission. It shall determine from time to time what shall be included within emergency purchases and emergency sales and shall regulate the same; and it shall make such other rules and regulations as may be necessary in the exercise of the powers and performance of the duties hereby given and imposed. (Sec. 27.)

82C-2-28. Id. To Procure All Supplies—Equipment—Services.

The commission of finance shall procure by contract or purchase, equipment, materials, provisions, furniture and furnishings, instruments and apparatus, tools, machinery, stationery, light, fuel, heat, water and all office supplies and services, printing and binding and insurance necessary for and required by the legislature of the state of Utah and the several departments of the state government, and contract for the publication of the laws, codes, reports and journals, and the decisions of the supreme court and all proclamations and other notices required by law to be published by any official or department of the state; *provided*, that all purchases in excess of $1,000, except in cases of emergency and in the cases of the purchase of insurance, automobiles and trucks, shall be made on contract, let after advertisement for bids, to the responsible bidder making the lowest and best bid. The commission may reserve the right to reject any and all bids. (Sec. 28.)

82C-2-29. Id. To Sell All Unneeded State Equipment.

The commission of finance shall sell any material, equipment or supplies belonging to the state, not required for state purposes, and pay the proceeds thereof into the state treasury to the credit of the general fund, or in the discretion of the commission to the credit of the particular department from which such material, equipment or supplies may be taken. (Sec. 29.)

82C-2-30. Id. To Inspect and Test All Materials and Services Furnished.

The commission of finance shall inquire into and make rules and regulations for inspecting and testing articles and materials furnished to, or work and labor performed for, the several departments for the purpose of ascertaining that the prices, quality and amount of such articles or labor are fair, just and reasonable, and that all the requirements express or implied pertaining thereto have been complied with, and may reject and disallow all requisitions for articles, materials or labor not complying with such rules. (Sec. 30.)

82C-2-31. Id. Bulletins to Be Published.

The commission shall publish from time to time for the information of the several departments and of the general public bulletins of the work of the state government. (Sec. 31.)

82C-2-32. Id. Control of All State Investments.

The commission of finance after consulting with the state treasurer shall make and control the investments of all permanent funds of the

state, when by law said funds may be invested subject to such restrictions as are imposed by law. (Sec. 32.)

82C-2-33. Id. Securities in Which Funds May Be Invested.

The commission of finance shall invest all funds which it is authorized by law to invest when not otherwise specifically limited in state, municipal, or school district bonds of this state, or in bonds or other obligations of the United States or in bonds guaranteed both as to principal and interest by the United States or bonds of federal land banks, notes or bonds secured by mortgage insured by the federal housing administrator or notes or bonds secured by first mortgages on improved real estate when such notes or bonds do not exceed forty per cent of the cash value of the respective properties covered by such mortgages when purchased by the commission. The state treasurer shall honor and pay all vouchers drawn on any fund, which the commission of finance is authorized by law to invest, for the purchase of such investments when signed by any two members of the commission of finance upon delivery of such bonds or securities to him when there is attached to such voucher a certified copy of the approved resolution of the commission authorizing the purchase of such bonds and the commission of finance may sell any of such bonds upon like resolution, and the proceeds thereof shall be paid by the purchaser to the state treasurer. (Sec. 33.)

Cross-references.
Investment of funds of state institutions by state board of examiners, 86-1-50 et seq.

82C-2-34. Taxing Districts to Offer Bond Issues to Commission Before Other Sale.

The boards or officers of the several taxing districts of the state shall offer in writing all original bond issues and all refunding issues of bonds of their respective taxing districts to the commission of finance prior to advertising the same for sale, and the commission of finance shall, within five days after receipt of such written offer, either reject such offer or notify the issuer of the terms and conditions on which it is willing to purchase such bond issue, and, if the officials of the issuer are of the opinion said bond issue may be sold elsewhere at a lower rate of interest or on better terms such officials may reject the offer of the commission and proceed to sell such bond issue elsewhere. (Sec. 34.)

82C-2-35. Departments Failing to Comply—State Auditor to Withhold All Warrants.

Whenever in this act power is vested in, or any duty is imposed upon, the commission of finance, the duty is imposed upon all other departments to do all things necessary to make such power effective and to enable the commission to discharge such duties. The state auditor shall withhold all warrants payable on account of any department or to particular officials, employees or accounts, on written notice

from the commission that such department or any of its officials or employees has failed or is failing to comply with the provisions of this section; such warrants to be withheld until further written notice from the commission that the provisions of this section are being fully complied with by such department, its officials and employees and that reparation has been made for all loss caused to the state by such failure to comply with the provisions of this section. (Sec. 35.)

82C–2–36. "Departments" Construed.

"Departments," "other departments" and "several departments" as used in this act, unless the context otherwise clearly indicates, shall be construed to include all offices, boards, commissions, institutions, arms and agencies of the state government of every name or nature now in existence or that may be hereafter created for the purpose of carrying out the administrative functions of the state government, except as hereinafter provided. (Sec. 36.)

82C–2–37. University—Colleges.

The university of Utah, the Utah state agricultural college and the junior colleges of the state shall be subject only to those provisions of this act as shall be required by the commission of finance with the approval of the governor. (Sec. 37.)

82C–2–38. Unlawful Acts—Felony.

Every person acting as a purchasing agent for the state of Utah or any subdivision thereof, or who in any official capacity participates in the purchasing of any materials or supplies for any such political units, who asks, receives or offers to receive any emolument, gratuity, contribution, loan or reward, or any promise thereof, either for his own use or for the use or benefit of any other person or organization, from any person interested in the sale of such supplies or materials, is guilty of a felony. (Sec. 38.)

82C–2–39. Id.

Every person who is interested in any way in the sale of any materials or supplies to the state of Utah or any political subdivision thereof, who gives or offers to give any emolument, gratuity, contribution, loan or reward, or any promise thereof, to any person acting as a purchasing agent, or who in any official capacity participates in the purchase of such supplies or materials, whether it is given for his own use or for the use or benefit of any other person or organization, is guilty of a felony. (Sec. 39.)

82C–2–40. When Provisions of Act Do Not Apply to Obtaining Equipment and Personnel.

Nothing herein contained shall be construed to modify or amend the provisions of the "Employment Security Act," H. B. No. 167 of the regular session of the 24th legislature of Utah, and in any case where the provisions of the social security act or any other federal act or lawful ruling or regulation made pursuant thereto requires as a con-

dition to participation in the benefits of such act, the purchase of services, supplies, equipment or property in a manner other than as in this act provided or requires the employment of personnel in any manner other than in this act provided, then in any such respect the provisions of this act shall not apply but the purchase of such services, supplies, equipment or property shall be made and personnel shall be selected and employed in conformance with the requirements of such federal act or lawful ruling or regulation thereunder or in accordance with state laws enacted pursuant thereto or in conformity therewith. (Sec. 40.)

82C-2-41. Purchasing from Utah Commission for Adult Blind.

The purchasing agent and such agents in charge of purchase and supplies of state institutions, where possible, shall purchase brooms, mops, brushes, rubber mats and other supplies, other than the products of prison labor, from the Utah commission for the adult blind; *provided* that such goods and supplies are for sale by the Utah commission for the adult blind, *provided* that said goods and supplies are of standard quality and price. (Sec. 41.)

Cross-references.
Adult blind, 85-3-18.

82C-2-42. Blind to Be Employed—When.

Officers of state institutions employing persons for piano tuning, cane seating and reed furniture repairing shall employ persons who are under the supervision of the Utah commission for the adult blind, *provided*, that said persons are qualified. (Sec. 42.)

82C-2-43. Provisions as to Blind to Be Waived—When.

The executive secretary of the commission for the adult blind shall issue a release from the provisions of this act upon the request of the purchasing officer of the state when convenience or emergency requires it. (Sec. 43.)

82C-2-44. Board of Supplies Refers to Department of Finance.

Whenever any existing or continuing law names or refers to the state board of supplies and purchases it shall be construed to name and refer to the department of finance. (Sec. 44.)

82C-2-45. Sections Repealed.

Section 90-0-1, 90-0-4, 90-0-5, 90-0-6 and 90-0-7, Revised Statutes of Utah, 1933, and Sections 90-0-2 and 90-0-3, Revised Statutes of Utah, 1933, as amended by Chapter 78, Laws of Utah, 1933, are repealed. (Sec. 45.)

82C-2-46. Effective Date.

This act shall take effect on July 1, 1941 at the hour of 12:01 o'clock a. m. or upon the proclamation of the governor prior to that date. (Sec. 46.)

CHAPTER 3

DEPARTMENT OF PUBLICITY AND INDUSTRIAL DEVELOPMENT

L. 1941, ch. 75; eff. July 1.

82C-3-1. Department of Publicity and Industrial Development—Created.
82C-3-2. Id. Commission — Number — Terms — Appointment — Confirmation — Salary.
82C-3-3. Id. Members Not to Hold Other Office — Exceptions — No Additional Compensation.
82C-3-4. Id. Quorum — Chairman — Secretary — Employees.
82C-3-5 Id. Place of Office.
82C-3-6. Id. Official Seal—Bonds—Members May Administer Oaths.
82C-3-7. Advisory Council — Membership — Terms — Meetings — Duties and Functions.
82C-3-8. Department to Promote Employment.
82C-3-9. Id. To Coöperate with Local Authorities.
82C-3-10. Id. Powers and Functions.
82C-3-11. Id. Plan and Conduct Program of Information—Publicity.
82C-3-12. Id. Coöperation with Other Officials—Method of.
82C-3-13. Id. Participation in Federal Programs.
82C-3-14. Water Resources Development Division — Created—Purposes.
82C-3-15. Water Resources Advisory Council — Created — Membership—Terms.
82C-3-16. Id. Meetings—Quorum.
82C-3-17. Id. To Advise Commission.
82C-3-18. Department May Erect Experimental Industrial Plants—May Sell.
82C-3-19. Id. Coal Processing Industry — Elimination of Smoke.
82C-3-20. Id. Direct Self Help Associations.
82C-3-21. Appropriations.
82C-3-22. Partial Invalidity — Savings Clause.
82C-3-23. Chapter Repealed.
82C-3-24. Effective Date.

L. 1941, ch. 75; eff. July 1.

AN ACT creating the department of publicity and industrial development, making an appropriation; providing for the appointment of commissioners, their salaries, terms of office, powers and duties, and creating a publicity and industrial development advisory council; providing for the appointment of the members of the council, their terms of office, qualifications, duties and functions, vesting in the department of publicity and industrial development the powers and duties of the water storage commission, abolishing the water storage commission and repealing Chapter 6, Title 100, Revised Statutes of Utah, 1933, as amended by Chapter 132, Laws of Utah, 1937.

Be it enacted by the Legislature of the State of Utah:

82C-3-1. Department of Publicity and Industrial Development—Created.

There is created a department to be known as the state department of publicity and industrial development which shall be charged with the duties of providing opportunities for increased employment in Utah, of providing employment for the young men and women of the state and creating and sponsoring a program of industrial development of the natural resources in every part of the state and with the duty of coöperating with the federal government and its agencies in the develop-

ment of industries in this state, and for the purpose of coöperating with the federal government in the national defense. (Sec. 1.)

Cross-references.
Geological and mineralogical survey, 34-0.

82C-3-2. Id. Commission—Number—Terms—Appointment—Confirmation—Salary.

The department of publicity and industrial development shall be composed of a commission of three members appointed by the governor by and with the consent of the senate; *provided* that for the year 1941 one member shall be appointed for two years, one for four years and one for six years, and thereafter each member shall be appointed for a term of six years. Each commissioner shall be subject to removal at the pleasure of the governor. Not more than two members of the commission shall belong to the same political party. Vacancies in the office of commissioner occurring by reason of death, resignation or other cause, or by rejection by the senate, shall be filled by the appointment of another person by the governor, which appointment shall be submitted by him to the senate for confirmation or rejection at the first session thereof after the appointment, or if made while the senate is in session, at that session. During the first regular or special session, if any, after the twenty-fourth session of the legislature the governor shall submit to the senate for confirmation or rejection the names of three persons to serve as members of the commission. During each regular session of the legislature the governor shall submit to the senate all interim appointments and also the name of a member of the commission to fill the vacancy occurring by expiration of the term of the member expiring on the 1st day of March. If the senate shall within ten days after the submission of such names vote not to confirm any of the persons so named in his continuance in such office, the term of office of the person not confirmed shall forthwith terminate and his office shall become vacant. In any such case the senate shall forthwith notify the governor and he shall forthwith appoint another person to fill the vacancy so created and shall submit his name to the senate for similar action and so on, until the senate shall confirm the appointment or shall fail to reject.

Each member shall qualify by taking the constitutional oath of office and shall receive a salary at the rate of $4,000 per annum payable monthly following the date of his qualification. Each member shall be paid his expenses necessarily incurred while actually engaged in the performance of his duties in authorized travel from the office of the commission at the state capitol. (Sec. 2.)

Comparable provisions.
Idaho Code, § 65-1901 (establishing "state board of publicity"; five members; four of them appointed by governor; governor is fifth member, and is president of the board); § 65-1905 (duty of board to engage in advertising Idaho, its resources, its advantages, its products; and to take any action which will develop its industries and promote general welfare and prosperity of its citizens).

82C-3-3. Id. Members Not to Hold Other Office—Exceptions—No Additional Compensation.

Each member of the commission shall devote his full time and attention to the duties of his office and shall not hold any other office under the laws of this state or under the government of the United States or of any other state except as hereinafter provided, but this provision shall not be construed to prevent any member from holding such nominal position or title as may be required by law as a condition to participation by the state in any appropriation or allotment of any money, property or service which may be made or alloted by any agency, governmental or private, for any of the functions of the department or of the institutions under its supervision, nor shall this provision be construed to prevent any member from acting as head or chief of any of the divisions, departments or bureaus which may be established by the commission for the efficient operation of the department in the performance of its functions, but in any such case no member of such commission shall receive any additional compensation therefor. (Sec. 3.)

82C-3-4. Id. Quorum—Chairman—Secretary—Employees.

Two members of the commission shall constitute a quorum for the transaction of business unless otherwise required by law. The governor shall appoint one of its members as its chairman who shall preside at all of its meetings until the membership of the commission shall be changed for any cause. The commission shall elect a secretary, who may or may not be a member of the commission, and shall appoint such other employees as it may deem necessary. (Sec. 4.)

82C-3-5. Id. Place of Office.

The office of the state department of publicity and industrial development shall be maintained at the state capitol and it shall be furnished with the necessary equipment, supplies and assistance. (Sec. 5.)

82C-3-6. Id. Official Seal—Bonds—Members May Administer Oaths.

The commission shall adopt and use an official seal and shall file an impression and a description thereof in the office of the secretary of state. Copies of its records and proceedings and copies of documents and papers in its possession may be authenticated with the seal of the commission, attested by its chairman or by its secretary and when so authenticated shall be received in evidence to the same extent and with the same effect as the originals.

Each member of the commission shall give a bond for the faithful performance of his duties in such form and in such amount as the board of examiners shall determine.

Each member of the commission shall have the power to administer oaths for all purposes required in the discharge of his duties. (Sec. 6.)

82C-3-7. Advisory Council—Membership—Terms—Meetings—Duties and Functions.

In order to more accurately ascertain the needs and wishes of the people of the state in connection with the performance of any of the

duties of the commission, there is created a publicity and industrial development advisory council consisting of six individual tax payers and electors of the state no more than four of whom shall be members of the same political party. The members of the advisory council shall be appointed by the governor by and with the consent of the senate. They shall serve without pay or compensation but shall be paid their actual and necessary expenses incurred in attending meetings of the council. Each member of the advisory council shall be chosen with due regard to his intelligence and ability and his knowledge and interest in the functions and duties of the department or in any of the institutions under its supervision or control. The term of office of each member of the council shall be six years and until his successor shall have been appointed and have qualified, *provided however* that during the year 1941 the governor shall appoint one member for the term expiring March 1, 1942, one for a term expiring March 1, 1943, one for a term expiring March 1, 1944, one for a term expiring March 1, 1945, one for a term expiring March 1, 1946, and one for a term expiring March 1, 1947. In February, 1942 and in February of each year thereafter the governor shall appoint a member for the full term of six years commencing on the second day of March next, to succeed the member whose term has then expired. Each appointment shall be submitted for confirmation or rejection by the senate during the session being held at the time of the appointment, or, if none is then being held, at the next session of the senate. Unless rejected at the session to which the appointment is first submitted the appointment shall be deemed confirmed. Vacancies occurring in the membership of the advisory council shall be filled by the governor for the remainder of the term of the vacant membership, subject to the subsequent confirmation or rejection by the senate. Nothing herein shall be construed to disqualify a member for reappointment.

The members of the said advisory council shall meet at the earliest convenient date in the month of March of each year at the office of the commission at the state capitol at the call of the chairman of the commission. At its first meeting the advisory council shall elect a chairman from its membership who shall serve until the next annual meeting of the council and the council may at any time elect such other officers from its membership as it shall deem necessary. The commission shall assign one of its employees to act as secretary of the council without additional compensation therefor, and shall supply the council with such stationery, supplies and facilities as may be reasonably necessary. Meetings of the advisory council may be held at any time or place and upon call of the commission or of the chairman of the council upon notice of the time, place and purpose of the meeting given by mail, telegraph or telephone, to each of the members of the council not less than two days prior to the date fixed for such meeting. A majority of the members present at any meeting shall constitute a quorum for the transaction of business.

It shall be the duty and function of the advisory council to make suggestions to and to advise the commission with respect to the policies, rules or regulations of the commission, the conduct of its business and

of its employees, and the needs and wishes of the public with respect to any of the functions of the commission or the institutions under its control. It shall be the duty of the commission to receive and consider the suggestions and advice of the advisory council but nothing herein contained shall be construed to require the commission to adopt the same or to conform its practices thereto. (Sec. 7.)

82C–3–8. Department to Promote Employment.

It shall be the primary responsibility of the department of publicity and industrial development to build Utah industries, to provide employment for Utah citizens, and to raise the earning level of Utah residents. (Sec. 8.)

82C–3–9. Id. To Coöperate with Local Authorities.

The department is authorized and empowered to coöperate with any state department, board, commission or officer or any city, town, county, or other local official or board or with any other public, semi-public, or private agency in promoting construction and road building projects in any parts of the state and in providing camping grounds and facilities in scenic centers of the state. (Sec. 9.)

82C–3–10. Id. Powers and Functions.

The department is authorized and empowered:

(1) To investigate, study and undertake ways and means of promoting and encouraging the prosperous development and protecting the legitimate interests and welfare of Utah business, industry and commerce.

(2) To investigate, study and undertake ways and means of expanding markets and promoting and developing new markets for Utah products.

(3) To promote and encourage the location and development of new business, industries and commerce within the state.

(4) To investigate and study conditions affecting Utah business, industry and commerce and to collect and disseminate information and engage in technical studies, scientific investigations and statistical research and educational activities necessary or useful for the proper execution of its duties in promoting and developing Utah business, industry and commerce.

(5) To make to the legislature from time to time recommendations for the remedy or improvement of any conditions and the elimination of any restriction or burden imposed by law or otherwise existing which adversely affect or retard the development or expansion of business, industry or commerce.

(6) To initiate, promote and conduct or cause to be conducted research designed to further new and more extensive uses and consumption of Utah's natural and other resources and their by-products; and for such purposes with the approval of the governor to enter into contracts and agreements with research laboratories maintained by educational or endowed institutions within or outside the state; *provided* said contracts and agreements, if any, shall not involve the state of Utah in any pledge of funds or expenditure of money in excess

of the unexpended appropriations made for the purposes covered in this act at the immediately next preceding session of the legislature.

(7) To investigate or study conditions of unemployment and to recommend specific remedies for the alleviation of such conditions and aid in restoring employment in communities of the state affected in order that the burden of public relief may be lessened.

(8) To encourage and develop commerce with other states and foreign countries and to devise ways and means of removing trade barriers hampering the free flow of commerce between this and other states.

(9) To coöperate with commissions of other states engaged in formulating and promoting the adoption of inter-state compacts and agreements helpful to the business, industry and commerce of this state.

(Sec. 10.)

Cross-references.
Geological and mineralogical survey, Title 34; powers and duties respecting immigration, labor and statistics, 42–3.

82C–3–11. Id. Plan and Conduct Program of Information—Publicity.

The department, in order to promote and develop business, industry and commerce in the state is authorized and empowered to provide employment for the citizens of the state, shall, with the approval of the governor, have the power and its duty shall be to plan and conduct a program of information, advertising and publicity relating to the business, industrial, commercial, agricultural, educational, recreational, scenic, historic, highway and residential facilities, advantages and attractions of the state or any part thereof. The department shall encourage and so far as it is practicable to do so, coördinate the activities of persons, firms, associations, corporations, and other organizations engaged in publicizing and promoting such facilities, advantages and attractions of the state or of any part thereof. (Sec. 11.)

82C–3–12. Id. Coöperation with Other Officials—Method of.

The department is authorized and empowered to coöperate with federal, state, town, county or other officials, private citizens or industries in building a program for the development of the natural resources of Utah by:

(1) Determining which of such resources can be profitably exploited.

(2) Discovering and putting into operation methods of stimulating the expansion of already existing industries.

(3) Providing financial assistance for the building and development of private industry and the stimulation of private enterprise in whatever manner the legislature shall provide.

(4) Coöperating with agriculture, livestock raising, mining, industry and other divisions of the state's activities with the view of bringing prosperity to both them and to labor.

(5) Inducing outside capital in making investments in Utah.

(Sec. 12.)

82C–3–13. Id. Participation in Federal Programs.

The department is authorized and empowered by and with the approval of the governor to accept in behalf of this state and to bind this

state by such acceptance or by contract any executive or legislative provisions heretofore and hereafter promulgated or enacted by the federal government whereby this state is invited, permitted, or authorized to participate in the distribution, disbursement or administration of any fund, property or service offered or contributed in whole or in part by the federal government for any of the purposes or functions of the department. The department is authorized and empowered to use any such fund, property or service furnished by the federal government for the purposes enumerated in or contemplated by such executive or legislative provision. (Sec. 13.)

82C-3-14. Water Resources Development Division—Created—Purposes.

There is created a division of the department of publicity and industrial development to be known as the water resources development division, of which one of the commissioners of the department shall be the director, and the purposes of this division shall be to investigate all projects for the development of the water resources of the state, to devise plans for all projects involving the development of the water resources of this state and to recommend such projects as are deemed advantageous to the development of such water resources to the department, which shall have authority to proceed with such projects, either independently or in coöperation with any other state or with any federal agency; *provided, however*, that any engineering required in connection with such projects shall be under the supervision and direction of the engineering department of the state. (Sec. 14.)

82C-3-15. Water Resources Advisory Council—Created—Membership—Terms.

In order to ascertain what projects are most desirable for the development of the water resources of the state and to aid this department and this division in the performance of any of their duties, there is created a water resources development advisory council consisting of seven individuals, tax payers and electors of the state, no more than four of whom shall be members of the same political party. The members of the advisory council shall be appointed by the governor by and with the consent of the senate. They shall serve without pay or compensation but shall he paid their actual and necessary expenses incurred in attending meetings of the council. Each member of the advisory council shall be chosen with due regard to his intelligence and ability and his knowledge and interest in the functions and duties of the department or in any of the institutions under its supervision or control. The terms of office of each member of the council shall be seven years and until his successor shall have been appointed and qualified; *provided, however*, that during the year 1941 the governor shall appoint one member for the term expiring March 1, 1942, one for a term expiring March 1, 1943, one for a term expiring March 1, 1944, one for a term expiring March 1, 1945, one for a term expiring March 1, 1946, one for a term expiring March 1, 1947, and one for a term expiring March 1, 1948. In February, 1942, and in February of each year there-

after the governor shall appoint a member for the full term of seven years commencing on the second day of March next, to succeed the member whose term has been expired. Each appointment shall be submitted for confirmation or rejection by the senate during the session being held at the time of the appointment, or, if none is then being held, at the next session of the senate. Unless rejected at the session to which the appointment is first submitted, the appointment shall be deemed confirmed. Vacancies occurring in the membership of the advisory council shall be filled by the governor for the remainder of the term of the vacant membership, subject to the subsequent confirmation or rejection by the senate. Nothing herein shall be construed to disqualify a member for reappointment. (Sec. 15.)

82C–3–16. Id. Meetings—Quorum.

The members of the said water resources advisory council shall meet at the earliest convenient date in the month of March of each year at the office of the commission at the state capitol at the call of the chairman of the commission. At its first meeting the advisory council shall elect a chairman from its membership who shall serve until the next annual meeting of the council and the council may at any time elect such other officers from its membership as it shall deem necessary. The commission shall assign one of its employees to act as secretary of the council without additional compensation therefor, and shall supply the council with such stationery, supplies and facilities as may be reasonably necessary. Meetings of the advisory council may be held at any time or place and upon call of the commission or of the chairman of the council upon notice of the time, place and purpose of the meeting given by mail, telegraph or telephone, to each of the members of the council not less than two days prior to the date fixed for such meeting. A majority of the members present at any meeting shall constitute a quorum for the transaction of business. (Sec. 16.)

82C–3–17. Id. To Advise Commission.

It shall be the duty and function of the water resources advisory council to make suggestions to and to advise the commission with respect to the policies, rules or regulations of the water resources development division, the conduct of its business and of its employees, and the needs and wishes of the public with respect to any of the functions of the water resources development division. It shall be the duty of the commission to receive and consider the suggestions and advice of the advisory council but nothing herein contained shall be construed to require the commission to adopt the same or to conform its practices thereto. (Sec. 17.)

82C–3–18. Department May Erect Experimental Industrial Plants—May Sell.

The department may erect industrial plants for experimental purposes and for the purpose of utilizing Utah resources and of stimulating industrial development and shall operate such plants through their experimental stages and with the approval of the governor may sell the same to Utah coöperatives. (Sec. 18.)

82C–3–19. Id. Coal Processing Industry—Elimination of Smoke.

The department may aid in starting a coal processing industry in Utah and shall initiate and support movements in coöperation with any public agency of the state to eliminate in all areas of the state excessive smoke wherever the same is detrimental to the health and happiness of the inhabitants of the state or a hindrance to commercial and industrial development of the state. (Sec. 19.)

82C–3–20. Id. Direct Self Help Associations.

The department shall direct the activities of self-help associations as the legislature may provide. (Sec. 20.)

82C–3–21. Appropriations.

There is appropriated to the department from funds not otherwise appropriated the sum of $25,000 or so much thereof as may be necessary, said sum to be used by the commission with the approval of the governor for the organization and the accomplishment of the objects enumerated herein. (Sec. 21.)

82C–3–22. Partial Invalidity—Savings Clause.

If any clause, sentence, paragraph or part of this act or the application thereof to any condition or circumstance shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this act nor affect the application thereof to other conditions or circumstances, but such judgment shall be confined in its operation to the clause, sentence, paragraph or part thereof and to the conditions and circumstances directly involved in the controversy in which such judgment shall have been rendered. (Sec. 22.)

82C–3–23. Chapter Repealed.

Chapter 6, Title 100, Revised Statutes of Utah, 1933, as amended by Chapter 132, Laws of Utah, 1937, is repealed. (Sec. 23.)

82C–3–24. Effective Date.

This act shall take effect on July 1, 1941, at 12:01 A. M. or upon the proclamation of the governor prior to that date. (Sec. 24.)

CHAPTER 4

CONSERVATION AND RESEARCH FOUNDATION

L. 1937, ch. 157; eff. May 11.

82C–4–1. Foundation Created for Scientific Research of Natural Resources.
82C–4–2. Membership of Foundation—Expenses — Records — Bonds of Officers—State to Hold Prior Lien on Assets.
82C–4–3. Name—State Agency.
82C–4–4. Appropriation for Treatment of Utah Coals — Profits Conveyed to State—Governor and Auditor Members of Board.
82C–4–5. State Agencies to Provide Facilities for Assistance.

82C-4-6. Foundation as State Agency Empowered to Receive Grants of Funds.
82C-4-7. "Nonprofit" Defined.
82C-4-8. Appropriation or Unexpended Balance to Revert to General Fund, When.
82C-4-9. Information Secret — Used Exclusively for Benefit of State—Exceptions.

L. 1937, ch. 157; eff. May 11.

AN ACT to encourage the conservation and most efficient utilization of the natural resources of the state of Utah for the greatest benefit to all of the present and future citizens of the state by providing means for the scientific investigation and practical demonstration of processes and methods for such conservation and utilization of said resources; providing that a scientific, nonpolitical, nonprofit foundation, or corporation organized under the laws of the state of Utah may be made an agency of the state in carrying out the purposes of this act; providing that state funds for carrying out the purposes of this act may be made available to such foundation or corporation; setting forth the terms and conditions under which said funds may be made available to such foundation or corporation for the purposes of this act; providing the sum of $25,000 for the scientific investigation and practical demonstration of methods of treating Utah coals for the production of a substantially smokeless fuel; fuel gas, motor fuels, oils and other valuable by-products; delegating to the Utah conservation and research foundation the authority to expend such funds as an agency of the state for the purpose specified and setting forth the terms and conditions of such expenditures; and providing that state agencies may provide facilities for assistance in carrying out of research work under said grant.

Be it enacted by the Legislature of the State of Utah:

82C-4-1. Foundation Created for Scientific Research of Natural Resources.

That a scientific, nonpolitical, nonprofit foundation or corporation shall be made an agency of the state of Utah for carrying out scientific research and practical demonstration of processes and methods for the conservation and efficient utilization of the natural resources of the state of Utah and state funds shall be granted for such purposes.

(Sec. 1.)

Cross-references.
Geological and mineralogical survey, Title 34.

82C-4-2. Membership of Foundation—Expenses—Records—Bonds of Officers—State to Hold Prior Lien on Assets.

(1) That such foundation or corporation shall be composed only of citizens of the state of Utah.

(2) That such foundation or corporation shall be organized under the laws of the state of Utah.

(3) That such foundation or corporation shall be organized as a scientific, nonpolitical, nonprofit research and conservation organization open to all citizens making affirmation that their object in joining

is and will continue to be, while they remain members thereof, the conservation and most efficient utilization of the natural resources of the state for the equal welfare and benefit of all the citizens of the state.

(4) No officer or trustee of said foundation shall receive any salary or remuneration for services as such officer or trustee other than necessary expenses incurred in carrying out their duties as officers, such expenditures to be approved by the state board of examiners.

(5) An exact and complete record of all expenditures of funds appropriated by the state shall be kept and reported to the state board of examiners for each quarterly period, and that the books and records of said corporation shall be subject to an audit by the state auditor whenever he shall deem such an audit advisable.

(6) The officers and trustees of such foundation or corporation shall furnish individual surety bonds to the total sum of $2500, to protect the state against speculation or irregular use of the funds appropriated, the premium for which shall be paid out of the foundation funds.

(7) The state of Utah shall have a prior lien upon all of the assets of the foundation or corporation for the payment of the funds appropriated. (Sec. 2.)

82C-4-3. Name—State Agency.

The foundation shall be known as the Utah Conservation and Research Foundation and is empowered to act as an agency of the state under the terms of this act. (Sec. 3.)

82C-4-4. Appropriation for Treatment of Utah Coals—Profits Conveyed to State—Governor and Auditor Members of Board.

There is granted to the Utah conservation and research foundation out of the money in the general fund of the state treasury the sum of $25,000 to be used for the following purposes:

(1) To cover the salaries paid and expenses incurred in carrying out the examination of technical literature and investigation of plants and processes and the conducting of small scale tests to determine the processes most suitable for the treatment of Utah coals by low temperature carbonization for the production of a semicoke or char, fuel gas, motor fuels, oils, or other by-products, and for making a complete and detailed report to the governor of the state of the results of all work done and all data and information secured in conducting the researches provided for under this grant.

(2) The board of trustees of the Utah conservation and research foundation shall have the authority to hire the necessary technical and clerical help to carry out such research work and large scale testing and such help shall be under the control and direction of said board of trustees provided that no such employee shall be closely related by birth or marriage to any of the members of the board of trustees of said foundation, and no such technician or other help shall receive a salary greater than $400 per month.

(3) The governor and the auditor of the state of Utah shall be ex officio members of the board of trustees of the Utah conservation and

research foundation and of its committee having in charge the expenditure of funds granted under this act during the life of this grant.

(4) All net income or profits of the Utah conservation and research foundation from rents, royalties or other income secured in connection with the processing of Utah coal shall be conveyed to the state by the Utah conservation and research foundation in the form of grants to the educational funds of the state or to state educational institutions except as herein provided, after the state shall have been reimbursed for the funds appropriated herein.

(5) That all such researches and practical demonstrations carried out under this grant shall be conducted by said foundation as trustees for the people of the state and for the equal benefit of all the people of the state and the results of all researches and practical investigations shall be made available to all the people and communities of the state.

(Sec. 4.)

82C-4-5. State Agencies to Provide Facilities for Assistance.

(1) The Utah conservation and research foundation may have access to and the use of the facilities of the libraries and laboratories of the university of Utah, Utah state agricultural college, and Utah engineering experiment station for use in carrying out said research work under such regulations as govern the present use of said facilities, under coöperative agreement with the consent of the board of regents or directors of said state institutions, but such work shall be under the sole direction of the authorized committee of the board of trustees of the Utah conservation and research foundation, and no expenses for materials consumed in such research work shall be borne by said state institutions, except that office and laboratory space and the use of state owned equipment and facilities supplied under such agreement shall be provided free of cost; *and provided*, that equipment installed and at such institutions by the Utah conservation and research foundation shall become the property of the state institution where so installed when the said foundation has completed its work therewith; and the president of the said state institution where such work is conducted shall be an ex officio member of the committee of the Utah conservation and research foundation having in charge such work and during the period of such work.

(2) The attorney-general shall render such legal advice in connection with the expenditure of the appropriated fund as the said foundation may require. (Sec. 5.)

82C-4-6. Foundation as State Agency Empowered to Receive Grants of Funds.

The Utah conservation and research foundation is hereby empowered to act as an agency of the state to receive grants of funds from the government of the United States or other sources for the purposes of this act and for the specific purpose of conducting scientific research and practical demonstrations of processes for the treatment of Utah coals by low temperature carbonization for the production of a substantially smokeless fuel, fuel gas, motor fuels, oils and other

by-products, said researches and practical demonstrations to be conducted by said foundation as trustee for the people of the state and for the equal benefit of all the people of the state. (Sec. 6.)

82C–4–7. "Nonprofit" Defined.

The term "nonprofit" as used herein shall be interpreted to mean that no part of the net earnings of said foundation shall enure to the benefit of any member of said corporation, but said term "nonprofit" shall not be interpreted in any way to prevent any operations of said corporations designed to secure profit of said foundation. (Sec. 7.)

82C–4–8. Appropriation or Unexpended Balance to Revert to General Fund, When.

The appropriation granted under this act shall remain in effect until May 1, 1939, but not thereafter unless by specific act of the legislature, and at the close of such period all funds remaining unexpended shall revert to the general fund of the state. (Sec. 8.)

82C–4–9. Information Secret—Used Exclusively for Benefit of State—Exceptions.

All information obtained and all formulae, processes and methods of a valuable nature discovered, under the provisions of this act, shall be held secret and protected by the agency herein provided for, to be used exclusively for the benefit of this state and its citizens; *provided, however,* that the information and findings of the foundation may be made available, at the discretion of the foundation, to institutions of higher learning, libraries, scientific journals and scientists, and to institutions that rendered substantial assistance in obtaining the aforesaid information and findings. (Sec. 9.)

History.
As amended by L. 41, 2nd Spec. Sess., ch. 32, eff. Aug. 12, adding proviso to text.

CHAPTER 5

STATE COUNCIL OF DEFENSE

L. 1941, 2nd Spec. Sess., ch. 33; eff. June 13.

82C–5–1. Title of Act.
82C–5–2. Governor Authorized to Create, Dissolve or Suspend Council.
82C–5–3. Council — Number — Qualifications — Employees — Compensation —Vacancies.
82C–5–4. Powers and Duties of Council.
82C–5–5. Id. Coöperation with Existing Agencies.
82C–5–6. Local Councils of Defense—Appointment — Powers and Duties — Termination.
82C–5–7. District Councils—Duties.
82C–5–8. Appropriation for Act.
82C–5–9. Partial Invalidity of Act—Saving Clause.
82C–5–10. Effective Date.

L. 1941, 2nd Spec. Sess., ch. 33; eff. June 13.

AN ACT relating to national and state defense, providing for the establishment of a state council of defense and of local and district councils of defense, and prescribing the powers and duties thereof, and making an appropriation.

Be it enacted by the Legislature of the State of Utah:

82C-5-1. Title of Act.

This act may be cited as the "State Council of Defense Act."

(Sec. 1.)

82C-5-2. Governor Authorized to Create, Dissolve or Suspend Council.

The governor is authorized and empowered in time of emergency or public need in the nation or the state to create by proclamation a state council of defense, hereinafter designated as the "council," for the general purpose of assisting in the coördination of the state and local activities relating to national and state defense. Whenever he deems it expedient, the governor may, by proclamation, dissolve or suspend such council or reëstablish it after any such dissolution or suspension. (Sec. 2.)

Comparable provisions.

Cal. Milit. and Vet. Code, § 1500, added by Laws of 1941 (enactment to provide state and local defense councils); § 1510 (creating state council of defense); § 1560 (authorizing establishment of local defense councils).

Iowa 1941 Session Laws, Ch. 75 (authorizing governor to appoint commission, not to exceed 15 members, to be known as Iowa industrial and defense commission).

Mont. 1941 Session Laws, Chs. 128 and 142 (creating Montana preparedness and advisory commission, consisting of 11 members).

A. L. R. notes.

Selective Training and Service Act as interference with state's rights, 129 A. L. R. 1181; soldiers' and sailors' civil relief acts, 130 A. L. R. 774; validity and construction of war legislation in nature of moratory statute, 137 A. L. R. 1380.

82C-5-3. Council — Number — Qualifications — Employees — Compensation—Vacancies.

(a) The council shall consist of seven members appointed by and holding office during the pleasure of the governor. The governor shall serve as chairman of the council. He shall designate one of the members of the council as vice-chairman. Appointment of members shall be made without reference to political affiliation and with reference to their special knowledge of industry, agriculture, consumer protection, labor, education, health, welfare or other subjects relating to national or state defense.

(b) The council may employ an executive director and such technical, clerical, stenographic and other personnel and fix their compensation, and may make such expenditures within the appropriation therefor as are necessary to carry out the purposes of this act.

(c) The members of the council shall serve without compensation, but shall be reimbursed for their actual and necessary traveling and other expenses incurred in connection with attendance upon meetings of the council.

(d) The governor may at his discretion terminate the individual appointment to the council and fill vacancies.

(e) The council shall be provided with appropriate office space, furniture, equipment, supplies, stationery and printing in the same manner as other state agencies are supplied. (Sec. 3.)

82C–5–4. Powers and Duties of Council.

The council shall have the following powers and duties:

(a) To adopt, amend, and repeal rules, regulations, and by-laws governing its procedure and activities.

(b) To coöperate with the advisory commission to the council of national defense through its division of state and local coöperation or with any similar federal agencies hereafter created, and with any departments or other federal agencies engaged in defense activities.

(c) To coöperate with similar councils of defense in other states.

(d) To coöperate with local defense councils.

(e) To supervise and direct investigations, and report to the governor with recommendations for legislation or other appropriate action as it may deem necessary, with respect to the following matters insofar as they are or may be related to defense:

(1) Industrial materials and facilities.

(2) Production and manufacturing facilities.

(3) Agriculture, food supply and land use.

(4) Transportation facilities.

(5) Labor supply and training, labor relations and human resources, professions, trades and skills.

(6) Consumers and consumer protection.

(7) Housing and related facilities.

(8) Health, hospitals, and sanitation facilities.

(9) Welfare.

(10) Educational facilities.

(11) Recreational areas and facilities.

(12) Finance.

(13) Civil liberties, including but without limitation, the protection thereof, maintenance of law and order and measures to guard against sabotage and subversive activities.

(14) Civil defense, including police mobilization, coördination for fire protection, and disaster relief.

(15) Any other type of activity directly or indirectly related to defense.

(f) To create committees, either within or without its membership, to aid it in the discharge of its powers and duties.

(g) To require and direct the coöperation and assistance of state and local governmental agencies and officials.

(h) To make full investigation as to all questions directly or indirectly relating to the powers or duties vested in it by this act, or by any other law.

(i) To do all acts and things, not inconsistent with law, for the furtherance of defense activities. (Sec. 4.)

82C-5-5. Id. Coöperation with Existing Agencies.

In order to avoid duplication of services and facilities the council and the local and district councils of defense established under the authority of this act are:

(a) Directed to utilize the services and facilities of existing officers, offices, departments, commissions, boards, bureaus, institutions and other agencies of the state and of the political subdivisions thereof, and

(b) All such officers and agencies shall coöperate with and extend their services and facilities to the council and to the local and district councils of defense as they shall request. (Sec. 5.)

82C-5-6. Local Councils of Defense—Appointment—Powers and Duties—Termination.

Each political subdivision of the state may establish a local council of defense by the proclamation of the executive officer or governing body thereof. Local councils of defense, if and when established, shall coöperate with and assist the council, and shall perform such services as may be requested by it. Local councils may act jointly with other such councils. Insofar as applicable, local councils shall have the same power and duties within their respective jurisdictions as are vested in the council. Such councils shall terminate or cease activity whenever the council is dissolved or suspended. (Sec. 6.)

82C-5-7. District Councils—Duties.

In coöperation with the local officials to establish district councils of defense in critical areas of the state of especial importance in defense activities. Such district councils shall act as coördinating agencies under the supervision and direction of the council, and in the coöperation with local government agencies. (Sec. 7.)

82C-5-8. Appropriation for Act.

There is appropriated out of any money in the state treasury not otherwise appropriated the sum of $125,000, or so much thereof as may be necessary for the council to carry out the purposes of this act. (Sec. 8.)

82C-5-9. Partial Invalidity of Act—Saving Clause.

If any provision of this act, or the application of such provision to any person or circumstance is held invalid, the remainder of the act and the application of such provision to other persons or circumstances shall not be affected thereby. (Sec. 9.)

82C-5-10. Effective Date.

This act shall take effect upon approval.

Approved June 13, 1941. (Sec. 10.)

CHAPTER 6

STATE OFFICE BUILDING

L. 1937, ch. 152; eff. May 11.

82C-6-1. Office Building — Outstanding Bond Issue.
82C-6-2. Appropriation.
82C-6-3. Bond Issue to Cover Indebtedness and Remodeling.
82C-6-4. Loan Commissioners to Provide Bonds.
82C-6-5. Payment of Bonds.
82C-6-6. Bonds Not Taxable.
82C-6-7. Investment of Sinking Fund.

L. 1937, ch. 152; eff. May 11.

AN ACT empowering the secretary of state to accept as a gift on behalf of the state from the Salt Lake City Chamber of Commerce and commercial club the property and improvements thereon located at 32 Exchange Place, Salt Lake City, Utah, to be used as a state office building; providing for an appropriation to defray expenses, and providing for authorization of bond issue to cover present encumbrances and to make improvements.

Be it enacted by the Legislature of the State of Utah:

82C-6-1. Office Building—Outstanding Bond Issue.

The secretary of state upon recommendation of the board of examiners is authorized to accept as a gift, on behalf of the state, from the Salt Lake City chamber of commerce and commercial club, the property and improvements thereon located at 32 Exchange Place, Salt Lake City, Utah, to be used as a state office building, subject to an outstanding bond issue of $90,000. (Sec. 1.)

82C-6-2. Appropriation.

There is appropriated the sum of $100 or as much thereof as may be necessary to defray the legal and other necessary expenses incidental to bringing the abstract of title up to date, recording entries of conveyance, and examination of title. (Sec. 2.)

82C-6-3. Bond Issue to Cover Indebtedness and Remodeling.

The state board of loan commissioners is authorized to issue bonds which shall bear interest at a rate to be fixed by said board not exceeding four per cent per annum, interest payable semiannually, and shall be serial bonds which shall run not longer than twenty years from the date of their issue in the amount of $125,000 to cover the existing encumbrance now on the above described property and to provide a fund for the remodeling and rehabilitation of the above described premises. Said bonds shall be signed by the governor and attested by the secretary of state and shall have the great seal of the state affixed and shall be countersigned by the state treasurer and shall be registered by the state auditor in a book to be kept by him for that purpose. Coupons attached to said bonds shall be signed and said bonds may be registered under such terms, conditions and regulations as may be prescribed by the state board of loan commissioners.

The full faith and credit of the state of Utah are pledged for the payment of the principal of said bonds when due and for the payment of the interest accruing thereon as the same falls due. (Sec. 3.)

82C-6-4. Loan Commissioners to Provide Bonds.

The state board of loan commissioners is authorized to provide the necessary bonds to carry out the provisions of this act. All necessary expenses incurred in the preparation and in the negotiation of said bonds shall be paid out of the general fund of the state of Utah. (Sec. 4.)

82C-6-5. Payment of Bonds.

To provide for the payment of interest on and the principal of such bonds as the same become due, such sum or sums as may be necessary are appropriated and set aside from the general funds of the state, or from such other funds as may be provided by law to pay said bonds and the interest thereon. (Sec. 5.)

82C-6-6. Bonds Not Taxable.

Bonds issued under the provisions of this act shall not be taxable for any purpose within this state. (Sec. 6.)

82C-6-7. Investment of Sinking Fund.

The state board of loan commissioners is authorized and directed to invest any sinking fund accumulated for the payment of such bonds in bonds of the state of Utah, of the United States, or any of its agencies, or in county bonds, municipal bonds or school district bonds issued under the laws of the state of Utah. (Sec. 7.)

CHAPTER 7

INTERSTATE COÖPERATION

L. 1939, ch. 130; eff. Feb. 24.

82C-7-1. Senate Committee.
82C-7-2. House Committee.
82C-7-3. Governor's Committee.
82C-7-4. Utah Coöperation Commission — Personnel — Officers.
82C-7-5. Terms of Office — Utah Council of American Legislator's Association.
82C-7-6. Function of Commission.
82C-7-7. Eligibility of Members of Delegations and Committees—Advisory Boards.
82C-7-8. Commission to Report—Compensation — Secretary — May Participate in Central Secretariats.
82C-7-9. Informal Designations.
82C-7-10. Council Declared Joint Governmental Agency.
82C-7-11. Secretary of State to Report Text of Act.
82C-7-12. Partial Invalidity — Saving Clause.
82C-7-13. Effective Date.

L. 1939, ch. 130; eff. Feb. 24.

AN ACT to facilitate the coöperation of the state of Utah with other units of government and to establish an unpaid commission for that purpose.

Be it enacted by the Legislature of the State of Utah:

82C-7-1. Senate Committee.

There is established a standing committee of the senate of this state to be officially known as The Senate Committee on Interstate Coöperation to consist of five senators. The members and the chairman of this committee shall be designated in the same manner as is customary in the case of the members and chairmen of other standing committees of the senate. In addition to the regular members the president of the senate shall be ex officio honorary nonvoting member of this committee. (Sec. 1.)

Comparable provisions.
Cal. Polit. Code, § 332, added by Laws of 1939 (creating California commission on interstate coöperation); § 332.1 (creating senate committee on interstate coöperation).

A. L. R. notes.
Constitutionality, construction, and application of compacts and statutes involving coöperation between states, 134 A. L. R. 1411.

82C-7-2. House Committee.

There is established a similar standing committee of the house of representatives of this state to be officially known as The House Committee on Interstate Coöperation to consist of five members of the house of representatives. The members and the chairman of this committee shall be designated in the same manner as is customary in the case of the members and chairman of other standing committees of the house of representatives. In addition to the regular members the speaker of the house of representatives shall be ex officio honorary nonvoting member of this committee. (Sec. 2.)

Comparable provisions.
Cal. Polit. Code, § 332.2 (creating assembly committee on interstate coöperation).

82C-7-3. Governor's Committee.

There is established a committee of administrative officials and employees of this state to be officially known as The Governor's Committee on Interstate Coöperation to consist of five members. Its members shall be: the budget director or the corresponding official of this state, ex officio; the attorney-general, ex officio; the chief of the staff of the state planning board or the corresponding official of this state, ex officio; and two other administrative officials or employees to be designated by the governor. If there is uncertainty as to the quantity of any of the ex officio members of this committee the governor shall determine the question and his determination and designation shall be conclusive. The governor shall appoint one of the five members of this committee as its chairman. In addition to the regular members the governor shall be ex officio honorary nonvoting member of this committee. (Sec. 3.)

82C-7-4. Utah Coöperation Commission—Personnel—Officers.

There is established the Utah commission on interstate coöperation. This commission shall be composed of fifteen members:

(1) The five members of the senate committee on interstate coöperation.

(2) The five members of the house committee on interstate coöperation.

(3) The five members of the governor's committee on interstate coöperation.

The governor, the president of the senate and the speaker of the house of representatives shall be ex officio honorary nonvoting members of this commission. The chairman of the governor's committee on interstate coöperation shall be ex officio chairman of this commission. The chairman of the senate committee on interstate coöperation shall be ex officio first vice chairman of the commission and the chairman of the house committee shall be ex officio second vice chairman of the commission. (Sec. 4.)

Comparable provisions.

Cal. Polit. Code, § 332.3 (California commission on interstate coöperation consists of 15 members; namely, the 5 members of the senate committee, the 5 members of assembly committee, 5 officials of the state appointed by governor, who designates one appointee as chairman; governor is ex officio an honorary nonvoting member).

82C-7-5. Terms of Office—Utah Council of American Legislator's Association.

The said standing committee of the senate and the said standing committee of the house of representatives shall function during the regular sessions of the legislature and also during the interim periods between such sessions. The members shall serve until their successors are designated and they shall respectively constitute for this state the senate council and house council of the American legislators' association. The incumbency of each administrative member of this commission shall extend until the first day of February next following his appointment and thereafter until his successor is appointed. (Sec. 5.)

82C-7-6. Function of Commission.

It shall be the function of this commission:

(1) To carry forward the participation of this state as a member of the council of state governments.

(2) To encourage and assist the legislative, executive, administrative and judicial officials and employees of this state to develop and maintain friendly contact by correspondence, by conference, and otherwise, with officials and employees of the other states, of the federal government and of local units of government.

(3) To endeavor to advance coöperation between this state and other units of government whenever it seems advisable to do so by formulating proposals for and by facilitating

(a) The adoption of compacts

(b) The enactment of uniform or reciprocal statutes

(c) The adoption of uniform or reciprocal administrative rules and regulations

(d) The informal coöperation of governmental offices with one another

(e) The personal coöperation of governmental officials and employees with one another individually

(f) The interchange and clearance of research and information

(g) Any other suitable process.

(4) To do all such acts as will in the opinion of this commission enable this state to assist in forming a more perfect union among the various governments in the United States and in developing the council of state governments for that purpose. (Sec. 6.)

A. L. R. notes.
Constitutionality, construction, and application of compacts and statutes involving coöperation between states, 134 A. L. R. 1411.

82C-7-7. Eligibility of Members of Delegations and Committees—Advisory Boards.

The commission shall establish such delegations and committees as it deems advisable in order that they may confer and formulate proposals concerning effective means to secure intergovernmental harmony and may perform other functions for the commission in obedience to its decisions. Subject to the approval of the commission the member or members of each such delegation or committee shall be appointed by the chairman of the commission. State officials or employees who are not members of the commission on interstate coöperation may be appointed as members of any such delegation or committee but private citizens holding no governmental position in this state shall not be eligible. The commission may provide such other rules as it considers appropriate concerning the membership and the functioning of any such delegation or committee. The commission may provide for advisory boards for itself and for its various delegations and committees and may authorize private citizens to serve on such boards. (Sec. 7.)

Comparable provisions.
Cal. Polit. Code, § 332.4 (similar).

82C-7-8. Commission to Report—Compensation—Secretary—May Participate in Central Secretariats.

The commission shall report to the governor and to the legislature within fifteen days after the convening of each regular legislative session and at such other times as it deems appropriate. Its members and the members of all delegations and committees which it establishes shall serve without compensation for such service. The secretary of state shall be the secretary of the commission. It may by contributions to the council of state governments participate with other states in maintaining the said councils' district and central secretariats and its other governmental services. (Sec. 8.)

Comparable provisions.
Cal. Polit. Code, § 332.5 (similar; members of commission and members of all committees serve without compensation, but may be paid necessary expenses).

82C-7-9. Informal Designations.

The committees and the commission established by this act shall be informally known as, the senate coöperation committee, the house coöperation committee, the governor's coöperation committee and the Utah coöperation commission. (Sec. 9.)

82C-7-10. Council Declared Joint Governmental Agency.

The council of state governments is declared to be a joint governmental agency of this state and of the other states which coöperate through it. (Sec. 10.)

82C-7-11. Secretary of State to Report Text of Act.

The secretary of state shall forthwith communicate the text of this measure to the governor, to the senate, and to the house of representatives of each of the other states of the Union and shall advise each legislature which has not already done so that it is invited to enact a law similar to this measure, thus establishing a similar commission and thus joining with this state in the common cause of reducing the burdens which are imposed upon the citizens of every state by governmental confusion, competition, and conflict. (Sec. 11.)

82C-7-12. Partial Invalidity—Saving Clause.

If any clause or other portion of this act is held to be invalid that decision shall not affect the validity of the remaining portions of this act. The legislature declares that all such remaining portions of this act are severable and that it would have enacted such remaining portions if the invalid portions had not been included in this act. (Sec. 12.)

82C-7-13. Effective Date.

This act shall take effect upon approval.
Approved February 24, 1939. (Sec. 13.)

CHAPTER 8

CENTENNIAL OBSERVANCE

L. 1939, ch. 132; eff. July 24.

82C-8-1. Utah Centennial Commission—Number of Members—Appointment — Purpose—Powers and Duties.
82C-8-2. Centennial Observance — Exposition — Powers and Duties of Commission.
82C-8-3. Opening and Closing Dates of Exposition.
82C-8-4. Reports of Commission.
82C-8-5. Property to Belong to State.
82C-8-6. Persons Responsible for Funds—Bonds.
82C-8-7. Appropriation.
82C-8-8. Effective Date.

L. 1939, ch. 132; eff. July 24.

AN ACT providing for the Utah centennial observance to be held in the year 1947, creating a commission for such purpose, prescribing its powers and duties, and making an appropriation therefor.

Be it enacted by the Legislature of the State of Utah:

82C-8-1. Utah Centennial Commission—Number of Members—Appointment—Purpose—Powers and Duties.

In order to commemorate the advent of the pioneers into Salt Lake valley, to portray fittingly the natural resources and scenic wonders

of Utah, the prehistoric culture of the west, the development of irrigation, farming, mining, forestry, transportation, culture and the arts, a commission is created within the department of publicity and industrial development, consisting of 15 members to be appointed by the governor by and with the consent of the senate. Nine members shall constitute a quorum for the transaction of business. The members shall be selected without regard to political or other affiliations and shall serve without compensation but shall be paid their actual and necessary expenses. The members so appointed shall be named previous to and shall take office upon the effective date of this act and shall hold office for a term of 10 years but shall be subject to removal by the governor at any time with or without cause. One of the members so appointed shall be designated by the governor as chairman of the commission. Such organization shall be known as the Utah centennial commission and shall be a body corporate to continue until the completion of the duties hereinafter conferred upon it; it may adopt and use a corporate seal, with the approval of the governor it may contract and be contracted with, take, hold and dispose of property, real and personal, requisite or appropriate for its uses. The commission may with the consent of the governor be sued and may institute or defend proceedings in any court of law or otherwise in the name of "the centennial commission of Utah" as fully and effectually to all intents and purposes as though such commission were incorporated under such name or title and no such proceeding may be instituted or maintained against or in the names of the members of the commission nor shall any such proceeding abate by reason of any change in the membership of the commission but all such proceedings may be continued as though no such change had been made. (Sec. 1.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 42, eff. July 1, making no material change in text.

82C–8–2. Centennial Observance—Exposition—Powers and Duties of Commission.

The commission is authorized and directed to plan and arrange for a fitting centennial observance in the year 1947, with appropriate provision being made therefor in such communities and at such scenic, historical, cultural, and recreational centers of attraction from Yellowstone Park on the north to Boulder Dam and Grand Canyon on the south and from the Salt Flats on the west to the Dinosaur quarries on the east and the natural bridges in the southeast, as the commission may designate and to hold and maintain an exposition on some appropriate site to be selected by it to accomplish the purposes specified in Section 1 of this act.

It shall be the duty and the commission shall have power:

(1) To acquire with the approval of the commission of publicity and industrial development and to hold possession of necessary properties; to improve, reclaim, beautify, illuminate and develop the same, to erect and maintain buildings and other structures thereon for the display and

protection of exhibits or for the use, comfort, convenience, service, pleasure and entertainment of those attending.

(2) To secure, install and display various exhibits commemorating the advent of the pioneers into Salt Lake Valley, portraying the natural resources and scenic wonders of Utah and the prehistoric culture of the west, showing the development of irrigation, farming, mining, forestry, transportation, culture and the arts, and to offer and give prizes, premiums and other awards.

(3) To provide or arrange for public entertainment both at the exposition grounds and at other places throughout the state of Utah consisting of historical pageants, musical, dramatic, educational programs, and athletic and sports attractions.

(4) To provide ways and means for the safety, comfort and security of the public.

(5) To publicize and arrange for the entertainment of visitors at the national parks, monuments and other places of scenic or historic interest in Utah.

(6) To secure funds to cover the cost of the centennial observance through private contributions and public appropriations, from admission charges where entertainment and other attractions are provided by or under the direction of the commission, from charges to exhibitors and concessionaires exhibiting or operating in the grounds under the control of the commission, and by other lawful ways and means.

(7) To procure and carry insurance indemnifying exhibitors, whether public or private corporations or individuals, against loss or damage to any property exhibited at the exposition; also to procure and carry workmen's compensation insurance and public liability and property damage and other insurance necessary for the protection of the commission against claims for injuries to its employees or third persons.

(8) To have general control, management and supervision over all activities, relating to the preparation and conducting of the centennial observance; to decide within the limits of the funds available and under the conditions imposed by this act, the number and location of the various grounds, buildings, camps, and attractions that may be used to entertain and instruct those persons who shall visit the state of Utah or otherwise join in the centennial observance.

(9) To appoint subject to the approval of the commission of publicity and industrial development a director and such other agents and employees as it may deem necessary in the administration of this act and by regulation prescribe the conditions of their employment and fix their remuneration according to the standards adopted by the department of finance, to define their respective duties and powers, require that bonds be given, determine the amount and conditions thereof; and to remove any such appointee at any time with or without cause. The commission shall not appoint a director nor employ experts in any line until the services of such person or persons are immediately required nor shall it continue the employment of any such person after the required work has been completed.

(10) To receive and direct subject to the approval of the commission of publicity and industrial development the expenditure, subject to specified conditions attached thereto, of all appropriated and contributed funds.

(11) To organize sponsoring groups or committees in different sections of the state and among various groups, societies and organizations.

(12) To solicit the coöperation of neighboring states and the aid and assistance of the federal government.

(13) To limit the character and size of the exposition so as to keep within the resources available for the purpose, taking account of appropriations made by the federal government or its agencies, the state, or political subdivisions thereof, and of private contributions, admission, concessions and other charges.

(14) To do all things which may be necessary, expedient or incidental to the transaction of its business. (Sec. 2.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 42, eff. July 1, making only minor changes in text.

82C–8–3. Opening and Closing Dates of Exposition.

The exposition provided in connection with the centennial observance shall be officially opened on May 1, 1947, and continue to October 15, 1947. (Sec. 3.)

82C–8–4. Reports of Commission.

The accounts of the commission shall be audited annually by the state auditor or such other person as the commission of publicity and industrial development may designate. The commission shall from time to time make reports to the governor and to the commission of publicity and industrial development concerning such matters in connection with the administration of this act as he or it may require and shall annually before December first make to the governor and to the commission of publicity and industrial development a report which shall contain a statement of all receipts and disbursements to the date of such report, a statement of its assets and liabilities, and such other information as may be necessary to advise them and the legislature as to the progress of the work of such commission and its further requirements. (Sec. 4.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 42, eff. July 1, making no material change in text.

82C–8–5. Property to Belong to State.

All property, whether real or personal, and all money acquired, possessed or received by the commission from whatever source and all profits earned in the administration of this act shall be the property of the state of Utah, and all property purchased, expenses, disburse-

ments and liabilities incurred by the commission in connection with its activity under this act shall be paid for by the commission from the money received by the commission. The Commission shall deposit its funds with the state treasurer. After the closing of the centennial observance the commission shall proceed to wind up its affairs and all real estate and personal property held by it shall be disposed of in such manner as the legislature may provide. (Sec. 5.)

82C–8–6. Persons Responsible for Funds—Bonds.

No member of the commission shall be personally liable for any loss of its funds but the director employed by the commission shall be responsible for the handling of all such funds and the director and such secretaries, cashiers, trustees or other persons as the commission may employ, who in any way have the handling of any of the funds made available to or accruing to the commission, shall be accountable for the funds which they handle and all such persons shall be properly and adequately bonded. (Sec. 6.)

82C–8–7. Appropriation.

To initiate the purchase of grounds, erection of structures and general preparation for the Utah centennial observance in 1947 and to effectuate the purposes of this act there is appropriated the sum of $10,000 out of any money in the general fund of the state of Utah not otherwise appropriated. (Sec. 7.)

82C–8–8. Effective Date.

This act shall take effect July 24, 1939. (Sec. 8.)

TITLE 83

STATE FISCAL YEAR

83–0–1. Commences July 1st.

The fiscal year of the state of Utah shall commence on the 1st day of July of each year. (L. 25, p. 9, § 5794.)

History.

Formerly state fiscal year began the first day of December. Comp. Laws 1907, § 2460x.

Cross-references.

See also Const. Art. XIII, § 1; fiscal year in cities, 16–8–86; as to reports to state officers, see 87–10–1 to 87–10–4; as to fiscal year under tax laws, see 80–14–14.

TITLE 84

STATE FLAG AND STATE FLOWER [STATE TREE AND STATE SONG]

84-0-1. State Flag Described.
84-0-2. State Flower Is Sego Lily.
L. 1933, ch. 64; eff. Feb. 20.
84-0-3. State Tree.
84-0-4. Effective Date.
L. 1937, ch. 117; eff. Feb. 24.
84-0-5. State Song—Utah We Love Thee.
84-0-6. Effective Date.

84-0-1. State Flag Described.

The state flag of Utah shall be a flag of blue field, fringed, with gold borders, with the following device worked in natural colors on the center of the blue field:

The center a shield; above the shield and thereon an American eagle with outstretched wings; the top of the shield pierced with six arrows arranged crosswise; upon the shield under the arrows the word "Industry," and below the word "Industry" on the center of the shield, a beehive; on each side of the beehive, growing sego lilies; below the beehive and near the bottom of the shield, the word "Utah," and below the word "Utah" and on the bottom of the shield, the figures "1847"; with the appearance of being back of the shield there shall be two American flags on flagstaffs placed crosswise with the flags so draped that they will project beyond each side of the shield, the heads of the flagstaffs appearing in front of the eagle's wings and the bottom of each staff appearing over the face of the draped flag below the shield; below the shield and flags and upon the blue field, the figures "1896"; around the entire design, a narrow circle in gold. (C. L. 17, § 2664.)

84-0-2. State Flower Is Sego Lily.

The sego lily is hereby selected as and declared to be the Utah state flower. (C. L. 17, § 2667.)

L. 1933, ch. 64; eff. Feb. 20.

AN ACT providing for selection and designation of a state tree.

Be it enacted by the Legislature of the State of Utah:

84-0-3. State Tree.

The blue spruce is hereby selected as and designated to be the Utah State Tree. (Sec. 1.)

84-0-4. Effective Date.

This Act shall take effect upon approval.

Approved February 20, 1933. (Sec. 2.)

L. 1937, ch. 117; eff. Feb. 24.

AN ACT providing for the selection and designation of a state song.

Be it enacted by the Legislature of the State of Utah:

84-0-5. State Song—Utah We Love Thee.

The song entitled "Utah We Love Thee" by Evan Stephens is selected and designated to be the Utah state song. (Sec. 1.)

84-0-6. Effective Date.

This act shall take effect upon approval.
Approved February 24, 1937. (Sec. 2.)

TITLE 85

STATE INSTITUTIONS

Chapter 1. GENERAL PROVISIONS.
Chapter 2. ART INSTITUTE.
Chapter 3. SCHOOLS FOR THE DEAF AND THE BLIND.
Chapter 4. STATE FAIR ASSOCIATION.
Chapter 5. STATE HISTORICAL SOCIETY.
Chapter 6. STATE INDUSTRIAL SCHOOL.
Chapter 7. UTAH STATE HOSPITAL.
Chapter 8. UTAH STATE TRAINING SCHOOL.
Chapter 9. STATE PRISON. [CONVICT-MADE GOODS.]

CHAPTER 1

GENERAL PROVISIONS *

85-1-1. Governing Boards — Governor to Appoint.
85-1-2. Id. Vacancies—Term of Office.
85-1-3. Id. Must Not Be Interested in Contracts, etc.
85-1-4. Buildings — Repairs and Construction—Contracts for.
85-1-5. Advertising for Bids—Proposals—Awards.
85-1-6. Monthly Expenses—Payment.
85-1-7. Biennial Reports to Governor.
85-1-8. Biennial Accounts — Estimate of Income and Requirements.
85-1-9. Remittance of Proceeds of Sales of Products.

* History of act. This chapter was R. S. 1898, Ch. 1, Title 61, p. 482; Comp. Laws 1907, Ch. 1, Title 74, p. 778.

85-1-1. Governing Boards—Governor to Appoint.

Members of the governing board of each state institution shall be appointed by the governor, by and with the consent of the senate, except as otherwise provided. (C. L. 17, § 5204.)

Comparable provisions.

Cal. Welf. and Inst. Code, § 150 ("Department of Institutions" as being "in the State government"); § 151 (under control of executive officer known as "Director of Institutions"); § 154, as amended by Laws of 1941 (enumerating the institutions of which the department has jurisdiction).

Iowa Code 1939, § 3275 (board of control of state institutions is composed of three electors of the state; term of office, six years); § 3276 (governor appoints, with approval of two-thirds of members of senate in executive session, successors to members as their respective terms expire); § 3291.1 (governor may appoint a business manager for each institution operating under board of control).

Cross-references.

Expenditures in excess of appropriations, 26-0-23; investment of funds by board of examiners, 86-1-50 et seq.; location of state institutions, Const. Art. XIX, § 3.

Decisions from other jurisdictions.

— California.

Presumption exists that administrative officer, charged by legislature with an administrative duty, will perform that duty in accordance with Constitution and laws of State of California; such presumption prevails until attacked and some evidence presented that officer has been guilty of dereliction and that action taken by him has been arbitrary or discriminatory. In case at bar, there was no evidence upon which to base con-

clusion that director of institutions acted arbitrarily or discriminatorily in fixing cost to state of care, support and maintenance of incompetent; nor could value of incompetent's services, performed as hospital storekeeper, be offset against cost of caring for the incompetent. In re Stobie's Estate, 30 Cal. App. 2d 525, 86 P.2d 883.

— Iowa.

The state board of control, in entering into a contract for the purchase of barrel staves for use in manufacturing butter tubs in the state penitentiaries, acted purely as a state agency, and its contract for the purchase of such staves was the contract of the state, and such board is not suable in the courts of such state for breach of such contract. J. D. Hollingshead Co. v. Board of Control of State Institutions, 196 Iowa 841, 195 N. W. 577.

An action against the superintendent of a state hospital cannot be maintained if it is in effect a cause of action against the state. Cross v. Donohoe, 202 Iowa 484, 210 N. W. 532.

State board of control had authority to create office of auditor and clerk of industries for reformatory. State v. Conway, 219 Iowa 1155, 260 N. W. 88.

85-1-2. Id. Vacancies—Term of Office.

A vacancy in a governing board may occur by the expiration of a term, by death, by lawful removal from office, by the permanent departure of a member thereof from the state, by his incapacity to act, or by his resignation. Such vacancy, other than by the expiration of a term, shall be filled by the governor for the remainder of the term, with the consent of the senate, if in session. If the senate is not in session, the appointment shall be made and shall continue until the next regular session of the senate. Each member of the board shall hold office until his successor is appointed and qualified. (C. L. 17, § 5205.)

85-1-3. Id. Must Not Be Interested in Contracts, etc.

No member of the governing board of a state institution, and no official or employee thereof, shall be pecuniarily interested, directly or indirectly, in any contract, business or transaction entered into by or on behalf of the institution. (C. L. 17, § 5206.)

A. L. R. notes.

Member of governmental board voting on measure involving his personal interest, 133 A. L. R. 1257; relation as creditor of contracting party as constituting interest within statute or rule of common law against public officer being interested in contract with the public, 73 A. L. R. 1352; relationship as disqualifying interest within statute making it unlawful for an officer to be interested in a public contract, 74 A. L. R. 792.

85-1-4. Buildings—Repairs and Construction—Contracts for.

Whenever the needs of a state institution require a building to be repaired or erected, or any work amounting to more than $200 to be done, the governing board of such institution, unless otherwise provided by law, shall advertise for at least ten days, in some newspaper published in this state and having general circulation therein, for sealed proposals for repairing or erecting such building, or performing such work, in accordance with plans and specifications to be had at the office of the board; *provided*, that repairs or construction contemplating an expenditure of $3,000 or more shall be made under the direction of the Utah state building commission. (C. L. 17, § 5208.)

Cross-references.

Duties of state finance commission, 82C-2; building commission, Title 10; contractors' bonds, 17-1.

A. L. R. notes.

Availability of proceeds of insurance on public building for purpose other than restoring or replacing building damaged or destroyed, 65 A. L. R. 1124; insurance on public building, availability of proceeds for purpose other than restoring or replacing building, 65 A. L. R. 1124; public buildings, what are, 19 A. L. R. 543.

85–1–5. Advertising for Bids—Proposals—Awards.

The advertisement must state the place where and the day and hour when the proposals will be opened, must reserve the right in the board to reject any or all proposals, and shall require a certified check for not less than five per cent of the amount of the bid to accompany the same. Such check shall be made payable to the order of the board, and the check of the successful bidder shall be forfeited in case he fails or refuses to enter into the contract and furnish the bond required. At the time and place specified in such notice the board shall publicly open and read all proposals received and shall award the contract to the lowest responsible bidder. In case none of the proposals are satisfactory, all must be rejected, and the board shall advertise anew in the same manner as before until a satisfactory proposal is submitted.

(C. L. 17, § 5209.)

85–1–6. Monthly Expenses—Payment.

On the first day of each month, or as soon thereafter as the bills for the expenses for the previous month have been audited, the governing board of each state institution, or the proper committee thereof duly authorized by the board for such purpose, shall make a requisition upon the state auditor for a warrant in sufficient amount to pay the bills so audited, and thereupon the state auditor shall draw his warrant against the appropriation made for such institution for the amount named in the requisition in favor of the treasurer of the governing board of the institution, or, in case of the state prison, in favor of the warden thereof. To obtain such warrant, the treasurer of the board or the warden must present to the state auditor a written authorization from the board. (C. L. 17, § 5210.)

85–1–7. Biennial Reports to Governor.

The governing board of each state institution shall make biennially to the governor, on the 1st day of October preceding each regular session of the legislature, a detailed report showing a statement of its important official acts, the growth and condition of the institution, the report of the chief executive officer thereof, a list of officials and their salaries, and an estimate of the cash value of the real and personal property of the institution, or of the state in connection therewith, together with an inventory of the same. (C. L. 17, § 5211.)

85–1–8. Biennial Accounts—Estimate of Income and Requirements.

At such time each governing board shall also furnish to the governor and to the state auditor detailed accounts of its receipts and expenditures during the preceding two years, ending June 30, as well as an itemized estimate of the income and requirements of the institution for the coming biennial period. Such accounts and estimates must be countersigned by the chief executive officer of the institution, and by the secretary or clerk of the same, if there is one. (C. L. 17, § 5212.)

Cross-references.
Budget to be submitted by department of finance, 82C–2–18.

85-1-9. Remittance of Proceeds of Sales of Products.

All moneys received by the state industrial school, the state schools for the deaf and the blind, and the Utah state hospital, for the sale of products and livestock shall be paid into the state treasury at the close of each month and placed to the credit of the maintenance account of the institution from which such moneys are received. A detailed report, under oath, of the moneys so collected by the aforesaid institutions shall be filed with the state auditor and the state treasurer at the time such moneys are deposited with the state treasurer.

(C. L. 17, § 5213.)

CHAPTER 2

ART INSTITUTE *

85-2-1 to 85-2-16. (Repealed.)
L. 1937, ch. 118; eff. May 11.
85-2-17. Utah State Institute of Fine Arts.
85-2-18. General Corporate Powers.
85-2-19. Objects and Purposes.
85-2-20. Governing Board — Quorum —Executive Committee.
85-2-21. Terms of Office—Expenses.
85-2-22. Fiscal Year.
85-2-23. Chairman and Other Officers —Bonds.
85-2-24. Oaths—Vacancies.
85-2-25. By-laws—Powers of Board.
85-2-26. Members of Institute.
85-2-27. Id. Life Membership.
85-2-28. Id. Annual Members—Fees.
85-2-29. Id. Annual Membership for Life—Fees.
85-2-30. Utah State Alice Art Collection.
85-2-31. Id. Collection Insured and Loaned.
85-2-32. Application of Funds.
85-2-33. Sections Repealed.

* History of act. This chapter was Comp. Laws 1907, Ch. 3, p. 786.

85-2-1 to 85-2-16. (Repealed by L. 37, ch. 118, § 17, eff. May 11. See 85-2-33.)

L. 1937, ch. 118; eff. May 11.

AN ACT creating the Utah State Institute of Fine Arts, defining the scope thereof, defining the rights, powers, privileges, and duties of the body, providing for membership and for a governing board, and repealing Sections 85-2-1, 85-2-2, 85-2-3, 85-2-4, 85-2-5, 85-2-6, 85-2-7, 85-2-8, 85-2-9, 85-2-10, 85-2-11, 85-2-12, 85-2-13, 85-2-14, 85-2-15, and 85-2-16, Revised Statutes of Utah, 1933.

Be it enacted by the Legislature of the State of Utah:

85-2-17. Utah State Institute of Fine Arts.

The name of the Utah art institute, organized under an act approved March 9, 1899 and laws amendatory or supplementary thereto, shall hereinafter be the Utah State Institute of Fine Arts, and by this name it is constituted and continued a body politic and corporate with perpetual succession. It may have and use a corporate seal and by the aforementioned name may sue or be sued and contract and be contracted with. It is vested with all the property and franchises of and shall be subject to all the contracts, obligations and liabilities of the

former corporation. It may take, hold, lease, sell or convey real and personal property as the interests of the institute shall require.
(Sec. 1.)

85-2-18. General Corporate Powers.

The institute in its corporate capacity may take by purchase, grant, gift, devise or bequest any property, real or personal, for any purpose appropriate to its objects. It may convert property received by gift, grant, devise or bequest and not suitable for its uses, into other property so available or into money. Such property so received or converted shall be held, invested and managed and the proceeds thereof used by the board for the purposes and under the conditions prescribed in the grant or donation. If by the terms of any such grant, gift, devise or bequest conditions are imposed which are impracticable under the law such grant or donation shall not thereby fail, but the conditions thereof must be rejected and the intent of the grantor or donor carried out as nearly as may be. No grant, gift, devise or bequest for the benefit of the institute shall be defeated or prejudiced by any misnomer, misdescription or informality whatever if the intention of the grantor or donor can be shown or ascertained with reasonable certainty.
(Sec. 2.)

85-2-19. Objects and Purposes.

The objects and purposes of the institute shall be to advance the interests of the fine arts, including literature and music, in all their phases, within the state of Utah, and to that end to coöperate with and locally sponsor federal agencies and projects directed to similar undertakings, to develop the influence of art, literature and music in the adult educational field, thus supplementing the more formal instruction of the public school system, to associate manufacturers, agriculturalists and industrialists in these endeavors, to utilize broadcasting facilities and the power of the press in disseminating information and, in general, to foster, promote, encourage and facilitate, not only a more general and lively study of the fine arts, literature and music, but to take all necessary and useful means to stimulate a more abundant production of an indigenous art, literature and music in this state. (Sec. 3.)

85-2-20. Governing Board—Quorum—Executive Committee.

The governing board of the institute shall consist of 13 members who are residents of this state, and who have been appointed by the governor, subject to the approval of the senate, one of whom shall be an artist, one an architect, one a writer, one a musician, one a sculptor, one a craftsman, one to represent the drama, one to represent the dance and five business or professional men or women interested in either art, literature or music. Seven members of the governing board shall constitute a quorum for the transaction of business. Between meetings of the board, its full powers may be exercised as to the ordinary business of the institute by an executive committee of seven members, appointed by the board, a majority of whom shall constitute a quorum thereof.
(Sec. 4.)

85-2-21. Terms of Office—Expenses.

Six of the members of the governing board shall be appointed for an initial term of two years and seven of the members of the governing board shall be appointed for an initial term of four years; thereafter, as the terms of the incumbent members expire, their successors shall be appointed and shall hold office for a period of four years, the term of each commencing on the first day of July next after his appointment. Members of the board shall serve without compensation and shall not receive gifts, prizes or awards of money from the purchasing fund of the institute during their terms of office, but members shall be allowed their actual expenses in attending meetings of the board or its committees or in attending to any business of the institute under authority of the board. (Sec. 5.)

85-2-22. Fiscal Year.

The fiscal year of the institute shall commence on the first day of July and end on the thirtieth day of June in each year and biennial appropriations made for its maintenance, unless otherwise specified, shall be deemed to be for the two years commencing on the first day of July next after the appropriation is made. (Sec. 6.)

85-2-23. Chairman and Other Officers—Bonds.

The board shall choose one of its number to be chairman. He shall be the chief executive officer of the board and shall hold office for two years and until his successor is chosen and has qualified. The board shall likewise appoint a secretary, who need not be a member of the board, and also a treasurer, and it may require from each a bond for the faithful discharge of his duty, such bonds to be approved by and delivered to the secretary of state. Bonds taken by the board to secure the faithful discharge of official duties shall be copied in the board's record book and in case of loss or destruction of any bond such record shall be prima facie evidence of its contents and execution. The secretary shall receive such compensation as may be fixed by the board. (Sec. 7.)

85-2-24. Oaths—Vacancies.

Members of the board shall qualify by taking and filing an oath that they will faithfully perform the duties of said office. Vacancies in the governing board shall be filled by appointment by the governor within one month from the time of such vacancy. (Sec. 8.)

85-2-25. By-laws—Powers of Board.

The governing board may adopt by-laws and rules of procedure to govern the institute; may receive, hold and manage its gifts, devices, bequests and property and perform all acts necessary to accomplish its purposes; may issue certificates of membership and offer and confer prizes, mentions, medals and diplomas for works of fine art and in literature and music when in competition under rules prescribed by it. (Sec. 9.)

85–2–26. Members of Institute.

Members of the institute shall be of four classes, namely: members of the governing board, honorary members, annual members, and life members. (Sec. 10.)

85–2–27. Id. Life Membership.

Any person who submits to the governing board a work of art executed by himself which is accepted by said board, shall be the tender and acceptance of such work of art, on receipt of a certificate of membership issued by said board, become an honorary member for life. The board shall also be empowered to confer an honorary life membership for outstanding achievement in art, literature or music upon any resident of the state of Utah. (Sec. 11.)

85–2–28. Id. Annual Members—Fees.

Any patron of art, literature or music or anyone interested therein shall upon payment of $2.50 be entitled, if elected by the board, to a certificate of membership for one year and to become an annual member. (Sec. 12.)

85–2–29. Id. Annual Membership for Life—Fees.

Upon payment of $100 any person, if elected by the board, shall have all the privileges of annual membership for life. (Sec. 13.)

85–2–30. Utah State Alice Art Collection.

There shall be appointed by the governing board a committee of three artists or judges of art to take charge of all works of art acquired under this chapter, which collection shall be known as the Utah State Alice Art Collection. Every person holding a certificate of membership is eligible to serve upon this committee. (Sec. 14.)

85–2–31. Id. Collection Insured and Loaned.

All works of art acquired under this act shall become part of the Utah State Alice Art Collection. Ample insurance shall be provided for the art collection by the governing board. Said art collection shall be held as the property of the state, under control of the board, and may be loaned in whole or in part for exhibition purposes to different parts of the state according to rules and regulations prescribed by the governing board. The governing board shall take every precaution to avoid damage or destruction to the property of the art institute and the art works submitted by exhibitors and shall procure ample insurance thereon. All art works shipped to and from the place of exhibition shall be packed by an expert packer at the expense of the institute. (Sec. 15.)

85–2–32. Application of Funds.

All money received by the institute shall be applied or expended in the furtherance of the art, literature and music interests of the state as ordered by the governing board. (Sec. 16.)

85–2–33. Sections Repealed.

Sections 85–2–1, 85–2–2, 85–2–3, 85–2–4, 85–2–5, 85–2–6, 85–2–7, 85–2–8, 85–2–9, 85–2–10, 85–2–11, 85–2–12, 85–2–13, 85–2–14, 85–

2–15, and 85–2–16 Revised Statutes of Utah, 1933, are repealed. (Sec. 17.)

CHAPTER 3

SCHOOLS FOR THE DEAF AND THE BLIND *

ARTICLE 1

SCHOOL FOR THE DEAF

85–3–1. A Body Corporate—Location.
85–3–2. Corporate Powers.
85–3–3. Purposes — Qualifications of Pupils.
85–3–4. Board of Trustees.
85–3–5. Id. Official Oaths and Bonds.
85–3–6. Id. Meetings.
85–3–7. Id. To Receive No Compensation—Expenses Allowed.
85–3–8. By-laws—Contracts with Instructors — Religious and Political Doctrine Not to Be Taught or to Affect.
85–3–9. President—Term—Vacancy.
85–3–10. Superintendent — Secretary —Treasurer.
85–3–11. Qualifications and Duties of Superintendent — Removal.
85–3–12. Fiscal Year and Appropriations.

ARTICLE 2

SCHOOL FOR THE BLIND

85–3–13. A Body Corporate—Location.
85–3–14. Corporate Powers.
85–3–15. Trustees.
85–3–16. Subject to Same Laws as School for Deaf.
85–3–17. Purposes — Qualifications of Pupils.
85–3–18. Id. Powers and Duties of Trustees.

ARTICLE 3

PROVISIONS COMMON TO BOTH SCHOOLS

85–3–19. Counties to Pay Expenses of Indigent Pupils.
85–3–20. Compulsory Attendance.
85–3–21. Id. Neglect of Parents or Guardians—Penalty.

L. 1941, 1st Spec. Sess., ch. 34; eff. July 1.

85–3–22. Advisory Council for Deaf and Blind Schools—Members—Terms, etc.
85–3–23. Id. Meetings — Chairman —Quorum.
85–3–24. Id. Duties.
85–3–25. Boards to Submit Information to Council—May Visit Schools for Deaf and Blind.
85–3–26. Effective Date.

* History of act. This chapter was formerly R. S. 1898, Title 61, Chs. 3 and 4, p. 487 et seq.; Comp. Laws 1907, Title 74, p. 788 et seq.

ARTICLE 1

SCHOOL FOR THE DEAF

85–3–1. A Body Corporate—Location.

The institution for the deaf and dumb, heretofore made a body corporate under the name of Utah School for the Deaf, shall continue as established and located in Ogden, in the county of Weber.

(C. L. 17, § 5324.)

Comparable provisions.

Cal. Polit. Code, § 2236 (California School for the Deaf); § 2237 (part of school system of the state, but deriving no revenue from public school fund); § 2241 (under administration of state department of education).

Idaho Code, § 32–2901 (establishing state school for education of deaf and blind children).

Iowa Code 1939, § 3919 (state board of education governs state school for the deaf).

Mont. Rev. Codes, § 1473.2 (school for deaf and blind at Great Falls to be conducted as separate unit under direction of state board of education, with local executive board to be appointed by governor).

Cross-references.
Land grant, Const. Art. XX, § 1, Enabling Act, § 12; establishment, Const. Art. X, § 10, Art. XIX, § 2; location, Const. Art. XIX, § 3; proceeds of sale of products, 85–1–9.

85–3–2. Corporate Powers.

It shall have perpetual succession, a corporate seal, and by the aforementioned name may sue and be sued, contract and be contracted with, and may take and hold by purchase, gift, devise or bequest real and personal property required for its uses. It may also convert such property, when not suitable for its use, into other property which may be suitable, or into money. It shall be deemed a public corporation, and its property shall be exempt from all taxes and assessments.
(C. L. 17, § 5325.)

85–3–3. Purposes—Qualifications of Pupils.

The purposes of the school shall be to provide a practical education for the deaf, the mute and the deaf-mute of the state, under twenty-one years of age, who are otherwise of sound body and of sound mind, and to instruct them in agriculture and the mechanical trades and arts to the end that they may become self-supporting and useful citizens. Individuals above the age of twenty-one years capable of receiving beneficial instruction, but incapable on account of deafness or inability to speak, of receiving adequate instruction in the common schools, may, in the discretion of the board of trustees, be admitted to the school and receive instruction. Residents of the state shall be entitled to the benefits of the school free of expense. Pupils from other states may be received into the school and instructed on such terms as the board of trustees may prescribe. (L. 19, p. 295, § 5326.)

A. L. R. notes.
Transportation of school pupils at expense of public, 63 A. L. R. 413.

85–3–4. Board of Trustees.

The government and control of the Utah school for the deaf and the management of its property and its affairs shall be vested in a board of trustees which shall consist of the members of the state board of education. (L. 25, p. 5, § 5327.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 31, eff. July 1, rewriting text of entire section.

85–3–5. Id. Official Oaths and Bonds.

Excepting the attorney-general, each member of the board before entering upon the duties of his office shall take the constitutional oath and execute a bond to the state in the penal sum of $3000, conditioned for the faithful discharge of his duties. (C. L. 17, § 5328.)

Cross-references.
Constitutional oath, Art. IV, § 10; official oaths and bonds, Title 65.

85–3–6. Id. Meetings.

The board shall meet at the school in March, June, September and December of each year, on dates determined by it, and at other times as often as may be necessary. (C. L. 17, § 5329.)

85–3–7. Id. To Receive No Compensation—Expenses Allowed.

No member of the board shall receive any compensation for his services as such member, but he may be paid his actual expenses incurred in attending meetings of the board or of its committees, or in attending to any business of the school under the authority of the board or of its committees. (C. L. 17, § 5330.)

85–3–8. By-laws—Contracts with Instructors—Religious and Political Doctrine Not to Be Taught or to Affect.

The board may adopt by-laws, and from time to time repeal or amend them, and it may therein provide for special meetings of the board and for the distribution of its business among committees. It may make such rules not inconsistent with law, as it may deem proper, regarding the admission, expulsion and terms of instruction of pupils, and the internal management of the school. All contracts made with instructors and employees shall be subject to termination at any time, at the will of the board, when in its judgment the interests of the school so require. No partisan political or sectarian religious doctrine shall be taught in the school; and no political or religious belief shall be required as a qualification of any pupil, instructor, officer or employee of the school. (C. L. 17, § 5331.)

Cross-references.
No religious or partisan test required of teacher or student, Const. Art. X, § 12.

85–3–9. President—Term—Vacancy.

The board shall choose one of its members president. Between meetings of the board he may exercise its powers in the ordinary business of the school. He shall be the executive officer of the board, and shall hold the office of president for one year. A vacancy in his office may be filled by the board for the remainder of the term. (C. L. 17, § 5332.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 31, eff. July 1, changing "two" to "one" in fourth line.

85–3–10. Superintendent—Secretary—Treasurer.

The board shall appoint a superintendent, whose salary shall be fixed by the board in accordance with standards adopted by the department of finance, who shall be the principal of the school. It shall also appoint a secretary of the institution, who may be a member of the board and a treasurer who shall not be a member of the board. The salary of the treasurer and of the secretary, if he is not a member of the board, shall be fixed by the board in accordance with standards adopted by the department of finance. The treasurer shall give a bond to the school in its corporate name in such form and in such amount as shall be determined by the department of finance. (C. L. 17, § 5333.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 31, eff. July 1, making material changes in text.

85–3–11. Qualifications and Duties of Superintendent—Removal.

The superintendent of the school shall be a competent expert educator of the deaf and dumb, and of the blind, and he must be acquainted with the school management and class instruction of deaf, mute, deaf-mute and blind persons. Subject to the approval of the board, the superintendent may select and dismiss all instructors or employees of the school. He shall be responsible for the care of the premises and of the property of the school, for the control of instructors and employees, for the regulation of the household, for the discipline of the school, for the arrangement and execution of a proper course of study and manual training, and for the training of the pupils in morals and manners. He shall have general oversight of all the internal affairs of the school. The superintendent may be removed at any time by a vote of two-thirds of the members of the board of trustees.

(C. L. 17, § 5334.)

85–3–12. Fiscal Year and Appropriations.

The fiscal year of the school shall commence on the 1st day of July and end on the 30th day of June, and biennial appropriations made for its maintenance, unless otherwise specified, shall be deemed to be for the two years commencing on the 1st day of July next after the appropriation is made. (C. L. 17, § 5335.)

ARTICLE 2

School for the Blind

85–3–13. A Body Corporate—Location.

The institution for the blind heretofore established in connection with the Utah school for the deaf and made a body corporate by the name of the Utah School for the Blind, shall continue as established and located in Ogden, in the county of Weber. (C. L. 17, § 5319.)

Comparable provisions.

Cal. Gen. Laws, Act 1987, § 1 (creating California School for the Blind); § 2 (under control of department of education); § 3 (investing department of education with powers and duties theretofore exercised by California School for the Deaf and the Blind, in so far as they apply to department for the blind); Cal. Welf. and Inst. Code, § 154, as amended by Laws of 1941 (enumerating, inter alia, Industrial Home for the Adult Blind, Industrial Workshop for the Blind, and State Blind Shop, as being under jurisdiction of department of institutions).

Iowa Code 1939, § 3919 (state board of education governs state school for the blind).

Cross-references.

Land grant, Const. Art. XX, § 1; establishment, Const. Art. X, § 10, Art. XIX, § 2; location, Const. Art. XIX, § 3; proceeds of sale of products, 85–1–9; tax for needy blind, 19–5–68.

85–3–14. Corporate Powers.

It shall have perpetual succession, a corporate seal, and by the aforementioned name may sue and be sued, contract and be contracted with, and may take and hold by purchase, gift, devise or bequest, real and personal property required for its uses. It may also convert such property, when not suitable for its uses, into other property which is suitable, or into money. It shall be deemed a public corporation, and its property shall be exempt from all taxes and assessments.

(C. L. 17, § 5320.)

85–3–15. Trustees.

The trustees and officers of the Utah school for the deaf are hereby constituted the trustees and officers of the Utah school for the blind, which shall, until otherwise provided by law be conducted in connection with the said school for the deaf. (C. L. 17, § 5321.)

85–3–16. Subject to Same Laws as School for Deaf.

All provisions of law governing the Utah school for the deaf, as far as applicable, shall apply to the Utah school for the blind. (C. L. 17, § 5323.)

85–3–17. Purposes—Qualifications of Pupils.

The purposes of the school shall be to provide a practical education for the blind of the state, under twenty-one years of age, who are otherwise of sound body and of sound mind, and to instruct them in the mechanical trades and arts to the end that they may become self-supporting and useful citizens. Residents of the state shall be entitled to the benefits of the school free of expense. Pupils from other states may be received into the school and instructed on such terms as the board of trustees may prescribe. (L. 19, p. 294, § 5322.)

A. L. R. notes.
Transportation of school pupils at expense of public, 63 A. L. R. 413.

85–3–18. Id. Powers and Duties of Trustees.

Persons above the age of twenty-one years, capable of receiving beneficial instruction, but incapable on account of blindness or defective sight of receiving adequate instruction in the common schools, may, in the discretion of the board of trustees, be admitted to the school and receive instruction. The board of trustees shall have general supervision of the adult blind of the state, and shall prepare and maintain a register of the adult blind in the state which shall contain all such pertinent facts as the board may deem important. It may establish, equip and maintain such homes and workshops for the industrial training of the adult blind as it may deem necessary, furnish the needed materials and tools therefor and aid in the marketing of the products of their work. It shall also provide a circulating library for the blind of the state. (L. 21, p. 45, § 430.)

Cross-references.
State purchases from Utah commission for adult blind, 82C–2–41; employment of blind persons by state, 82C–2–42.

ARTICLE 3

Provisions Common to Both Schools

85–3–19. Counties to Pay Expenses of Indigent Pupils.

In all cases where an applicant for admission to, or an inmate of, the Utah school for the deaf or Utah school for the blind shall be unable to pay for necessary clothing or transportation, application shall be made to the board of county commissioners of the county wherein the applicant, or the parent or guardian of the applicant, resides. If the

board of county commissioners finds the facts as represented, it shall so certify to the superintendent of the school, who must then provide the necessary clothing and transportation, and render bills for the same quarterly to the board of county commissioners of such county. If the bills are found correct, the board of county commissioners shall order them paid out of the county treasury. (C. L. 17, § 5336.)

A. L. R. notes.
Transportation of school pupils at expense of public, 63 A. L. R. 413.

85–3–20. Compulsory Attendance.

Every parent, guardian or other person having control of any deaf, mute or blind child between the ages of eight and eighteen years, who on account of its deafness, muteness or defective sight is unable to be educated in the public schools, shall be required to send such child to the Utah school for the deaf or the Utah school for the blind for at least six months of each school year, except in cases where it appears to the satisfaction of the board of trustees:

(1) That such child is taught at home by a competent teacher in the same branches and the same length of time as children are required by law to be taught in the state school; or,

(2) That such child has already acquired proficiency in the branches of learning taught in the state school; or,

(3) That such child is in such physical or mental condition (which must be certified, if required, by a competent physician) as to render such attendance inexpedient or impracticable. (C. L. 17, § 5337.)

85–3–21. Id. Neglect of Parents or Guardians—Penalty.

Any such parent, guardian or other person, having control of any totally deaf, mute or blind child between the ages of eight and eighteen, who fails to comply with the provisions of the next preceding section, after having been notified of its requirements, is guilty of a misdemeanor. (C. L. 17, § 5338.)

L. 1941, 1st Spec. Sess., ch. 34; eff. July 1.

AN ACT creating an advisory council for the schools for the deaf and blind.

Be it enacted by the Legislature of the state of Utah:

85–3–22. Advisory Council for Deaf and Blind Schools—Members—Terms, etc.

In order to keep the boards of trustees of the schools for the deaf and blind advised of the needs of those who are handicapped by deafness or blindness, of practical methods of overcoming such handicaps, of educating and training such unfortunates to secure positions of independence and for their general welfare, there is created an advisory council for the schools for the deaf and the blind consisting of five individuals, electors of the state, at least two of whom shall be women. The members of the advisory council shall be appointed by the governor. Each appointment shall be submitted for confirmation or rejection by the senate during the session being held at the time of the appointment

or, if none is then being held, at the next session of the senate. They shall serve without pay or compensation but shall be paid their actual and necessary expenses incurred in attending meetings of the council. Each member of the advisory council shall be chosen with due regard to his intelligence and ability and his knowledge and interest in the functions and duties of the board of trustees of the schools for the deaf and the blind and in the welfare of the people of the state so handicapped. The term of office of each member of the council shall be five years and until his successor shall have been appointed and have qualified, *provided, however,* that during the year 1941 the governor shall appoint one member for the term expiring March 1, 1942, one for a term expiring March 1, 1943, one for a term expiring March 1, 1944, one for a term expiring March 1, 1945, and one for a term expiring March 1, 1946. In February 1942 and in February of each year thereafter the governor shall appoint a member for the full term of five years commencing on the second day of March next, to succeed the member whose term has then expired. (Sec. 1.)

85-3-23. Id. Meetings—Chairman—Quorum.

The members of the advisory council shall meet at the earliest convenient date in the month of March of each year at the office of the state board of education at the state capitol at the call of the chairman of the board. At its first meeting the advisory council shall elect a chairman from its membership who shall serve until the next annual meeting of the council, and the council may at any time elect such other officers from its membership as it shall deem necessary. The board shall assign one of its employees to act as secretary of the council without additional compensation therefor, and shall supply the council with such stationery, supplies and facilities as may be reasonably necessary. Meetings of the advisory council may be held at any time or place and upon call of the governor or of the board or of the chairman of the council upon notice of the time, place and purpose of the meeting given by mail, telegraph or telephone to each of the members of the council not less than two days prior to the date fixed for such meeting. A majority of the members present at any meeting shall constitute a quorum for the transaction of business. (Sec. 2.)

85-3-24. Id. Duties.

It shall be the duty and function of the advisory council to make suggestions to and to advise the board of trustees of the schools with respect to their policies, rules or regulations, the operation of the schools and the conduct and the methods of their superintendent and employees. It shall be the duty of the boards to receive and consider the suggestions and advice of the advisory council, but nothing herein contained shall be construed to require the board to adopt the same or to conform its practices thereto. (Sec. 3.)

85-3-25. Boards to Submit Information to Council—May Visit Schools for Deaf and Blind.

The boards of trustees of the schools for the deaf and of the blind shall submit to the advisory council at any time information and de-

tails regarding any of the activities of either institution when requested by the council and shall permit said council or any member thereof to visit the schools at any convenient time. (Sec. 4.)

85–3–26. Effective Date.

This act shall take effect at 12:01 a. m. on the first day of July, 1941 or upon proclamation of the governor prior to that date. (Sec. 5.)

CHAPTER 4

STATE FAIR ASSOCIATION *

85–4–1. A Body Corporate — Powers —To Be Under Control of Department of Publicity and Industrial Development.
85–4–2. Directors—Number.
85–4–3. Id. Term—Oath—Bond.
85–4–4. Id. May Enact By-laws.
85–4–5. Id. Quorum — President — Treasurer — Secretary — Salaries—Bonds.
85–4–6. Id. Expenses—To Be Approved by Department of Finance.
85–4–7. General Purposes — Leases for Private Exhibitions—Receipts to Maintenance Fund.
85–4–8. Biennial and Annual Exhibitions.
85–4–9. [Id.] Conditions of Entry—Premiums.
85–4–10. Termination of Terms of Present Directors.

* **History of act.** This chapter was formerly Comp. Laws 1907, Title 74, Ch. 6.

85–4–1. A Body Corporate—Powers—To Be Under Control of Department of Publicity and Industrial Development.

The Utah state fair association is continued a body corporate with perpetual succession subject to the direction, supervision and control of the commissioners of the department of publicity and industrial development. It may have and use a corporate seal, and by the aforesaid name may sue and be sued, contract and be contracted with, and take and hold by purchase, gift, devise or bequest, real and personal property required for its uses. It may also, with the approval of the department of finance, convert such property, when not suitable for its uses, into other property which may be suitable for its uses, into other property, or into money *provided, however,* that money received from such conversion shall be paid into the state treasury and placed to the credit of the state fair association maintenance fund. The Utah state fair association shall be deemed a public corporation, and its property shall be exempt from all taxes and assessments. (C. L. 17, § 5345.)

History.

As amended by L. 41, ch. 90, eff. July 1, making material changes in text.

Comparable provisions.

Cal. Agric. Code, § 70 (State Agricultural Society is state institution within department of finance; consists of board of directors of 14 members); § 73 (board of directors of the society is required to provide for and manage an annual fair or exposition at Sacramento); § 72, as amended by Laws of 1941 (establishing division of fairs and expositions in department of finance; in charge of a chief appointed by director of finance in accordance with provisions of Civil Service Act).

Iowa Code 1939, § 2873 (Iowa state fair board consists of governor, state secretary of agriculture, and president of state college of agriculture and mechanic arts; a president and vice president and one director from each con-

gressional district; a secretary and a treasurer); § 2887 (board may delegate management of state fair to executive committee and two or more additional members of the board; may employ such assistance as deemed necessary in carrying on such fair).

Cross-references.

Constitutional provisions, Const. Art. XIX, §§ 2, 3; exhibits by Art Institute, 85-2; by geological and mineralogical survey, 34-0-2; agricultural exhibitions, 3-1-13.

Decisions from other jurisdictions. — Iowa.

The state fair board is an agency of the state and cannot be sued for death or injury occurring at state fair grounds. De Votie v. Iowa State Fair Board, 216 Iowa 281, 249 N. W. 420.

85-4-2. Directors—Number.

The government and control of the association and the management of its property and affairs shall be vested in a board of twelve directors subject to the supervision, direction and control of the commissioners of the department of publicity and industrial development. (C. L. 17, § 5347.)

History.

As amended by L. 41, ch. 90, eff. July 1, adding all matter after "directors" in second line.

85-4-3. Id. Term—Oath—Bond.

Each director shall be appointed by the commissioner of the department of publicity and industrial development for a term of four years. Each director shall qualify by taking the constitutional oath of office and by giving a bond for the faithful performance of his duties in such form and in such amounts as shall be determined by the state department of finance. (C. L. 17, § 5348.)

History.

As amended by L. 41, ch. 90, eff. July 1, rewriting text of entire section.

Cross-references.

Constitutional oath, Art. IV, § 10; official oaths and bonds, Title 65.

85-4-4. Id. May Enact By-laws.

The board of directors may enact by-laws and regulations for the association with the approval of the commissioners of the department of publicity and industrial development. (C. L. 17, § 5349.)

History.

As amended by L. 41, ch. 90, eff. July 1, adding all matter after "association" in second line.

85-4-5. Id. Quorum — President — Treasurer — Secretary — Salaries—Bonds.

A majority of the directors shall constitute a quorum. One of its members shall be chosen by the commissioners of publicity and industrial development as president. The president shall be the executive officer of the association and shall hold office for two years and until his successor is appointed and qualified. The board shall likewise appoint a treasurer and a secretary. The board shall appoint officers or employees who receive remuneration, commissions or salaries for their services only with the approval of the commissioners of the department of publicity and industrial development, the remuneration, commissions or salaries of such officers or employees shall be fixed in accordance

with standards adopted by the department of finance. The commissioners of the department of finance shall determine which of said officers or employees shall furnish surety bonds. Such bonds shall be at the expense of the state in such amount and in such form as shall be determined by the state department of finance. (C. L. 17, §§ 5350, 5351.)

History.
As amended by L. 41, ch. 90, eff. July 1, adding all matter after "secretary" in sixth line.

85-4-6. Id. Expenses—To Be Approved by Department of Finance.

The directors shall serve without pay, but their actual and necessary expenses incurred in the performance of their official duties, the account for which shall be verified by oath, when approved by the state department of finance, shall be paid by the state treasurer on warrant of the state auditor out of money in the treasury appropriated for that purpose. (C. L. 17, § 5352.)

History.
As amended by L. 41, ch. 90, eff. July 1, substituting "necessary" for "reasonable" in first line and inserting clause after "oath" in third line.

85-4-7. General Purposes—Leases for Private Exhibitions—Receipts to Maintenance Fund.

The purposes of the association shall be to promote in the state of Utah stock breeding, agriculture, horticulture, mining, manufacturing, and the domestic sciences and arts; and the association shall have the authority to use and to lease the property of the association, during any portion of the interval between the holding of the annual or biennial exhibitions, for private stock exhibitions, shows, racing meets, and for other legitimate purposes, upon terms and conditions to be prescribed by the board of directors. All moneys received from such leases shall be covered into the state treasury at the end of each month and placed to the credit of the state fair maintenance fund.
(C. L. 17, § 5346.)

85-4-8. Biennial and Annual Exhibitions.

The association shall hold a biennial exhibition, and may hold an annual exhibition, of such agricultural, domestic science, horticultural and mineral products, manufactured articles, and domestic animals, as in its opinion subject to the direction, supervision and control of the commissioners of the department of publicity and industrial development, will best stimulate industrial pursuits among the people of this state, and may award premiums for the best specimens of such exhibited articles and animals; *provided*, that the board of directors may permit competition by livestock exhibited by citizens of the several states and territories of the United States. (C. L. 17, § 5353.)

History.
As amended by L. 41, ch. 90, eff. July 1, inserting clause after "opinion" in fourth line.

85-4-9. [Id.] Conditions of Entry—Premiums.

The board shall, subject to the direction, supervision and control of the commissioners of the department of publicity and industrial development, fix the conditions of entry, and shall publish biennially or annually, as the case may be, a list of premiums. (C. L. 17, § 5354.)

History.
As amended by L. 41, ch. 90, eff. July 1, inserting clause after "shall" in first line.

85-4-10. Termination of Terms of Present Directors.

The terms of office of the board of directors of the Utah state fair association appointed pursuant to Section 85-4-3, Revised Statutes of Utah, 1933, shall terminate upon the appointment and qualification of the twelve directors of the Utah state fair association herein provided for.

History.
Added by L. 41, ch. 90, eff. July 1.

CHAPTER 5

STATE HISTORICAL SOCIETY

85-5-1. Created a State Institution.
85-5-2. Records of Historical Value—To Be Custodian.
85-5-3. Id. To Catalogue, Arrange and Display.
85-5-4. Accounts and Reports.
85-5-5. Board of Control; Number and Term—Executive Officers; Term.

85-5-1. Created a State Institution.

The state historical society of Utah is continued as a state institution, with full power to carry out the objects and purposes for which it was organized. (C. L. 17, § 5357.)

Comparable provisions.
Cal. Gen. Laws, Act 3312, § 1 (establishing California state historical association); § 2 (vesting control in state board of education as trustees of the association).
Idaho Code, § 65-3801 (authorizing corporation known as Historical Society of Idaho Pioneers to become the Historical Society of the State of Idaho).
Mont. Rev. Codes, § 1560.1 (authorizing Historical Society of Montana to adopt and use official seal).

85-5-2. Records of Historical Value—To Be Custodian.

The said society shall be custodian of all records, documents, relics, and other material of historic value, which are now or hereafter may be in charge of any state, county or other official, not required by law to be kept as a part of the public records, ten years after the current use of the same or sooner in the discretion of the heads of such departments; and copies thereof when made and certified by the secretary of said society under seal shall have the same force and effect as if made by the original custodians. (C. L. 17, § 5358.)

85–5–3. Id. To Catalogue, Arrange and Display.

The said society shall keep all collections made by it in suitable and convenient rooms to be provided by the secretary of state or the board of regents of the University of Utah, and shall properly catalogue, arrange and display the same for the use of the public.

(C. L. 17, § 5359.)

85–5–4. Accounts and Reports.

The board of control of said society shall keep a correct account of funds received and disbursed by it, and shall make reports to the governor as in the case of other state institutions. (C. L. 17, § 5360.)

85–5–5. Board of Control; Number and Term—Executive Officers; Term.

The board of control of said society shall consist of ten members who shall serve without pay. Members of said board shall be appointed for a term of four years and until their successors are appointed and qualified. Such board is authorized to transact the business and exercise the corporate powers of the society. The board of control shall choose a president and a vice president from its own members. It shall also choose a secretary, a treasurer and a librarian, who shall each serve for two years. (L. 25, p. 8, § 5357x.)

CHAPTER 6

STATE INDUSTRIAL SCHOOL*

85–6–1. State Industrial School—Location—Purposes.
85–6–1.10. State Industrial School to Be Under State Department of Public Welfare.
85–6–2 to 85–6–4. (Repealed.)
85–6–5. General Powers and Duties of Public Welfare Commission Relating to Industrial School.
85–6–5.10. [Id.] To Succeed to All Powers and Duties.
85–6–6. Id. Appointment of Superintendent.
85–6–7. (Repealed.)
85–6–8. Id. Commission to Visit School.
85–6–9. Instruction at School.
85–6–10. Rules and Regulations for Parole.
85–6–11. Binding Out Inmates.
85–6–12. Care and Keep of Females.
85–6–13. Trespass — Escapes —Penalty.
85–6–14. Term of Commitment.
85–6–15. [Id.] Discharge.
85–6–16. Incorrigibles—Procedure.
85–6–17. When Parents and Guardians Liable for Expenses.
85–6–18. Care of Pregnant Inmates—County to Pay for.
85–6–19. Id. Liability of County.

* **History of act.** This chapter was formerly R. S. 1898, Title 61, Ch. 6, p. 491; Comp. Laws 1907, Title 74, Ch. 7, p. 793.

85–6–1. State Industrial School—Location—Purposes.

The state industrial school, located in Ogden, in the county of Weber, shall be for the confinement, discipline, education, employment and reformation of juvenile offenders committed to it according to law, and such others as may be received into the institution by contract entered into by the public welfare commission. (C. L. 17, § 5363.)

History.
As amended by L. 33, ch. 65, eff. June 26; L. 41, 1st Spec. Sess., ch. 24, eff. July 1; adding text after "law" in third line.

Comparable provisions.
Cal. Welf. & Inst. Code, § 154, as amended by Laws of 1941 (enumerating, inter alia, Preston School of Industry, and Ventura School for Girls, as being under jurisdiction of department of institutions); §§ 1000 and 1001 (designating these institutions and also the Whittier State School as being correctional institutions or schools for reception of wards of juvenile court; general government and supervision thereof vested in state department of institutions).
Idaho Code, § 32–3001 (establishing state industrial training school for care, protection, training and education of delinquent children and to provide for care and control and discharge of juvenile offenders).
Iowa Code 1939, § 3685 ("Iowa Training School for Boys" at Eldora; "Iowa Training School for Girls" located at Mitchellville); § 3287 (under management of board of control of state institutions).
Mont. Rev. Codes, § 12488 (establishing Montana State Reform School); § 12489 (changing name to Montana State Industrial School).

Cross-references.
Land grant, Enabling Act, § 12; constitutional provisions, Const. Art. VII, § 15, Art. XIX, §§ 2, 3, Art. XX, § 1; commitment of juvenile offenders to, 14–7; disposition of proceeds of sales of products, 85–1–9; detention schools, 14–8.

Decisions from other jurisdictions.
— Iowa.
Judgment, convicting 17-year-old defendant of larceny and sentencing him to an industrial school, proper in view of age of defendant. State v. Monroe, 189 Iowa 1253, 179 N. W. 606.
Duties required of an auditor and clerk of industries at a reformatory inhered in and pertained to administration of office. State v. Conway, 219 Iowa 1155, 260 N. W. 88.

85–6–1.10. State Industrial School to Be Under State Department of Public Welfare.

The government, management, operation and control of the state industrial school shall be in the state department of public welfare under the direction and control of the public welfare commission.

History.
L. 41, 1st Spec. Sess., ch. 24, eff. July 1, which amended certain sections of this chapter and repealed certain others, contained this section as section 1.

Cross-references.
Department of public welfare, 76A–1.

85–6–2 to 85–6–4. (Repealed by L. 41, 1st Spec. Sess., ch. 24, § 6, eff. July 1.)

85–6–5. General Powers and Duties of Public Welfare Commission Relating to Industrial School.

With the approval of the governor and the department of finance, the public welfare commission may contract and be contracted with, and sue and be sued in all matters concerning the school, and may contract to receive for care juvenile charges from the United States department of justice, other states of the United States or other public or private agencies on such terms and under such conditions as may be determined by the commission with the approval of the governor and the department of finance.

It may take, in the name of the state, and hold in trust for the school, realty or personalty, and, with the approval of the departments of finance and engineering, may convert property which is not suitable for the uses of the school into property which is suitable.

It may adopt rules for the regulation of all the concerns of the institution not inconsistent with the law. It shall see that the affairs of

the institution are conducted in accordance with the requirements of the law, and that strict discipline is maintained therein; it shall provide employment and instruction for the inmates, and appoint a steward and teachers, and such other officers as in its judgment the wants of the institution may require, and prescribe their duties; and shall exercise a vigilant supervision over the institution, its affairs and inmates; and it may remove any officer at its pleasure, and fix the salaries to be paid to the officers, according to standards established by the department of finance. (C. L. 17, § 5366.)

History.
As amended by L. 33, ch. 65, eff. June 26; L. 41, 1st Spec. Sess., ch. 24, eff. July 1, rewriting first and second paragraphs but making no material change in third paragraph.

85–6–5.10. [Id.] To Succeed to All Powers and Duties.

The public welfare commission shall succeed to all the powers and discharge all the duties and perform all the functions which by existing and continuing law are conferred upon and required to be discharged or performed by the board of trustees of the state industrial school. Whenever any existing and continuing law refers to or names the board of trustees of the state industrial school or to any employee or officer of said board, it shall be construed to mean, refer to and name the public welfare commission or the corresponding employee or officer of said commission.

History.
L. 41, 1st Spec. Sess., ch. 24, eff. July 1, which amended certain sections of this chapter and repealed certain others, contained this section as section 2.

85–6–6. Id. Appointment of Superintendent.

With the approval of the governor, the commission shall appoint a superintendent of the school. (C. L. 17, § 5368.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 24, eff. July 1, which contained a section 4 which read as follows: "The person holding the position of superintendent of the state industrial school and all employees of said school at the time this act becomes effective shall continue in their respective positions upon the same terms with respect to salaries and duties, without specific action by the public welfare commission, subject to removal or discharge at any time thereafter by the commission at its discretion." Amendment rewrote text.

85–6–7. (Repealed by L. 33, ch. 65, § 2, eff. June 26.)

85–6–8. Id. Commission to Visit School.

It shall be the duty of the commission to visit the industrial school as often as it may deem necessary to inquire into all matters connected with the government and discipline thereof; and one or more of the members of the commission or the director of the division of the state department of public welfare which shall have charge of correctional institutions for minors, shall visit the school at least once in every month, and examine into the progress and behavior of the inmates, and inspect the register and accounts of the superintendent. A record of such visits shall be kept in the superintendent's books.
(C. L. 17, § 5370.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 24, eff. July 1, making changes in first and fourth line and inserting "at least" after "school" in sixth line.

85–6–9. Instruction at School.

The public welfare commission shall cause the inmates to be instructed in correct principles of morality, and in such branches of useful knowledge as shall be adapted to their age and capacity. Each inmate of the school shall, so far as practicable, be taught a trade or some useful occupation to fit him to earn a livelihood upon his release.

(C. L. 17, § 5371.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 24, eff. July 1, substituting "public welfare commission" for "board" in first line.

85–6–10. Rules and Regulations for Parole.

The public welfare commission may establish rules and regulations under which any inmate may be allowed to go upon parole outside of the buildings and inclosures, but such inmate shall remain in the legal custody and under the control of the commission and shall be subject at any time to be returned within the inclosure of the institution. Full power to enforce such rules and regulations, and to retake and keep any child so upon parole, is hereby conferred upon the commission, whose written order, certified by its secretary, shall be sufficient warrant to any officer authorized to make arrests to return to actual custody and paroled inmate; and it is made the duty of all such officers to execute any such order. (C. L. 17, § 5376.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 24, eff. July 1, substituting "commission" for "board" wherever used in text.

85–6–11. Binding Out Inmates.

The public welfare commission may in its discretion bind out inmates, with their consent or the consent of their parents or guardians, as apprentices or servants during their minority, to such persons and at such places and to learn such proper trades and employments as in its judgment will conduce to their reformation, amendment and future benefit. Such inmates shall remain in the legal custody and under the supervision of the commission and shall be subject at any time to be returned to the institution. (C. L. 17, § 5372.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 24, eff. July 1, substituting "commission" for "board" wherever used in text.

85–6–12. Care and Keep of Females.

The commission may, subject to the approval of the department of finance, contract with any institution organized in this state for the reformation of females, for the care and keeping of any girl who shall be committed to the state industrial school, and may pay for such care and keep out of the funds appropriated to the state industrial school. Such girl shall remain in the legal custody and under the supervision of the

department of public welfare and shall be subject at any time to be returned to the institution. (C. L. 17, § 5377.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 24, eff. July 1, substituting clause after "may" in first line and "department of public welfare" for "board" in seventh line.

85–6–13. Trespass—Escapes—Penalty.

Every person who wilfully aids or assists any boy or girl lawfully committed to the state industrial school in escaping or attempting to escape therefrom, or who knowingly conceals such boy or girl after his or her escape, or any person who without permission, enters any of the buildings or inclosures appropriated to the use of the inmates or makes any attempt to do so, or enters anywhere upon the premises belonging to the industrial school and commits, or attempts to commit, any trespass or depredation thereon, or if any person either from within or without the inclosures, wilfully annoys or disturbs the peace or quiet of the institution, or any inmate therein is guilty of a misdemeanor. (C. L. 17, § 5378.)

History.
As amended by L. 37, ch. 119, eff. May 11, inserting text after "escape" in fourth line.

85–6–14. Term of Commitment.

Every person committed to the state industrial school shall remain until he shall arrive at the age of twenty-one years, or be legally discharged. The discharge shall be a complete release of all penalties incurred by conviction of the offense for which he was committed. (C. L. 17, § 5374.)

85–6–15. [Id.] Discharge.

No person shall be committed to said school for a term to extend beyond the time when he shall attain the age of twenty-one years; and the public welfare commission by its order may, at any time after six months' service, upon satisfactory evidence of reformation discharge any inmate from the school. (C. L. 17, § 5375.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 24, eff. July 1, substituting "public welfare commission" for "board" in third line.

85–6–16. Incorrigibles—Procedure.

If any person committed to the state industrial school shall prove unruly or incorrigible, or if his presence shall be manifestly and continually dangerous to the welfare of the school, the public welfare commission shall have the power to order his removal to the county from which he came. If such person has been convicted of a felony or misdemeanor, and judgment has been suspended, he shall be delivered to the sheriff of the county from which he came, and thereafter proceedings against such person shall be resumed as if no order committing him to the school had been made. (C. L. 17, § 5379.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 24, eff. July 1, substituting "public welfare commission" for "board" in third line.

85-6-17. When Parents and Guardians Liable for Expenses.

The public welfare commission shall estimate and determine, as nearly as may be, the actual expense per annum of keeping and taking care of such persons as are committed to the state industrial school on the complaint of their parents or guardians for incorrigible or vicious conduct; and the cost of keeping them, the cost of transportation to the school and the costs of court shall be wholly paid by such parent or guardian, unless for good cause the commission shall otherwise order and direct, in which case such expense shall be paid by the county from which the child was committed. (C. L. 17, § 5373.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 24, eff. July 1, substituting "public welfare commission" for "board" wherever used in text.

85-6-18. Care of Pregnant Inmates—County to Pay for.

Whenever an inmate of the industrial school is about to become a mother, the superintendent of said school shall at once notify the county commissioners of the county from which she was committed. If said county commissioners fail within ten days after such notice to provide a suitable place for her confinement, she may be placed by the public welfare commission in some suitable place for her welfare until after her child is born; and the expenses connected therewith shall be a legal claim against the county from which she was committed. As soon after the child is born as the condition of the mother will permit, she may be returned to the school. (L. 23, p. 160, § 1.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 24, eff. July 1, substituting "public welfare commission" for "board" in fifth line.

85-6-19. Id. Liability of County.

The county from which the girl was committed shall pay all expenses of her keep while away from the industrial school, including board, clothing for her child, medical bills, and the expense of transporting her to and from the school. (L. 23, p. 160, § 2.)

CHAPTER 7

UTAH STATE HOSPITAL

85-7-1. Successor to State Insane Asylum.
85-7-1.10. Department of Public Welfare to Control State Hospital.
85-7-2, 85-7-3. (Repealed.)
85-7-4. Public Welfare Commission —Powers in Connection with State Hospital.
85-7-4.10. Id. To Discharge Powers and Duties Conferred by Existing Laws.
85-7-5. Id. Rules and Regulations.
85-7-6. Id. Records — Meetings — Duties of Inspection—Estimate and Assessment of Care of Inmates.
85-7-7. Id. Supervision and Control of All Insane Persons.
85-7-8, 85-7-9. (Repealed.)
85-7-10. Objects of Hospital.
85-7-11. Medical Superintendent — Term — Salary — Qualifications — Powers and Duties.
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History of act. This chapter was formerly R. S. 1898, Title 61, Ch. 7, p. 495; Comp. Laws 1907, Title 74, Ch. 8, p. 797.

85–7–1. Successor to State Insane Asylum.

The state insane asylum now established and located at Provo in the county of Utah, shall be known as the Utah State Hospital.

(L. 27, p. 49, § 5383.)

Cross-references.

Constitutional provisions, Const. Art. XIX, §§ 2, 3; Art. XX, § 1; land grant, Enabling Act, § 12; disposition of proceeds from sale of products, 85–1–9; sterilization of defectives, Title 89; guardianship, 102–13–19 et seq.; relatives to support insane poor, Title 91; sales, mortgages and leases of ward's property for hospital expense, 102–13–41.

85–7–1.10. Department of Public Welfare to Control State Hospital.

The government and control of the Utah state hospital shall be vested in the state department of public welfare under the control of the public welfare commission.

History.
L. 41, ch. 71, eff. July 1, which amended certain sections of this chapter and repealed certain other sections, contained this section as section 2.

Comparable provisions.
Cal. Welf. and Inst. Code, § 6500 (enumerating the state hospitals for care and treatment of the insane); § 6501 (designating each state hospital as a corporation); § 6504 (each hospital to have board of five trustees appointed by governor with consent of senate); § 154, as amended by Laws of 1941 (enumerating, inter alia, the state hospitals coming under jurisdiction of department of institutions).

Idaho Code, §§ 64–101 and 64–102 (placing "State Hospital South" and "State Hospital North" under management and control of department of public welfare and its commissioner).

Iowa Code 1939, § 3287 (investing board of control of state institutions) with full power to contract for, manage, control and govern enumerated institutions including, inter alia, designated state hospitals).

Mont. Rev. Codes, § 1413 (vesting management, control, and supervision of state insane asylum in state board of commissioners for the insane, consisting of governor, secretary of state, and attorney general).

Cross-references.
Department of public welfare, 76A–1.

Decisions from other jurisdictions.
— California.
Rule, that findings of trial court upon disputed issues of fact are not to be overturned on appeal unless they totally lack support of substantial evidence, is as applicable to proceeding, brought for purpose of declaring incompetency of a person and for appointment of guardian, as to any other proceeding. In re McConnell's Estate, 26 Cal. App.2d 102, 78 P.2d 1043.

The state cannot engage in private or quasi-private business or make a profit from its hospital. In re Stobie's Estate, 30 Cal. App. 2d 525, 86 P.2d 883.

Power to discharge patient otherwise than upon habeas corpus is vested exclusively in officers of hospital. Ex parte Williams, 30 Cal. App. 2d 733, 87 P.2d 379.

— Iowa.
Though a state warrant has been issued for salaries of state hospital employees, the funds on which it is drawn remain the property of the state until payment, and not of the superintendent of the hospital. Cross v. Donohoe, 202 Iowa 484, 210 N. W. 532.

Where legal services were furnished to one deprived of his liberty in insane hospital to secure his release from such commitment, and the evidence showed that such services were furnished in good faith, for benefit of ward, held that allowance made by court therefor was fully sustained by the record. In re Guardianship of Schulte, Jr., 231 Iowa 237, 1 N. W. 2d 193.

85–7–2, 85–7–3. (Repealed by L. 41, ch. 71, § 6, eff. July 1.)

85–7–4. Public Welfare Commission—Powers in Connection with State Hospital.

With the approval of the governor and the department of finance, the public welfare commission may contract and be contracted with, and may sue and be sued, in all matters pertaining to the hospital. It may take and hold by gift, devise or bequest real and personal property required for the use of the hospital, and with the approval of the governor it may convert property so received, and not suitable for its use, into money or property which is suitable for such use.

(C. L. 17, § 5387.)

History.
As amended by L. 41, ch. 71, eff. July 1, making material changes in text.

85–7–4.10. Id. To Discharge Powers and Duties Conferred by Existing Laws.

The public welfare commission shall succeed to all powers and discharge all duties and perform all the functions which by existing and

continuing laws are conferred upon and required to be discharged or performed by the board of trustees of the Utah state hospital or by the board of insane asylum commissioner or by the state board of insanity. Whenever any existing and continuing law refers to or names any said boards, or any officer or employee thereof, it shall be construed to refer to and mean the public welfare commission or the corresponding officer or employee of said commission.

History.
L. 41, ch. 71, eff. July 1, which amended certain sections of this chapter and repealed certain other sections, contained this section as section 3.

85-7-5. Id. Rules and Regulations.

The public welfare commission may make rules and regulations for the hospital. (C. L. 17, § 5388.)

History.
As amended by L. 41, ch. 71, eff. July 1, rewriting text and substituting "public welfare commission" for "board."

85-7-6. Id. Records—Meetings—Duties of Inspection—Estimate and Assessment of Care of Inmates.

The public welfare commission shall cause to be kept a full and correct record of its proceedings pertaining to the affairs of the hospital which shall be open at all reasonable times to the inspection of any citizen. It shall hold meetings at least once a month at the hospital. The commission or the director of the division of the department of public welfare having charge of welfare institutions shall make a thorough inquiry into all the departments of labor and expense, and a careful examination of the buildings, property and general condition, of the hospital, at least once in every three months. The commission shall operate, maintain and repair the buildings, grounds and other physical properties of the hospital, *provided however* that the roads and driveways on the ground of the hospital shall be under the care and supervision of the department of engineering, and building repairs involving expenditure of over $3,000 shall be made by the department of engineering. The commission shall estimate and determine after conference with parents or guardians as nearly as may be the actual expense per annum of keeping and taking care of a patient in the hospital and such amount shall be assessed to and paid by the parents or guardians of patients who are of sufficient financial ability to do so. (C. L. 17, § 5389.)

History.
As amended by L. 41, ch. 71, eff. July 1, making material changes in text and adding two sentences after "months" in ninth line.

85-7-7. Id. Supervision and Control of all Insane Persons.

The public welfare commission shall have the supervision and control of all insane persons in the state whether residing in the hospital or elsewhere. (C. L. 17, § 5390.)

History.
As amended by L. 41, ch. 71, eff. July 1, substituting "public welfare commission" for "board" in first line of text.

85-7-8, 85-7-9. (Repealed by L. 35, ch. 95, § 3, eff. May 14.)

85-7-10. Objects of Hospital.

The objects of the Utah state hospital shall be to care for all insane persons residing within the state, also noninsane epileptics capable of mental improvement residing within the state; and to furnish them proper attendance, medical treatment, seclusion, rest, restraint, amusement, occupation, and support conducive to their physical and mental well-being. (C. L. 17, § 5384.)

History.
As amended by L. 35, ch. 95, eff. May 14, making minor changes in text.

Cross-references.
See also 85-7-38, 85-8-8, as to care of mental cases.

85-7-11. Medical Superintendent — Term — Salary — Qualifications —Powers and Duties.

With the approval of the governor the public welfare commission shall appoint a medical superintendent, who shall reside at or near the hospital and who shall hold his office at the pleasure of the commission. He shall receive an annual salary, payable monthly, to be fixed by the commission according to standards established by the department of finance. He shall be a well educated, experienced physician, a graduate in medicine, and shall have practiced his profession at least five years since the date of his diploma. He shall be the chief executive officer of the hospital, and shall have general superintendence of the buildings, grounds and property thereof, subject to the regulations of the commission. He shall have control of the patients, prescribe and direct their treatment, adopt sanitary measures for their welfare and discharge such of them as, in his judgment have recovered their reason. He shall immediately certify to the judge of the district from which the patient was committed, the fact of his recovery and discharge, whereupon the judge shall immediately enter an order restoring the patient to competency; *provided, however,* that this amendment shall not affect the regular procedure wherein a guardian has been appointed. He shall appoint, with the approval of the commission, as many attendants or employees as he may deem necessary for the efficient and economical care and management of the hospital, may fix their compensation according to standards of the department of finance, and discharge any of them. He shall prescribe the duties of the subordinate officers and employees, maintain discipline among them, and enforce obedience to all regulations of the institution. (C. L. 17, §§ 5393, 5395.)

History.
As amended by L. 33, ch. 66, eff. June 26; L. 35, ch. 94, eff. May 14; L. 41, ch. 71, eff. July 1, which contained a section 5 which read as follows: "The person holding the position of superintendent of the Utah state hospital at the time this act becomes effective and all employees of the hospital at such time shall continue in employment under the same terms as to salary and duties without specific action upon the part of the public welfare commission, subject to removal or discharge at any time thereafter by the commission at its discretion." Amendments made many material changes in text and inserted clause after "reason" in fourteenth line.

85-7-12. Id. Accounts—Records—Reports.

The superintendent shall cause to be kept full and correct accounts and records of his official transactions from day to day in books pro-

vided for that purpose, in the manner prescribed by the public welfare commission. He shall report monthly to the commission, producing vouchers for all expenditures made by him during the previous month. He shall cause all his accounts to be made up to and including the last day of June of each year and shall submit an annual report to the commission. (C. L. 17, § 5396.)

History.
As amended by L. 41, ch. 71, eff. July 1, substituting "public welfare commission" for "board" wherever used in text.

85–7–13. Assistant Physician—Duties.

Whenever the public welfare commission shall deem it necessary, it may, upon the nomination of the superintendent and with the approval of the governor, appoint one or more assistant physicians, who are duly licensed to practice medicine. Their salaries shall be fixed by the commission according to the standards of the department of finance, to be paid in the same manner as the salaries of other employees, and they shall hold office during the pleasure of the commission. They shall perform such duties as may be directed by the superintendent and prescribed by the rules of the commission. (C. L. 17, § 5396.)

History.
As amended by L. 41, ch. 71, eff. July 1, making many material changes in text and substituting "public welfare commission" for "board" wherever used.

85–7–14. Steward—Bond—Duties.

The public welfare commission, upon the nomination of the superintendent and with the approval of the governor, shall appoint a steward, who shall give a bond in such amount and in such form as may be fixed by the department of finance to be approved by the commission. The steward, under the direction of the superintendent, shall have general oversight of the farm, stock, garden, grounds, fences, buildings, furniture, fixtures and apparatus of the hospital, and shall receive all articles, goods and merchandise belonging thereto, and shall be responsible for the safe keeping and economical distribution of the same. The steward shall have charge of the books and accounts of the hospital. (C. L. 17, § 5397.)

History.
As amended by L. 35, ch. 95, eff. May 14; L. 41, ch. 71, eff. July 1, making many material changes in text and substituting "public welfare commission" for "board" wherever used.

Cross-references.
Official oaths and bonds, Title 65.

85–7–15. Application for Admission—Powers and Duties of District Judges.

The judges of the district courts shall have cognizance of all applications for admission to the hospital, and for the safe-keeping of insane persons within their respective districts, except in cases otherwise provided for. In case of the absence of the district judge from any county when an application as aforesaid should be heard, the judge of any other district may attend and hear the same upon the written request of

the clerk of the district court of the county wherein the alleged insane person resides, or the chairman of the board of county commissioners may act upon such application. (C. L. 17, § 5398.)

Cross-references.
Inquiry into sanity of criminal defendants, 105-49; restoration to capacity in guardianship matters, 102-13-21.

1. Malicious inquisition of lunacy.
In action for malicious prosecution in instituting lunacy proceedings, where defendant's motives or belief are in issue, the question of probable cause is exclusively for determination of the jury. One must act as a reasonably prudent man in instituting lunacy proceeding, and mere bona fide belief is insufficient defense to action for malicious prosecution in instituting such proceeding. Straka v. Voyles, 69 U. 123, 252 P. 677.

85-7-16. Forms—Commission to Furnish to Clerks of District Courts.

The public welfare commission shall furnish the clerks of the several district courts with such blanks, warrants, certificates, etc., as will enable the district judges with regularity and facility to comply with the provisions of this chapter. (C. L. 17, § 5399.)

History.
As amended by L. 41, ch. 71, eff. July 1, substituting "public welfare commission" for "board" in first line of text.

85-7-17. Temporary Commitments—Discharge—Further Proceedings.

Upon the filing of a verified application alleging that a person is in such mental condition that his commitment to the hospital is necessary for his proper care or observation, if such person is found by two duly licensed physicians to be in such mental condition, he may be committed by any district judge having jurisdiction, to the hospital for a period of thirty days pending the determination of his insanity. Within thirty days after such commitment the superintendent of the hospital shall discharge him, if he is not insane, and shall so notify the judge who committed him, or, if he is insane, he shall report the patient's mental condition to the judge with the recommendation that he be committed as an insane person, or discharged to the care of his guardian, relatives or friends, if he is harmless and can properly be cared for by them. Within said thirty days the committing judge may authorize a discharge as aforesaid, or he may commit the patient to the institution as an insane person, if in his opinion such commitment is necessary. If in the opinion of the judge additional medical evidence as to the mental condition of the alleged insane person is desirable, he may appoint a physician to further examine him and report thereon.
(L. 27, p. 49, § 5400 [2].)

A. L. R. notes.
Right without judicial proceeding to arrest and detain one who is, or is suspected of being, mentally deranged, 45 A. L. R. 1464.

85-7-18. Application for Definite Admission—Form—Contents.

Application for definite admission to the Utah state hospital shall be made in the form of an information, duly verified, setting forth the following facts:

(1) That the person on whose behalf the application is made is believed by the informant to be insane and a proper person for care and treatment at the Utah state hospital;

(2) That such person is found in the county and has a residence therein, if such is known to be the fact; and, if such residence is not in the county, where it is, if known, or where it is believed to be, if the informant is advised on the subject.

(3) The application shall state the names and addresses of three of the nearest adult relatives of such alleged insane person residing in the state of Utah, if known; and, if such relatives are not known to be in the state of Utah, where they are, if known, or where it is believed they are to be found. (L. 27, p. 49, § 5400 [5].)

History.
As amended by L. 41, ch. 89, eff. May 13, making material changes throughout text.

1. Numbering of section.
This section, as amended by L. 41, ch. 89, was erroneously numbered 87–7–18.

85–7–18a. Notice to Relatives—Form.

The clerk of the court where such application shall be filed shall immediately serve notice on the three nearest relatives named in the application by mail.

The notice shall be substantially in the following form:

In the District Court of ..... County, State of Utah, Address .....

(Person to be notified.)

.....

You are hereby notified that on this date there was filed in this court an application for admission to the Utah state hospital of ...., an alleged insane person, and that an examination into the sanity of the said person will be held in the said court before the Honorable ....., Judge of said court within three days from this date at 10:00 A. M. of said date, or at such other time as shall be determined by the court.

History.
Added by L. 41, ch. 89, eff. May 13.

85–7–18b. Necessity for Prior Hearing—Court to Make Finding.

That if the examination is conducted at a time prior to three days from the date of filing the application there shall be a finding of the court setting forth the necessity for the hearing at an earlier date. Such finding shall be in the nature of a finding on the physical condition of the alleged insane person or the acuteness of the insanity of the person making it necessary to hold the examination prior to three days from the date of the filing of the application.

History.
Added by L. 41, ch. 89, eff. May 13.

85–7–19. Examination—Warrant to Produce Alleged Insane Person.

On the filing of such information the district judge of the county in which such person resides, if a resident of the state, or, if a nonresident, then the district judge of the county in which such person

shall be found, may examine the informant under oath, and, satisfied there is reasonable cause therefor, shall at once investigate the grounds thereof. For this purpose he may require the person for whom such admission is sought to be brought before him, and may issue his warrant therefor to the sheriff or any constable of the county, which shall be in form substantially as follows:

State of Utah, County of .....
To .....greeting: You are hereby commanded to forthwith bring before me ....., alleged to be an insane person, and make due return hereof.
Witness my hand and the seal of the ..... district court in and for .....county, this .....day of ....., 19.....

.....
Judge.

The district judge must set the matter for hearing and notify the district attorney thereof. (C. L. 17, § 5401.)

A. L. R. notes.
May proceedings to have a person declared insane and to appoint conservator or committee of his person or estate rest upon substituted or constructive service of process, 77 A. L. R. 1227.

85-7-20. Id. Right to Appear—Duty of District Attorney.

The sheriff must provide, at the expense of the county, for the suitable custody of such person until the investigation shall be concluded. If the judge shall be of opinion, from such preliminary inquiries that he may make, that it will be inexpedient to bring such person before him he may dispense with his presence. In the examination evidence for and against the application must be heard. Any citizen of the county, or any relative of the person for whom the application is made, may appear and resist the application, and the parties may appear by counsel. The district attorney must represent the state in such examination, and if in his opinion the person alleged to be insane is not a proper person for care and treatment at the hospital, he must resist the application. The judge shall cause to appear before him two duly licensed, practicing physicians, before whom the examination shall be conducted. (C. L. 17, § 5402.)

A. L. R. notes.
Constitutional right to jury trial in proceeding for adjudication of incompetency or insanity, 91 A. L. R. 88.

85-7-21. Id. Two Physicians to Conduct.

After a careful hearing of the evidence and a personal examination by the physicians of the person alleged to be insane, they shall certify on oath whether or not the person is insane, whether the case is of temporary or curable character, whether the person has a homicidal, suicidal or incendiary mania, or whether he would be dangerous, if at large, to other persons or to property of the community in which he may live. In connection with their examination the physicians shall endeavor to obtain from the relatives of the person, or from others who may know

the facts, correct answers as far as possible to the interrogatories of the certificate, which must be propounded in such cases.

(C. L. 17, § 5403.)

85-7-22. Id. Physicians' Certificate.

The physicians' certificate shall be in form substantially as follows:

Physicians' Certificate

State of Utah, County of.....

..... and .....,

being duly sworn, each for himself, certifies that he is a practicing physician in medicine, that at the request and in the presence of the Honorable ....., district judge of the..... district court, in and for.....county, he has heard the evidence concerning, and has personally examined, ... with reference to his mental state, and finds that said .....is ..... insane and so far disordered in his mind as to endanger health, persons or property, and that his mental illness is not a case of idiocy, imbecility or simple feebleness of mind; that the further facts pertaining to his condition, as nearly as can be ascertained, are set forth in the answers to the following questions:

1. Name? .....
2. Age? .....
3. Residence? .....
4. Nativity? .....
5. What state last from?..... and how long in Utah?.....
6. Nationality? .....
7. Race? ..... Type? .....
8. Sex? ..... Conjugal condition?.....
9. How many children?..... Age of youngest? .....Oldest? .....
10. Occupation? .....
11. Education? .....
12. Religious impressions? .....
13. Has the patient been successful in business? ....
14. Have any relatives suffered from, or been treated for insanity? .....
15. Has there been a prolonged departure from the usual or customary conduct? ....., If so, when did this change take place? ....
16. Is the departure beyond his control? .....
17. Is this the first attack? ..... If not, when did others occur? ..... What was their duration? ..... What treatment was employed? ..... If sent to a hospital, state where ..... How long did he remain at the hospital? .....

18. What peculiarity or defect is noticeable in the patient?.....
19. Is there any permanent hallucination; if so, what is it? .....
20. Is there any permanent delusion; if so, what is it?.....
.....
21. Has ..... been intemperate in the use of liquor in any form? .....
Opium in any form? ..... Any other drug? .....Tea? ..... Coffee?
..... Tobacco in any form? .....
22. Is there a disposition to uncleanly habits? .....
.....Destruction of clothing? .....
Furniture? .....
23. Is there a disposition to injure others? .....
Is it directed to relatives? .....
Is it from sudden passion? .....
Is it premeditated? .....
24. Is there a disposition to injure self? .....
What means has he employed? ..... or would he be likely to employ for the purpose? .....
.....
25. Is there a disposition to burn property? .....
26. Review questions 23, 24 and 25, and state whether the patient is actually homicidal, ... suicidal, ...
or incendiary, ...
27. Is there a disposition to wander? .....
28. Has the patient ever had convulsions? .....
29. Has the patient suffered from epilepsy? .....
Eruptions? .....Discharges from sores? ..... Injury to the head?
..... Injury to spine? .....
Is the patient suffering from any other traumata, or hernia, or tumor? .....
30. Has the patient undergone any surgical operations? .....
Enumerate .....
31. Is the patient apparently in his usual physical health? .....
or is he feeble? ..... or emaciated? ..... Does he eat normally? ..... Does he sleep normally?
.....Is there any defect in vision?
.....In hearing? .....
In speech? .....or coördination?
..... or attention? .....
or memory? ..... or inhibition?
..... Any evidence of paralysis? .....
32. Is the patient excited? .....or quiet? .....
cheerful? ..... or moody? .....
or irritable? .....
33. Is the disease increasing? .....or decreasing? .....or stationary? .....

34. Are there any rational intervals? ..... if so, do they occur periodically? .....
35. In what way is the patient dangerous to be at large? .....
.....
36. What is the probable cause of the patient's mental illness? .....
.....
.....
37. To which class does the case belong? .....
To which type? .....
38. Name and address of attending physician .....
.....
39. Name, relation and address in full of authorized correspondent .....
.....

(C. L. 17, § 5404.)

85–7–23. Id. Duty of Judge—Findings and Order.

On the return of the physicians' certificate the judge shall, as soon as practicable, conclude his investigations, and shall find whether the person alleged to be insane is insane; whether, if insane, he is a proper person for care and treatment at the hospital; and whether the residence of such person is in such county, and if not in such county, where it is, if ascertainable. If he finds such person is not insane, he shall order his immediate discharge. If he finds such person insane and a proper person to receive care and treatment in the hospital, he shall order such person to be committed to the hospital, except as provided in section 85–7–27. No person simply feeble-minded, nor a person suffering with senile dementia only, nor a person in an unconscious condition, nor a child under ten years of age, nor a person suffering from a contagious or infectious disease, shall be considered a proper person for care and treatment at the hospital. (C. L. 17, § 5405.)

A. L. R. notes.

Constitutional right to jury trial in proceeding for adjudication of incompetency or insanity, 91 A. L. R. 88; when finding or adjudication as to one's mental condition by official or body not clearly judicial is conclusive evidence or has effect of a judgment as regards legal mental status, 108 A. L. R. 47.

85–7–24. Warrant of Commitment.

The judge's warrant of commitment shall be in form substantially as follows:

Warrant of Commitment.

State of Utah, County of.....
I, ..., judge of the ..... judicial district in and for..... county, upon the information of....., having caused ..... to be brought before me for examination as to ..... sanity, and having heard the testimony of ..... and ....., witnesses who have been acquainted with the said ..... during the time of ..... alleged insanity; and Drs.....

and ....., practicing physicians, after hearing the testimony of the witnesses and after a personal examination of the said ....., having made the certificate by law required; find that the said..... is insane and a proper person to receive care and treatment at the Utah State Hospital; that the residence of said..... is ..... County, Utah, and that ..... is .....indigent and is .....able to bear the actual charges and expenses for the time ..... may remain in the hospital. I therefore order the said.....,
a .....male, aged ..... years, to be committed to the Utah State Hospital at Provo City, in Utah County, and ..... is charged with the execution of this order.

Witness my hand this ..... day of ....., 19.....

.....
Judge.
(C. L. 17, § 5406.)

85-7-25. Id. Execution.

The district judge shall deliver to the sheriff or other person appointed to execute the warrant of commitment certified copies of the information, the physicians' certificate, and the warrant of commitment, and a certificate of the appointment of a guardian, if one is appointed. The sheriff or other person appointed shall execute the warrant by conveying the patient to the hospital, and delivering him, together with the copies of the information, physicians' certificate and warrant, and the certificate of the appointment of guardian, if any, to the superintendent. The superintendent shall acknowledge such delivery on the warrant, which the sheriff or other person appointed shall then return to the clerk of the district court of the county, with the amount of his actual expenses indorsed thereon. (C. L. 17, § 5407.)

85-7-26. Expenses and Fees of Sheriff or Substitute.

The sheriff shall be allowed his actual expenses for conveying a patient to the hospital and returning therefrom, to be paid by the county from which such patient is committed. In the absence of the sheriff or his deputy, or in case of their inability to act, the district judge may appoint some suitable person to execute the warrant. Such person shall take and subscribe an oath to discharge properly his duties in the matter. He shall be entitled to $3 per day and his actual expenses going to and returning from the hospital, to be paid by the county from which the patient shall have been committed. He may, by consent of the district judge, secure such assistants as he may need to execute the warrant. An assistant shall receive such compensation as the board of county commissioners may determine, not exceeding $3 per day and actual traveling expenses. No female shall be thus taken to the hospital without the attendance of some other female or some relative.

The superintendent in his acknowledgment of delivery shall state whether there was such person in attendance, and give the name. If any relative or immediate friend of the patient who is a suitable person, shall so request he shall have the privilege of executing the warrant in preference to any other person, and for so doing he shall be entitled to his necessary expenses, but not to fees. (C. L. 17, § 5411.)

Cross-references.
Sheriff's fees, 28–2–4.

85–7–27. Non-resident Insane—Rules for Admission.

Non-residents of this state conveyed or coming here while insane may, upon the written recommendation of the board of county commissioners of the county in which such insane person is found, be returned by the public welfare commission to the home or friends of such insane person, if known, and must not be permitted to be supported in the hospital. This prohibition shall not prevent the commitment to, and temporary care in, the hospital of persons stricken with insanity while traveling through or temporarily sojourning in this state. The commission upon the recommendation of the superintendent of the hospital may admit patients from other states upon the request of the patient's physician; *provided*, that a sum not less than is now charged for voluntary patients shall be paid in advance monthly for their care. (C. L. 17, § 5412.)

History.
As amended by L. 35, ch. 95, eff. May 14; L. 41, ch. 71, eff. July 1, substituting "public welfare commission" for "board" in fourth line of text and adding last sentence.

85–7–28. Release of Patient on Application—Form of Bond and Order.

By order of the judge of the district court issuing the commitment the relatives or friends of a patient in the hospital may receive such patient therefrom; *provided*, no patient who is under a criminal charge or conviction shall be discharged from the hospital without the order of the court having jurisdiction of such criminal case. Applications must be made to the judge and satisfactory evidence produced that such patient will be properly taken charge of and given proper care. Such applicants shall give bond to the district court of the county in substantially the following form:

State of Utah, County of .....

Know all men by these presents: That we, ... and ....., as sureties, are held and firmly bound unto the state of Utah in the penal sum of $..... lawful money of the United States, to be paid to the public welfare commission, for which payment well and truly to be made we firmly bind ourselves, our executors and administrators, jointly and severally, by these presents. The condition of this obligation is such that whereas an order has been made by the judge of the..... judicial court in and for.....county, directing the superintendent of the Utah State Hospital to deliver the person of ....., an insane person, to ....., the..... of

said person, the said order being that the said..... will take charge of and properly care for the said.....; now therefore, if the said.....shall obey all orders of the said judge relating to the proper care and custody of said patient and shall return said patient to the hospital when so ordered by the judge of said court, and shall obey the laws of the state relating to insane persons, and faithfully perform the duties and comply with the requirements therein set forth, then this obligation shall be void and of no effect; otherwise to remain in full force and virtue.

Witness our hands this..... day of .....19.....

.....

.....

State of Utah, County of.....

and....., being duly sworn, each deposes and says that he is a resident of the state of Utah and a freeholder therein, and that he [is] worth the sum of $..... over and above all his debts and liabilities, exclusive of property exempt from execution.

(Signatures)

Subscribed and sworn to before me this ..... day of....., 19.....

.....

Thereupon the district judge shall issue his order to the superintendent of the hospital directing him to deliver such patient to the person designated, which order shall be in the following form:

State of Utah, County of.....

To the superintendent of the Utah State Hospital:

Whereas,.....has made application that ..... be awarded the custody of ....., an insane person who was committed to the Utah State Hospital on the ..... day of ..... and whereas he has complied with the provisions of law in such cases made and provided, you are hereby directed to deliver the said..... ..... to .....

.....

Judge.

(C. L. 17, §§ 5413, 5414.)

History.

As amended by L. 41, ch. 71, eff. July 1, substituting "public welfare commission" for "board" in fourteenth line of text.

1. Release to parents.

The patient may be released to his father. Rawson v. Hardy, 88 U. 131, 135, 48 P.2d 473, superseding 88 U. 109, 39 P.2d 755; s. c., 88 U. 146, 54 P.2d 1213.

85-7-29. Id. Return to Hospital.

If after such removal it shall be brought to the knowledge of the judge that the person thus removed is not cared for properly, or is dangerous to persons or property, he may order such person to be returned to the hospital. (C. L. 17, § 5414.)

85–7–30. Release of Person Improperly Detained.

When it shall appear from affidavit filed, or other evidence, that any patient in the hospital is not insane and is unjustly deprived of his liberty, or is not a proper person to receive care and treatment in the hospital, the public welfare commission shall ask for an immediate inquiry into the merits of the case by the district judge of the district in which such patient is held. If on such examination it shall appear to the judge that such person is not insane, or is not a proper person to receive care and treatment in the hospital, his immediate discharge shall be ordered in substantially the following form:

State of Utah, County of.....
To the Superintendent of the Utah
State Hospital:

Having this day examined....., a person heretofore committed to the Utah State Hospital, and having adjudged the said ..... as being now sane and restored to reason (or as not being a proper person to receive treatment in the hospital), I therefore direct you to return..... to the county of.....at the expense of said county.

.....
Judge.

If the person is found to be insane, the judge shall order his continued detention, and may order the parties demanding of the commission such inquiry to pay the costs of examination. (C. L. 17, § 5415.)

History.

As amended by L. 35, ch. 95, eff. May 14; L. 41, ch. 71, eff. July 1, substituting "public welfare commission" for "board" in fourth line of text.

A. L. R. notes.

Attorneys' fees or other expenses incident to proceeding for judicial determination of restoration of sanity or capacity of one previously adjudged to be insane or incompetent as a charge against his estate, 121 A. L. R. 1501.

Jurisdiction of court after adjudication of restoration to competency, as regards claims against former incompetent, 128 A. L. R. 1386.

Jurisdiction of proceedings for restoration to competency of one who has allegedly regained sanity after an adjudication of incompetency, 121 A. L. R. 1509.

Right of appeal in proceeding for restoration to competency, 122 A. L. R. 541.

Showing as to mental condition which will entitle one restrained on ground of insanity to release, 19 A. L. R. 715.

85–7–31. Temporary Reception by Superintendent Without Order of Judge.

The superintendent of the hospital may, without the order of a judge, receive into his custody and detain in the hospital, for not more than five days, any person whose case is certified, substantially as required by section 85–7–22, to be one of violent and dangerous insanity or of other emergency by two physicians licensed to practice in this state and who have been practicing therein for more than three years, which certificate must be filed with the district judge having jurisdiction of such person. The sheriff or any police officer shall upon the request of the applicant or of one of such physicians cause the arrest and delivery of such person to the superintendent. The person applying for such admission shall within five days cause the alleged insane person to be

committed to or removed from the institution; otherwise he shall be liable to the state for the expense incurred and to a penalty of $50, which may be recovered in an action by the attorney-general.

(L. 27, p. 49, § 5400 [1].)

85-7-32. [Id.] Cases Needing Immediate Care—Procedure for Admittance.

The superintendent of the hospital may, when requested by a physician, or by a member of a board of health, a county commissioner, a sheriff or other peace officer, receive and care for as a patient for a period not exceeding ten days any person needing immediate care and treatment because of mental derangement. Such request for admission of a patient shall be in writing and filed at the institution at the time of his reception, together with a statement in a form prescribed or approved by the public welfare commission giving such information as it deems appropriate. Any such patient deemed by the superintendent not suitable for such care shall upon request of the superintendent be removed forthwith from the institution by the person requesting his reception. If he is not so removed, such person shall be liable to the state for all reasonable expenses incurred under this section on account of the patient, which may be recovered in an action by the attorney-general. The superintendent shall cause every such patient either to be examined by two physicians, qualified as provided in the preceding section, who shall cause application to be made for his admission or commitment to such institution, or to be removed therefrom before the expiration of said period of ten days. Reasonable expenses incurred in the examination of the patient and his transportation to the hospital shall be allowed, certified and paid by the board of county commissioners of the county in which the patient resides, or by the patient, or his relatives, friends or guardian. (L. 27, p. 49, § 5400 [3].)

History.
As amended by L. 41, ch. 71, eff. July 1, substituting "public welfare commission" for "board" in eighth line of text.

85-7-33. Id. Of Alcoholics and Drug Addicts.

The superintendent of the hospital may, without the order of a judge, receive into his custody and detain in the hospital for care and treatment any person whose case is certified to be one of alcoholism or drug addiction. No such person shall be received, detained or treated without first obtaining the written consent of the person to be treated, or of his parents, relatives or lawful guardian, together with a certificate by two physicians licensed to practice in this state and who have been practicing therein for more than three years. All necessary expenses connected with the reception, care, detention and treatment of such persons under this section shall be paid to the superintendent by the person treated, or by his parents, other relatives or guardian.

(L. 27, p. 49, § 5400 [4].)

85-7-34. Id. Of Cases of Incipient Insanity.

The superintendent of the Utah state hospital may receive and detain as a patient for a reasonable time, when there is room in the treat-

ment building, any suitable person who is in an incipient state of mental derangement, who desires treatment and who voluntarily makes written application to the superintendent for admission, provided he is competent to make such application. The application must be accompanied with the certificate of a licensed physician that the applicant is a fit subject for admission. (L. 23, p. 29, § 1.)

85–7–35. Voluntary Patients—Expenses of.

The expense for the care and treatment of such patient shall be borne by the applicant or by his relatives or friends, or shall be authorized by the board of county commissioners of the county in which he resides. (L. 23, p. 29, § 4.)

Cross-references.
See also 102–14–21.

85–7–36. Id. Discharge.

The superintendent may discharge a voluntary patient upon recovery, or because further treatment in the hospital may be unnecessary or undesirable. (L. 23, p. 29, § 2.)

85–7–37. Id.

A voluntary patient may not be detained for more than seven days after having given notice in writing to the superintendent of his desire to leave; *provided*, that if the superintendent deems it unsafe to release such patient, he shall make application to a judge of the fourth judicial district to have the patient regularly examined before such court as to his sanity. (L. 23, p. 29, § 3.)

85–7–38. Admission of Feeble-Minded and Epileptics.

Application for the admission of feeble-minded and non-insane epileptics shall be made to the superintendent of the hospital, who shall examine the patient, and submit the evidence to the public welfare commission. The commission shall have authority to admit or reject the patient. In such cases the patient shall make application by his or her guardian, parent or friends, or by any member of the board of county commissioners of any county. (C. L. 17, § 5384.)

History.
As amended by L. 35, ch. 95, eff. May 14; L. 41, ch. 71, eff. July 1, substituting "public welfare commission" for "board" wherever used in text.

Cross-references.
See also 85–7–10, 85–8–8.

85–7–39. Fees of Examining Physician—County to Pay.

Examining physicians shall each be allowed $5 by the board of county commissioners of the county in which the examination is had unless they shall be otherwise paid. (C. L. 17, § 5420.)

85–7–40. Insane Persons to Be Restrained Only by Authority—Exceptions.

No person supposed to be insane shall be unlawfully restrained of his liberty by any other person, nor otherwise than in pursuance of authority obtained as herein provided, excepting for such a brief period

as may be necessary for the safety of persons and property and until such authority can be obtained. (C. L. 17, § 5419.)

A. L. R. notes.
Right without judicial proceeding to arrest and detain one who is, or is suspected of being, mentally deranged, 45 A. L. R. 1464.

85-7-41. Costs of Commitment to Be Borne by County.

Every person committed to the hospital must be suitably clothed and his person properly cleansed before he is delivered to the superintendent, and the superintendent may refuse to receive such patient until the provisions hereof are complied with. All costs for the examination and commitment, and for suitable clothing, and for the proper cleansing of the patient, shall be paid by the county from which such patient is committed. If the patient is not indigent, the county shall collect the costs thereof from the parties liable therefor. (C. L. 17, § 5421.)

85-7-42. Lack of Facilities—Discrimination—Order in Which Admitted.

If at any time it becomes necessary for want of room, or other cause, to remove any patient from the hospital, or to discriminate in the general reception of patients therein, the superintendent shall give notice thereof to the several clerks of the district courts. Only harmless and incurable patients may be removed by the public welfare commission. Indigent patients so removed must be returned to the county from which they were committed at the expense of such county. When discrimination in reception is necessary, patients shall take precedence in the following order: (1) Cases of less than one year's duration; (2) chronic cases of more than one year's duration presenting the most favorable prospects for recovery; (3) cases for whom application has been longest on file. When cases are equally meritorious indigents are to be preferred. (C. L. 17, § 5416.)

History.
As amended by L. 41, ch. 71, eff. July 1, substituting "public welfare commission" for "board" in fifth line of text.

85-7-43. Liability of Estate of Insane Person.

The provisions herein made for the support of the insane at public expense shall not release the estate of such persons from liability for their care and treatment, and the public welfare commission is authorized and empowered to collect from the estate of such persons any sums paid by the state in their behalf. (C. L. 17, § 5417.)

History.
As amended by L. 33, ch. 66, eff. June 26; L. 41, ch. 71, eff. July 1, substituting "public welfare commission" for "board" in third line of text.

A. L. R. notes.
Attorneys' fees or other expenses incident to proceeding for judicial determination of restoration of sanity or capacity of one previously adjudged to be insane or incompetent as a charge against his estate, 121 A. L. R. 1501; labor or services performed by one while inmate of government institution as basis of deduction or set-off in respect of the liability of his estate or his relatives, 114 A. L. R. 981.

85–7–44. Counties to Care for Insane.

On information laid before the board of county commissioners of any county that a certain insane person in the county is suffering for want of proper care, the board shall forthwith inquire into the matter, and, if it finds the information well founded, it shall make all needful provisions for the care of such person. (C. L. 17, § 5422.)

A. L. R. notes.
Liability for medical or surgical services rendered inmates of public institutions, 44 A. L. R. 1285.

85–7–45. [Id.] Contribution by State.

On receipt on notice from the public welfare commission or the superintendent of the hospital that any person committed to the hospital cannot be received therein for want of room, the board of county commissioners shall require such person to be suitably provided for until such admission can be had. If such person is indigent, the county shall be entitled to receive from the state a sum equal to the amount allowed by the state for the cost of care and treatment of indigent patients in the hospital. (C. L. 17, § 5423.)

History.
As amended by L. 33, ch. 66, eff. June 26; L. 35, ch. 95, eff. May 14; L. 41, ch. 71, eff. July 1, substituting "public welfare commission" for "board" in first line of text.

A. L. R. notes.
Liability for medical or surgical services rendered inmates of public institutions, 44 A. L. R. 1285.

85–7–46. Unlawful Introduction Into Hospital, a Crime.

If any person in anywise attempts to introduce another into the hospital contrary to the provisions of this chapter, he is guilty of a misdemeanor, and shall be fined in any sum not less than $50 nor more than $300. (C. L. 17, § 5424.)

85–7–47. Abuse of Insane Persons—Penalty—Liability.

Any one having care of an insane person who unduly restrains such person, either with or without authority, or who treats such person with wanton severity or cruelty or in any way abuses such person, is guilty of a misdemeanor, besides being liable in an action for damages. (C. L. 17, § 5425.)

Cross-references.
Harsh and cruel treatment of insane, 103–30.

85–7–48. Trespass in or About Hospital—Penalty.

If any person, without permission, enters any of the buildings or inclosures appropriated to the use of the patients, or makes any attempt to do so, or enters anywhere upon the premises belonging to the hospital and commits, or attempts to commit, any trespass or depredation thereon, or if any person, either from within or without the inclosures, willfully annoys or disturbs the peace or quiet of the institution, or any patient therein, he is guilty of a misdemeanor and may be fined in any sum not less than $5 nor more than $50, or may be imprisoned not less than five nor more than fifty days, or may be punished by both such fine and imprisonment. (C. L. 17, § 5426.)

85-7-49. Abduction or Escape of Patients—Penalty.

If any person abducts any patient from the hospital, or induces any patient to elope or escape therefrom, or attempts to do so, or aids or assists therein, he shall be fined in any sum not less than $50 nor more than $300, or be imprisoned not less than fifty days nor more than six months, or may be punished by both such fine and imprisonment in the discretion of the court. (C. L. 17, § 5427.)

85-7-50. Importation of Insane Persons Forbidden—Penalty and Liability—Exportation.

Whoever brings or causes to be brought into this state any idiot, imbecile or insane person, with the intent to make such person a charge upon the state shall be fined $100, besides being liable, at the suit of the state, for all damages incurred thereby, and for costs of transportation to the place whence such idiot, imbecile or insane person has come. The board of county commissioners may transport such idiot, imbecile or insane person to the place whence he has come.

(C. L. 17, § 5428.)

85-7-51. Violation of Chapter—Omnibus Penalty.

Any person refusing or neglecting to comply with, or willfully and knowingly violating, any of the provisions of this chapter, except where another penalty is herein provided, shall be fined in any sum not exceeding $500 or imprisoned in the county jail not more than three years, or punished by both such fine and imprisonment.

(C. L. 17, § 5429.)

85-7-52. Recommitment—Form of Order.

Any person who has been committed to the Utah state hospital and has been discharged therefrom, and who has a recurrence of his nervousness, may be recommitted to the hospital for further care and treatment by any judge of a district court in the state of Utah, upon the application of any guardian, relative, friend or officer of the law, stating said person has a recurrence of his nervousness or is not cared for properly, or is dangerous to persons or property and is in need of further care and treatment at the hospital. After hearing the evidence and testimony and being convinced that said person is in need of further care and treatment for his nervous condition the committing officer shall issue an order of recommitment substantially as follows:

IN THE JUDICIAL COURT OF THE
.....JUDICIAL DISTRICT
COUNTY OF.....STATE OF UTAH
State of Utah }
County of..... } ss.

IN THE MATTER OF
.....RECOMMITMENT
No. .....
AN ALLEGED INSANE PERSON

It appearing to the court that.....
was heretofore on the.....day of.....,
19...., committed to the Utah state hospital and subsequently released,

and it now appearing to the court upon the testimony of.....
and upon the application of.....that
the said.....should be recommitted
to the Utah state hospital for further care and treatment.

NOW, THEREFORE, it is ORDERED that the said.....
be and.....hereby is recommitted to
the Utah state hospital at Provo, Utah. The sheriff of.....
county is charged with the execution of this order.

DATED this .....day of.....,
19.....

.....
Judge.

Received of.....sheriff of
.....county, this said.....
herein mentioned, this.....day of.....,
19.....

.....
Superintendent of Utah State
Hospital
By.....

ACCOMPANIED BY

.....

History.
Added by L. 33, ch. 66, eff. June 26.

85–7–53. Leave of Absence.

The superintendent of the Utah state hospital may permit any patient thereof, except as provided hereunder, temporarily to leave said hospital in charge of his guardian, relative, friend, or by himself, for a period of not exceeding twelve months, and may receive him when returned by any such guardian, friend, or upon his own application, within such period, without any further order of court commitment. Any such permission or trial visit or parole shall in no way affect the original order of commitment. The superintendent may require as a condition to such leave of absence, that the person in whose charge the patient is permitted to leave the hospital, shall make weekly or monthly reports to him of the condition of such patient. The superintendent, guardian, relative or friend, may terminate such leave of absence at any time, and authorize the arrest and return of the patient to the hospital. Any officer of this state qualified to serve criminal processes in any city, or county, of this state, or any officer or employee of the Utah state hospital shall cause such a patient to be arrested, and returned to the hospital upon the request of the superintendent, guardian, relative or friend. Any patient who has not returned to the hospital at the expiration of twelve months shall be deemed to be discharged therefrom, unless for special reasons of an exceptional character, in the judgment of the superintendent, the parole should be extended.

No patient who may be under a criminal charge or conviction shall be paroled, given leave of absence, or discharged from this hospital without order of the court, having jurisdiction in such criminal case.

No patient, while in the custody of the Utah state hospital, shall be permitted to go upon trial visit or parole, who, in the opinion of the superintendent or physician in charge is homicidal, suicidal, destructive or dangerous, either to himself or others. During the time any patient is on a trial visit on parole, as provided hereunder, the Utah state hospital shall not be liable for his expenses while he is absent from the hospital. Such liability shall devolve upon the guardian, relative, friend, committee, or person to whose care the patient is paroled, or the proper official of the town or county where he may have found domicile.

History.
Added by L. 33, ch. 66, eff. June 26.

85–7–54. Patients Placed at Board.

The public welfare commission upon the recommendation of the superintendent may place at board in a suitable family in this state any indigent patient in the hospital who has been regularly committed and is quiet and not dangerous. Any such patient so placed at board by the commission shall be deemed to be an inmate of the hospital. The cost to the hospital for placing such patient at board shall not exceed $4 per week for each patient. The bill for the support of the persons who are placed at board in families by the commission shall be paid monthly by the hospital and shall be made out by the steward, examined by the commission and if approved, submitted to the state auditor as are other obligations of the hospital.

The placing at board of such patients shall in no way affect the rights of the hospital to supervision and re-admission of the patients. All patients so placed at board shall be at the expense of the hospital and shall be visited by the superintendent or his duly appointed assistant at least every three months. Frequent reports may be required from those into whose care patients are placed by the superintendent.
(L. 35, p. 186, § 2.)

History.
Added by L. 35, ch. 95, eff. May 14; amended by L. 41, ch. 71, eff. July 1, making no change in phraseology of text.

CHAPTER 8

UTAH STATE TRAINING SCHOOL

85–8–1. Location.
85–8–1.10. Utah State Training School to Be Governed and Controlled by Department of Public Welfare.
85–8–2, 85–8–3. (Repealed.)
85–8–4. Public Welfare Commission Shall Operate — Accounts —Report to Governor.
85–8–5. Id. May Requisition Prison Labor.
85–8–6, 85–8–7. (Repealed.)
85–8–8. Id. To Maintain Educational and Custodial Departments.
85–8–9. Id. Powers and Duties.
85–8–10. (Repealed.)
85–8–11. Medical Superintendent — Qualifications — Residence —Salary.
85–8–12. Id. Powers and Duties.
85–8–13. Id. To Return Support Money Advanced on Death or Discharge of Patient.

85–8–14. Id. Official Bond.
85–8–15. Persons Who May Not Be Received Into School.
85–8–16. Persons Who May Be Received Into School.
85–8–17. Admission to School—Application for.
85–8–18. Id. On Physicians' Certificate—Temporary Admission — Discharge — Review of Superintendent's Orders.
85–8–19. Id. Application to District Judge.
85–8–20. Id. Examination Before Judge.
85–8–21. Id. By Physicians.
85–8–22. Id. Physicians' Affidavit.
85–8–23. Id. Order of Commitment.
85–8–24. Id. Warrant of Commitment.

85–8–1. Location.

The school for feeble-minded persons, to be known as "Utah State Training School," shall be located at American Fork City, in Utah county. (L. 29, p. 102, § 1.)

Comparable provisions.

Cal. Welf. and Inst. Code, § 154, as amended by Laws of 1941 (enumerating, inter alia, Sonoma State Home and Pacific Colony, for the feeble-minded, as coming under jurisdiction of department of institutions).

Idaho Code, § 64–401 (establishing school for feeble-minded and epileptic persons, known as "Idaho State School and Colony").

Iowa Code 1939, § 3287 (conferring upon board of control of state institutions the power to contract for, manage, control and govern various institutions including, inter alia, hospital for epileptics and school for feeble-minded).

Mont. Rev. Codes, § 1474 (establishing at Boulder, Montana, in connection with and under control of Montana school for deaf and blind, a Montana training school for feeble-minded persons, for training and detention of epileptics and feeble-minded minors and adults); § 1473.1, added by Laws of 1937 (transferring school for deaf and blind to Great Falls).

85–8–1.10. Utah State Training School to Be Governed and Controlled by Department of Public Welfare.

The Utah state training school shall be in the department of public welfare under the government and control of the public welfare commission, and the state department of public welfare shall succeed to all the powers and discharge all duties and perform all functions which by existing and continuing law are conferred upon or required to be discharged or performed by the board of trustees of the Utah state training school heretofore created and appointed. Whenever any existing or continuing law refers to or names the board of trustees of the Utah state training school or any officer, agent or employee of such board, it shall be construed to mean, refer to, or name, the public welfare commission or the corresponding officer, agent or employee of said commission.

History.

L. 41, ch. 72, eff. July 1, which amended certain sections of this chapter, contained this section as section 1.

85–8–2, 85–8–3. (Repealed by L. 41, 1st Spec. Sess., ch. 32, § 1, eff. July 1. Repeal of these sections was also apparently intended by L. 41, ch. 72, § 5, but reference therein was to nonexistent sections 82–8–2 and 82–8–3 of the Revised Statutes of 1933.)

85–8–4. Public Welfare Commission Shall Operate—Accounts—Report to Governor.

The commission shall operate, maintain and repair the buildings, ground and physical properties of the school, *provided however* that the roads and driveways on the grounds of the school shall be maintained by the department of engineering. It shall keep a strict and accurate account of all moneys disbursed by it in the furnishing, maintaining and operating the school, and shall make a biennial report thereof, and of all its contracts and transactions, to the governor on or before the 1st day of October preceding each regular session of the legislature, and the governor shall transmit the same to the said session of the legislature. (L. 29, p. 102, § 5.)

History.
As amended by L. 41, ch. 72, eff. July 1, changing first sentence of text.

Cross-references.
Department of public welfare, 76A–1.

85–8–5. Id. May Requisition Prison Labor.

The board shall make requisition upon the warden of the state prison for prisoners to labor upon the grounds of the school, and the warden shall furnish as many prisoners as may be necessary or practicable to work thereon. Such prisoners shall be under the sole custody and direction of the authorities of the state prison while engaged in such labor, and the expenses of extra guards and any other extra expense made necessary by reason of such labor shall be paid from funds belonging to the school. (L. 29, p. 102, § 6.)

85–8–6, 85–8–7. (Repealed by L. 41, 1st Spec. Sess., ch. 32, § 1, eff. July 1. Repeal of these sections was also apparently intended by L. 41, ch. 72, § 5, but reference therein was to nonexistent sections 82–8–6 and 82–8–7 of the Revised Statutes of 1933.)

85–8–8. Id. To Maintain Educational and Custodial Departments.

The board shall maintain a school department for the instruction and training of feeble-minded persons who are within school age or who are capable of being benefited by school instruction, and a custodial department for the care and custody of feeble-minded persons beyond the school age or not capable of being so benefited, and shall cause to be given to them instruction and training in unskilled labor and trades, and in such arts, crafts, manual training, kindergarten, and occupations as may be appropriate for such persons to undertake.
(L. 29, p. 102, § 9.)

Cross-references.
See also 85–7–10, 85–7–38, as to care of mental cases.

85–8–9. Id. Powers and Duties.

The powers and duties of the commission shall be as follows:

(1) To make rules, not inconsistent with law, for the government of the school.

(2) To hold meetings at the training school at least once in each quarter year.

(3) To keep a record of its proceedings respecting the administration of the school open at all times during office hours to the inspection of any citizen.

(4) With the approval of the governor to appoint a medical superintendent, to hold his office during the pleasure of the commission,

(5) To receive, take and hold property, both real and personal, in trust for the state for the use and benefit of the school.

(6) To visit the school and keep constantly advised of all items of labor and expense, and of the condition of the school and its buildings and property, and to make such improvements as in its judgment are necessary for the care of the inmates, and, in case of absolute necessity, to remove them to the nearest possible safe and appropriate place.

(7) To cause the accounts of the school to be so kept and reported as to show the quality, quantity, cost and vendor of every article purchased.

(8) To examine and audit the accounts for all expenditures of the superintendent for salary of employees, and all other expenses incident to the conduct of the school, and the care and maintenance of the inmates, and, if approved by it, to certify the same to the state auditor.

(9) To make regulations and fix the terms for the admission of feeble-minded persons. (L. 29, p. 102, § 10.)

History.
As amended by L. 41, ch. 72, eff. July 1, making material changes in first four subdivisions of text.

85–8–10. (Repealed by L. 41, 1st Spec. Sess., ch. 32, § 1, eff. July 1. Repeal of this section was also apparently intended by L. 41, ch. 72, § 5, but reference therein was to nonexistent section 82–8–10 of the Revised Statutes of 1933.)

85–8–11. Medical Superintendent—Qualifications—Residence—Salary.

The medical superintendent must be a graduate in medicine, trained in psychiatry, with special training and institutional experience in the care and training of feeble-minded persons.

He must reside at or near the school and give his entire time and attention to promoting the best interests of the institution. His duties not specified in this chapter shall be prescribed by the commission.

The salary of the medical superintendent shall be fixed by the commission, according to standards established by the department of finance. (L. 29, p. 102, §§ 14, 15, 17.)

History.
As amended by L. 41, ch. 72, eff. July 1, which contained a section 2 which provided that the person holding the position of medical superintendent of the Utah state training school at the time this act became effective, and each other employee of such school at said time, should continue in his employment in the same capacity and at the same rate of compensation then effective as to him without specific action upon the part of the commission and might continue in such employment subject to removal or discharge at any time thereafter by the commission at its discretion. Amendment changed last paragraph of text.

85-8-12. Id. Powers and Duties.

The medical superintendent shall be the executive head of the school, with powers and duties as follows:

(1) To manage the training school, determine the treatment in, and prescribe and enforce the sanitary regulations thereof.

(2) With the approval of the commission, to appoint, control and remove the attendants, assistants and teachers and all other employees, and fix their compensation according to standards established by the department of finance.

(3) To prescribe, and enforce performance of, the duties of the attendants, assistants and teachers.

(4) To ascertain and timely report to the commission the amount, character and quality of provisions, fuel and clothing required for each six months ending on the 1st day of June and December.

(5) With the approval of the commission to make any expenditures necessary in the performance of his duties, except for provisions, fuel and clothing.

(6) To take charge of all moneys found upon any feeble-minded person admitted to the school, and, with the approval of the commission, to make fair and equitable charges and collect them from all patients who are able to pay, and account for all money so received to the commission.

(7) To keep a daily record of his official acts in the manner prescribed by the rules.

(8) To make up his annual accounts to the 1st day of July in each year, and, as soon thereafter as possible, to report a statement thereof and of the general condition of the school to the commission.

(9) He must estimate quarterly in advance the probable expenses of the school and submit such estimate to the commission for consideration and approval. (L. 29, p. 102, § 16.)

History.
As amended by L. 41, ch. 72, eff. July 1, substituting "commission" for "board of trustees" wherever used in text and making other minor changes.

85-8-13. Id. To Return Support Money Advanced on Death or Discharge of Patient.

If, at the time of the discharge of a person from the school, or after the death and burial of any person therein confined, there remains in the custody of the trustees or superintendent any money paid for the support or maintenance of such person, it must, upon demand, be repaid. (L. 29, p. 102, § 21.)

85-8-14. Id. Official Bond.

The medical superintendent shall execute an official bond for the faithful performance of his duties in such form and in such amount as may be determined by the department of finance.

(L. 29, p. 102, § 18.)

History.
As amended by L. 41, ch. 72, eff. July 1, rewriting section.

Cross-references.
Official oaths and bonds, Title 65.

85–8–15. Persons Who May Not Be Received Into School.

No feeble-minded convict or defective delinquent shall be received into the school, except such as in the judgment of the superintendent may be benefited by training therein. (L. 29, p. 102, § 20.)

85–8–16. Persons Who May Be Received Into School.

All feeble-minded persons who are residents of this state, whose defects prevent them from receiving proper instruction and training in the public schools, or whose defects prevent them from properly taking care of themselves, or who are a social menace, may be admitted to the school under such regulations and conditions as the board of trustees may provide. (L. 29, p. 102, § 22.)

85–8–17. Admission to School—Application for.

An application in behalf of any person for whom admission is requested may be made in substantially the following form:

STATE OF UTAH

To the trustees of the Utah State Training School:

The subscriber ..... of ..... in the county of..... respectfully represents that..... residing in ..... in the county of ..... is feeble-minded and a proper subject for a school for the feeble-minded; and therefore requests that said ..... be admitted as a pupil to the school department of said school, and makes the following statement relative to the patient:

1. Sex.....; age.....years; birthplace of patient....., of mother....., of father.....; maiden name of mother.....; name of father.....

If patient is foreign born, how long a resident in United States..... ..... How long a resident of Utah..... Color.....

2. Has the patient ever been an inmate of a school for the feeble-minded or other institution? If so, state when, where and for what length of time.....

3. What is the physical condition of the patient? ....

4. Has the patient been physically injured? If so, when and to what extent.....

5. Is the patient subject to epilepsy?.....

6. Is the patient cleanly in dress and personal habits? .....

7. Is the patient paralytic, violent, dangerous or destructive?..... .....

8. Has or had the patient insane or feeble-minded relatives? If so, state the degree of consanguinity, and whether paternal or maternal. .....

9. Last known address of patient.....
10. Names and post-office addresses of guardian and nearest relatives or friends.....
11. Does the patient or either parent own real estate or other property in Utah? If so, where.....
12. Has the patient or either parent resided in any place in this state five years continuously prior to this application? If so, who, when and in what city or town.....
If less than five years in Utah, where patient formerly resided, and for how long.....
13. Does the patient['s] husband or either parent receive a pension from the United States government?.....
The applicant is unable to answer the above questions more fully.

.....
Applicant.

.....
(State relationship to patient.)

Said application must be accompanied by an affidavit in substantially the following form:

State of Utah, County of.....
I, the undersigned, a permanent resident of .....,
County of....., State of Utah, being duly sworn depose and say: that I am a graduate of a legally chartered medical school or college; that I have been in the actual practice of medicine for three years since said graduation and next preceding the making of this affidavit; that I am duly registered in accordance with the provisions of the laws of Utah; and that within the last five days, namely, on the.....day of....., 19...., I personally examined with care and diligence .....
.....a resident of....., County of....., State of Utah, and as a result of such examination find that said.....
.....is mentally deficient and in my opinion is a proper subject for the Utah State Training School.

.....M.D.

Subscribed and sworn to before me this.....day of....., 19.....

.....
Notary Public.

Upon receipt of such application and affidavit the medical superintendent upon being satisfied that the person is a proper applicant shall receive such person into the school. (L. 29, p. 102, § 23 [1].)

85-8-18. Id. On Physicians' Certificate—Temporary Admission—Discharge—Review of Superintendent's Orders.

The board of trustees may, in its discretion, receive any feebleminded person upon application being made therefor by the parent or guardian of such person, which application shall be accompanied by the affidavit of a physician, qualified as provided herein, stating that such person is deficient in mental ability, and that in the opinion of the

physician he is a fit subject for said school. The physician who makes said affidavit shall have examined the alleged feeble-minded person within five days of his signing and making oath to the affidavit. The board of trustees may also, in its discretion, receive any person upon the written request of his parent or legal guardian, and may detain him for observation, for a period of not exceeding thirty days, to determine whether he is feeble-minded. Persons received by the school shall be classified by the superintendent. The superintendent may receive pupils, and may at any time discharge any pupil or patient and cause him to be removed to his home. All orders for receiving or discharging patients shall be subject to review by the board of trustees.

(L. 29, p. 102, § 23 [2].)

85–8–19. Id. Application to District Judge.

Whenever it appears that any person within the county is so feeble-minded as to prevent him from receiving proper instruction and training in the public schools, or to prevent him from properly taking care of himself, or that any person by reason of feeble-mindedness is a social menace, any person may file with the clerk of the district court of the county in which such person resides an application in form substantially as follows:

STATE OF UTAH

To the honorable judges of the district court in and for the county of.....

The subscriber hereto, ... of .....in the county of....., respectfully represents, that ..... residing in..... in the county of ..... is feeble-minded and a proper subject for custody in the Utah State Training School; and therefore prays that said.....may be committed to the Utah State Training School; and makes the following statement relative to the patient:

1. Sex.....; age..... years; birthplace of patient....., of mother....., of father.....; maiden name of mother.....; name of father.....
If patient is foreign born, how long a resident in the United States ..... How long a resident of Utah..... Color ..... Occupation..... Single, married, widowed, divorced.....

2. Has the patient ever been an inmate of a school for the feeble-minded, or other institution? If so, state when, where and for what length of time.....

3. What is the physical condition of the patient? .....
.....

4. Has the patient been physically injured? If so, when and to what extent.....

5. Is the patient subject to epilepsy? .....
6. Is the patient cleanly in dress and personal habits?.....
.....
7. Is the patient paralytic, violent, dangerous or destructive?.....
.....
8. Has or had the patient insane or feeble-minded relatives? If so, state the degree of consanguinity, and whether paternal or maternal
.....
9. (If a woman) Has she ever borne children? .....
..... How long since the birth of her last child?
.....
10. Last known address of patient.....
11. Names and post-office addresses of guardian and nearest relatives or friends.....
12. Does the patient, husband, either parent or any child of the patient, own real estate in Utah? If so, where.....
13. Has the patient, husband or either parent of the patient, resided in any place in this state five years continuously? If so, when, who and in what city or town.....
If less than five years in Utah, where patient formerly resided, and for how long.....
14. Does the patient, husband or either parent of the patient, receive a pension from the United States government?.....
The applicant is unable to answer the above questions more fully.

.....
Applicant.

.....
State relationship to the patient.

Subscribed and sworn to before me this.....day of....., 19.....

.....
Notary Public.

Upon receipt of such application, duly signed and verified, the clerk of the district court shall present the same at the earliest date, and the judge of the district court shall direct the issuance of a warrant to the sheriff of the county to produce the person described in such application before the court forthwith for examination.

(L. 29, p. 102, § 23 [3].)

85-8-20. Id. Examination Before Judge.

When the person is taken before the judge, subpoenas must issue to two or more witnesses, best acquainted with such feeble-minded person, to appear and testify at the examination. The judge must also require at least one duly licensed graduate in medicine to appear and attend such examination. (L. 29, p. 102, §§ 24, 25.)

85-8-21. Id. By Physicians.

The physician or physicians must hear the evidence, and make a personal examination of the patient. (L. 29, p. 102, § 27.)

85–8–22. Id. Physicians' Affidavit.

Each physician, after hearing the evidence and making the examination, must, if he believes such person to be so feeble-minded as to be unable to receive the proper instruction and training in the public schools, or to properly care for himself, or to be in such condition as to constitute a social menace, make an affidavit in form as follows:

State of Utah, County of.....

I, the undersigned, being duly sworn depose and say; that I am a graduate of a legally chartered medical school or college; that I am duly registered in accordance with the provisions of the laws of Utah; and that within five days prior to my making this affidavit, namely on the.....day of....., 19...., I personally examined with care and diligence,..... ....., a resident of....., County of....., State of Utah, and as a result of such examination find that said ..... is mentally deficient and in my opinion is a proper subject for the Utah State Training School.

.....M.D.

.....

(Permanent address of physician)

Subscribed and sworn to before me this.....day of....., 19.....

.....

Notary Public.

(L. 29, p. 102, § 28.)

85–8–23. Id. Order of Commitment.

The district judge, after such examination and the making and filing of such affidavit, if he believes the person to be so feeble-minded as to be unable to receive the proper instruction and training in the public schools, or to properly care for himself, or by reason of feeble-mindedness, to be a social menace, must make an order that such person be confined in the Utah state training school. (L. 29, p. 102, § 29.)

85–8–24. Id. Warrant of Commitment.

The warrant of commitment, proceedings thereon, and return thereof, shall be, as near as may be, as provided for insanity matters in chapter 7 of this title. (Code Report.)

CHAPTER 9

STATE PRISON [CONVICT-MADE GOODS]

85–9–1. Purposes and Uses.
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L. 1937, ch. 122; eff. Mar. 10.

DEPARTMENT OF ADULT PROBATION AND PAROLE

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85–9–78. Violating Terms of Parole.
85–9–79. Conflicting Acts Repealed.
85–9–80. Effective Date.

L. 1937, ch. 123; eff. Mar. 17.

PROBATION AND PAROLE OF CONVICTS—OUT-OF-STATE SUPERVISION

85–9–81. Authority to Enter Into Compacts.
85–9–82. Partial Invalidity — Saving Clause.
85–9–83. Short Title.
85–9–84. Effective Date.

L. 1933, ch. 67; eff. Jan. 19, 1934.

CONVICT-MADE GOODS TRANSPORTED INTO UTAH

85–9–85. Subject to State Regulations.
85–9–86. Effective Date.

L. 1933, ch. 68; eff. Mar. 21.

SALE OF CONVICT-MADE GOODS ON OPEN MARKET

85–9–87. Sale Forbidden.
85–9–88. Goods to Be Labeled.
85–9–89. "Open Market" Defined.
85–9–90. Violation, a Misdemeanor.
85–9–91. Effective Date.

History of act. This chapter was R. S. 1898, Title 61, Ch. 9, p. 506; Comp. Laws 1907, Title 74, Ch. 10, p. 810.

85–9–1. Purposes and Uses.

The state prison shall be for the confinement of convicts lawfully sentenced thereto. Convicts sentenced to the state prison by any United States court may be received and there kept in pursuance of their sentences upon such terms as the board of corrections shall approve. (C. L. 17, §§ 5444, 5473.)

Comparable provisions.

Cal. Penal Code, § 2901 (wardens of state prisons to receive persons sentenced to imprisonment in state prison); § 2902 (and to receive criminals sentenced to state prisons by authority of the United States).

Idaho Code, § 20–101 (requiring maintenance of penitentiary at Boise City); § 20–102 (under control, direction and management of board of state prison commissioners, consisting of governor, secretary of state, and attorney-general).

Iowa Code 1939, § 3287 (conferring upon board of control of state institutions full power to contract for, manage, control and govern, inter alia, women's reformatory, men's reformatory, state penitentiary).

Mont. Rev. Codes, § 12434 (conferring supervision of all matters connected with state prison upon board of state prison commissioners, consisting of governor, secretary of state, and attorney general).

Cross-references.

Constitutional provision, Const. Art. XIX, § 2; land grant, Enabling Act, § 12; offenses punishable by confinement in state prison, 103–1–13; place of execution of death penalty, 105–37–17; person of prisoner under protection of law, 103–1–38.

Decisions from other jurisdictions.

— California.

Order of removal from office of members of state board of prison directors was affirmed, in view of sufficiency of evidence supporting finding that the board had constructive knowledge, and therefore became responsible for permitting guards of San Quentin state prison to administer corporal punishment contrary to law upon many prisoners over a period of several months. O'Brien v. Olson, 42 Cal. App. 2d 449, 109 P.2d 8.

— Iowa.

It was within the power of the legislature, and was not a violation of Const. Art. I, § 17, prohibiting cruel and unusual punishments, to provide for the punishment of convicts by solitary confinement. State v. Cahill, 196 Iowa 486, 194 N. W. 191.

Plaintiff held not entitled to recover damages against warden of state penitentiary for breach of contract, entered into by plaintiff with superintendent of chair department of the penitentiary, whereby the latter ordered from plaintiff certain material to be used in the manufacture of chairs. Henry Quellmalz Lumber & Manufacturing Co. v. Hollowell, 198 Iowa 722, 200 N. W. 177.

Petitioner seeking by habeas corpus to procure his release from the department for the criminal insane at the men's reformatory to which he had been previously legally committed, on the ground that he was restored to sanity, held to have had the burden of establishing his sanity. Molesworth v. Baumel, 198 Iowa 1293, 201 N. W. 41.

A. L. R. notes.

Validity of statute empowering administrative officials to transfer to penitentiary inmate of reformatory, 95 A. L. R. 1455.

85–9–2. Board of Corrections.

The government and control of the state prison and its affairs shall be vested in a board of corrections which shall consist of the governor,

ex officio, and three resident citizens of the state, appointed by the governor, not more than two of whom shall be of the same political party. Each appointive member of the board shall hold office for six years and until his successor shall be appointed and qualified: *provided*, the term of the first appointee shall terminate on the first Monday in March, 1939, the term of the second appointee shall terminate on the first Monday in March, 1941, and the term of the third appointee shall terminate on the first Monday in March, 1943. In January, 1939, and biennially thereafter the governor with the consent of the senate shall appoint one member for the term of six years. (C. L. 17, § 5445.)

History.
As amended by L. 37, ch. 120, eff. Mar. 10, making various changes in text and adding proviso.

Cross-references.
Under Const. Art. VII, § 13, the state prison commissioners supervised the prison "until otherwise provided by law."

85–9–3. [Id.] Members to Give Bond.

Each appointive member of the board shall qualify by taking the constitutional oath of office, and by giving bond to the state of Utah in such form and in such amount as shall be determined by the department of finance conditioned for the faithful performance of his duties. (C. L. 17, § 5446.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 33, eff. July 1, making material change in text.

Cross-references.
Constitutional oath, Art. IV, § 10; official oaths and bonds, Title 65.

85–9–4. Id. Power to Sue and Contract.

The board of corrections may contract and be contracted with, and may sue and be sued, in all matters concerning the state prison. (C. L. 17, § 5447.)

1. Conveyance of certain land to Salt Lake City.
L. 39, ch. 136, eff. Feb. 28, ratified an agreement entered into in 1925 between the board of corrections and Salt Lake City and authorized the board of corrections to convey to Salt Lake City a certain tract of land upon payment of the purchase price thereof.

85–9–5. [Id.] Compensation.

The members of the board of corrections, except the governor, shall each receive ten dollars per diem as compensation for their actual time and services on the board of corrections; *provided*, that no board member shall receive more than $25 per month plus their actual and reasonable expenses incurred in the performance of their official duties, the accounts for which verified by oath shall be paid out of money in the state treasury not otherwise appropriated. (C. L. 17, § 5448.)

History.
As amended by L. 37, ch. 121, eff. May 11, making material changes in text.

85–9–6. Officers of Prison Enumerated.

The officers of the state prison shall consist of a warden, who shall be the principal keeper, one deputy warden, one clerk, who shall also be a keeper, one physician and surgeon, a matron, and as many keepers and guards as the warden and the board may deem necessary. Each of

said officers, before entering upon the duties of his office, shall take and subscribe the constitutional oath, and file the same with the secretary of state. (C. L. 17, § 5449.)

Cross-references.
Constitutional oath, Const. Art. IV, § 10; pensions for prison guards, 71–2; officers and guards exempt from jury service, 48–0–10.

85–9–7. Warden—Appointment—Term—Qualifications.

The board shall appoint the warden, who shall hold office during its pleasure. He shall possess the ability and qualifications necessary to successfully carry on the industries of the prison, and shall be a person who has the executive ability essential to the proper management of the officers and employees under his jurisdiction, and to enforce and maintain proper discipline in every department. (C. L. 17, § 5450.)

85–9–8. Parole Agents—Appointment—Duties.

The board may appoint some suitable and discreet person as parole agent for the state, to serve at its pleasure, whose duties shall be prescribed by the board. The parole agent shall have all the powers that guards, peace officers and sheriffs now possess, to be exercised anywhere within the state. When not on duty away from the state prison the parole agent shall perform the duties of a guard or such other duties as he may be directed to perform by the warden relating to the affairs of the state prison or prisoners. (C. L. 17, § 5451.)

85–9–9. Overseers of Prison Labor—Appointment.

The board may appoint persons having the necessary practical knowledge to be overseers of such work as may be established, when in its judgment such appointments will promote the efficiency of the prison labor. (C. L. 17, § 5449.)

85–9–10. Deputy Warden and Other Officers—Appointment.

The deputy warden and all other officers and employees of the prison shall be appointed by the warden, subject to the approval of the board, and shall hold their offices at the pleasure of the warden and the board. (C. L. 17, § 5452.)

85–9–11. Warden—Residence—Duties—Bond.

The warden shall reside at the prison in apartments to be assigned to him by the board. He shall be in constant attendance at the prison, except when absent on some necessary duty or when ill, in which case his duties during his absence or illness shall be performed by the deputy. In no case shall the warden and deputy warden be absent from the prison at the same time. Before entering upon the duties of his office the warden shall execute to the state a surety bond in such amount and in such form as shall be determined by the department of finance, conditioned that he will faithfully account for all money and property that may come into his hands by virtue of his office and perform all the duties incumbent upon him as such warden according to law. (C. L. 17, § 5453.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 33, eff. July 1, rewriting last sentence of text.

Cross-references.
Warden to furnish information to board of pardons, 07–0–9.

85–9–12. Id. To Keep Daily Journal.

The warden shall keep a daily journal of the proceedings of the prison, in which he shall note every infraction of the rules and regulations of the prison by any officer or guard thereof which shall come to his knowledge, and he shall make a memorandum therein of every complaint made by any convict of cruel or unjust treatment by any officer of the prison or of a want of good and sufficient food or clothing; also of every infraction of the rules and regulations of the prison by any prisoner, naming him and specifying the offense; and also what punishment, if any, shall have been inflicted and the extent thereof. The journal shall be laid before the board at every regular meeting, and at every special meeting when demanded. (C. L. 17, § 5454.)

85–9–13. Id. General Duties.

It shall be the duty of the warden under the rules and regulations adopted by the board for the government of the prison:

(1) To exercise general superintendence over the government, discipline and police of the prison, and to superintend all the business affairs thereof.

(2) To give necessary directions to all inferior officers, keepers and guards, and to ascertain whether they have been careful and vigilant in their respective duties.

(3) To examine daily into the state of the prison, and the health, conduct and safe-keeping of the prisoners.

(4) To use every proper means to furnish employment to the prisoners most beneficial to the state and best suited to their several capacities.

(5) To superintend any manufacturing and mechanical business that may be carried on by the state within the prison; to receive the articles manufactured, and sell and dispose of the same for the benefit of the state.

(6) To take charge of the realty attached to, and of the personalty belonging to, the prison.

(7) To inquire into the justice of any complaint made by any of the convicts relative to their food, clothing or treatment.

(8) To be, under the direction of the board, the custodian of appropriations made by the legislature and drawn from the state treasury, and of all funds belonging to the prison and arising from the labor of the convicts or the sales of manufactured articles.

(9) Generally to have charge of all departments of the prison and its officers as the executive head thereof. (C. L. 17, § 5455.)

1. **Establishment of garment factory.** Resolution of board of correction with respect to establishment of a garment factory within walls of prison held not to contravene subdivision (4) of this section. Pollock v. Mabey, 63 U. 377, 226 P. 186.

85–9–14. Id. To Post Certain Provisions of Penal Code.

The warden shall cause to be posted and maintained in conspicuous places outside and within the buildings and upon the grounds of the state prison, and at and near any camp where convicts are at work, copies of section 103–48–2, 103–48–7, 103–7–11 and 103–7–12.

(C. L. 17, § 7973.)

85–9–15. Id. To Cover Funds Into State Treasury.

At the end of each month the warden shall cover into the state treasury all moneys received by him from every source by virtue of his office, together with an itemized statement, on oath, that the said statement is true and complete in detail of the moneys so received, which money shall be placed by the state treasurer to the credit of the maintenance account of the state prison. (C. L. 17, § 5456.)

85–9–16. Id. To Take Charge of Convicts' Personal Property.

The warden shall take charge of any property which a convict may have about his person when received at the prison. Money so taken shall be placed in the prison accounts to the credit of the convict from whom it is taken. Other property, if of any value and not of a perishable nature, shall be kept by the warden and returned to the convict when he shall be discharged, or it shall be delivered to his legal representatives in case of his death before being released; *provided*, that if no legal representative shall demand such property within two years after the death of the convict, the whole of it shall become the property of, and be applied to the use of, the state. (C. L. 17, § 5457.)

85–9–17. Clerk—Bond.

The clerk of the prison, before entering upon the duties of his office, shall execute a bond to the state in such form and in such amount as shall be determined by the department of finance, conditioned that he will keep a true, honest and faithful record of the accounts of the prison, and pay over all moneys that may come into his hands as such clerk, and will faithfully discharge all the duties of such office as prescribed by law and the rules and regulations of the prison. (C. L. 17, § 5458.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 33, eff. July 1, changing text after "state" in second line.

Cross-references.
Official oaths and bonds, Title 65.

85–9–18. Id. Duties.

It shall be the duty of the clerk of the prison:

(1) To attend at the prison daily during business hours, unless by the direction of the board or the warden he is otherwise engaged in transacting business on account of the prison.

(2) To keep the books and accounts of the prison in such manner as to clearly exhibit all financial transactions relating to it; to also keep a register of convicts, in which shall be entered in alphabetical order the name of each convict, the crime of which he is convicted, the date of his conviction, term of sentence, from what county, and by what court sentenced, his place of nativity, age, occupation, complexion, stature, number of previous convictions, and whether previously confined in a prison in this or any other state, together with when and how he was discharged. The board or warden may require such additional facts to be stated on the register as may be deemed proper.

(3) To do all such clerical work as may be required of him by the board or warden relating to the affairs of the prison.

(C. L. 17, § 5459.)

Cross-references.
Criminal identification, Title 22.

85-9-19. Prison Physician—Duties.

It shall be the duty of the prison physician:

(1) To attend at all times to the wants of sick convicts, whether in the hospital or in their cells, and to give them all necessary medical attention.

(2) To examine weekly, in company with the warden, the cells of the convicts for the purpose of ascertaining whether they are kept in a proper condition as to cleanliness and ventilation, and, if they are not so kept, to point out to the warden the deficiencies and report the same monthly to the board of corrections.

(3) To prescribe the diet of sick convicts, and his directions in relation thereto shall be strictly followed; and to be present at and superintend all corporal punishments which may be inflicted in the prison.

(4) To keep a daily record of all admissions to the hospital, and of cases treated in the cells or elsewhere, including the prisoner's sex, color, nativity, age, occupation, habits of life, crime, period of entrance and discharge from the hospital, and the nature of the disease.

(5) To make a yearly report to the board of the sanitary condition of the prison during the year, which report shall also contain a condensed statement of the information contained in his daily record.

(6) To make such other reports as the board or warden may from time to time require. (C. L. 17, § 5460.)

85-9-20. Id.

It shall be the duty of the physician, in case any convict claims to be unable to labor by reason of sickness, to examine such convict, and if it is his opinion upon examination that the convict is unable to labor, he shall immediately certify such fact to the warden. Such convict shall thereupon be relieved from labor, and admitted to the hospital or placed in his cell or elsewhere for medical treatment as the physician shall direct, having due regard for the convict's safekeeping. Such convict shall not be required to labor so long as in the opinion of the physician his disability continues, but whenever the physician shall certify to the warden that such convict is sufficiently recovered to be able to labor, the convict shall be required to labor. (C. L. 17, § 5461.)

85-9-21. Right of Visitation in Board of Corrections.

It shall be the duty of the warden and other officers of the prison, whenever requested, to admit the board of corrections or any member thereof into any part of the prison; to exhibit to it or any member, on demand, all the books, papers, and accounts pertaining to the prison or to the business, government, discipline or management thereof, and to render the board every facility to enable it to discharge its duties.

(C. L. 17, § 5463.)

85–9–22. Officers and Employees—Salaries—Perquisites.

The salaries of all officers and employees of the state prison shall be fixed by the board of corrections, in accordance with salary standards adopted by the department of finance and shall be paid monthly at the office of the prison. The warden shall, in addition to his salary, be allowed the use of house, fuel, lights and provisions for his family and for guests who visit him on business connected with the prison; and any officer of the prison may in the discretion of the board be allowed the use of a house or an apartment free of rent. No officer or other person employed in or about the prison shall be permitted to receive in any way perquisites, emoluments or supplies for himself or his family from the prison other than the compensation allowed by the board. The board may, if it deems it in the interest of the prison, require the keepers, guards, and such of the employees as it may designate, to be lodged, and messed or boarded, in the prison, and for that purpose may furnish lodging rooms in a plain and substantial manner, and supply provisions from the prison stock, which shall be cooked and prepared by the labor of convicts and served at such times, on such terms and in such places as the board may direct. (C. L. 17, § 5464.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 33, eff. July 1, adding clause after "corrections" in second line of text.

85–9–23. Conduct Disqualifying Members of Board and Officers.

No member of the board shall be warden of the prison, or be concerned in the business thereof, or hold any other appointment or place connected with the prison, and no person shall be appointed a member of the board, warden, deputy warden or clerk, or to any other employment in the prison, who shall be personally interested, directly or indirectly, in any kind of business carried on in the prison. No member of the board and no officer of the prison shall employ the labor of any convict upon any work in which he shall be personally interested. Should any officer be or become in any manner personally interested in any contract for furnishing provisions, clothing or other things for the use of the state prison, or be or become in any manner personally interested in any contract for the construction of buildings of any kind, or in any way connected therewith, or for furnishing material of any kind for the construction of such buildings, such officer shall be removed from office and shall forfeit any interest he may have in such contract. (C. L. 17, § 5465.)

85–9–24. Meetings of Board of Corrections—Journal.

The board shall meet at the state prison bimonthly, and as much oftener as the proper control and management thereof may require. A majority of the members of the board shall constitute a quorum for the transaction of business. For a meeting held for the appointment or removal of the warden, or any business relating thereto, at least ten days' notice in writing to each member shall be given by the chairman or secretary of the board, stating the object of the meeting. All orders and resolutions of the board shall be entered in its journal. The governor shall be chairman of the board. The clerk of the prison shall act

as its secretary and shall attend and keep regular minutes of its proceedings. All rules and regulations adopted by the board shall be recorded in a book kept at the office of the prison for that purpose, and shall be signed by the members of the board. It shall be the duty of the board to make and adopt all such general rules for the government and discipline of the prison as it may deem expedient, and from time to time change and amend the same. (C. L. 17, § 5467.)

85–9–25. Classification of Prisoners—General Duties of Board.

It shall be the duty of the board to classify the prisoners into three grades, as follows: In the first grade shall be included those appearing to be corrigible or less vicious than the others and likely to obey the laws and maintain themselves by honest industry after their discharge; in the second grade shall be included those appearing to be incorrigible or more vicious, but so competent to work and so reasonably obedient to prison discipline as not to seriously interfere with the productiveness of their labor, or of the labor of those with whom they may be employed; in the third grade shall be included those who are incorrigible, or so insubordinate or so incompetent, otherwise than from temporary ill health, as to seriously interfere with the discipline or productiveness of the labor of the prison. The board shall also make and adopt rules for the separation and classification of prisoners, for their promotion and reduction from one grade to another, and from time to time change and amend the same as circumstances may require. In making such rules and regulations the board shall, as far as practicable and consistent with the discipline of the prison, adopt such as shall in its judgment best conduce to the reformation of the convicts. A printed copy of the rules and regulations shall be furnished every officer and guard at the time he is appointed and sworn, and so much thereof as relates to the duties and obligations of the convicts shall be posted in a conspicuous place in each cell and shop, and such rules shall, so far as practicable, be written or printed in a language known to the convict occupying the cell. The board shall at its regular meetings examine all the different departments of the prison; and inquire into all matters connected with the government, discipline and policy thereof, and the punishment and employment of the convicts therein confined. It shall examine the books, accounts and vouchers of the warden and clerk, the money, the purchases and sales of articles provided for the prison, or sold on account thereof, and ascertain whether or not the convicts are properly fed, clothed and governed. The board shall also inquire into any improper acts which may be alleged to have been committed by the warden or any other officer or employee of the prison, and for that purpose may issue subpoenas to compel the attendance of witnesses and the production of books, papers and writings before the board, and the board may examine any witnesses produced before it, on oath to be administered by the chairman of the board, or in his absence by some other member thereof. (C. L. 17, § 5468.)

85–9–26. Food and Clothing of Prisoners.

The board may make such regulations in regard to the food, rations, clothing and bedding of the convicts as the health, well-being and cir-

cumstances of each may require; but all diet, rations, clothing, beds and bedding shall be plain, of good quality and in sufficient quantity for the sustenance and comfort of the convicts. (C. L. 17, § 5469.)

85–9–27. Reports of the Operation of Prison.

The board shall annually, and oftener if it deems it necessary, require reports from the warden and other officers of the prison in relation to all matters connected with the management, business, discipline, money and property thereof, and the condition, conduct and employment of the convicts confined therein. The biennial reports of the board to the governor and legislature must show the whole number of convicts in the prison, and the whole number received during each of the two years, with the names of the counties whence they were received, and the crimes of which they were convicted, together with the number of those who shall have died or escaped, been discharged, or pardoned, and such other facts and suggestions as will fully exhibit the entire workings of the prison during the two preceding years.
(C. L. 17, § 5470.)

85–9–28. Register of Facts Relating to Each Prisoner.

The board shall cause to be entered from time to time in a register such facts respecting each prisoner received into the prison as can be ascertained, of parentage, and of early social influence seeming to indicate his constitutional and acquired defects and tendencies; and, based upon these, an estimate of the character of the prisoner and the best plan of treatment. Upon such register shall also be entered from time to time minutes of observed improvement or deterioration of character, and notes as to methods of treatment employed, and all orders or alterations affecting the standing or situation of the prisoner, and any facts of personal history which may be brought to the knowledge of the board affecting the question of the final release of the prisoner or his parole.
(C. L. 17, § 5471.)

85–9–29. Employment of Prisoners in and About Prison.

The warden may employ, under such regulations as the board shall adopt, convicts in the erection or repair of the buildings or walls of the prison, and in the operation and maintenance of the prison.
(C. L. 17, § 5472.)

85–9–30. Recommendations to Board of Pardons.

The board of corrections, upon the request of the board of pardons, shall, in the case of an application of a convict or of an ex-convict to be restored to his civil rights, furnish the board of pardons with a statement of such person's deportment during his imprisonment; and it may at all times make whatever recommendations to the board of pardons it shall believe proper respecting such rights. (C. L. 17, § 5474.)

Cross-references.
Board of pardons, Title 67.

85–9–31. Prison Labor—Not to Interfere with Private Enterprise.

It shall be the duty of the board of corrections to meet at least once in six months to determine what lines of productive labor shall be pur-

sued in the prison, and in so determining the board shall select diversified lines of industry so as to interfere as little as possible with the same lines of industry carried on by citizens of this state. No contract shall be made for the labor of prisoners confined in the state prison, but they shall be employed by the warden under rules and regulations established by the board. (C. L. 17, § 5475.)

Cross-references.

Constitutional provisions, Art. XVI, § 3, Art. XIX, § 3, Art. XX, § 1; sale of convict-made goods, 85–9–87 et seq.; importation, 85–9–85; employment at state training school, 85–8–5.

1. Validity of contracts of board.

Contract between board of corrections and manufacturer providing that latter would install certain machinery in prison and provide materials, and former would sell goods manufactured in prison by convict labor in excess of what was needed for state institutions, was not a contract for sale of goods, but rather was contract for prison labor, and hence, was void. Price v. Mabey, 62 U. 196, 218 P. 724.

2. Establishment of garment factory.

Resolution of board of corrections with respect to establishment of a garment factory within walls of prison, held, not to contravene this section. Pollock v. Mabey, 63 U. 377, 226 P. 186.

A. L. R. notes.

Impairment of obligation of convict labor contracts, 3 A. L. R. 1671.

85–9–32. Id. For State Departments and Institutions.

The board shall be required to employ as many prisoners as are necessary in making articles for the various state departments and institutions, as far as practicable, who shall pay the market price of all articles furnished. (C. L. 17, § 5476.)

85–9–33. Id. For Irrigation Works.

For the purpose of reclaiming state lands by irrigation, and for the purpose of furnishing public work for convicts confined in the state prison, the board of corrections may locate and construct, in the name of and for the use of the state, ditches, canals, reservoirs and feeders, for irrigating and domestic purposes, and to that end may use labor of persons confined as convicts in the state prison. (C. L. 17, § 5477.)

85–9–34. Id. Earnings of Prisoners.

The board may adopt rules for crediting to deserving prisoners some portion of their earnings: to unmarried prisoners, not to exceed ten per cent of their net earnings, to be paid to them on discharge; and to married prisoners, not to exceed twenty-five per cent of their net earnings, to be paid to their families, if living in this state and shown to be dependent upon them for support. If married prisoners have not resident families so dependent, they are to be credited with the same amount as unmarried prisoners, and paid the same on discharge. (C. L. 17, § 5478.)

85–9–35. Id. Convicts to Be Kept Employed—Eight Hours a Day's Work.

All convicts not confined in solitude for misconduct in the prison shall as far as practicable be kept constantly employed at hard labor on the average for not less than eight hours a day, Sundays and holidays excepted, unless incapable of laboring by reason of sickness or other infirmity. (C. L. 17, § 5481.)

Cross-references.
Holidays, Title 37; eight-hour law, 49–3.

1. Convict labor.
Under this section and 105–37–7, officers of state charged with the government and control of state prison have duty to provide, if possible, means by which requirements of law with respect to convict labor can be carried into effect without contravening Constitution or statutes. Pollock v. Mabey, 63 U. 377, 226 P. 186.

85–9–36. Religious Belief and Exercises Not to Be Denied.

No inmate of the state prison shall be denied the full exercise of his religious belief and the liberty of worshiping according to the dictates of his conscience; *provided*, that nothing in this section shall be so construed as to impair the discipline of the prison, or to prevent the assembling of all the inmates in the chapel thereof for such general religious instruction as the board may deem wise and expedient.

(C. L. 17, § 5482.)

85–9–37. Separate Cells for Prisoners.

Whenever there shall be a sufficient number of cells in the prison the warden shall keep the prisoners in separate cells at night, and also during the day when unemployed. (C. L. 17, § 5483.)

85–9–38. Duties of Guards and Keepers—Penalty for Breach.

The guards, keepers and employees of the state prison must be ready at all times to attend to any duty required of them by the warden. The several keepers and guards are hereby expressly charged with all the duties and responsibilities of jailers. Any guard, keeper or other employee of the state prison who knowingly violates any rule or regulation adopted by the board, or who violates any of the provisions of this chapter, or who neglects to perform the duties required of him by the rules and regulations of the prison or by the provisions of this chapter, is guilty of a felony, and may be punished by a fine not exceeding $1,000 or by imprisonment in the state prison for a period not exceeding three years, or by both such fine and imprisonment. (C. L. 17, § 5484.)

85–9–39. Punishment of Convicts.

The warden or deputy warden may punish convicts for misconduct in such manner and under such regulations as shall be adopted by the board; *provided*, that punishment by showering with cold water or whipping with the lash on the bare body shall in no case be allowed. The warden or deputy warden shall, the next day after inflicting punishment upon any convict, enter in a book kept for that purpose a written memorandum thereof signed by him, stating the offense committed and the kind and extent of the punishment inflicted. In no case shall any punishment be brutal or inhuman, and no corporal punishment shall be inflicted without the presence of the prison physician.

(C. L. 17, § 5484.)

A. L. R. notes.
Constitutionality of statutes in relation to treatment or discipline of convicts, 50 A. L. R. 104; liability for death of or injury to prisoner, 61 A. L. R. 569.

85-9-10. Officers May Defend Selves and Prison Property and Prevent Escapes.

When several convicts acting together, or one convict alone, shall offer violence to an officer or guard of the prison, or to any other convict or person, or shall do or attempt to do any injury to any building, or any workshop or appurtenances thereof, or shall attempt to escape, or resist or disobey any lawful and reasonable command, the officers of the prison shall use all suitable means to defend themselves and the prison property, to enforce the observance of discipline, to frustrate such attempt to escape and to secure the persons of such offenders.

(C. L. 17, § 5485.)

Cross-references.
Assaults by prisoners, 103-7-11, 103-7-12.

85-9-11. Use of Liquors and Drugs Forbidden.

No spirituous or fermented liquor, drug, medicine or poison shall, on any pretense whatever, be sold or given away in the prison or in any building appurtenant thereto, or on the land granted to the state for the use and benefit of the prison; and no such drug or medicine shall be given to, or suffered to be used by, any convict in the prison unless he is ill, and then only under the special direction of the prison physician. (C. L. 17, § 5486.)

85-9-12. Records of Prison—Care and Use—Distribution of Reports.

All books of account, registers and other documents and papers relating to the affairs of the prison shall be considered public property, and shall remain therein, and the warden shall preserve at least one set of copies of all official reports made to the governor and legislature respecting the prison, and likewise a set of similar reports relating to the prisons of other states as far as he shall be able to obtain the same. To accomplish this purpose, there shall be printed biennially for the use of the prison 300 extra copies of the report of the board, 100 of which shall be supplied to the warden for exchange with prisons of other states, and the warden shall promptly transmit to each of the state prisons in the United States one copy of such report.

(C. L. 17, § 5487.)

85-9-13. Economy to Be Practiced.

It shall be the duty of the warden and the deputy warden to see that rigid economy is practiced in all matters pertaining to the prison and the prisoners, and that duplicate receipts are taken for all expenditures made by them on account of the prison, one of which shall be sent to the state auditor's office monthly. (C. L. 17, § 5488.)

85-9-14. Audits of Accounts.

The board shall examine and audit before payment all bills and accounts of the prison at least monthly, and enter a strict account of the same in its books. After the accounts shall have been examined, en-

tered and audited, they shall be transmitted by the board to the state auditor. (C. L. 17, § 5489.)

85–9–45. Id. In Case of Vacancy in Office of Warden.

In case of a vacancy in the office of warden, the board shall cause an inventory to be taken, and the state auditor shall settle the accounts of the former warden on the presentation of his books and vouchers, duly authenticated. (C. L. 17, § 5490.)

85–9–46. Delivery of Prisoners to Prison—Sheriff's Expenses.

The actual expenses of sheriffs in conveying convicts to the prison shall be set out in a bill containing the items thereof, and shall be presented to the warden when the prisoner is delivered at the prison. The warden shall certify on it that the prisoner has been received, and the bill, including the sheriff's actual expenses in returning to the county whence the prisoner shall have been sent, shall be audited by the state auditor and paid from the state treasury. Before drawing his warrant the state auditor shall correct any errors in the bill as to form, items or amount, and the sheriff shall be paid his actual traveling expenses and the expenses of the convict. (C. L. 17, § 5492.)

85–9–47. Id. Exchange of Credentials by Warden and Sheriff.

When any convict shall be delivered to the warden, the officer having such convict in his charge shall deliver to the warden the certified copy of the sentence received by such officer from the clerk of the court, and shall take from the warden a certificate of delivery of such convict; and such certified copy of the sentence of any convict shall be prima facie evidence of the facts therein contained.

(C. L. 17, § 5493.)

Cross-references.
Sheriff's duties, 19–19–3.

85–9–48. Correspondence by or to Prisoners—Penalty.

No person, without the consent of the warden, shall bring into or carry out of the state prison any letter or writing, or any information to or from any convict. Any person who violates the provisions of this section is guilty of a misdemeanor. (C. L. 17, § 5494.)

85–9–49. Right of Entry Into Prison.

The following persons shall be authorized to visit the prison at pleasure, namely: the governor, members of the legislature, state officers, the judges of the supreme and district courts, grand jurors, prosecuting attorneys, attorneys on professional business, sheriffs, members and officers of any board authorized by law to visit the same, and all regular officiating ministers of the gospel. But no other person shall be permitted to go within the walls of the prison where convicts are confined, except by special permission of the warden or under such regulations as the board of corrections shall prescribe. (C. L. 17, § 5495.)

A. L. R. notes.
Right, and remedy for enforcement of right, of defendant in criminal case to interview or confer with prospective witness in custody in public institution, 124 A. L. R. 454.

85–9–50. Visitors—Fee; Disposition.

The board may establish rules for the admission of visitors within the prison, and it may prescribe a reasonable sum, not more than twenty-five cents, to be charged each individual for one admission. The warden shall procure suitable tickets, which shall be held by the clerk. The clerk shall keep an account of the sales thereof, and pay over the money received to the warden daily. The gatekeeper at the prison entrance shall receive the tickets, and shall deliver them each day to the warden before the prison is closed. It shall be the duty of the board to appropriate annually out of the fees received from visitors such sum as it may determine for the purchase of books to be kept at the prison for the use of convicts. (C. L. 17, § 5496.)

85–9–51. Prison School.

A school may be maintained in the prison for the instruction of convicts confined therein. It shall be conducted under such regulations as may be made by the board of corrections. (C. L. 17, § 5497.)

85–9–52. Prison Library.

The prison library for the use of the convicts shall be maintained under such regulations as the board may make. (C. L. 17, § 5498.)

85–9–53. Disease and Epidemics—Removal of Prisoners.

In case any pestilence or contagious disease shall break out among the prisoners in the prison, or in the vicinity of the prison, the board may cause the convicts therein to be removed to some suitable place of security, where such of them as may be ill shall receive all necessary care and medical attention, but the convicts shall be returned to the prison as soon as it may be safe to do so. (C. L. 17, § 5499.)

85–9–54. Fire—Removal of Prisoners.

Whenever by reason of the prison or any building contiguous or near thereto being on fire there shall be reason to apprehend that the convicts may be injured or endangered by such fire, or may escape, the warden may remove the convicts to some safe and convenient place, and there confine them as long as may be necessary to avoid the danger. (C. L. 17, § 5500.)

85–9–55. Id. Repair of Buildings Destroyed.

If any of the shops or buildings are destroyed or injured by fire, or other cause, they may, with the approval of the state board of examiners, be rebuilt or repaired immediately under the direction of the board of corrections, and the expense thereof shall be paid from the state treasury. (C. L. 17, § 5501.)

85–9–56. Audits by State Auditor.

It shall be the duty of the state auditor to examine and audit the accounts of the warden, and to lay a statement of the same before the legislature at each regular session thereof. (C. L. 17, § 5502.)

85–9–57. Escapes—Rewards; Payment.

Whenever any convict shall escape from the prison, it shall be the duty of the warden to take all proper measures for his apprehension, and for that purpose he may offer a reward not exceeding $50 for the apprehension and return of such convict; the accounts for such reward and other sums of money necessarily paid for advertising and apprehending any such convict, shall be audited by the state auditor and paid out of the state treasury. (C. L. 17, § 5503.)

Cross-references.
Rewards by governor, 87–2–1, subd. 8; rescues and escapes, 103–48; venue of prosecution for escapes, 105–8–13.

A. L. R. notes.
Construction of statute authorizing public authorities to offer reward, 86 A. L. R. 579; escape or prison breach as affected by means employed to effect it, 50 A. L. R. 989; knowledge of reward as condition of right to claim it, 53 A. L. R. 542.

85–9–58. Aid to Convicts on Discharge.

When a convict shall be discharged from prison by pardon or otherwise, the warden shall furnish him with clothing, if he is not already provided for, not exceeding $10 in value, and such sum of money, not exceeding $10, as the warden may deem necessary and proper, provided the prisoner has less than $10 of earnings to his credit. The board may in its discretion furnish such convict with a further sum of money, not exceeding $15, whenever in its opinion the necessities of the convict are such as to require the same. Instead of paying to a discharged convict the sum of money as above allowed, the warden may in his discretion expend the money and allowance, or such portion thereof as may be necessary, in paying the fare of the convict to his home or place of destination. (C. L. 17, § 5504.)

85–9–59. Use of Prison Labor on State Roads.

Convict labor may be utilized in providing material for constructing state roads and also in the construction and improvement of state roads. When state prison convicts are used in the construction or improvement of any state road, the work shall be under the authority and control of the state road commission, but the convicts shall be in the custody and under the control of the prison authorities.
(C. L. 17, §§ 5508, 5509.)

Cross-references.
Employment at state training school, 85–8–5.

L. 1937, ch. 122; eff. Mar. 10.

DEPARTMENT OF ADULT PROBATION AND PAROLE

AN ACT to establish a department of adult parole and adult probation of the state of Utah, to provide for its operation and control by the board of corrections, prescribing additional powers and duties of the board of corrections, providing penalty for contributing to delinquency of a probationer or parolee, and repealing all acts in conflict therewith.

Be it enacted by the Legislature of the State of Utah:

85-9-60. Department of Adult Parole and Probation.

There is created a department of Adult Parole and Adult Probation of the state of Utah. (Sec. 1.)

Cross-references.
Board of pardons and granting of pardons, Title 67.

A. L. R. notes.
Constitutionality of statute prescribing course of conduct for discharged convict, 38 A. L. R. 1036; parole as suspending running of sentence, 28 A. L. R. 947; release of prisoner on illegal or void order as affecting further imprisonment, 49 A. L. R. 1306.

85-9-61. Board of Correction to Manage.

The management and control of the adult parole and adult probation department shall be vested in the board of corrections. (Sec. 2.)

85-9-62. Offices.

The board of corrections shall maintain its office as a board of adult parole and adult probation at the state capitol and shall provide the necessary equipment and supplies. (Sec. 3.)

85-9-63. Organization—Assistants.

The board of corrections shall elect one of its members as chairman who shall preside at all of its meetings and shall appoint a secretary who may or may not be a member of the board and shall employ such other persons as experts and assistants as may be necessary to perform the duties of the board. (Sec. 4.)

85-9-64. Meetings.

The board of corrections shall hold regular monthly meetings at its office and such special meetings as may be deemed necessary. (Sec. 5.)

85-9-65. By-laws, Rules and Regulations.

The board of corrections shall adopt such by-laws, rules and regulations as are necessary for the proper operation of the department of adult parole and adult probation. (Sec. 6.)

85-9-66. Standards of Personnel—Examinations.

The board of corrections shall set standards of personnel and appoint and prescribe the powers and duties of a chief adult parole and probation agent, such person to be selected from an eligible list compiled by merit examination conducted by the board. (Sec. 7.)

85-9-67. Compensation of Employees.

The board of correction shall fix the salary and compensation of every person employed by it, subject to the approval of the state board of examiners. (Sec. 8.)

85-9-68. Parole and Probation Districts.

The board of corrections shall establish such parole and probation districts in the state as may be expedient and necessary to the efficient

and economical administration of the department, and appoint such district agents as may be necessary to serve in the district, subject to the advice of the judicial district judge or judges within the district; said agents shall be chosen from an eligible list established through merit examinations conducted by the board of corrections. (Sec. 9.)

85-9-69. Custody of Probationers.

The legal custody of all probationers is vested in the chief agent and the court having jurisdiction of the offender. (Sec. 10.)

85-9-70. Clinics.

The board of corrections shall establish and maintain clinics for the purpose of thoroughly investigating the social, mental and physical conditions and background of those charged with the various crimes and shall conduct examinations wherever required, and, upon completing such an examination, the board shall file a copy of its findings and formal clinical report with the court having jurisdiction and make such recommendations to the court as it may see fit. For this purpose the board may, without expense to it, command the services of any expert in the employ of the state of Utah or any other expert in the employ of any state institution. (Sec. 11.)

85-9-71. Court Records to Be Certified to Department.

The court having jurisdiction of any offender, immediately upon the entry of the order of probation or suspended sentence as provided in 105-36-17, Revised Statutes of Utah, 1933, shall direct the clerk of such court to certify a copy of the records in the case and deliver the same to the department of adult parole and adult probation. (Sec. 12.)

85-9-72. Records of Board of Pardons Certified to Department.

The board of pardons, immediately upon the entry of the order of parole, shall direct its secretary to certify a copy of the records in the case and deliver the same to the department of adult parole and adult probation. (Sec. 13.)

85-9-73. Agents to Have Powers of Peace Officers.

The chief adult parole and probation agent and district adult parole and probation agents shall have all the powers that peace officers and sheriffs now possess to be exercised anywhere within the state and in addition shall have the power to administer oaths. (Sec. 14.)

85-9-74. Information as to and Copy of Complaints Sent to Department.

The county attorney, upon the issuing of a criminal complaint, shall immediately forward to the department of adult parole and adult probation full information and a complete copy of said complaint. (Sec. 15.)

85-9-75. Criminal Identification Bureau Records.

The state bureau of criminal identification and investigation shall furnish a copy of the criminal record of any person arrested in this

state to the department of adult parole and adult probation upon request of the chief agent. (Sec. 16.)

85-9-76. Contributing to Delinquency—Misdemeanor.

Any person knowingly contributing to the delinquency of any probationer or any parolee residing in this state is guilty of a misdemeanor. (Sec. 17.)

85-9-77. Violating Terms of Probation.

In case a probationer violates the terms and conditions of his probation or suspended sentence the agent in charge of such probationer shall immediately report to the court having jurisdiction such violation and make such recommendations as may be expedient in the case. (Sec. 18.)

85-9-78. Violating Terms of Parole.

In the case a parolee violates the terms and conditions of his parole the chief agent shall immediately report to the board of pardons such violation and make such recommendations as may be expedient in the case. (Sec. 19.)

A. L. R. notes.
Right to notice and hearing before revocation of suspension of sentence, parole, or conditional pardon, 54 A. L. R. 1471.

85-9-79. Conflicting Acts Repealed.

All other acts and parts of other acts in conflict herewith are repealed. (Sec. 20.)

85-9-80. Effective Date.

This act shall take effect on approval.
Approved March 10, 1937. (Sec. 21.)

L. 1937, ch. 123; eff. Mar. 17.

PROBATION AND PAROLE OF CONVICTS—OUT-OF-STATE SUPERVISION

AN ACT to provide that the state of Utah may enter into a compact with any of the United States for mutual helpfulness in relation to convicted persons on probation or parole.

Be it enacted by the Legislature of the State of Utah:

85-9-81. Authority to Enter Into Compacts.

The governor of this state is authorized to execute a compact on behalf of the state of Utah with any of the United States legally joining therein in the form substantially as follows:

A compact entered into by and among the contracting states, signatories thereto, with the consent of the congress of the United States of America, granted by an act entitled An Act Granting the Consent of Congress to any two or more States to enter into Agreements or Compacts for coöperative effort and mutual assistance in the prevention of crime and for other purposes.

The contracting states solemnly agree:

Form of Compact.

(a) That it shall be competent for the duly constituted judicial and administrative authorities of a state party to this compact (herein called sending state) to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact (herein called receiving state) while on probation or parole, if

(1) Such person is in fact a resident of or has his family residing within the receiving state and can obtain employment there.

(2) Though not a resident of the receiving state and not having his family residing there, the receiving state consents to such person being sent there.

Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state and has not resided within the sending state more than six continuous months immediately preceding the commission of the offense for which he has been convicted.

Receiving State to Supervise Probationers or Parolees.

(b) That each receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

Extradition Procedure Waived, When.

(c) That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole from such sending state. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are expressly waived on the part of states party hereto as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state; *provided*, if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

Transporting Prisoners.

(d) That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states parties to this compact without interference.

Rules and Regulations.

(e) That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

Execution of Compact—Effect.

(f) That this compact shall become operative immediately upon its execution by any state as between it and any other state or states so executing. When executed it shall have the full force and effect of law within such state, the form of execution to be in accordance with the laws of the executing state.

Renunciation of Compact.

(g) That this compact shall continue in force and remain binding upon each executing state until renounced by it. That duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending state. Renunciation of this compact shall be by the same authority which executed it, on sending six months' notice in writing of intention to withdraw from the compact to the other states party thereto. (Sec. 1.)

85-9-82. Partial Invalidity—Saving Clause.

If any section, sentence, subdivision or clause of this act is for any reason held invalid or unconstitutional such decision shall not affect the validity of the remaining portions of this act. (Sec. 2.)

85-9-83. Short Title.

This act may be cited as the Uniform Act for Out-of-State Supervision. (Sec. 3.)

85-9-84. Effective Date.

This act shall take effect upon approval.
Approved March 17, 1937. (Sec. 4.)

L. 1933, ch. 67; eff. Jan. 19, 1934.

CONVICT-MADE GOODS TRANSPORTED INTO UTAH

AN ACT relating to goods, wares, and merchandise manufactured or produced by convicts or prisoners.

Be it enacted by the Legislature of the State of Utah:

85-9-85. Subject to State Regulations.

That all goods, wares, and merchandise manufactured, produced or mined, wholly, or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, transported into the state of Utah, and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery

in the state of Utah, be subject to the operation and effect of the laws of the state of Utah, to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in the state of Utah, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise. (Sec. 1.)

85–9–86. Effective Date.

This act shall take effect on January 19, 1934. (Sec. 2.)

L. 1933, ch. 68; eff. Mar. 21.

SALE OF CONVICT-MADE GOODS ON OPEN MARKET

AN ACT forbidding the sale of convict-made goods on the open market and applying state regulations as to the sale and disposition of convict-made goods to all such products, regardless of origin.

Be it enacted by the Legislature of the State of Utah:

85–9–87. Sale Forbidden.

The sale on the open market of this state of all goods, wares, or merchandise manufactured or mined, wholly or in part, by convicts or prisoners, except prisoners on parole or probation, or in any penal and/or reformatory institution, is hereby prohibited and declared to be unlawful. On and after January 19, 1934, the provisions of this act and all other laws and regulations of this state in effect at that time and not inconsistent with this act, shall apply to all goods, wares, and merchandise manufactured or mined, wholly or in part, by convicts or prisoners, except prisoners on parole or probation, or in any penal and/or reformatory institution, and transported into the state of Utah for use or distribution, to the same extent and in the same manner as if such goods and merchandise were so manufactured, produced, or mined within the state of Utah. (Sec. 1.)

Comparable provisions.

Cal. Penal Code, § 2876 (unlawful for any person to sell, expose for sale, or offer for sale within California any articles manufactured wholly or in part by convict or other prison labor, except articles the sale of which is specifically sanctioned by law); § 2877 (board may provide for manufacture of small articles of handiwork by prisoners out of raw materials purchased by prisoners with their own funds, which articles may be sold at state prisons); § 2880 (subjecting to operation and effect of laws of California goods manufactured, produced or mined wholly or in part in any state prison, transported into California, and remaining therein for use, consumption, sale or storage).

Idaho Code, 1940 Supp., § 20–701 (similar).

Mont. Rev. Codes, § 12447.1 (all wearing apparel manufactured at state prison, and not required for use therein, must be sold to state for use by state in its public institutions; none of said wearing apparel may be sold in open market in competition with products of free labor).

85–9–88. Goods to Be Labeled.

All goods, wares, and merchandise manufactured or mined, wholly or in part, by convicts or prisoners, except prisoners on parole or probation, in the state of Utah, and all goods, wares, and merchandise shipped into the state of Utah, shall be plainly marked thereon: "Prison-made goods." (Sec. 2.)

Comparable provisions.

Cal. Penal Code, § 2870 (articles manufactured in prisons must have plainly marked or stamped thereon either the words "San Quentin Prison," or words "Folsom Prison," or words "California Institution for Men"); § 2881 (requiring labeling, molding, branding, stenciling or embossing of words "Convict-made," followed by name of any penitentiary, prison, reformatory or other establishment wherein were made goods sold or offered, traded, consigned, kept, exposed or displayed for sale).

Iowa Code 1939, § 3274.1 (requiring branding, labeling or marking of goods made by convict labor in any penitentiary, prison, reformatory or other establishment in which convict labor is employed in Iowa or outside of state of Iowa, before the goods are exposed for sale in Iowa).

Mont. Rev. Codes, § 11572 (requiring that goods, produced or manufactured or made by convict labor in any prison, be plainly stamped or marked with words "Prison-made," when exhibited or sold, or offered for sale).

85-9-89. "Open Market" Defined.

The words "open market," as used in this act, shall mean all sales and/or exchanges conducted or transacted through the medium of stores, shops, sales offices, sales agents or agencies, whether retail or wholesale, or in any other manner, to the consuming public, but not including institutions, subdivisions, departments of state, municipalities or school districts, and not including the manufacture and sale of belts, beads, bracelets, watch fobs, jewelry or other trinkets sold for the personal benefit of convicts or prisoners. (Sec. 3.)

Comparable provisions.

Idaho Code, 1940 Supp., § 20-709 (identical, through the words "to the consuming public"; the remainder of the Utah provision is not contained herein); § 20-703 (provisions of statute relating to sales on open market shall not include sale and/or exchange of convict-made goods to or with other institutions, major portion of whose maintenance is contributed by Idaho or its political subdivisions, for use and/or consumption of said institutions or for use and/or consumption of population therein contained).

85-9-90. Violation, a Misdemeanor.

Any person, firm, or corporation, which violates any of the provisions of this act shall be guilty of a misdemeanor. (Sec. 4.)

85-9-91. Effective Date.

This act shall take effect upon approval.

Approved March 21, 1933. (Sec. 5.)

TITLE 86

STATE LANDS

Chapter 1. STATE LAND BOARD.
Chapter 2. RIGHTS OF WAY.
Chapter 3. DESERT LAND GRANT.
Chapter 4. RESERVOIR LAND GRANT FUND.
Chapter 5. WELLS.
Chapter 6. FARM LANDS ACQUIRED BY STATE.
Chapter 7. ACQUISITION BY UNITED STATES OF LANDS IN UTAH FOR NATIONAL FORESTS.

CHAPTER 1

STATE LAND BOARD

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86-1-3. Organization of Land Board — Chairman — Executive Secretary — Quorum.
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L. 1941, ch. 106; eff. May 13.

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L. 1941, 2nd Spec. Sess., ch. 24; eff. June 11.

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L. 1941, 2nd Spec. Sess., ch. 25; eff. June 18.

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86-1-48.18. Governor Authorized to Lease Certain State Lands.
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86-1-50. Investment of Funds.
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86-1-58. Exchange of Lands Between Board and Proprietors.
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86-1-60. Id. Interfering with an Application, a Crime.
86-1-61. Record of Selections—County Recorders to Enter.
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86-1-63. Flood Control.
86-1-64. Attorney General to Approve Legal Forms.

L. 1941, ch. 93; eff. May 13.

TRESPASS ON STATE LANDS

86-1-65. Designation of Unlawful Acts Relating to State Lands—Misdemeanor.
86-1-66. Id. Same — Constitutes Trespass.
86-1-67. Id. Liability for Violation of Act.
86-1-68. Id. Suits for Collection of Damages.
86-1-69. Disposition of Monies Collected.

L. 1935, ch. 101; eff. Mar. 25.

WATERSHEDS—PROCEEDINGS AGAINST OWNERS OF LAND WITHIN

86-1-70. Authorizing Land Board to Bring Action to Limit Grazing.
86-1-71. Effective Date.

History of act. This chapter was Chapter 1 of Title 62 of R. S. 1898, p. 523, and Comp. Laws 1907, Title 75, Ch. 1, p. 827. It was amended in 1899 by Laws 1899, Ch. 64. Whitmore v. Candland, 47 U. 77, 151 P. 528, quoting many provisions of old law.

86-1-1. State Land Board—Members.

The state land board shall be composed of the three members of the commission of finance. (L. 31, p. 83, § 5571.)

History.

As amended by L. 37, ch. 124, eff. May 11; L. 41, 1st Spec. Sess., ch. 35, eff. July 1, which contained a section 3 which read as follows: "The terms of office of the present members of the state land board shall terminate upon the appointment and qualification of the members of the commission of finance." Amendments changed text of entire section, and deleted last two sentences.

Comparable provisions.

Cal. Pub. Res. Code, § 6101, added by Laws of 1941 (state lands commission "in the Department of Finance"; consists of controller, lieutenant governor, and director of finance); § 6102 (commission is successor to, and is vested with powers, duties, purposes, responsibilities and jurisdiction of department of finance as successor to surveyor general, register of state land office, state land office, division of state lands in department of finance); § 6103 (commission to administer laws through division of state lands of department of finance, which division is continued in existence).

Idaho Code, § 58-101 (state board of land commissioners to have direction, control and disposition of public lands; and to exercise its constitutional functions through instrumentality of a department of public lands, which is hereby created).

Iowa Code 1939, § 85 (secretary of state to have charge of books, records, papers, and property pertaining to state land office); § 89 (books and records of land office to show accurate chain of title from general government to purchaser of each smallest subdivision of land); § 90 (separate tract books to be kept, inter alia, for university lands, saline lands, swamp lands); § 91 (tract books to be ruled in manner similar to those used in United States land offices); § 92 (certified copies of documents and records are deemed presumptive evidence of facts to which they relate).

Mont. Rev. Codes, § 1805.1 (creating department of state government designated as "Department of State Lands and Investments," whose general purpose is to administer federal land grants made to State of Montana, other state lands, funds arising from these lands, and funds coming under its control through provisions of Article XXI of State Constitution); § 1805.5 (requiring governor to appoint commissioner of state lands and investments, who shall be chief administrative and executive officer under the board in all matters except those pertaining to state forests, who shall not be a member of state board of land commissioners); § 1805.6 (state forester is chief administrative and executive officer under the board in all matters pertaining to the state forests).

Cross-references.

Disclaimer of rights in unappropriated lands, Const. Art. III, § 2, Enabling Act, § 3; land grants, Const. Art. X, Enabling Act, § 6 et seq.; acceptance by state, Const. Art. XX; Indian lands, Const. Art. III, § 2, Enabling Act, § 3; sale of lands, Const. Art. X, § 3 et seq., Art. XIX, § 3, Art. XX, § 1, Enabling Act, § 3; lands held in trust, Const. Art. X, §§ 5, 7, 10, Art. XX, § 1; preservation of forests, Const. Art. XVIII, § 1; state finance commission to be state land board, 82C-2-12.

1. Actions against board.

The state land board cannot, without its consent, be sued. But that is a defense that is for its benefit and protection alone, and not for others. Decorso v. Thomas, 89 U. 160, 176, 50 P.2d 951, rehearing denied 89 U. 179, 57 P.2d 1406.

2. Damages resulting from flooding.

An action against board of land commissioners for damages resulting from a break in an irrigation canal is, in effect, an action against the state, where judgment was directed to be paid out of state funds. Wilkinson v. State, 42 U. 483, 492, 134 P. 626; Dall v. State, 42 U. 498, 134 P. 632, discussing general question at length.

3. Review of acts of board.

Courts may not review the acts or conduct of the board, for the purpose of correcting mere irregularities. Whitmore v. Candland, 47 U. 77, 151 P. 528.

Decisions from other jurisdictions.

- - Federal.

A party who, by satisfactory showing to the land office, has received a certificate that he is entitled to pre-empt

land, has color of title thereto; and one, believing that he has title and making improvements on the land, makes them in good faith, and is consequently entitled to receive the value thereof. Wells v. Riley, 2 Dill. (U. S.) 566.

The legislation of the state with reference to the disposition of swamp lands and the contracts made in pursuance thereof are not void as subversive of the trust imposed upon the state by the Act of Congress by which such lands were granted. American Emigrant Co. v. Adams County, 100 U. S. 61, 25 L. Ed. 563.

The reservation of lands by the proper department acting within the scope of its authority is a reservation by proclamation of the president within the meaning of the school grant of 1841, the proclamation by the president being simply his official public announcement of the order reserving the lands. Wolsey v. Chapman, 101 U. S. 755, 25 L. Ed. 915.

Lands not earned by a railroad company and certified back to the United States by the state are to be restored by the United States to pre-emption and homestead entry. Sioux City & St. P. R. Co. v. Countryman, 159 U. S. 377, 40 L. Ed. 187, 16 S. Ct. 28, aff'g 83 Iowa 172, 40 N. W. 72.

— California.

Execution and recordation of deed to "base" land, reciting upon its face the object and purpose of execution of deed, did not constitute contract between grantor and the United States, but simply evidenced readiness and willingness of grantor to make the exchange; nor could title pass until application to select "lieu" land was approved. Downer v. Grizzly Livestock & Land Co., 6 Cal. App.2d 39, 43 P.2d 843.

Mining Act of July 26, 1866, indicated congressional intention to recognize and give legal validity to existing mining claims in accordance with local rules, customs, and regulations, including extralateral rights in those lands to which said rules and regulations applied. Ames v. Empire Star Mines Co., Ltd., 17 Cal.2d 213, 110 P.2d 13.

Patent cannot rut off previously existing vested rights in the patented property. Ames v. Empire Star Mines Co., Ltd., 17 Cal.2d 213, 110 P.2d 13.

— Iowa.

The president of the United States has no authority to grant a lease of public lands. Lorimier v. Lewis, Morris 253, 39 Am. Dec. 461.

It is competent for the officers of the land department to cancel sales and entries of land which they may find to have been improperly made. Bellows v. Todd, 34 Iowa 18.

The legislative act of the sovereign power in making a grant of land is just as effective to pass the title as could be any form of deed executed by its officers. Courtright v. Cedar Rapids & M. River R. Co., 35 Iowa 386, aff'd 21 Wall. (U. S.) 310, 22 L. Ed. 582.

That portion of the sloping bank of a navigable stream unsuitable for agricultural purposes by reason of the annual rise of water is under the jurisdiction of the state for all purposes not inconsistent with the riparian rights of the abutting owner. Board of Park Com'rs v. Taylor, 133 Iowa 453, 108 N. W. 927.

As between the government and the patentee of public lands, any mistake in the survey of the granted tract may be corrected, if the effect thereof is to restore, to the public domain, lands of which the government might otherwise be deprived. Barringer v. Davis, 141 Iowa 419, 120 N. W. 65.

The legal title to swamp lands remains in the general government, where it appears that no title therefor has ever issued from the United States to the state. State v. Jones, 143 Iowa 398, 122 N. W. 241, aff'd 226 U. S. 460, 57 L. Ed. 300, 33 S. Ct. 168.

A government patent is not necessarily conclusive against an adverse claimant, and it is permissible to show that at the time the patent was issued the government did not own the land described therein, as where there is loss of title by erosion. Bigelow v. Herrink, 200 Iowa 830, 205 N. W. 531.

Issuance of patent by state is assertion of existence of property thereby conveyed. Meeker v. Knutz, 213 Iowa 370, 239 N. W. 27.

86-1-2. Id. Members to Receive Travel Expenses.

Each member of the board shall receive his actual and necessary traveling expenses while in the performance of his official duties.

(L. 31, p. 83, § 5573.)

History.

As amended by L. 37, ch. 124, eff. May 11; L. 41, 1st Spec. Sess., ch. 35, eff. July 1, making no change in text.

86-1-3. Organization of Land Board—Chairman—Executive Secretary—Quorum.

The land board shall organize by selecting a chairman and secretary from its own membership. It may with the approval of the governor employ an executive secretary, prescribe his qualifications, define his duties, and fix his salary in accordance with salary standards adopted by the department of finance. The executive secretary shall hold his office during the pleasure of the land board. He shall furnish a bond in such amount and kind as shall be determined by the commission of finance conditioned that he will faithfully perform his duties, safely keep and account for all funds, securities, documents and papers entrusted to his care, and upon expiration of his office deliver all funds, securities, documents and records of his office to his successor. The executive secretary of the state land board may be one of the members of the board and in such case he shall receive no additional compensation therefor. The board shall employ such clerical and other employees as shall be necessary for the efficient and economical performance of the duties and functions of the board, and fix their salaries in accordance with salary standards adopted by the commission of finance. Two members of the board shall constitute a quorum for the transaction of business.

History.
Section 86-1-3, Revised Statutes of 1933, was repealed by L. 37, ch. 124, eff. May 11. This section, as herein set forth, was enacted by L. 41, 1st Spec. Sess., ch. 35, eff. July 1, as section 86-1-3.

86-1-4. Seal—Record of Board Action.

The state land board shall adopt a seal, filing a description and impression thereof in the office of the secretary of state, and it shall affix the same to all instruments of conveyance, certificates and other official documents. A full record of the acts of the board shall be kept by the executive secretary, who shall preserve all papers and documents submitted to the board. (L. 25, p. 51, § 5576.)

1. Operation and effect of section.
This section merely requires the board to keep a record, but does not require it to keep any particular form of record, or prescribe method of making and keeping the record, and certainly the courts can prescribe none. Moreover, the courts should consider attacks upon the records of the state land board with considerable care and caution. Whitmore v. Candland, 47 U. 77, 151 P. 528.

86-1-5. Fees.

The board shall charge fees as follows; all of which must be paid in advance, and for which a receipt shall be issued:

Lease, grazing lands	$2.00
Lease, mineral	2.00
Certificate of sale	2.00
Certified copy of patent	2.50
Certified copy of certificate of sale	2.50
Certified copy of agreement to purchase	2.50
Noting assignment of application, certificate, lease or water contract	.50

Furnishing information, or searching records, per hour..... 1.00
Preparing affidavit of lost certificate 1.00
Certified copies of other records or papers, 15c per folio, plus $1.00 for seal.
And for services not specified above or elsewhere a reasonable fee.
(C. L. 17, § 2514.)

Cross-references.
Fees for making loans of funds, 86-1-50.

A. L. R. notes.
Constitutionality and construction of statutes relating to grazing and pasturing sheep or goats on public land, 70 A. L. R. 410.

86-1-6. Rules and Regulations.

The board may make all needful rules and regulations not inconsistent with the provisions of this title for carrying the same into effect.
(L. 25, p. 51, § 5613.)

86-1-7. To Represent State in Actions—Counsel.

The board shall cause the state to be properly represented in all suits, actions, controversies or claims relating to state lands *provided* that upon the request of the board the attorney general or under his direction any district attorney, county attorney, shall institute and prosecute the necessary action or proceedings for the enforcement of any of the provisions of this title. No other counsel shall be employed therefor except with the approval of the governor and the attorney general. (L. 25, p. 51, § 5614.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 35, eff. July 1, adding proviso to text.

86-1-8. Annual Report to Governor.

The board shall annually, on the 1st day of January in each year, make a full report of its transactions to the governor, showing the amount of lands in each county belonging to the state, to what fund they belong, their value to the amount sold or leased during the year, and such other items of information concerning the state lands as it may deem proper. (L. 25, p. 51, § 5615.)

86-1-9. Contests as to Preference Rights—Hearings, Findings.

Where contests arise as to the preference rights of claimants for lands under the control of the board, it shall have full power to direct the taking of evidence concerning the points involved, which shall be reported in full. The board shall notify the parties of its findings and conclusions. (L. 25, p. 51, § 5619.)

86-1-10. Witnesses—Subpoena and Oaths.

The board may issue subpoenas to compel the attendance of witnesses and the production of books and papers before it, and any member may administer oaths in the performance of its official duties.
(L. 25, p. 51, § 5620.)

86–1–11. Survey of Land Grants—Application for.

The governor shall, by and with the consent of the board, make application to the commissioner of the general land office for the survey of public unsurveyed lands for the purpose of satisfying the public land grants to this state, in accordance with the provisions of federal law. (L. 25, p. 51, § 5621.)

86–1–12. Papers to Be Indorsed with Date of Receipt.

The board upon receipt by its office of any application, bid, contract or other paper shall immediately indorse thereon the day and time of the receipt thereof. (L. 25, p. 51, § 5623.)

86–1–13. Payment of Expenses—State Lands Maintenance Fund.

All expenditures of the state land board including all necessary expenses attending the examination, survey, location, selection, appraisement, sale of state lands, investment of funds, defense of state titles, purchase of blanks, books and stationery, compensation of officers and employees, and all expenses necessarily incurred in carrying out the provisions of this title, shall be paid by the state treasurer from funds received by him from leases, rentals, interest, penalties, forfeitures or other income, derived from the administration of state land grants by said board. It is the duty of the state treasurer to establish a fund to be known as the "State Lands Maintenance Fund" and to pay into said fund 20 per cent of all moneys received by him from leases, rentals, interest, penalties, forfeitures or other income derived from the administration of state land grants by said board, and all of the expenses of the land board as above enumerated shall be paid out of said fund. Said expenses shall be paid on warrants of the state auditor issued on vouchers certified to by the said board, or its executive secretary. Said board shall determine monthly the amount of expenses incurred in the administration of each of said grants, and shall keep a separate record thereof, and shall monthly certify the same to the state auditor, who shall keep a separate record thereof. Each of said grants shall be charged with the expenses of its administration.

Provided, that the expenses incurred by said board for flood control works, and for the purchase, lease, patrol, revegetation and survey of lands for flood prevention and control shall be paid by the state treasurer from funds appropriated for that purpose on warrants of the state auditor issued on vouchers certified to by the said board, or its executive secretary, all vouchers issued by the state land board or its executive secretary under the provisions of this act must be accompanied by all necessary supporting invoices, statements and claims approved by the board of examiners.

The state auditor shall on or before September thirtieth of each calendar year, cover into the several funds from which derived any unexpended balance remaining in the state land maintenance fund as of June thirtieth of each calendar year.

There is hereby annually appropriated to the state land board from the state lands maintenance fund all necessary monies with which to pay the expenses of the state land board. (L. 31, p. 83, § 5583.)

History.

As amended by L. 33, ch. 69, eff. June 26; L. 35, ch. 96, eff. Mar. 26; L. 37, ch. 125, eff. Mar. 22, which contained a section 2 which read as follows: "Any law or any act or portion thereof in conflict herewith is hereby repealed in so far as it is in conflict with the provisions of this act." Amendments made material changes in text and added all matter after "board" in ninth line.

1. Validity.

Act appropriating money for payment of expenses of state land board from fees, interest, rentals, and royalties received, was invalid for uncertainty where there was no law authorizing payment from such funds nor apportioning expenses among various institutions for whom funds were held in trust under Const. Art. X, §§ 3, 5, Art. XX, § 1, and Enabling Act, §§ 6-13. Dern v. Holden, State Auditor, 69 U. 488, 256 P. 537.

86-1-14. To Manage and Dispose of All State Lands—Disposition of Submerged Lands.

The state land board shall have the direction, management and control of all lands heretofore or hereafter granted to this state by the United States government, or others, and of lands lying below the water's edge of any lake or stream to the bed of which the state is entitled, for any and all purposes whatsoever, except lands used or set apart for public purposes or occupied by public buildings, and may sell or lease the same for the best interests of the state in accordance with law; *provided*, that lands belonging to the state, lying below the water's edge of any lake or stream shall not be sold, except to promote a material public or quasi public use or service, and then only in such quantity as may be reasonably necessary to promote such public or quasi public use or service; *and provided further*, that such use shall not unreasonably interfere with navigation and that such land is sold at a cash price of not less than $25 per acre under the provisions of law relating to the sale of state lands. In cases where the owners of riparian lands have made valuable improvements on contiguous lands lying below the water's edge, the board may in its discretion sell to such riparian owners, or their successors in interest, under the provisions of law relating to the sale of state lands, the lands on which such improvements have been made, and such additional lands as may be necessary to the reasonable use and enjoyment of such improvements, at the cash price of not less than $25 per acre; and whenever all the owners of lands bordering on any lake, or bay thereof, desire to unwater such lake or bay and thereby reclaim the bed thereof for agricultural purposes, the board may sell the land comprising such bed to such riparian owners at the cash price of not less than $25 per acre, upon their making application to purchase the same and furnishing a bond to the state with surety or sureties satisfactory to the board, in double the amount of the purchase price of the land, conditioned on such reclamation taking place within five years from the date of such sale. In no case shall the state land board sell such submerged lands unless and until the purchaser has furnished such bond to the state. In accomplishing such reclamation no interference shall take place with existing water rights. The sale of whatever right, title and interest the state has in such bed shall be by quitclaim deed or other similar conveyance, with reservation to the state of all mineral rights. Nothing herein contained shall be construed as a legislative declaration of ownership by the state of beds of nonnavigable lakes, or bays thereof,

or of beds of nonnavigable rivers or streams. In all cases lands containing coal or other mineral shall be reserved from sale, except in the aforesaid cases of improvements made by riparian owners, in which cases all coal or mineral rights shall be reserved to the state.

(L. 31, p. 159, § 5575.)

History.

This section was adopted in 1898 (R. S. 1898, § 2325) and was amended in 1911 and at subsequent sessions of the legislature. See State v. Rolio, 71 U. 91, 106, 262 P. 987.

Cross-references.

Powers of fish and game commissioner, 30-0-6; powers of armory board, 54-2-2.

1. Discretion of board.

A court has no jurisdiction to direct, by mandamus, how the discretionary power, formerly vested in the state board of land commissioners by this chapter, shall be exercised. Miles v. Wells, 22 U. 55, 61 P. 534, applying Chapter 64 of Session Laws of 1899.

2. Conveyance to Central Utah Water Company.

L. 37, ch. 154, eff. Mar. 22, authorized and directed the state land board to convey to the Central Utah Water Company certain water rights, reservoirs, interest in reservoirs, reservoir rights, laterals, canals, ditches and easements.

3. Conveyance to Piute Reservoir and Irrigation Company.

L. 37, ch. 155, eff. Mar. 22, authorized and directed the state land board to convey to the Piute Reservoir and Irrigation Company certain lands, water rights, reservoir rights, canals, laterals and easements.

4. Conveyance to Price River Water Conservation District.

L. 37, ch. 156, eff. Mar. 22, authorized and directed the state land board to convey to the Price River Water Conservation District certain water rights, laterals, canals, ditches, tunnels, easements, diversion dams, headgates, flumes and rights-of-way.

5. Scope and operation of section.

This section defines the general powers of the board. Van Wagoner v. Whitmore, 58 U. 418, 425, 199 P. 670.

This act places the whole matter of making disposition of the state's lands in the hands and under the control of the state land board. No right of appeal to the courts, or of reviewing the board's actions otherwise by the courts, except where lack or excess of power is alleged, has been given. All the courts can do, therefore, is to inquire into and determine in a proper proceeding whether the board has acted without or in excess of its powers or jurisdiction. Whitmore v. Candland, 47 U. 77, 151 P. 528.

6. Title to beds of navigable waters.

By enacting Laws 1927, p. 8, the legislature in express terms reasserted the state's title to the beds of all navigable waters. State v. Rolio, 71 U. 91, 107, 262 P. 987, followed in Robinson v. Thomas, 75 U. 446, 449, 286 P. 625. This section confirms state's title to the beds of all navigable waters. State v. Rolio, 71 U. 91, 106, 262 P. 987.

A. L. R. notes.

Constitutionality and construction of statutes relating to grazing and pasturing sheep or goats on public land, 70 A. L. R. 410.

Estoppel of one not party to sale or mortgage of public land by failure to disclose his interest in property, 50 A. L. R. 790.

Prohibition to control action of land officers, 115 A. L. R. 31.

Right of public to use shore of inland navigable lakes between high and low water mark, 31 A. L. R. 978.

Rights of boating and fishing on inland lakes, 6 A. L. R. 1056.

86-1-15. Coal and Mineral Deposits Reserved—Exceptions—Sales on Royalty Basis.

All coal and other mineral deposited in lands belonging to the state of Utah are hereby reserved to the state. Such deposits are reserved from sale, except on a rental and royalty basis as herein provided, and the purchaser of any lands belonging to the state shall acquire no right, title or interest in or to such deposits, but the rights of such purchaser shall be subject to the reservation of all coal and other mineral

deposits, and to the conditions and limitations prescribed by law providing for the state and persons authorized by it to prospect or mine, and to remove such deposits, and to occupy and use so much of the surface of said lands as may be required for all purposes reasonably incident to the mining and removal of such deposits therefrom; *provided* that improved farm lands acquired by the state through foreclosure proceedings or improved farm lands conveyed to the state by deed in satisfaction of farm loan mortgages may be sold by the state without mineral reservations. Salts and other minerals in the waters of navigable lakes and streams are likewise reserved to the state and shall be sold by the state land board only upon royalty basis. The amount of such royalties and the terms of such contracts shall be determined by the board; *provided*, that all such contracts shall be subject to the use of the waters for public purposes, and *provided further* that before executing a contract which contemplates the recovery of salts and minerals from said waters, the state land board shall require evidence that an application for the appropriation of water for such purpose has been filed with the state engineer and is pending in his office.

(L. 25, p. 51, § 5575x.)

History.

As amended by L. 35, ch. 97, eff. Mar. 21; L. 41, ch. 91, eff. May 13, making minor changes in text and adding proviso.

1. "Mineral land."

Land valuable for coal is mineral land within meaning of public land laws. United States v. Sweet, 245 U. S. 563, 62 L. Ed. 473, 38 S. Ct. 193.

86-1-16. Id.

All applications to purchase, approved subsequent to May 12, 1919, shall be subject to a reservation to the state of all coal and other mineral deposits in said lands, with the right to the state or persons authorized by it to prospect for, mine and remove the same as provided by law, and all certificates of sale and all patents issued therefor shall contain such reservation. (L. 25, p. 51, § 5575x1.)

86-1-17. Id. Sale of Surface Rights.

Lands in which minerals are reserved, the surface of which has a value for other purposes, may be sold under the provisions of law relating to the sale of state lands, subject to such reservation.

(L. 25, p. 51, § 5575x2.)

86-1-18. Mining Leases—Rentals and Royalties.

The board may lease in tracts not exceeding 2560 acres in extent to any one person for prospecting and mining purposes any portions of the unsold, unleased lands of the state for such annual rental, not less than fifty cents per acre per annum, and for such royalty upon the product as the board may deem fair and in the interest of the state. Such rental paid for any year shall be credited against the royalties as they accrue for the year. Such leases shall be for indeterminate periods, and upon condition that at the end of each twenty-year period succeeding the first day of the year in which the lease is issued, such readjustment of terms and conditions may be made as the board may determine to be necessary in the interest of the state. Application for

such leases shall be made, on oath, in such form as the board may prescribe, and the applicant shall describe the land, state the annual rental and royalty offered by him, specify the particular mineral or minerals, and give such additional information as may be required by the rules and regulations of the board. (L. 25, p. 51, § 5575x3.)

86–1–19. Id. On Lands Sold with Rights Reserved.

The board may lease for prospecting and mining purposes the deposits of coal or other mineral or minerals that may be in lands sold with a reservation of mineral deposits, and may lease such deposits in unsold lands belonging to the state. (L. 25, p. 51, § 5575x4.)

86–1–20. Id. Lessees—Extent of Rights—Protection and Indemnity to Surface Owner.

A lessee of valuable mineral deposits shall have the right at all times to enter upon the lands described in his lease for prospecting and mining; *provided*, he shall not injure, damage or destroy the improvements of the surface owner or lessee, and the lessee shall be liable to and shall compensate such owner for all damage to the surface of said land and improvements thereon. Any such lessee may occupy so much of the surface of said land as may be required for all purposes reasonably incident to the mining and removal of the mineral deposits; first, upon securing the written consent or waiver of the surface owner or lessee; or, second, upon payment for the damage to the surface of said land and improvements thereon to the owner or lessee thereof where agreement may be had as to the amount thereof; or, third, upon the execution of a good and sufficient bond to the state of Utah for the use and benefit of the owner or lessee of the land to secure the payment of such damages as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon; such bond to be in form and in accordance with the rules and regulations and in such an amount as shall be prescribed by the board, and to be filed with and approved by the board. (L. 25, p. 51, § 5575x5.)

86–1–21. Id. Terms and Conditions of Leases.

All leases of mineral deposits shall be conditioned upon payment of the rent in advance annually, and upon the payment of the royalty provided for in the lease, and such other things as may be required by the board, and, upon the violation of any of the conditions of the lease the board may at its option after thirty days' notice by registered mail cancel the lease. Upon failure or refusal of the lessee to accept the readjustment of terms and conditions determined by the board at the end of any twenty-year period, such failure or refusal shall work a forfeiture of his lease and the same shall be canceled. (L. 25, p. 51, § 5575x6.)

86–1–22. Id. Inspection of Workings by Board.

The board shall cause inspection to be made from time to time by a competent person, of all mines or works operated under such leases for the production of minerals as often as it shall deem necessary for the

interests of the state, and the board shall have the right at all times to inspect such mines or works. (L. 25, p. 51, § 5575x7.)

86-1-23. Id. Rules Concerning and Form of Application.

The board shall by rules and regulations prescribe the form of application, the form of lease, the annual rental, the amount of royalty and the basis upon which the royalty shall be computed, and such other details as it may deem necessary in the interest of the state. (L. 25, p. 51, § 5575x8.)

86-1-24. To Sell or Lease State Lands—Disposition of Proceeds.

The board shall cause all public lands now owned by the state, or lands the title to which may hereafter be vested in the state, to be classified and registered and thereafter sold or leased. The funds arising from the sale or leasing thereof shall be invested in the manner provided in this chapter. Any person making application to the land board for the selection of land shall in addition to the purchase price to be paid therefor pay a fee of fifteen cents per acre to cover costs incurred in the selection of such land. All such fees shall be deposited with the state treasurer at the end of each month in a permanent fund to be known as the state land selection fund, and shall be drawn upon by the board to pay necessary expenses in the selection and registration of such land. (L. 25, p. 51, § 5577.)

History.

As amended by L. 41, 1st Spec. Sess., ch. 35, eff. July 1, making no change in phraseology of text.

1. Mandamus.

Mandamus to interfere with exercise of board's powers under this section has been denied. Miles v. Wells, 22 U. 55, 61 P. 534.

86-1-25. Apportionment of Land Grants to Several Funds.

The board shall designate what lands selected by the state shall be assigned to each specific fund designated in grants made by the United States. Such selections shall be so apportioned among the various grants that each shall receive as nearly as possible its pro rata share of the different classes of land selected. (L. 25, p. 51, § 5578.)

86-1-26. Appraisal of State Lands—Compensation to Appraisers.

The board shall cause the state lands and the improvements thereon to be appraised or reappraised at such times as it may deem for the best interests of the state, and may appoint suitable persons to select, locate and appraise all lands granted to the state, who shall each receive a compensation of not to exceed $6 per day for the time actually and necessarily employed, and actual and necessary traveling expenses while in the performance of his duties. (L. 25, p. 51, §§ 5579, 5581.)

1. Necessity for appraisement.

Under this section, appraisement is a statutory condition precedent, and should be in substantial compliance with the statute. But whether failure to appraise improvements is a mere irregularity or is jurisdictional is questionable. Whitmore v. Candland, 47 U. 77, 151 P. 528.

2. Sufficiency of appraisement.

Appraisal by a single member of the board may be irregular, but it is not void. Whitmore v. Candland, 47 U. 77, 151 P. 528.

3. Judicial review.

The court has no power to review the appraisement, although the appraiser

may have grossly erred in his judgment as to the value, or may have seriously erred in considering certain so-called improvements valueless. If he acts in good faith and without fraud or collusion, his acts are not reviewable by the courts. Whitmore v. Candland, 47 U. 77, 151 P. 528.

4. **Mandamus.**

Mandamus to interfere with board's discretion under this section has been denied. Miles v. Wells, 22 U. 55, 61 P. 534.

86-1-27. Selection of State Lands—Relinquishment.

All selections of land shall be made in legal subdivisions according to the United States survey, and when a selection has been made and approved by the board, it shall take such action as may be necessary to secure the approval of the proper officers of the United States and the final transfer to this state of the lands selected. The board may cancel, relinquish or release the claims of the state to, and may reconvey to the United States, any particular tract of land erroneously listed to the state, or any tract upon which, at the time of selection, a bona fide claim has been initiated by an actual settler. (L. 25, p. 51, § 5580.)

Cross-references.

Selected under direction of secretary of interior, Enabling Act, § 13.

1. **Extent of right.**

Where, under Enabling Act, state had exclusive right to select unoccupied and unclaimed non-mineral lands, right of selection carried with it the right to take possession and to continue in such possession, at least until someone with better right claimed lands, until they found them to be mineral in character; and if state had this right, it could transfer right of possession to another, and person who obtained it would certainly have right to exclude mere intruders who had no right in or to land whatever. McKinney v. Carson, 35 U. 180, 99 P. 660.

2. Effect of Enabling Act.

Where under Enabling Act state had exclusive right to select unoccupied and unclaimed non-mineral lands, and made selection, it was held that secretary of interior could not, by mere rejection of state's selection, defeat rights of state, since Enabling Act conferred no such power upon him. McKinney v. Carson, 35 U. 180, 99 P. 660.

86-1-28. Classification of Lands Prior to Selection.

The board shall provide for field and office use uncertified plats of the surveyed lands of the state; shall ascertain, as far as practicable, what of the unappropriated government lands in the state are capable of irrigation, and the sources and reliability of the supply of water for the same; and shall select such lands as may be suitable under the various grants by the federal government to the state, and shall classify said lands upon the office plats according to the following classification: agriculture, grazing, timber, reservoir sites, natural gas producing, mineral, coal, stone, saline or arid lands, and show whether the same are improved or occupied. (L. 25, p. 51, § 5582.)

86-1-29. Sales of State Land—Method—Amounts—Price—Notice of Sales.

Whenever the state land board deems it to the best interest of the state of Utah it may sell state or school lands not used or set apart for public purposes or occupied by public buildings or improvements; *provided*, that no land shall be sold for less than the appraised value thereof, and that no more than 160 acres of irrigated land shall be sold to any one individual, company or corporation; *provided also*, that the

sale of such lands shall be made only to citizens of the United States or to those who have declared their intention to become such. Arid and grazing lands may be sold in amounts not to exceed four sections to any person, firm or corporation. Upon any sale the purchaser shall make the first payment and the state land board shall issue a certificate of sale. In the sale of lands, the state land board shall give notice of such sale by publication in some newspaper published and of general circulation in the county where the land to be sold is situated, and publication shall be had, when deemed necessary by the board, in such other newspaper or newspapers as it may designate. If there is no newspaper published in the county where the land to be sold is situated, then notice shall be published in some newspaper published in the state having general circulation in the county where the land is situated, to be designated by the state land board; and at least three notices shall be posted in conspicuous places, one of which shall be at the court house in said county. Such notice shall contain a description of the land to be sold and shall be published at least once a week for four weeks next preceding such sale and shall specify when and where the sale will be held. The sale may be had at public auction or by sealed bids, as the board may determine.

Provisions of this act do not apply to land acquired through deed or foreclosure in satisfaction of mortgage. (L. 25, p. 51, § 5584.)

History.
As amended by L. 41, ch. 92, eff. May 13, rewriting text of entire section.

Cross-references.
Land board to furnish tax commission lists of lands sold, 80–5–50.

1. Aliens.
There is no restriction in this section with respect to the leasing of state lands to aliens. Decorso v. Thomas, 89 U. 160, 176, 50 P.2d 951, rehearing denied 89 U. 179, 57 P.2d 1406.

2. Private sales.
If lands are offered at public auction as required by statute, and are not sold for want of bidders, they may be sold at private sale. Whitmore v. Candland, 47 U. 77, 151 P. 528.

86–1–30. Sales of Lands Under United States Irrigation Projects.

No lands belonging to the state, within the areas to be irrigated from works constructed or controlled by the United States or its authorized agencies, shall be sold except in conformity with the classification of farm units by the United States and the title to such lands shall not pass from the state, until the applicant therefor shall have complied with the provisions of the laws of the United States, and the regulations thereunder concerning the acquisition of the right to use water from such works, and shall produce the evidence thereof; *provided*, that the area or areas to be so irrigated shall be determined by due notice, given by the United States or its duly authorized agencies and filed with the land board. After the withdrawal of lands by the United States for any irrigation project, no application for the purchase of state lands within the limits of such withdrawal shall be accepted, except upon the conditions prescribed in this section. Any state lands needed by the United States for irrigation works shall be sold to the United States at private sale at the appraised value thereof.

(L. 25, p. 51, § 5585.)

86–1–31. Sales to Settlers on Unsurveyed School Lands.

Actual and bona fide settlers or occupants who have improved unsurveyed state school lands, and were for two years prior to the extension of the United States survey over said lands actual settlers or occupants thereof, or who hold the same or the possession thereof by purchase from original settlers or their assigns, said original settlers having resided upon, occupied or cultivated said lands for two years prior to the extension of the surveys of the United States over the same, may be permitted to purchase such lands at private sale at the appraised valuation thereof. Applications to make purchase by such preferred claimants must be made within ninety days after the plats of said surveys have been filed in the United States land office.

(L. 25, p. 51, § 5588.)

1. Words and phrases defined.
Under this section it is not necessary that a person shall actually reside upon the land in order to be an "occupant" thereof. Twiggs v. State Board of Land Com'rs, 27 U. 241, 75 P. 729.

2. Applications.
Word "must," as used in this section, is directory, not mandatory, and state board of land commissioners had power to grant occupant of school land certificate of sale, notwithstanding more than 90 days had elapsed, where there was no other application pending for purchase of land. Hamblin v. State Board of Land Com'rs, 55 U. 402, 187 P. 178.

3. Certificate of sale.
Mandamus could not be employed to compel state board of land commissioners to issue certificate of sale to occupant of school land as provided under this section, since issuance of such certificate to any particular person is not made by statute an imperative duty on part of board. Hamblin v. State Board of Land Com'rs, 55 U. 402, 187 P. 178.

1. Purchasers from occupant.
A purchaser from an occupant succeeds to the latter's preferential right to purchase under this section. Twiggs v. State Board of Land Com'rs, 27 U. 241, 75 P. 729.

86–1–32. Sales to Applicants Requesting Selection.

Whenever any citizen of the United States, or person who has declared his intention to become such, shall make application in writing for the selection by the state of any tract of land in satisfaction of any grant to the state, the board may select and contract to sell the same at private sale to the person requesting the selection thereof at a price to be fixed by the board, not less than $2.50 per acre, provided that at the time of making such contract ten per cent of the purchase price shall be deposited with the board to be applied as the first payment on such land after the same is patented to the state, and the remainder of the purchase price shall be paid in not to exceed twenty equal yearly payments. Any person who has heretofore become a purchaser of lands so selected shall have the same privilege of extending payment of the remainder of the purchase price of said selected lands as is accorded to purchasers under the provisions of section 86–1–37. All lands heretofore selected by the board upon the application of citizens may be sold to applicants under the provisions of this section.

(L. 25, p. 51, § 5589.)

1. Scope and operation of section.
This section does not make it the duty of the state board of land commissioners to select and contract land applied for, nor to fix a uniform price for all lands selected. Miles v. Wells, 22 U. 55, 61 P. 534.

2. Words and phrases defined.
There are no provisions in Chapter 64 of the Session Laws of 1899 cited supra which indicate that the word "may" occurring in the sentence "The board may select and contract to sell," etc., in this section of said act, was used in any

other than its ordinary sense; to have used it otherwise would have neutralized the plain provisions of some, and materially modified others, of the sections of the act. Miles v. Wells, 22 U. 55, 61 P. 534.

3. Nature of rights of applicant.

Under this chapter, after an application for lands is made, until the selection is made and the price to be paid, and the time in which the deferred payments shall be made are fixed by the board, and assented to by the applicant, and a contract of sale containing the stipulation agreed upon is executed, the applicant has no vested rights whatever. Miles v. Wells, 22 U. 55, 61 P. 534, applying Chapter 64 of session laws of 1899.

4. Certificate of sale.

Certificates of sale of state land did not constitute mere pledges of personal property but interest in real estate which could be mortgaged, and administrator of mortgagor's estate was entitled to redeem from judicial sale, although he had acquiesced in sale of securities as personal property. Young v. Corless, 56 U. 564, 191 P. 647. This case is followed in McNeil v. McNeil, 61 U. 141, 211 P. 988.

86-1-33. Sales to Occupants Relinquishing Rights Under Federal Laws.

The state land board is hereby authorized to make contracts with bona fide occupants who have in good faith filed upon the lands in this state under the laws of the United States, whereby such occupants may relinquish their said entries and be permitted to purchase at private sale land from the state after its selection by the board, at a price to be fixed by the board, which price shall not be less than $1.25 per acre, provided that at the time of making such contract twenty-five cents per acre shall be deposited with the board to be applied as the first payment on such land, after the same is patented to the state, and the remainder of the purchase price shall be paid in not to exceed twenty equal yearly payments; but this section does not confer any authority upon such board to contract with occupants, in any manner whatever, who have gone into possession or filed upon land after application has been filed by any other person or persons with said board for the selection or purchase from the state of the same lands or any part thereof. Occupants holding contracts with the state land board for the purchase of land selected by the board as in this section provided shall have the same privilege of extending their payments of the remainder of the purchase price due under said contract, as is provided in section 86-1-37.

(L. 25, p. 51, § 5590.)

86-1-34. Sale of Timber.

The board may sell the timber on the unsold and unleased lands of the state, except as provided in section 86-1-39, in the same way as it may sell state lands, but payment for such timber must be made as provided in section 86-1-37. A failure to make such payment shall work a forfeiture of such contract of sale. All right of ownership in any timber on lands of the state by virtue of purchase from the state shall cease ten years from and after such purchase.

(L. 25, p. 51, § 5591.)

History.

This section differs materially from former section 21 of Laws of 1899. See Miles v. Wells, 22 U. 55, 61 P. 534.

1. Discretion of board.

The former discretionary power of board, conferred by 86-1-14 as it formerly read, could not be interfered with by mandamus. Miles v. Wells, 22 U. 55 61 P. 534.

86–1–35. Id. Restrictions.

No contract by the board for the sale of timber on any lands of the state shall permit or entitle the purchaser to cut, use, injure or destroy any growing timber or trees less than eight inches in diameter at the butt. The board shall make such rules and regulations for the disposal of the tops and limbs of trees cut for logging and other purposes as shall secure the young timber on the state lands from injury or destruction by fire. Nothing in this chapter shall be construed to prevent settlers from removing any timber from unsold or unclaimed lands of the state for their own domestic use. (L. 25, p. 51, § 5592.)

Cross-references.
Timber cutting forbidden, 103-26 78.

86–1–36. Notice of Sales—Publication.

Notice of all sales of land or timber, except timber which has no value for manufacturing, commercial or saw purposes, shall be given by publication in some newspaper published and of general circulation in the county wherein the sale shall be held, and when deemed necessary by the board, in such other newspapers as it may designate; if there is no newspaper published in the county, then in some newspaper published in the state having general circulation in such county, to be designated by the board. Such notice shall be published at least once a week for four weeks next preceding such sale, and shall specify when and where the same will be held. (L. 25, p. 145, § 5593.)

86–1–37. Payment for Land or Timber Sold.

Payment for lands and timber sold under the provisions of this chapter shall be as follows: Not less than one-tenth of the purchase price to be paid in cash at the time of the sale, and the balance in not to exceed twenty equal yearly payments. No lands shall be sold on which there is timber of a kind and in sufficient quantity to be of commercial value; but such lands may be leased or timber thereon may be sold for such purposes and on such terms as will secure a continued growth of timber thereon. No timber shall be sold at less than its actual value to be ascertained by careful appraisement thereof. The rate of interest on all deferred payments shall be five per cent per annum, and shall be paid as follows: On the day of sale the interest on the unpaid portion of the purchase price shall be computed and paid up to the 1st day of January next ensuing, and thereafter the interest and the installments of the purchase price remaining after the first payment has been made shall become due and payable annually in advance on the 1st day of January of each year. No timber shall be sold except for cash, unless the purchaser shall secure the state for the payment of the full purchase price by giving, at the time of purchase and execution of notes for purchase, a good and sufficient bond running to the state for double the value of the timber on said lands; said bond to be in such form as the board may direct, and subject to its approval. Any purchaser may make full payment for land purchased at any time, and after the payment of the amount required to be paid at the time of the

sale a purchaser may pay any part of the amount due equal to one or more annual payments. (L. 25, p. 51, § 5594.)

1. Title and rights of purchasers.
Under this section purchaser of land is entitled to possession from and after date of purchase and before issuance of certificate of sale. Livingston v. Thornley, 74 U. 516, 280 P. 1042.

86–1–38. Id.

All payments of principal, interest or rental shall be made to the board, and it shall issue its receipt in duplicate therefor, and transmit the original receipt to the person making the payment and deliver the duplicate to the state auditor. (L. 25, p. 51, § 5595.)

86–1–39. Reservation of Timber Lands.

The board shall set apart and reserve from sale such tracts of timber lands and the timber thereon as may, in its opinion, be required to preserve the forests of the state, prevent the diminution of the flow of streams, and aid in the irrigation of the arid lands.
(L. 25, p. 51, § 5612.)

History.
This section is identical with Laws 1899, and court has denied mandamus to interfere with board's discretionary powers hereunder. Miles v. Wells, 22 U. 55, 61 P. 534.

86–1–40. Disposal of Improvements on Land Sold.

Any person purchasing land upon which improvements have been made by any other person and appraised as provided in Section 86–1–26, shall pay to the board, in addition to the amount of principal and interest required by law to be paid at the time of sale, the full appraised value of such improvements, the amounts thus paid for improvements shall be paid by the board to the owners of such improvements, unless such owners shall, within ninety days after such sale, remove the improvements, for which purpose they shall have the right to go upon the land. In case the owner elects to remove the improvements and removes the same within the said ninety days, the board shall authorize the return to the person by whom it was paid the amount paid for improvements. (L. 25, p. 51, § 5596.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 36, eff. July 1, inserting "authorize" after "shall" in third line from last of text.

Cross-references.
Improvements by occupying claimants, 78–6–8.

1. What constitutes improvements.
Removal of brush from the land, breaking up some of the original sod or soil, etc., does not constitute the "improvements" contemplated by this section. Whitmore v. Candland, 47 U. 77, 151 P. 528.

2. Appraisal.
It is only removable improvements on state's lands that the board is required to appraise. Whitmore v. Candland, 47 U. 77, 151 P. 528.
Under this section movable improvements are movable, as where occupant refuses to accept value of improvements as fixed by appraisers, or where appraisers considered any improvements they found on the land as possessing no value, and claimant thinks otherwise. Whitmore v. Candland, 47 U. 77, 151 P. 528.

A. L. R. notes.
Betterment or occupying claimant acts as available to plaintiff seeking affirmative relief, 137 A. L. R. 1078; rights as between adverse claimants to improvements placed on public lands, 6 A. L. R. 95.

86–1–41. Certificate of Sale.

Upon the sale of land as herein provided, the board shall issue to the purchaser a certificate of sale, showing the land purchased, the amount paid, the amount due, and the time when the principal and interest will become due. (L. 25, p. 51, § 5597.)

1. What constitutes a "sale."
The application and the certificate of sale provided for by 86–1–32, when construed together, constitute a "sale" under this section. Young v. Corless, 56 U. 564, 568, 191 P. 647. This case is reviewed in McNeil v. McNeil, 61 U. 141, 211 P. 988. The foregoing cases discuss at some length the nature and status of the certificate of sale.

2. Right of purchaser to possession.
Under this section and 86–1–37 purchaser is entitled to possession from and after date of purchase and before issuance of certificate of sale. Livingston v. Thornley, 74 U. 516, 280 P. 1042.

A. L. R. notes.
Validity of mortgage executed by entryman on public land before patent, 41 A. L. R. 938.

86–1–42. Sales of Lands Unsold After Appraisal.

Whenever the board shall have exposed for sale at public auction any of the lands of this state pursuant to law, and any of such lands shall remain unsold, the board may in its discretion, sell any of the said lands, at not less than the appraised value, and issue certificates of sale thereof, to such persons, respectively, as shall thereafter make application therefor. (L. 25, p. 51, § 5598.)

1. Manner of sale.
If the appraised lands are offered at public auction as required by statute, and are not sold for want of bidders, they may be subsequently sold at private sale. Whitmore v. Candland, 47 U. 77, 151 P. 528.

86–1–43. Patents.

Upon payment in full of principal and interest, and the surrender of the original certificate of sale for any tract of land sold, the governor shall under the great seal of the state issue a patent therefor to the purchaser, his assignee or successor in interest. In case the purchaser shall have died and the land described shall have been sold by order of any court having jurisdiction, and such sale shall have been duly confirmed, the patent shall be issued to the purchaser to whom confirmation of sale is made. If the estate of a deceased person shall have been distributed by order of such court, the patent shall be issued to the distributees. All patents so issued shall be attested by the secretary of state, and a record thereof shall be kept in the office of the board. (L. 25, p. 51, § 5599.)

Cross-references.
Governor to issue patents, 87–2–1, subd. 11.

A. L. R. notes.
Validity of lease by entryman upon public land before patent, 83 A. L. R. 1347; validity of mortgage executed by entryman on public land before patent, 41 A. L. R. 938.

86–1–44. Leases of State Lands.

All state lands unleased and unsold shall be subject to lease at the actual leasing value thereof as fixed by the board. Lands other than grazing and arid lands shall be leased for terms of not more than five years, and in tracts not exceeding 640 acres in extent to any one person, company or corporation, except that in leases of mineral deposits the

term shall be as provided herein. Grazing and arid lands may be leased for such terms, not exceeding twelve years, and in tracts of such quantities as may be for the best interests of the state, in the discretion of the board; *provided*, that no lease shall exceed 25,000 acres to any one person or corporation. When it shall be shown that a lease has been secured for the purpose of re-leasing or for the benefit of any person or corporation other than the lessee, the board may in its discretion, declare such lease void. Application for leases shall be made to the board, and shall contain an affidavit that the applicant is not the owner of a lease of state lands of more than 640 acres, except grazing or arid lands, including the amount applied for, and that he desires to lease for his own use and benefit. Applications for leases shall be accompanied by the fees provided by law. If the board deems it advisable to lease any land it shall cause the same to be appraised and determine the annual rental thereon, and shall thereupon notify the applicant thereof, and upon receipt of the first installment of rental, a lease of the land applied for, duly executed, shall be delivered to the lessee. The first payment upon the lease shall be to the 1st day of January next ensuing. Subsequent payments shall be due and payable in advance, on the 1st day of January of each year. In leasing grazing lands, the board shall give the preference to actual settlers and citizens. The board may withhold from sale or lease lands on which there are springs of water, where water for stock purposes is scarce and their sale or lease, if inclosed, would in the opinion of the board create a monopoly of large tracts of the United States or state grazing lands in favor of the purchasers or lessees of lands on which such springs or streams are located. (L. 25, p. 51, § 5600.)

Cross-references.

Leases for certain purposes, 86-1-48.10 et seq., 86-6.

1. Applicability of section.

This section has been applied to lease of salt beds by the state land board. Decorso v. Thomas, 89 U. 160, 167, 50 P.2d 951, rehearing denied 89 U. 179, 57 P.2d 1406, setting out some of the terms of the lease.

2. Lease by county court under former law.

Territorial legislature held to have had no right to pass law giving to county court authority to lease land-sections 16 and 36, reserved by United States for common school purposes. Burrows v. Kimball, 11 U. 149, 41 P. 719.

Lease by county court of land-section 16, reserved by United States for common school purposes, held invalid, even if territorial law giving court right to make such lease had been valid, since court, in making lease, failed to follow law's provisions. Burrows v. Kimball, 11 U. 149, 41 P. 719.

3. Parties.

Even though state land board is a party to a lease made under authority of this section, and has an interest in litigation in respect thereto, it is not a necessary and indispensable party to action to fix rights of parties in and to such leases. Decorso v. Thomas, 89 U. 179, 57 P.2d 1406, aff'g on rehearing 89 U. 160, 50 P.2d 951.

86-1-45. Id. When Several Applications Are Received.

Except as otherwise provided in this chapter, applications to lease shall be considered in the order filed; *provided*, that when simultaneous applications are filed the land board may, if deemed advisable by it, let the land to the person who will pay the highest rental therefor; *and provided further*, that applications to lease land already under lease shall not be received before sixty days prior to the expiration of said lease, and all such applications received within said sixty days shall be considered simultaneous. (L. 25, p. 51, § 5601.)

86–1–46. Id. Covenants by Lessee—Forfeiture—Improvements.

Each lease shall contain covenants that the lessee will promptly pay the rent annually in advance; that no waste shall be committed on the land; that the premises shall be surrendered at the expiration of the term; that the lessee will not sublet without the written consent of the board; that a failure to pay the agreed rent for a period of one month from the time rent is due shall work a forfeiture of the lease after notice as hereinafter provided; and that where improvements have been placed on the land by any person other than the lessee, the lessee will allow the owner of the improvements to remove the same within ninety days. (L. 25, p. 51, § 5602.)

86–1–47. Default in Payments—Forfeiture—Extensions—Reinstatement.

Any purchaser, or his assignee, who is in default for non-payment of principal, or interest, due the state for a period of one month, shall be notified by the board by letter of such default, said letter shall have printed thereon in addition to such notification, a copy of this section; and if, within ninety days after the mailing of such notice, such delinquent has not paid his delinquencies, and has procured no extension of time, as hereinafter provided, his contract of sale may be forfeited, without further notice, and such forfeiture shall be noted on the records of the board; upon application the board may extend the time for making interest payments not to exceed one year, and may extend the time for making principal payments not to exceed five extensions for one year each. All deferred payments shall bear interest at the rate of five per cent per annum. Any person whose contract of sale has been forfeited may upon application have his contract reinstated at any time before the land has again been sold or leased by paying one year's interest, and if said land has been leased, the board may reinstate said contract at the termination of said lease, or within thirty days thereafter, upon the payment of one year's interest as aforesaid. Upon reinstatement of a contract the board may fix the annual payments of principal by dividing the unpaid principal into twenty equal payments. (L. 25, p. 51, § 5603.)

History.

As amended by L. 33, ch. 70, eff. Mar. 20, rewriting text of entire section.

1. Forfeiture proceedings.

An assignee of a lease is entitled to notice and an opportunity to be heard before its interests in the lease can be lawfully canceled. Decorso v. Thomas 89 U. 160, 174, 50 P.2d 951, rehearing denied 89 U. 179, 57 P.2d 1406.

86–1–48. Restricted Use of Timber by Lessees.

The lessee of state lands shall not cut or use more timber therefrom than shall be necessary for the improvement of such lands, and for fuel for the use of his family. The cutting and hauling of timber from leased agricultural or grazing lands to sawmills is prohibited. (L. 25, p. 51, § 5604.)

L. 1941, ch. 106; eff. May 13.

LEASE OF LAND TO DAUGHTERS OF UTAH PIONEERS

AN ACT leasing certain state capitol real estate known as the Triangle to the Daughters of Utah Pioneers, Incorporated, for the erection and maintenance of a pioneer memorial building to be used for the preservation, housing and care of historical records, pioneer documents and relics relating to the life and work of the Utah pioneers.

Be it enacted by the Legislature of the State of Utah:

86-1-48.10. Lease of Land to Daughters of Utah Pioneers—Description.

The state land board is authorized and directed to execute in writing and deliver to the Daughters of Utah Pioneers, Incorporated, a non-pecuniary corporation, organized and existing under and by virtue of the laws of the state of Utah, a lease covering certain land, situated in Salt Lake County, state of Utah, lying between Columbus and North Main streets at the southwest corner of the capitol grounds, and more particularly described as follows, to wit:

Commencing at the SW Cor. of Lot 5, Block 11, Plat "E," Salt Lake City Survey; thence No. 23° 51′ 45″ W. 25.0′; thence No. 89° 59′ 13″ E. 187.43′ to the West line of Columbus Street; thence along the West line of Columbus Street So. 17° 47′ 15″ W. 257.49′; thence No. 23° 51′ 45″ W. 243.52′ to the point of commencement. (Sec. 1.)

86-1-48.11. Term of Lease.

The lease shall run for a period of ninety-nine years from the date of its execution and delivery at a rental of One Dollar per year, payable annually to the state treasurer on the first day of March of each year, commencing with the year 1943. (Sec. 2.)

86-1-48.12. Lessee to Deposit $50,000—Use of Money—Completion of Building.

The lease shall be subject to the following conditions:

The lessee, the Daughters of Utah Pioneers, Incorporated, shall deposit with the state treasurer the sum of fifty thousand dollars, not later than February 1, 1943, as evidence of its ability to carry out a building project. Said sum, with other funds is to be used in the erection of the building. It is further provided that the Pioneer Memorial Building shall not be subject to taxes or liens of any kind whatsoever.

The building shall be completed and ready for public reception before the Utah state centennial celebration, which will be held in the year 1947. (Sec. 3.)

86-1-48.13. Failure to Perform—Termination.

Failure on the part of the lessee, Daughters of Utah Pioneers, Incorporated, to perform the foregoing conditions will automatically terminate the lease. (Sec. 4.)

L. 1941, 2nd Spec. Sess., ch. 24; eff. June 11.

LEASE OF LAND TO UNITED STATES FOR USE AS BOMBING RANGE

AN ACT authorizing the governor to lease certain property owned by the state of Utah to the United States of America for use as a bombing range.

Be it enacted by the Legislature of the State of Utah:

96-1-48.14. Governor Authorized to Lease State Lands—Description.

The governor of the state of Utah is authorized to lease to the United States of America for use as a bombing range certain tracts of land, and buildings, improvements and appurtenances thereunto belonging, situated in Tooele county, state of Utah, containing thirty-nine thousand nine hundred (39,900) acres, more or less, said land being more particularly described as follows: All that land designated as state land in the sections herewith enumerated:

In Range 19 West; Section 31 Township 1 South Section 31 of Township 2 South; Sections 2, 17, 31, 36 of Township 3 South, Sections 2, 17, 31, 36 of Township 4 South.

In Range 18 West; Sections 32, 36 of Township 2 South, Sections 2, 16, 32, 36 of Township 3 South.

In Range 17 West; Sections 32, 36 of Township 1 South, Sections 2, 16, 32, 36 of Township 2 South.

In Range 16 West; Section 32 of Township 1 South, Sections 2, 16, 32, 36 of Township 2 South, Sections 31, 32 of Township 9 South, Section 31 of Township 10 South.

In Range 15 West; Sections 2, 16, 32, 36 of Township 2 North, Sections 2, 16, 32, 36 of Township 1 North, Sections 2, 16, 18, 19, 32, 36 of Township 1 South, Sections 2, 16, 32, 36 of Township 2 South, Sections 2, 16, 32, 36 of Township 3 South.

In Range 13 West; Sections 2, 16, 32, 36 of Township 7 South.

In Range 12 West; Sections 16, 32, 36 of Township 7 South, Sections 13, 35 of Township 8 South; said premises being shown on map identified as "Utah state planning board, 1937, map of region west of Great Salt Lake, corrected to January, 1938," attached hereto and made a part hereof. (Sec. 1.)

96-1-48.15. Terms of Lease—Right of Exchange.

Such lease shall be made for such consideration and for such period of time and upon such terms as may be agreed upon by the governor and the authorized agents of the United States of America, *provided* that at such time as the United States of America shall cease to use such land as a bombing range or for other military purpose said lease shall terminate, and *further provided*, that the state reserves the right to use said lands or any part thereof as base in exchange for other lands belonging to the United States of America in accordance with the laws of the state of Utah and of the United States relating to the exchange of lands. (Sec. 2.)

86-1-48.16. Jurisdiction—Right to Serve Process Reserved.

Jurisdiction is ceded to the United States in and over the lands described in Section 1 during the period of such lease, reserving however, to this state the right to serve all civil process and such criminal process as may lawfully issue under the authority of this state against persons charged with crimes against the laws of this state committed within or without said reservation. (Sec. 3.)

86-1-48.17. Effective When.

This act shall take effect upon approval.
Approved June 11, 1941. (Sec. 4.)

L. 1941, 2nd Spec. Sess., ch. 25; eff. June 18.

LEASE OF LAND TO UNITED STATES OR TO MUNICIPAL CORPORATIONS

AN ACT authorizing the governor of the State of Utah to lease to the United States of America or to any municipal corporation of the state of Utah such right, title, and interest which the state of Utah has in lands in the bed of, or on the margin of Utah Lake.

Be it enacted by the Legislature of the State of Utah:

86-1-48.18. Governor Authorized to Lease Certain State Lands.

For the purpose of coöperating with, and assisting the United States of America in its defense program, and more particularly for the establishment of airports and for other public purposes, the governor of the state of Utah is authorized to lease for a period not to exceed 99 years to the United States of America or to any municipal corporation of the state of Utah, upon such terms and conditions as he may determine, such right, title, and interest which the state now has, or which it may acquire in and to the lands hereinafter described or any part of the same, and to grant any easement or right-of-way in, upon, or across any state lands in and around Utah lake as may be necessary or desirable in connection with the defense program of the United States of America for the establishment of airports. (Sec. 1.)

86-1-48.19. Description Lands.

The lands subject to this act are located in Utah County, state of Utah, and more particularly described as follows:

All lands along the east shore of Utah lake lying between the south bank of Provo River and the Provo Bay Channel and located west of the east boundary of Section 3, 10 and 15 township 7 south range 2 east, Salt Lake base meridian extended south to the Provo River south to the Provo Bay Channel. (Sec. 2.)

86-1-48.20. Manner of Execution of Conveyances.

All deeds, leases, conveyances or other instruments herein authorized to be executed shall be executed in the manner in which patents to state lands are executed and attested. (Sec. 3.)

86-1-48.21. Use of Leased Lands.

Any lands conveyed, granted, leased or otherwise conveyed under this act shall be used for the establishment of airports or other projects by the United States government, and for other public purposes. (Sec. 4.)

86-1-48.22. Not to Affect Water Storage Rights.

The powers herein granted, and to be exercised hereunder, are intended to, and shall be construed to apply to the rights, title, and interest which the state of Utah may have in and to the lands herein described, and are not intended to, and shall not be construed to in any wise change or affect the legal title of any person whomsoever, in and to said lands, or any part thereof; for the storage and reservoir rights of Utah lake. (Sec. 5.)

86-1-48.23. Powers Granted Subject to Chapter 109, Laws of Utah, 1935.

The powers herein granted, and to be exercised hereunder, are subject to any and all powers granted to the governor of the state of Utah by Chapter 109, Laws of Utah, 1935. (Sec. 6.)

86-1-48.24. Effective When.

This act shall take effect upon approval.
Approved June 18, 1941. (Sec. 7.)

[Rev. Stats. 1933—Cont.]

86-1-49. Deposit and Allocation of Moneys Received.

The state land board each month shall pay into the treasury all moneys received by it accompanied by a statement showing the respective sources of said moneys and each source classified as to sales, leases, royalties, interest, fees, penalties and forfeitures and shall each day deposit all such moneys in a bank or banks approved by the commission and immediately thereafter deliver a duplicate deposit slip to the state treasurer, and no withdrawals shall be made therefrom except upon the signature of the secretary of the state land board and the state treasurer.

All moneys received from the sale of lands granted by Section 6 of the enabling act for the support of the common schools, all moneys received from the sale of lands selected in lieu of such lands, all moneys received from the United States under Section 9 of the Utah enabling act, all moneys received from the sale of lands or other securities acquired by the state by or through the investment or resulting from the investment of said funds therein, all sums paid for fees, all forfeitures, and all penalties in connection with all sales herein mentioned shall go into and constitute a part of the principal of the state school fund.

All moneys received from leases or rentals of lands granted for the support of the common and public schools, except the grants to the university and agricultural college and all sums paid for fees, including grazing fees, all forfeitures, and all penalties received in connection therewith shall go into the uniform school fund.

All moneys received from leases or rentals of lands acquired by the state through foreclosure of mortgage securing common school funds or through deeds from mortgagors or owners of such lands, less the necessary advances to protect the principal invested, all sums paid for fees, including grazing fees, all forfeitures, nnd all penalties received in connection therewith shall go into the uniform school fund.

All moneys received from the sale or other disposition of lands granted to the state by the United States under Section 8 of the enabling act for university purposes, all moneys received from the sale or other disposition of lands granted by the United States under said Section 8 of the enabling act for the agricultural college, all sums paid for fees, all forfeitures, and all penalties received in connection therewith shall go to the respective permanent funds established for the benefit of those institutions by and under the provisions of the enabling act of Utah and the constitution of Utah.

All moneys received from leases or rentals of lands acquired by the state for the benefit of the university and agricultural college through termination of contracts of purchase, investment of funds and selection, except the necessary advances made by the land board to protect the principal sum invested in such lands shall be regarded as income and shall be used and expended for the purposes of said institutions.

All moneys received from the sale or other disposition of lands granted to the state by the United States under Sections 7 and 12 of the Utah enabling act, and all sums paid for fees, all forfeitures, and all penalties received in connection therewith shall go to the respective funds established for the benefit of the institutions named in said Sections 7 and 12 of said enabling act.

All moneys received from leases or rentals of lands acquired by the state for the benefit of the institutions named in Sections 7 and 12 of the enabling act through selection, termination of contracts of purchase and investment of funds, except the necessary advances made by the land board to protect the principal sum invested in such lands, shall be regarded as income and shall be used and expended for the purposes of the institutions so named in said Sections 7 and 12 of the enabling act.

Eighty percent of all moneys received from the United States under the provisions of the act of congress of February 25, 1920, known as "The Leasing Act" (41 Stat. 450) shall be used for the support of the public school of the state as in said act of congress provided and shall go into the uniform school fund, and ten per cent thereof shall be allocated to the county in which the minerals were produced, to be used by such county for road purposes under the direction of the county commission, and ten per cent thereof shall be allocated to the school district within such county.

All moneys received from sale, royalties, bonuses, leases and rentals of minerals of all kinds, including coal, oil and gas, in all school lands and other lands of the state, wherein the minerals have been reserved to the state, all sums paid for fees, all forfeitures, and all penalties received in connection therewith shall be used for the support of the public schools of the state and shall go into the uniform school fund.

All moneys received from the sales of lands acquired by the state through foreclosure of mortgages securing school funds or through deeds from mortgagors or owners of such lands, whether a profit is realized or a loss sustained on the principal invested, shall be regarded as principal and shall go into the principal or permanent fund from which it was originally taken in reimbursement of that fund, the profits being used to offset losses and all moneys now on hand either in the office of the state land board or the state treasurer received as profit from such sales shall be forthwith distributed to the various funds entitled thereto.

All moneys tendered to the state land board and received by it as first or down payment on applications to purchase or to lease state lands or minerals shall be paid into the treasury and held in suspense pending final action on such applications and immediately thereafter the said payments shall either be credited to the appropriate fund or account as in this act provided or refunded to the applicant in accordance with the action taken, upon warrants issued by the state auditor upon vouchers certified to by the state land board.

(L. 25, p. 51, § 5606.)

History.

As amended by L. 37, ch. 126, eff. Mar. 22; L. 39, ch. 107, eff. Mar. 20, which contained a section 3 which read as follows: "Nothing herein contained shall be so construed as to in anywise affect the provisions of Chapter 96, Laws of Utah, 1935, relating to payment of expenses of the state land office and the state lands maintenance fund," and a section 4 which repealed all conflicting acts or parts of acts, except Chapter 96, Laws of Utah, 1935; L. 41, 1st Spec. Sess., ch. 35, eff. July 1. The text has been entirely rewritten with addition of seven paragraphs.

86–1–50. Investment of Funds.

The board shall with the approval of the governor make the necessary orders for the investment or disposal of the funds in the state treasury derived from the sale of public lands of this state. Such funds shall be invested for and on account of the specific purposes for which the lands were granted, in government, state, county, city or school district bonds, or notes or bonds secured by mortgage insured by the federal housing administrator. Nothing in this section shall be construed to prevent the board from authorizing the advance of the necessary funds to pay taxes and assessments, or to pay costs and expenses and a reasonable attorney's fee, in case foreclosure becomes necessary in order to protect the state's rights in any property upon which a mortgage has heretofore been taken, or to pay the necessary costs of maintenance upon state owned properties. Such funds when so advanced shall be added to and become part of the original obligation. Whenever the board shall order the investment of any part of such funds, it shall requisition the state auditor, who shall draw a warrant for the amount stated in the requisition in favor of the payee named, and the state treasurer shall pay such warrant out of the funds designated.

(L. 25, p. 51, § 5607.)

History.

As amended by L. 35, ch. 98, eff. May 14; L. 37, ch. 127, eff. Feb. 20; L. 41, 1st Spec. Sess., ch. 35, eff. July 1, rewriting entire text of section and deleting last seven sentences.

Cross-references.

Investments by state department of finance, 82C-2-33; reservoir land grant fund, 86-4.

1. Duty of auditor.

Where money is appropriated for particular purpose, and it is attempted to be used for different purpose, it is auditor's duty to interpose objection to such application of funds; however, it is not duty of auditor to ascertain whether investment of funds by land board is desirable or whether security is sufficient. State Board of Land Com'rs v. Ririe, 56 U. 213, 190 P. 59.

2. Powers of board to make investments.

State land board has authority to invest state school funds in bonds of incorporated towns, since under 88-2-12, subd. 21, the word "city" may mean incorporated town. State Board of Land Com'rs v. Ririe, 56 U. 213, 190 P. 59. (Frick, J., dissenting.)

3. Liability of land for taxes.

Where state accepted deed of land from defaulting mortgagor rather than foreclose the mortgage given upon the purchase of the land from the state, the state could not claim the land free from county taxes levied while the mortgagor had the title, notwithstanding the deed antedated the auditor's tax deed given when the county bought in the land at the tax sale (State v. Duchesne County, 96 U. 482, 85 P.2d 860), since such would not be within listed exemption from taxation and would constitute an abatement of taxes. State v. Salt Lake County, 96 U. 464, 85 P.2d 851.

4. Omnia praesumuntur rite esse acta.

Court has right to indulge presumption, in absence of any showing to contrary, that land board has satisfied itself as to desirability of investment and sufficiency of security as well as legality of bonds. State Board of Land Com'rs v. Ririe, 56 U. 213, 190 P. 59.

86-1-51. Id. In County Notes.

In addition to the securities in which public land funds of the state may be invested under the provisions of section 86-1-50, the board is hereby authorized to invest any of the funds derived from the sale and rental of public lands of the state in notes of counties made under the provisions of section 19-4-4; *provided*, that such loans or investments shall not in any one county exceed one-half of one per cent of the assessed valuation of the county as shown by the last tax assessment. (L. 25, p. 51, § 5608.)

86-1-52. Id. Use of Interest Derived.

Whenever the state board of examiners shall so direct, the interest derived from the investment of funds belonging to the state school fund, or the respective state institutions, together with all moneys received from rentals, shall from time to time, upon proper requisition therefor, be used for the maintenance of the common schools or said institutions; and whenever the state board of examiners shall order the use of said funds, or any portion thereof for such purposes, it shall notify the state auditor of such order, and the state auditor shall thereupon credit the amount to the maintenance account of the common schools, or of said institutions, and the funds so credited for the maintenance of said schools or institutions shall be drawn in the manner provided by law for the withdrawal of funds appropriated by the legislature for the maintenance of said schools or institutions. (L. 25, p. 51, § 5609.)

86-1-53. Subdivision of State Lands Into Lots—Appraisal and Sale.

Any portion of the public lands of this state not occupied by bona fide settlers having preference right of purchase, may be subdivided into lots, and sold as provided in this chapter, the board first being

satisfied that by a subdivision of any tract into lots a sale of the same can be made for a greater amount than if sold in legal subdivisions. The board may survey such tracts and direct their subdivision. A plat of the survey shall be filed in the office of the county recorder of the county wherein the land is situated, and a copy in the office of the board. Tracts so subdivided shall not be subject to lease, but each lot shall be sold at public auction at such times as the board may direct. The manner of appraisement and sale of such subdivided lands shall be in all respects the same as in the case of other lands sold.

(L. 25, p. 51, § 5610.)

1. **Mandamus.**
The discretion vested in board by this section will not be interfered with by mandamus. Miles v. Wells, 22 U. 55, 61 P. 534, followed in Hamblin v. State Board of Land Com'rs, 55 U. 402, 187 P. 178.

86–1–54. Method of Accounting by State Auditor.

The state auditor shall charge the board with the amount of money, rental, interest and principal, separately received from the sale or lease of lands, as shown by the duplicate receipts of the state treasurer; and upon presentation of the state treasurer's duplicate receipt shall credit the board with the amount of the same. (L. 25, p. 51, § 5611.)

86–1–55 to 86–1–57. (Repealed by L. 41, 1st Spec. Sess., ch. 35, § 4, eff. July 1.)

86–1–58. Exchange of Lands Between Board and Proprietors.

In order to compact, as far as practicable, the land holdings of the state, the board is hereby authorized to exchange any of the land held by the state for other land of equal value within the state held by other proprietors; and upon request of the board the governor is hereby authorized to execute and deliver the necessary patents to such other proprietors and receive therefrom proper deeds of the lands so exchanged; *provided*, that no exchange shall be made by the land board until a patent for the land so received in exchange shall have been issued to such proprietors or their grantors. (L. 25, p. 51, § 5618.)

86–1–59. Board Members and Employees—May Not Acquire State Lands.

The members of the state land board and its employees are hereby prohibited from acquiring, either directly or indirectly, any state lands or interest therein; *provided*, that the provisions hereof shall not interfere with any application or any contract to purchase any state lands or with any renewal of any lease made prior to March 6, 1925.

(L. 25, p. 51, § 5624.)

86–1–60. Id. Interfering with an Application, a Crime.

Any member of the board, or any employee thereof, who, either directly or indirectly, in his own interest, or in the interest of another, interferes with or hinders the application of a bona fide applicant to acquire state lands or any interest therein is guilty of a misdemeanor.

(L. 25, p. 51, § 5625.)

86-1-61. Record of Selections—County Recorders to Enter.

Whenever a clear list to lands in this state is received from the department of the interior of the United States it shall be transmitted to the state land board, and after the land board has noted the same upon its plats and records such clear list shall be transmitted to the secretary of state. On the first days of January and July it shall be the duty of the secretary of state to transmit to the county recorders a certified transcript of all lands within their respective counties selected and approved for the state of Utah under the provisions of federal law, during the preceding six months, and it shall be the duty of the county recorder immediately upon receipt of such certified transcripts to enter the same upon the records of his office, for which service he shall make no charge. (C. L. 17, §§ 1603, 5705.)

A. L. R. notes.
Liability of recording officer for mistakes or defects in respect to records, 94 A. L. R. 1303.

86-1-62. Id. Certified Transcripts, Evidence of Transfer to State.

Any certified transcript mentioned in the preceding section when so recorded shall be accepted in lieu of the original approved lists, and shall be sufficient evidence of the conveyance of the lands therein described by the United States to the state of Utah. (C. L. 17, § 1604.)

86-1-63. Flood Control.

The state land board may make surveys of any lands of the state which it may deem necessary to prevent and or control floods and to conserve the natural resources of the state and to carry out properly the intent and purposes of this section; and surveys of all areas of the state where there have been damaging floods resulting in the loss of life or property and surveys of all areas where such damaging floods are likely to occur, and if after such surveys it appears to the satisfaction of the state land board that such floods are likely to occur in any locality, which will endanger life, health and or property, then the state land board shall take immediate action such as it may deem necessary to control and or to prevent the occurrence of such floods. And for the purpose of controlling and preventing such floods it may coöperate with the people of the community affected thereby, the counties, cities or towns in which such floods are likely to occur, the state road commission, the federal government, railroads and any other persons, associations and corporations interested in the control and or the prevention of such floods; and may construct or cause to be constructed such control works as it deems necessary, on such basis of participation as may be deemed equitable; and for these purposes may acquire any additional lands either by purchase, exchange, lease, condemnation or gift necessary for the control and or the prevention of such floods; and may transfer such lands to such agencies as may exist or hereafter be created to maintain such prevention and or control works; and may employ or otherwise obtain the services of qualified engineers, foresters and range men; and may study flood-control problems and make recommendations to the governor and or the legislature relative to their

solution. It shall be the duty of the state land board to coöperate with the sheriffs of the various counties in extinguishing and preventing fires on watershed lands, and for such purpose it may employ men to patrol watershed lands. Whenever it appears to the satisfaction of the state land board that any watershed lands under either private, state or federal ownership are being made barren by overgrazing or any other cause, thereby creating a condition likely to cause floods, the state land board may coöperate with the federal government in acquiring the lands within the watershed thus affected, and may take such steps and action as it deems necessary and sufficient to prevent such lands from becoming barren so as to be the cause of floods, and may promote revegetation of such lands. The board may in its discretion limit the number and kind of stock that may be grazed each year on any state land leased for grazing purposes, and may stipulate the number of days that such land may be grazed. (L. 31, p. 83, § 5574x.)

Cross-references.
County flood control, 19–6a; fire control, 19–7.

86–1–64. Attorney General to Approve Legal Forms.

All leases and contracts of every kind entered into by the state land board shall before execution by such board be approved as to form by the attorney general.

History.
Added by L. 41, 1st Spec. Sess., ch. 35, eff. July 1.

L. 1941, ch. 93; eff. May 13.

TRESPASS ON STATE LANDS

AN ACT making it unlawful to remove minerals, or to cut or remove timber from state lands, or to extract salts or minerals from the waters of navigable lakes; to graze livestock; to construct any reservoir, ditch, highway, electric light, telephone or telegraph line upon state lands without authority from the state land board, and providing a penalty and liability therefor.

Be it enacted by the Legislature of the State of Utah:

86–1–65. Designation of Unlawful Acts Relating to State Lands—Misdemeanor.

Any person who shall wilfully or knowingly remove or extract any salt or other mineral from the water of any navigable lake, or from the bed thereof, or any mineral, gravel, soil, valuable trees, timber or improvements from state land, or who shall graze any livestock upon state lands, or who shall construct a reservoir, ditch, highway, fence, electric light, telegraph or telephone line upon land belonging to the state of Utah except for fishing, hunting, or other public purpose or who shall wilfully use or occupy state lands for more than thirty days after the cancellation or expiration of a lease without authority from the state land board so to do shall be guilty of a misdemeanor. (Sec. 1.)

86-1-66. Id. Same—Constitutes Trespass.

Any person who shall wilfully or knowingly remove or extract any salt or other minerals from the water of any navigable lake, or from the bed thereof, or any mineral, gravel, soil, valuable trees, timber or improvements from state lands, or who shall graze any livestock upon state lands, or who shall construct a reservoir, ditch, highway, fence, electric light, telegraph or telephone line upon land belonging to the state of Utah, or who shall use or occupy state lands for more than thirty days after the cancellation or expiration of a lease without authority from the state land board so to do shall be guilty of a trespass. (Sec. 2.)

86-1-67. Id. Liability for Violation of Act.

Any person found guilty of violating any of the provisions of Section 2 of this act shall be liable for the payment of twice the appraised value of the use of the land during the time it is occupied by a person without authority so to do, together with twice the amount of damage committed upon such land, and if salt or mineral is extracted from the water of any navigable lake or from the bed thereof without authority so to do shall be liable for twice the value thereof. (Sec. 3.)

86-1-68. Id. Suits for Collection of Damages.

All suits for the collection of rental and damages under the provisions of this act shall be instituted under the direction of the attorney general in the name of the state of Utah. (Sec. 4.)

86-1-69. Disposition of Monies Collected.

All money collected as rents or damages under the provisions of this act shall be placed in the same fund as if the land for which rents or damages are collected were occupied under a lease. (Sec. 5.)

L. 1935, ch. 101; eff. Mar. 25.

WATERSHEDS—PROCEEDINGS AGAINST OWNERS OF LAND WITHIN

AN ACT authorizing the state land board to commence legal proceedings against the owner of lands within watersheds for the protection of life and property.

Be it enacted by the Legislature of the State of Utah:

86-1-70. Authorizing Land Board to Bring Action to Limit Grazing.

That the state land board by and with the consent of the governor is hereby authorized to institute appropriate legal proceedings for the purpose of limiting the number of livestock and the period of grazing on privately owned watershed land in the state, where such section is found by the state land board to be reasonably necessary for the protection of life or property; *provided*, that the courts in such action shall assess against the state land board such amounts as will reasonably compensate the owner for any damage he may suffer by reason of such proceeding. (Sec. 1.)

86-1-71. Effective Date.

This act shall take effect upon approval.

Approved March 25, 1935. (Sec. 2.)

CHAPTER 2

RIGHTS OF WAY

86-2-1. For Public Utilities and Uses —Power of Board to Grant.
86-2-2. Right of Way—For Railroads Reserved—Forfeiture.
86-2-3. Id. For Ditches, Telephone and Transmission Lines Authorized by United States Reserved.
86-2-4. Id. For Highways, Reserved in Patent.

86-2-1. For Public Utilities and Uses—Power of Board to Grant.

Nothing in this title shall be so construed as to impair the vested or accrued rights for any ditches of any irrigation company, or any person owning any ditch or ditches on or passing through any state lands, or to prevent the sale of more than 160 acres, for a continuous right of way, or for stations or building grounds within the state for a common carrier, or for canal or irrigation companies or associations. And the state land board may grant rights of way on, through and over any state lands for the transmission of electrical energy, or for telephone or telegraph lines, and for canal and irrigation companies, and for roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines, quarries or mineral deposits; and for outlets, natural or otherwise, for the deposit or conduct of tailings, refuse or water from mills, smelters or other works for the reduction of ores or from mines, quarries or mineral deposits; and such rights of way shall be granted at such prices and upon such terms as the land board may deem wise and proper, or without compensation, if in its judgment the lands on, through or over which such rights of way are to be located, or other lands or property of the state, will receive benefits therefrom sufficient to compensate the state for the damage occasioned thereby.

(L. 25, p. 51, § 5616.)

86-2-2. Right of Way—For Railroads Reserved—Forfeiture.

The right of way through the state lands not appropriated to some public use is hereby granted to any railroad company duly organized under the laws of any state or territory or by the congress of the United States, which shall have filed with the secretary of state a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of 75 feet on each side of the center line of its road; also the right to take, from the state lands adjacent to the line of the road, material, earth, stone and timber necessary for the construction of its railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, sidetracks, turnouts and water stations, not to exceed in amount 10 acres for each station, to the extent of one station for each 10 miles of its road. Any railroad company desiring to secure the benefits of this section shall, immedi-

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ately after the location of any section of 20 miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, immediately after the official survey thereof, file with the state land board a map of its road; and upon approval thereof by the secretary of state the same shall be noted upon the plats in the office of the board; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way; *provided*, that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road. (L. 21, p. 102, § 1233.)

86–2–3. Id. For Ditches, Telephone and Transmission Lines Authorized by United States Reserved.

There is hereby granted over all lands now or hereafter belonging to the state of Utah a right of way for ditches, tunnels, telephone and transmission lines, constructed by authority of the United States. All conveyances of state lands hereafter made shall contain a reservation of such right of way. (L. 25, p. 51, § 5617.)

86–2–4. Id. For Highways, Reserved in Patent.

Whenever the state shall issue its patent for any lands, the same shall be made subject to the easement or right of the public to use all such highways as may have been established according to law across the land therein described. (C. L. 17, § 2809.)

Cross-references.
See in this connection 36–1–2.

CHAPTER 3

DESERT LAND GRANT*

86–3–1. Acceptance of Acts of Congress.
86–3–2. Powers Vested in Land Board.
86–3–3. Application for Selection of Lands.
86–3–4. Id. Certified Check to Accompany—Forfeiture.
86–3–5. Id. Investigation by Board—Notice—Objections.
86–3–6. Request that Lands Be Withdrawn from Entry.
86–3–7. Amendment of Application—Disapproval.
86–3–8. Contract Between Applicant and Land Board—Bond.
86–3–9. Id. Failure to Perform—Forfeiture.
86–3–10. Id. Proceedings to Be Taken by Board.
86–3–11. Sale of Land to Settlers.
86–3–12. Id. Disposition of Moneys Received — Reclamation Trust Fund—Carey Act Expense Fund.
86–3–13. Patents from United States to State and from State to Settler.
86–3–14. Water Rights to Be Appurtenant to Land—Lien for Purchase Price — Foreclosure and Redemption.
86–3–15. Lien in Favor of Contractor.
86–3–16. Right of Way for Canals to Be Reserved.
86–3–17. Annual Report by Contractor.

*History of act. This chapter was R. S. 1898, Title 62, Ch. 2, p. 533; Comp. Laws 1907, Title 75, Ch. 2, p. 838.

86–3–1. Acceptance of Acts of Congress.

The state of Utah hereby renews its acceptance of the conditions of section 4 of the act of congress entitled, "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1895, and for other purposes," approved August 18, 1894, and acts amendatory thereof, and of the act of congress (Statutes at Large, volume 36, part 1, chapter 140) approved April 4, 1910, in so far as the same relates to the extension of the provisions of said acts of congress over lands within the former Uintah Indian reservation, together with all grants of lands to the state under the provisions of the aforesaid acts. (L. 21, p. 343, § 5632.)

86–3–2. Powers Vested in Land Board.

The selection, management, and disposal of said lands shall be vested in the state land board, which is hereby authorized to make all contracts necessary to carry out the provisions of this chapter, and to make such rules not in conflict with this chapter or the said acts of congress as it may deem best in that behalf. (L. 21, p. 343, § 5633.)

86–3–3. Application for Selection of Lands.

Any person desiring to construct ditches, canals, reservoirs or other irrigation works to reclaim lands under the provisions of this chapter, shall file with the state land board an application for the selection of the lands to be reclaimed, designating such lands by legal subdivisions. Such application shall be accompanied by a proposal to utilize or extend an irrigation system already constructed, or one in process of construction, or the rights to construct which have been acquired, or to construct ditches, canals, reservoirs or other irrigation works, for the complete reclamation of the lands so designated. The proposal shall be prepared in accordance with the rules of the state land board and the rules, practice and regulations of the department of the interior, and shall state the source of water supply, whether the right to the same has been acquired or sought to be acquired; the location and dimensions of the works already constructed or in process of construction, or the location and dimensions of the proposed works, with estimated cost thereof; the maximum price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed, and the maximum amount per acre per annum for maintenance tax. In the case of corporations, it shall state the name of the corporation, the purpose of its incorporation, the names and places of residence of its directors and officers, the amount of its authorized and of its paid-up capital. If the applicant is not a corporation, the proposal shall set forth the name or names of the parties, and such other facts as shall enable the state land board to determine their financial ability to carry out the proposed enterprise. (L. 21, p. 343, § 5634.)

86–3–4. Id. Certified Check to Accompany—Forfeiture.

A certified check in such reasonable sum as may be required by the rules of the board, not less than $250, shall accompany each such proposal, the same to be held as a guaranty for the execution of the contract with the state by the party submitting such proposal in accordance

with its terms, in case of the approval of the same and the selection of the land by the board, and to be forfeited to the state in case of failure of said applicant to enter into a contract with the state in accordance with the provisions of this chapter. (L. 21, p. 343, § 5635.)

86-3-5. Id. Investigation by Board—Notice—Objections.

Upon receipt of such application and proposal the state land board shall examine the same, and if it does not comply with the regulations of the department of the interior and the rules of the board, it must be returned to the applicant for correction; but if it does so comply, the board shall determine whether the reclamation of the land applied for can be secured by means of the irrigation system proposed to be extended to such land for the purpose of its reclamation; whether there are sufficient water rights vested in the applicant; or whether there is sufficient unappropriated water in the source of supply; and whether the capacity of the constructed or proposed works is adequate to reclaim the lands described; whether or not the proposed cost of construction is reasonable; and whether or not the lands proposed to be irrigated are desert in character and such as may be properly set apart under the provisions of said act of congress and the regulations of the department of the interior thereunder; *provided*, that immediately upon the filing of any application the board shall give notice, for thirty days in a newspaper of general circulation in the state, of the nature of the application and a description in general terms of the lands applied for, giving the county where situated and the source of water supply. Written objections to the application may be filed with the board within forty days from the first publication of said notice, and the board shall consider and decide upon the merits and sufficiency of such objections. (L. 21, p. 343, § 5636.)

86-3-6. Request that Lands Be Withdrawn from Entry.

Upon the filing of such application the board shall forthwith file a list of the lands contained therein in the local federal land office with a request for the withdrawal of the lands described therein from entry. (L. 21, p. 343, § 5637.)

86-3-7. Amendment of Application—Disapproval.

When applications and proposals are not approved by the board it shall cause the parties making the same to be notified of its action and the reasons therefor. The parties so notified shall have sixty days after such notification in which to submit a satisfactory proposal. Should such application upon final hearing be not approved by the board, it shall file in the local federal land office a request to dismiss the aforesaid application for withdrawal. (L. 21, p. 343, § 5638.)

86-3-8. Contract Between Applicant and Land Board—Bond.

Upon the withdrawal of the land by the department of the interior, it shall be the duty of the state land board to enter into a contract with the applicant, which contract shall contain complete specifications of the location, dimensions, character of material, class of work, and estimated cost of the proposed works, and the maximum price and

terms per acre at which perpetual water rights shall be sold to settlers, and the maximum amount per annum for the maintenance tax, and the price and terms upon which the state is to dispose of the land to settlers. In the discretion of the board the contract may provide that the sale to a settler of a tract of land with a permanent water right shall include a pro rata interest in the reservoir and irrigation works, equal to the proportion that the tract of land purchased by him bears to the entire tract to be reclaimed by the irrigation system, and that upon full payment of the purchase price of the land and water right, capital stock of the corporation representing such interest shall be transferred to such settler, if the said irrigation system shall be constructed by a corporation, or if by an individual or company then such interest shall be conveyed to the settler by the person or company constructing the irrigation system. The price and terms for water rights and land, and the amount of maintenance tax shall in all cases be reasonable; and such contracting party shall have the power to fix, in the contract with the applicant for the land and permanent water right, the amount or quantity of the annual water supply, and said party shall have the right to provide reasonable rules and regulations for the use and distribution of the annual supply of water, such rules and regulations to be approved by the state land board. Said contracting party shall give a satisfactory bond in a penal sum equal to five per cent of the estimated cost of the works for the faithful performance of the provisions of the contract with the state, but in no case shall such bond exceed the sum of $50,000.
(L. 21, p. 343, § 5639.)

86–3–9. Id. Failure to Perform—Forfeiture.

All such contracts shall state that the work covered by the contract shall begin within six months from the date of contract and that the construction shall be prosecuted diligently and continuously to completion, and that the cessation of work under the contract for a period of six months shall forfeit to the state all rights under the contract and the penal sum named in the bond; *provided*, that no property or right which was vested in the applicant or contractor at the date of the contract shall be forfeited; *and provided also*, that in cases of contractors who at the date of the application own or have vested rights in water, and in a reservoir, a reservoir site, canals, or other irrigation works, the forfeiture shall extend only to such portions of the system unconstructed at the time of default and to the penalty of the bond given by such contractor. (L. 21, p. 343, § 5640.)

86–3–10. Id. Proceedings to Be Taken by Board.

Upon the failure of the contractor to comply with any requirement of his contract, it shall be the duty of the board to notify him of such failure, and that, unless the contractor shall comply with such requirements within sixty days from the date of such notice, the bond and contract, and, except as herein otherwise provided, all work constructed thereunder, shall be at once and thereby forfeited to the state, as provided in section 86–3–9. The board shall bring action in the proper court to cause the said works to be forfeited, and thereafter shall advertise for proposals to complete the said work, and may, in proper cases, con-

tract with a bidder who will pay the original contractor the highest sum for the works partially completed, complete the same, and supply water rights to the settlers on the lands to be reclaimed, for the price and upon the terms stated in the original contract. If no bid shall be received for the completion of said works and furnishing water rights to such settlers, for the price and upon the terms stated in the original contract, then the board shall bring the proper action for recovering the amount of the bond of the contractor. (L. 21, p. 343, § 5642.)

86-3-11. Sale of Land to Settlers.

Any citizen of the United States, or any person having declared his intention to become a citizen of the United States, over the age of twenty-one years, may make application to the board to enter any of said lands, not exceeding 160 acres, under the regulations of the department of the interior and the rules of the board. Each application must be accompanied by a certified copy of a contract for the perpetual water right made by the applicant with the person or corporation authorized by the board to furnish water for the reclamation of said lands, together with 25 cents per acre for the land applied for, and must contain a declaration that he will settle upon and improve said land. If such application is allowed, the board shall cause to be issued a certificate of the location to the applicant. If the application is not allowed, the 25 cents per acre accompanying it shall be returned to the applicant. If the construction contractor fails to furnish water to any settler under the provisions of his contract with the state, the state shall refund to such settler all payments that he shall have made to the state. The board shall dispose of all lands accepted by the state under the provisions of this chapter at a price not exceeding $1 per acre, except lands within the former Uintah Indian reservation, 25 cents per acre to be paid at the time of entry and the remainder at the time of making the final proof by the settler, but no settler shall be entitled to make more than one entry. For lands within the former Uintah Indian reservation the board shall charge a price of not more than $2.25 per acre and not less than $1.50 per acre, 25 cents per acre to be paid at the time of entry and the remainder at the time of making final proof by the settler. Of the price charged for such lands situated within the former Uintah Indian reservation the board shall pay to the United States the sum of $1.25 per acre as provided in the said act of congress, and the board is hereby authorized to make all contracts necessary, and to pay the United States the sum necessary, to carry out the provisions of this chapter. (L. 21, p. 343, § 5643.)

86-3-12. Id. Disposition of Moneys Received—Reclamation Trust Fund—Carey Act Expense Fund.

All moneys received by the board from the sale of lands selected under the provisions of this chapter shall be deposited with the state treasurer, and such sums as may be necessary shall be available for the payment of the expenses of the board in carrying out the provisions of this chapter, and such expense shall be paid by warrants drawn by the state auditor in the same manner as other expenses of the board are

paid, and any balance remaining over and above the expenses necessary to carry out the provisions of this chapter shall constitute a trust fund to be used only for the reclamation of other arid lands; *provided*, that until there is sufficient money in the said reclamation trust fund the expenses of the board in carrying out the provisions of this chapter may be paid from a Carey act expense fund to be appropriated by the legislature, and the auditor shall register such claims paid out of said expense fund in the order of their presentation. Whenever, except as provided in this chapter, money is in the said reclamation trust fund equal to a claim which has been paid out of the said Carey act expense fund, the auditor shall draw a warrant on said reclamation fund to reimburse the state for sums that have been paid out of said Carey act expense fund. The board shall draw by requisition on the auditor the sums necessary to pay the United States in order to obtain patent to lands accepted in this chapter, and the auditor shall draw his warrant on said reclamation trust fund giving precedence to sums to be paid to the United States over warrants to reimburse the state for expenses.

(L. 21, p. 343, § 5644.)

86–3–13. Patents from United States to State and from State to Settler.

Upon the completion of the said works or any section thereof the contractor shall notify the board that he is prepared to supply water to the land designated in his application, or any particular tract thereof; whereupon the board shall cause proof of that fact to be made to the department of the interior with a request that a patent to such land be issued to the state, and shall cause a notice to be given to each settler of such fact. Within three years thereafter each settler shall appear before the board and make final proof of reclamation, settlement and occupation in accordance with the regulations of the department of the interior and the rules of the board, and shall make final payment for the land entered by him. Upon final payment by any settler, the state shall issue a patent for the land entered, which shall be executed in the same manner that other patents are executed. (L. 21, p. 343, § 5645.)

86–3–14. Water Rights to Be Appurtenant to Land—Lien for Purchase Price—Foreclosure and Redemption.

The water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as the title passes from the United States to the state. Any person furnishing water for any tract of land so acquired shall have a first and prior lien on said water rights and land upon which such water is used for all deferred payments for such water rights, such lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of the land, and it shall remain in force and effect until the last deferred payment for the water rights is fully paid and settled according to the terms of the contract under which such water rights were acquired. The contract for the water rights upon which the aforesaid lien is founded shall be recorded in the office of the county recorder of the county where the land is situated.

Upon default of any deferred payments secured by any lien under the provisions of this chapter, the person holding said lien may foreclose the same according to the terms and conditions of the contract granting and selling to the settler the water rights, and such foreclosure shall be in the manner in which mortgages are foreclosed in this state; *provided*, that such settler shall have the right, within one year from the date of foreclosure as provided in this section, to redeem such land and water rights, by payment of the sum of such deferred payment or payments with interest at not to exceed twelve per cent per annum, with accrued cost of maintenance. (L. 21, p. 343, § 5646.)

Cross-references.
Foreclosure of mortgages, 104–55.

86–3–15. Lien in Favor of Contractor.

Under the provisions and subject to the conditions of the act of congress entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1897, and for other purposes," approved June 11, 1896, and under a section of the subtitle of said act "surveying the public lands," a lien is hereby created in favor of the contractor on and against the separate legal subdivisions of land reclaimed for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers. (L. 21, p. 343, § 5647.)

Cross-references.
Mechanics' liens, 52–1.

86–3–16. Right of Way for Canals to Be Reserved.

The maps in the office of the board shall show the location of the canals or other irrigation works approved in the contract with the board, and all lands entered under the provisions of this chapter shall be subject after entry to the rights of way of such canals or irrigation works, such rights of way to embrace the entire width of the canals and such additional width as may be required for their proper operation and maintenance, the width of right of way to be specified in the contract provided for in this chapter. (L. 21, p. 343, § 5648.)

86–3–17. Annual Report by Contractor.

The board shall require annual reports from each contractor, giving such details respecting the fulfillment of the contract as the board may require. (L. 21, p. 343, § 5649.)

CHAPTER 4

RESERVOIR LAND GRANT FUND

86–4–1. Defined.
86–4–2. Uses of Fund Authorized.
86–4–3. State Engineer to Make Plans for Reservoirs.
86–4–4. Irrigation Projects — Construction—Sale of Lands and Water Rights.
86–4–5. State Engineer to Supervise Work.
86–4–6. Payment Out of Fund.

86-4-7. Fund Appropriated to Uses of Chapter.
86-4-8. (Repealed.)
86-4-9. Title to Reservoirs Constructed—Rights of Patentees.
86-4-10. Omnibus Authority to Land Board.

History of act. This chapter was R. S. 1898, Title 62, Ch. 3, p. 537; Comp. Laws 1907, Title 75, Ch. 3, p. 843.

86-4-1. Defined.

The reservoir land grant fund shall consist of all moneys received from the sale of land selected under the grant to this state of 500,000 acres of land for the establishment of permanent water reservoirs for irrigation purposes. (L. 21, p. 350, § 5659.)

86-4-2. Uses of Fund Authorized.

The state land board shall cause to be selected suitable sites for the construction of reservoirs and procure, by selection, grant or purchase, the title to the land to be covered by water stored therein and shall cause to be constructed suitable reservoirs for the purpose of storing water to be supplied to state and other lands. The use of the reservoir land grant fund for these purposes shall be preferred. The state and board may loan the reservoir land grant funds to corporations or associations within the state for the construction or completion of reservoirs, whether public or private, at a rate of interest not to exceed five per cent per annum, in such sums, for such securities, and for such periods of time as in its judgment will promote the interest of the state and encourage the construction of reservoirs for agricultural purposes. No such loan shall be made unless the same is secured by a first lien upon improved real estate or established water rights, nor in an amount to exceed forty per cent of the cash value of such securities at the time the loan is made. Upon the completion of any reservoir for which a loan from the reservoir land grant fund has been made, one-tenth of the principal of such loan, together with the accrued interest, shall be repaid to the reservoir land grant fund on the last day of December of each year until the full amount of the principal and all accrued interest on any such loan shall have been fully paid. Whenever lands are selected for reservoir sites in connection with an irrigation project to be developed by the state by use of the reservoir land grant fund, and whenever lands are selected for irrigation and reclamation by use of the reservoir land grant fund, such lands shall be paid for from the reservoir land grant fund at a price of not less than $2.50 per acre, the money so realized to go to the various land grants from which the selections were made, being divided among the several grants in the same proportion as the selection of lands for said purposes.
(L. 21, p. 350, § 5660.)

Cross-references.
General limitation of time for presenting warrants as not applicable, 87-5-5.

86-4-3. State Engineer to Make Plans for Reservoirs.

When a reservoir site has been selected, the board shall cause to be made, by the state engineer, plans and specifications in detail showing the kind and quantity of materials required and the work necessary to be performed in the construction of such reservoir, together with an es-

timate of the total cost of the same and of the number of acres that may be irrigated therefrom. All plans and specifications shall be made with a view to constructing a substantial permanent reservoir.

(L. 21, p. 350, § 5661.)

86-4-4. Irrigation Projects—Construction—Sale of Lands and Water Rights.

Upon the determination by the board that any irrigation project is practicable, it may cause to be let contracts for the construction of the same, in such portions or sections as may be practicable to construct and complete as parts of the whole project, and thereupon the board shall give public notice of the lands irrigable under such project and the limit of area that will be sold to any one citizen, which limit shall represent the acreage which, in the opinion of the board may be reasonably required for the support of a family upon the lands in question, and of the place and time when the lands will be disposed of and the manner and terms of such disposal. The terms of disposal shall be determined with a view of returning to the reservoir land grant fund the cost of construction of the project, with interest at the rate of five per cent per annum, computed from the date of the completion of the project. With reference to lands in private ownership which may be irrigated by the waters of an irrigation project, the board shall make a written contract with each landowner before making any provision for the irrigation of such private lands by means of the irrigation system that is to be constructed. Said contract shall be drawn so as to properly secure the state for the expense of construction of the works necessary to irrigate such private lands and shall provide what the cost of the irrigation thereof shall be, which in no case shall be less than the actual cost thereof. And the board is hereby authorized to sell water or water rights pertaining to any state irrigation project to incorporated irrigation companies upon such security as shall be approved by the said board, but at a price not less than the actual cost of storage and delivery of said water. The board may, when the interest of the state and the successful sale, development and colonization of the land require such action, abate payments of interest due from purchasers of land and water or either of them, or extend the time of payments on principal and interest due or to become due, with or without interest, upon such terms and conditions as to the board shall seem just. Whenever the board has abated interest or granted extensions under the authority given in this section, the action of the board shall be entered in detail upon its records showing in each case the reasons for the action of the board and a full statement of such action shall be included in its next annual report. (L. 21, p. 350, § 5662.)

86-4-5. State Engineer to Supervise Work.

During the construction of any reservoir, the board shall cause the same to be supervised by the state engineer. (L. 21, p. 350, § 5663.)

86-4-6. Payment Out of Fund.

As the work progresses, the board shall make requisitions upon the state auditor for such sums of money as may be necessary in payment

therefor, and the state auditor must thereupon draw his warrants upon the state treasurer for the amounts specified in such requisitions, the same to be paid out of any money in the reservoir land grant fund.

(L. 21, p. 350, § 5664.)

86–4–7. Fund Appropriated to Uses of Chapter.

All the reservoir land grant fund is hereby appropriated for the purpose of carrying out the provisions of this chapter.

(L. 21, p. 350, § 5665.)

86–4–8. (Repealed by L. 35, ch. 98, § 2, eff. May 14.)

86–4–9. Title to Reservoirs Constructed—Rights of Patentees.

All reservoirs constructed under the provisions of this chapter, together with the water rights acquired thereby, shall be and remain the property of the state of Utah until the land to be irrigated thereby is sold and disposed of and fully paid for, and the same shall become appurtenant to the lands to be irrigated thereby, and when any such lands are sold and patented by the state such patents shall convey a proportionate interest in such reservoirs and water rights.

(L. 21, p. 350, § 5669.)

86–4–10. Omnibus Authority to Land Board.

The state land board may perform any and all acts and may make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this chapter into effect.

(L. 21, p. 350, § 5670.)

CHAPTER 5

WELLS

86–5–1, 86–5–2. (Repealed by L. 35, ch. 105, § 4, eff. Mar. 22.)

86–5–3. (This section was repealed by L. 35, ch. 105, § 4, eff. Mar. 22, but was subsequently amended by L. 39, ch. 108, eff. May 9, with the catchline "Wells on Private Lands—Leasing or Selling Wells," to read as follows: "Such wells may be driven on state or private lands. If on private lands, then the owner thereof must give to the state a good and sufficient deed of conveyance for at least one acre of land where such well is located, together with a right of way for a public highway of not less than four rods in width from the highway to the location of the said well. Whenever it is necessary to install machinery for lifting the water from such wells, the land board is hereby authorized and empowered to make such installation. The board is authorized to lease such wells for a period not to exceed five years to the responsible bidder who will agree to fur-

nish the water to the users thereof at the lowest price per gallon. The board is further authorized to sell said wells to the highest responsible bidder subject to such reservations as, in the judgment of the land board, shall be to the best interest of the state; *provided*, that use of water from said wells shall be subject to the provisions of Title 100, Revised Statutes of Utah, 1933, as amended by Laws of Utah, 1935, Chapter 105 and Laws of Utah, 1937, Chapter 130.")

CHAPTER 6

FARM LANDS ACQUIRED BY STATE

L. 1935, ch. 99; eff. Mar. 23.

86–6–1. Authority to Lease and Sell Farm Lands Acquired by Mortgage.
86–6–2. Id.
86–6–3. Purchaser in Default, Procedure.
86–6–4. Settlement of Deficiency Judgments.
86–6–5. Constitutionality.
86–6–6. Conflicting Acts Repealed.
86–6–7. Effective Date.

L. 1935, ch. 99; eff. Mar. 23.

AN ACT relating to the sale and lease of farm lands acquired by the state of Utah by virtue of mortgage foreclosures or otherwise permitting the state land board to make settlement of deficiency judgments as will best subserve the interests of the state.

Be it enacted by the Legislature of the State of Utah:

86–6–1. Authority to Lease and Sell Farm Lands Acquired by Mortgage.

The state land board is hereby authorized to sell or lease any or all farm lands acquired by the state through foreclosure proceedings, and all farm lands which have been or shall hereafter be deeded to the state by its mortgage debtors in settlement of the mortgage debt. The state land board is hereby authorized to cause the lands and improvements thereon to be appraised and to sell the said lands for a price not less than the appraised value; *provided*, that the mortgage debtor, or his assignee of record in the office of the state land board, shall have the first right or preference to purchase or lease the same as hereinafter provided. Said preference right must be exercised within thirty days after the state land board has acquired title to the property. The purchase price may be for cash or on terms of not less than 10 per centum of the purchase price in cash upon the execution of the contract, and the balance in 40 equal semiannual installments, with interest on deferred payments at the rate of 4 per centum per annum, payable semiannually. The state land board may lease said land to the said mortgagor for a period of not to exceed three years for a consideration equal to 5 per centum per annum of the appraised value together with all taxes and water assessments levied against such property during the

term of such lease; *provided, however*, that failure to comply with the terms and conditions of said lease shall constitute a forfeiture, and the preference right to purchase by said mortgagor shall terminate, and the state land board shall have the right to immediately repossess the property. (Sec. 1.)

Cross-references.
Leases of state lands generally, 86–1–44.

86–6–2. Id.

If the said mortgagor fails to exercise the rights granted in the preceding section, the board may lease said farm lands, or any portion thereof, to any bona fide applicant, for terms not exceeding three years, upon such terms and conditions as it may deem reasonable. (Sec. 2.)

86–6–3. Purchaser in Default, Procedure.

Any purchaser of said lands or his assignee, who is in default for nonpayment of principal or interest due the state for a period of one month, shall be notified by the board, by letter, of such default, and if within ninety days after the mailing of such notice such delinquent has not paid his delinquencies, his contract of sale shall become forfeited and void without further notice, and such forfeiture shall be noted upon the records of the board; thereafter the lands shall not be charged with any preference rights to purchase. (Sec. 3.)

86–6–4. Settlement of Deficiency Judgments.

The state land board is hereby authorized to make such settlement of all deficiency judgments that the state land board now holds as will best subserve the interests of the state. (Sec. 4.)

86–6–5. Constitutionality.

If any part or parts of this act shall be held to be unconstitutional, such decisions shall not affect the validity of the remaining parts of this act. The legislature hereby declares that it would have passed the remaining parts of this act even if it had known that such part or parts thereof would be declared unconstitutional. (Sec. 5.)

86–6–6. Conflicting Acts Repealed.

All acts in conflict herewith are hereby repealed. (Sec. 6.)

86–6–7. Effective Date.

This act shall take effect upon approval.
Approved March 23, 1935. (Sec. 7.)

CHAPTER 7

ACQUISITION BY UNITED STATES OF LANDS IN UTAH FOR NATIONAL FORESTS

L. 1935, ch. 137; eff. Feb. 16.
86-7-1. National Forests—Consent for Acquisition of Lands — Rights Reserved.
86-7-2. Effective Date.

L. 1935, ch. 137; eff. Feb. 16.

AN ACT to enable the United States to acquire by purchase, land in the state of Utah for construction, extension or establishment of national forests, reserving to the state the right to serve process and punish offenses committed thereon.

Be it enacted by the Legislature of the State of Utah:

86-7-1. National Forests—Consent for Acquisition of Lands—Rights Reserved.

Consent of the state of Utah is hereby given for the acquisition by the United States by purchase, of such lands in the state of Utah as in the opinion of the secretary of agriculture of the United States may be needed for the consolidation, extension or establishment of National Forests in this state, subject to the right of the state to cause its civil and criminal processes to be executed on such lands and to punish offenses against the laws of the state committed on lands so acquired.

(Sec. 1.)

86-7-2. Effective Date.

An emergency existing therefor, which emergency is hereby declared to exist, this act shall take effect and be in force from and after its passage and approval by the governor.

Approved February 16, 1935. (Sec. 2.)

TITLE 87

STATE OFFICERS

Chapter 1. SALARIES.
Chapter 2. GOVERNOR.
Chapter 3. SECRETARY OF STATE.
Chapter 4. AUDITOR.
Chapter 5. TREASURER.
Chapter 6. ATTORNEY-GENERAL.
Chapter 7. STATE CHEMIST.
Chapter 8. DISTRICT ATTORNEY.
Chapter 9. DEPUTY STATE OFFICERS.
Chapter 10. REPORTS OF STATE OFFICERS.

CHAPTER 1

SALARIES *

87-1-1. Officers of Executive Department.
87-1-2. Clerk and Reporter of Supreme Court.
87-1-3. Justices of Supreme Court—No Mileage or Expenses.
87-1-4. District Judges—Mileage and Expenses.
87-1-5. District Attorneys.
87-1-6. Id. Mileage and Expenses.
87-1-7. Mileage and Expenses Generally.
87-1-8. Payable Quarterly.

*History of act. This chapter was Comp. Laws 1907, Title 70, Ch. 1, p. 768. The constitutional authority for this legislation is found in Const. Art. VII, § 20.

87-1-1. Officers of Executive Department.

The annual salaries of the following state officers are fixed as follows: governor, $6,000; secretary of state, $4,500; state treasurer, $3,000; state auditor, $3,500; attorney-general, $4,500; superintendent of public instruction, $4,000. (L. 19, p. 288, § 5070.)

Cross-references.

State officers, compensation and mileage, Const. Art. VII, § 20; to be paid fixed salaries, Const. Art. XXI, §§ 1, 2; extra compensation forbidden, Const. Art. VI, § 30; special acts not to be passed, Const. Art. VI, § 26; fees to be paid over, Const. Art. XXI, § 2; salaries withheld until fees accounted for, 28-6-6.

1. Right to salary.

Public officer held entitled to salary for portion of term of office, notwithstanding he did not personally assume charge of office, and discharge duties thereof, and officer de facto in possession of office was paid salary. Tanner v. Edwards, 31 U. 80, 86 P. 765.

A. L. R. notes.

Agreement by public officer or employee to accept less than compensation or fees fixed by law, validity and effect of, or of acceptance of reduced amount, 118 A. L. R. 1458.

Compensation of public officers or employees for services rendered under unconstitutional act, 101 A. L. R. 1417.

Constitutional or statutory limitation of compensation of public officer as

applicable to one in governmental service who is paid in whole or in part from funds not derived from taxation, 135 A. L. R. 1033.
Constitutional provision against increase or decrease of compensation of public officer as affecting power of legislature to effect decrease by means of administrative procedure or consent of officer, 127 A. L. R. 529.
Constitutionality and construction of statute providing for payment of salary of public officer or employee during period of unlawful removal or suspension, or expenses incurred by him in gaining reinstatement or in defending himself against charge of misconduct or incompetency in office, 103 A. L. R. 763.
Deputies' salaries, who to pay, 26 A. L. R. 1309.
Vacations and holidays, right of public officers as regards, 134 A. L. R. 195.

87-1-2. Clerk and Reporter of Supreme Court.

The annual salaries of the following state officers are fixed as follows: clerk of the supreme court and ex officio librarian, $3,000; reporter of the decisions of the supreme court, $1,200. (L. 27, p. 49, § 5071.)

87-1-3. Justices of Supreme Court—No Mileage or Expenses.

The annual salaries of the justices of the supreme court are fixed at $5,000. No mileage or expenses shall be allowed. (C. L. 17, § 5072.)

Cross-references.
Constitutional provision, Const. Art. VIII, §§ 12, 20; similar provision, 20-2-1.

87-1-4. District Judges—Mileage and Expenses.

The annual salaries of the judges of the district court are fixed at $4,000. No mileage or expenses shall be allowed, except that when any district judge shall hold court in a county outside of the county in which he resides, he shall be entitled to his actual and necessary expenses incurred thereby. (L. 19, p. 288, § 1.)

Cross-references.
Constitutional provisions, Const. Art. VIII, §§ 12, 20.

1. Official year.
Under Constitution, official year begins on first Monday of January of year following general election, and, as to all state officers and district judges, ends on first Monday of January four years later, and such officers are entitled to receive four full quarters' pay in each year during their term of office, but paying them three days beyond four full years and deducting such amount from successors violated Constitution. Crockett v. Tuttle, 58 U. 213, 197 P. 900.

87-1-5. District Attorneys.

The annual salaries of district attorneys are fixed as follows: in the first judicial district, $1,500; in the second judicial district, $2,000; in the third judicial district, $3,000; in the fourth judicial district, $2,100; in the fifth judicial district, $2,000; in the sixth judicial district, $1,800; in the seventh judicial district, $2,100. (L. 27, p. 93, § 5074.)

Cross-references.
Assistants, 87-8-13.

87-1-6. Id. Mileage and Expenses.

District attorneys and deputy district attorneys shall receive in addition to their salaries their actual traveling expenses while on duty within their districts; while absent from their districts and while necessarily employed upon official business, they shall receive their necessary expenses for lodging and subsistence actually paid, not exceeding

$4 per day, and their actual and necessary traveling expenses; *provided*, that the district attorney of the seventh judicial district shall receive his actual lodging and subsistence expenses, not exceeding $4 per day, while absent from the city or town in which he resides and on duty within his district. (L. 23, p. 128, § 5075.)

1. Validity.

Contention that this section was unconstitutional because proviso with reference to district attorneys of seventh district was unconstitutional was held without merit, since even though it was conceded without deciding that proviso was unconstitutional, it was severable from remainder of section and would not render such remainder unconstitutional. Higgins v. Glenn, 65 U. 406, 237 P. 513.

Any attempt on part of legislature to change mileage allowed public officers, or to increase or decrease other items of expense to be allowed, must of necessity result in affecting, either by increasing or decreasing, their salaries or compensation within inhibition of Const. Art. VII, § 20, since terms "salary" and "compensation" appear to be synonymous and used interchangeably in that provision. Higgins v. Glenn, 65 U. 406, 237 P. 513.

Const. Art. VII, § 20, which provides for payment of actual and necessary expenses of state officers while traveling in state in performance of official duty did not intend to make it obligatory upon legislature to provide that expenses of all such officers should be paid out of state treasury; nor give officers right to have such expenses paid by state. Murdock v. Mabey, 59 U. 346, 203 P. 651.

And see annotations under Art. VII, § 20 of the Constitution.

2. Effect of 1923 amendment.

Provisions of amendment to this section in 1923 held not applicable to nor controlling of mileage and other expenses incurred by district attorneys who were holding office at time amendment was passed. Higgins v. Glenn, 65 U. 406, 237 P. 513.

87-1-7. Mileage and Expenses Generally.

All state officers, except those otherwise specifically provided for, shall receive, in addition to their salaries, their actual and necessary expenses while traveling in the performance of their official duties. (C. L. 17, § 5076.)

A. L. R. notes.

Accepting excessive mileage allowance as punishable offense, 134 A. L. R. 1258; allowance of mileage or traveling expenses to officer as affected by use of his own vehicle for transportation, 112 A. L. R. 172; constitutional inhibition of change of officer's compensation as applicable to allowance for expenses or disbursements, 106 A. L. R. 779; public officer's right and duties in respect of mileage and other allowances incident to duties of his office but which represented no actual expense or outlay by him, 81 A. L. R. 493.

87-1-8. Payable Quarterly.

The salaries of state officers and the mileage and expenses then due shall be paid quarterly. (C. L. 17, § 5077.)

1. Remedies.

Where salaries are fixed by law, and payment thereof is refused by officer whose duty it is to draw warrant, mandate is proper remedy to enforce payment. Crockett v. Tuttle, 58 U. 213, 197 P. 900.

CHAPTER 2

GOVERNOR

87-2-1. General Powers and Duties.
87-2-2. To Transmit List of Appointments to Senate.
87-2-3. Removal of Officers.
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L. 1933, ch. 72; eff. Mar. 21.

EMERGENCY POWER OF GOVERNOR OVER STATE REVENUE

L. 1937, ch. 151; eff. Feb. 24.

RESIDENCE

History of act. This chapter was R. S. 1898, Title 63, Ch. 1; Comp. Laws 1907, Title 76, Ch. 1.

87-2-1. General Powers and Duties.

In addition to those prescribed by the constitution, the governor has the following powers and must perform the following duties:

(1) He shall supervise the official conduct of all executive and ministerial officers.

(2) He shall see that all offices are filled and the duties thereof performed, or in default thereof, apply such remedy as the law allows, and, if the remedy is imperfect, acquaint the legislature therewith at its next session.

(3) He shall make appointments and fill vacancies as required by law.

(4) He is the sole official organ of communication between the government of this state and the government of any other state and of the United States.

(5) Whenever any suit or legal proceeding is pending against this state, or which may affect the title of this state to any property, or which may result in any claim against the state, he may direct the attorney-general to appear on behalf of the state, and may employ such additional counsel as he may judge expedient.

(6) He may require the attorney-general or the county attorney of any county to inquire into the affairs or management of any corporation doing business in this state.

(7) He may require the attorney-general to aid any county attorney in the discharge of his duties.

(8) He may offer rewards, not exceeding $1,000 each, payable out of the general fund, for the apprehension of any convict who has escaped from the state prison, or of any person who has committed, or is charged with the commission of, a felony.

(9) He must perform such duties respecting fugitives from justice as are prescribed by law.

(10) He must issue and transmit election proclamations as prescribed by law.

(11) He must issue land warrants and patents as prescribed by law.

(12) He must, prior to each regular meeting of the legislature, deliver to the secretary of state for publication all biennial reports of officers, commissions and boards for the two preceding years.

(13) He may require any officer, commission or board to make special reports to him in writing.

(14) He must discharge the duties of a member of all boards of which he is or may be made a member by the constitution or by law.

(15) He shall each year issue a proclamation recommending the observance of Arbor day, by the planting of trees, shrubs and vines, in the

promotion of forest growth and culture, and in the adornment of public and private grounds, places and ways, and in such other efforts and undertakings as shall be in harmony with the general character of such holiday.

(16) He has such other powers and must perform such other duties as are devolved upon him by law. (C. L. 17, §§ 2897, 5682.)

History.

This section does not differ materially from R. S. 1898, § 2403; Comp. Laws 1907, § 2403.

Comparable provisions.

Cal. Polit. Code, § 380 (contains substantially identical provisions; subd. 8 is applicable where offense is punishable with death; equivalent of subd. 15 herein is not included; includes provision worded as follows: "He may issue arms and accouterments for the use of colleges").

Idaho Code, § 65–702 (substantially the same, except as follows: as to subd. 8, governor may offer rewards not exceeding $500 each, in cases of felony, where offense is not punishable by death; reward, not exceeding $1,000, may be offered, where the escaped convict is charged with commission of offense punishable with death: subds. 11, 12, 14 and 15, as worded herein, are not included).

Iowa Code 1939, § 80 (governor may employ counsel to protect rights or interests of the state); § 82 (may direct attorney-general to appear, on behalf of municipality or officer thereof or contractor therewith, in action involving validity of patent as to any matter or thing entering into highway, bridge, or culvert construction, and may employ legal assistance); § 83 (may offer reward for arrest, not to exceed $500).

Mont. Rev. Codes, § 124 (substantially identical, except as follows: in subd. 8, reward not to exceed $1,000 for apprehension of escaped convict, or any person who has committed or is charged with offense punishable by death; subd. 14, enumerates boards in question; equivalent of subd. 15 herein is not included).

Cross-references.

Governor and his powers and duties, Const. Art. VII; extradition, 105–56; patents, 80–1–43; reports of state officers, 87–10–3; holidays, Title 37.

1. Conveyance of certain lands and water rights to Salt Lake City.

L. 33, ch. 90, eff. May 9, authorized the governor to convey certain lands and water rights in Salt Lake County to Salt Lake City.

2. Conveyance of certain land in consideration of conveyance to state.

L. 41, ch. 107, eff. May 13, authorized the governor to convey certain property owned by the state to William J. Korth and wife, Mary A. Korth in consideration of the conveyance by them of certain property to the state.

3. Conveyance of certain land to the United States.

L. 33, ch. 89, eff. Mar. 16, authorized and directed the governor to quitclaim certain land to the United States of America without cost.

4. Filling vacancies.

Filling vacancies in offices when the mode of supplying vacancies is not prescribed by law, is an ancient prerogative of the governor. People v. Clayton, 4 U. 421, 433, 11 P. 206, aff'd 132 U. S. 632, 33 L. Ed. 455, 10 S. Ct. 190.

Decisions from other jurisdictions.

— Federal.

Where the papers showed that accused was regularly charged by indictment with crime of murder committed in Idaho, and was a fugitive from its justice, the governor of Colorado was entitled to accept such papers, coming, as they did, from the governor of another state, as prima facie sufficient for a warrant of arrest; and his failure to require independent proof of the fact that petitioner was a fugitive from justice could not be regarded as an infringement of any right of petitioner under the Constitution or laws of the United States. Pettibone v. Nichols, 203 U. S. 192, 51 L. Ed. 148, 27 S. Ct. 111, 7 Ann. Cas. 1047.

The Supreme Court will not inquire as to the motives which guided the chief magistrate of a state when executing the functions of his office; nor, in case at bar, was any obligation imposed by the Constitution or laws of the United States upon the agent of Idaho to so time the arrest of petitioner, and so conduct his deportation from Colorado, as to afford him a convenient opportunity, before some judicial tribunal sitting in Colorado, to test the question whether he was a fugitive from justice, and, as such, liable, under the Act of Congress, to be conveyed to Idaho for trial there. Pettibone v. Nichols, 203 U. S. 192, 51 L. Ed. 148, 27 S. Ct. 111, 7 Ann. Cas. 1047.

— California.

California is in accord with the decisions of a dozen other states in holding

that mandamus or any other appropriate writ may issue against the governor under proper circumstances; for, if a governor were immune from judicial control under all circumstances merely because he is the chief executive of a state, it is apparent that he might arbitrarily remove public officers for political or personal reasons without just cause, and thereby defeat the very purpose of our democratic form of government. O'Brien v. Olson, 42 Cal. App. 2d 449, 109 P.2d 8.

Mandamus will lie to compel a governor to perform acts which are purely ministerial in their nature and which acts may properly be imposed on other persons or officers; and the same rule applies to a governor when he is acting in a judicial capacity pursuant to the constitutional provision authorizing him to hear and determine, as in case at bar, charges of unfitness preferred against prison directors; and a review of such a separate judicial proceeding does not infringe upon the exclusive executive authority which vests in the governor as the chief officer of the state. O'Brien v. Olson, 42 Cal. App. 2d 449, 109 P.2d 8.

— Iowa.

The executive and judicial are coordinate branches of the state government, with their respective duties assigned; and where the governor had made an order remitting the forfeiture and costs in a judgment on a bond given in a criminal case, it was held that the remission of the costs was without authority and invalid. State v. Beebee, 87 Iowa 636, 54 N. W. 479.

It is not an interference with the constitutional power of the governor, with reference to pardons, to provide by statute that under certain circumstances criminal proceedings shall be barred; it is only the power to commute or pardon after conviction that is vested in the governor. State v. Forkner, 94 Iowa 1, 62 N. W. 772, 28 L. R. A. 206.

In extradition proceedings, the executive of the asylum state performs his full duty when he determines (1) that an extraditable offense has been regularly charged, and (2) that the accused was within the jurisdiction of the demanding state when the offense charged was committed. Seely v. Beardsley, 194 Iowa 863, 190 N. W. 498.

A decree in equity, canceling a pardon issued by the governor for the convict's fraud in its procurement, is not void as an unwarranted interference by one department of the state government with a co-ordinate department thereof. Rathbun v. Baumel, 196 Iowa 1233, 191 N. W. 297, 30 A. L. R. 216.

Governor's determination as to sufficiency of evidence that party charged with crime is fugitive from justice is not conclusive. Drumm v. Pederson, 219 Iowa 642, 259 N. W. 208.

A. L. R. notes.

Construction of statute authorizing public authorities to offer reward, 86 A. L. R. 570.

Discrimination because of race, color, or creed in respect of appointment, duties, compensation, etc., of public officers or employees, 130 A. L. R. 1512.

Knowledge of reward as condition of right to claim it, 53 A. L. R. 542.

Mandamus to governor, 105 A. L. R. 1124.

Prohibition as means of controlling action of governor, 115 A. L. R. 14.

Residence or inhabitancy within district or other political unit for which he is elected or appointed as a necessary qualification of officer or candidate, in absence of express provision to that effect, 120 A. L. R. 672.

87-2-2. To Transmit List of Appointments to Senate.

Within ten days after the meeting of the legislature, the governor must transmit to the senate a list of all appointments made by him under the provisions of the constitution or of law during the recess of the legislature. (C. L. 17, § 5683.)

Comparable provisions.

Cal. Polit. Code, § 381, Idaho Code, § 65-703, Mont. Rev. Codes, § 125 (list of appointments to be transmitted to legislature or legislative assembly within 10 days after meeting thereof).

87-2-3. Removal of Officers.

All officers who are or shall be appointed by the governor alone, or by the governor by and with the consent of the senate, may, for official misconduct, habitual or willful neglect of duty, or for other good and sufficient cause, at any time during the recess of the legislature be removed, and the vacancy filled during such recess by the governor. (C. L. 17, § 5684.)

Cross-references.
Removal of state treasurer, 87–5–10.

A. L. R. notes.
Conclusiveness of governor's decision in removing or suspending officers, 92 A. L. R. 998.
Debts, failure of public officer to pay creditors on claims not related to his office as ground or justification for his removal or suspension, 127 A. L. R. 495.
Failure of public officer or employee to pay creditors on claims not related to his office or position as ground or justification for his removal or suspension, 127 A. L. R. 495.
Implied power of appointing authorities to remove without cause officer whose tenure is not fixed by law but who has been appointed for definite term, 91 A. L. R. 1097.
Membership in or affiliation with religious, political, social or criminal society or group as ground of removal of public officer, 116 A. L. R. 358.
Removal of public officer for misconduct during previous term, 17 A. L. R. 279.
Reversal of conviction of crime as affecting status of one removed from office because of the conviction, 106 A. L. R. 644.
Right to jury trial in proceeding for removal of public officer, 8 A. L. R. 1476.
What amounts to a conviction within statute prescribing grounds for removal of public officers, 24 A. L. R. 1290.

87–2–4. Records to Be Kept.

The governor must cause to be kept the following records:

(1) An account of all his official expenses and disbursements, including the incidental expenses of his department, and an account of all rewards offered by him for the apprehension of criminals and persons charged with crime.

(2) A register of all appointments made by him, with dates of commissions and names of appointees and predecessors. (C. L. 17, § 5686.)

Comparable provisions.
Cal. Polit. Code, § 382, Mont. Rev. Codes, § 126 (include substantially identical provisions; must also cause to be kept a register of all applications for pardon or for commutation of sentence; Cal. provision also requires keeping of register of statements in capital cases made to governor, with his action thereon).

87–2–5. To Issue Commissions to Officers.

The governor must commission all officers of the militia, and all officers appointed by the governor or by the governor with the consent of the senate. (C. L. 17, § 5687.)

Cross-references.
Fees for issuing commissions, 28–1–2.

87–2–6. Acting Governor—Powers and Duties.

Every provision of law relating to the powers and duties of the governor, and relating to acts and duties to be performed by others toward him, extends to the person performing, for the time being, the duties of governor. (C. L. 17, § 5688.)

Comparable provisions.
Mont. Rev. Codes, § 127 (substantially identical).

Cross-references.
Acting governor, Const. Art. VII, § 11.

A. L. R. notes.
Devolution, in absence of governor, of veto and approval powers upon lieutenant governor or other officer, 136 A. L. R. 1053.

87–2–7. Budget.

Within twenty days after the convening of the state legislature in regular session, the governor shall submit a budget for the two ensuing fiscal years. Such budget shall contain a complete plan of proposed

expenditures and his estimated revenues for the ensuing biennium. Accompanying the budget shall be a statement, showing the revenues and expenditures for the two fiscal years next preceding; the current assets, liabilities and reserves, and surplus or deficit, of the state, the debts and funds of the state; an estimate of the state's financial condition as of the beginning and end of the biennium covered by the budget; and any explanation the governor may desire to make as to the important features of the budget and any suggestion as to methods for the reduction of expenditures or increase of the state's revenue. Said budget shall embrace an itemized estimate of the appropriations for the state legislature as certified to the governor by the president of the senate and speaker of the house; for the executive department; for the judicial department; for payment and discharge of the principal and interest of the indebtedness of the state of Utah; for the salaries payable by the state under the constitution and laws; for such other purposes as are set forth in the constitution or laws; and for all other appropriations. The governor shall deliver the budget to the presiding officer of each house of the legislature, and a bill for all the proposed appropriations of the budget, clearly itemized and classified. For the purpose of preparing said budget the governor shall require from the proper state officials, including all heads of executive and administrative departments and state institutions, bureaus, boards, commissions and agencies expending or supervising the expenditure of the state moneys, and all institutions, applying for state moneys and appropriations, such itemized estimates of revenues and expenditures and other information, in such form and at such times, as he may direct. The estimate for the legislative department as certified by the presiding officers of both houses shall be included in the budget without revision by the governor. The governor may provide for hearings on all estimates and may require the attendance at such hearings of representatives of state departments and institutions and of other institutions or individuals applying for state appropriations. The governor may, in his discretion, revise all estimates, except those relating to the legislative department, and those providing for the payment of principal and interest of the state debt and for the salaries and expenditures specified by the constitution and laws of the state. The total appropriations made and expenditures authorized by the budget must not exceed the estimated revenues from taxes, fees and all other sources for the next ensuing biennium. If any item of the budget as enacted shall be held invalid upon any ground, such invalidity shall not affect the budget itself or any other item in it. (L. 23, p. 71, § 5691.)

Cross-references.
Budget to be prepared by state finance commission, 82C-2-18; budget control system over state departments, 82C-2-19 et seq.

L. 1933, ch. 72; eff. Mar. 21.

EMERGENCY POWER OF GOVERNOR OVER STATE REVENUE

AN ACT empowering the governor to require periodical budgets of proposed expenditures in each department, institution or agency of the

state and to compel reductions in expenditures, decrease in personnel or suspension of functions or services.

Be it enacted by the Legislature of the State of Utah:

87-2-8. Emergency Powers of Governor—Purpose.

Until otherwise provided by law, the governor shall have the following powers in addition to other powers now or hereafter conferred upon him, to-wit:

(a) To require each or any institution, agency or department of the state to submit on or before March 15, June 15, September 15 and December 15 of any year or at any such other time as he shall deem advisable, a budget showing, in such detail as the governor may require, all expenditures proposed by such institution, agency or department for the three months period commencing on the first day of the next succeeding month.

(b) To require any such state institution, agency or department to reduce its budget and to decrease its expenditures for such three-month period when, in his discretion, the condition of the state treasury requires such reduction or at any time when, in his discretion, it becomes necessary or expedient to reduce such state expenditures in order to make available revenue for emergency relief from the state for residents of the state in destitute and necessitous circumstances.

(c) To prevent any expenditure by any state institution, agency or department which in view of then existing circumstances would, in his discretion, be detrimental or injurious to the welfare of the people of the state.

(d) To suspend or discontinue in whole or in part by executive order any function or service of any department, commission, board, bureau, institution, or agency of the state government for a period of not to exceed ninety days beginning not less than 15 days after the date of such executive order and if during the period of time covered by such executive order it shall again be made to appear to the satisfaction of the governor that such a deficiency of revenue continues as demands a further suspension or discontinuance of such function or service he may from time to time extend the operation of such executive order for a like period of not to exceed ninety days. During such period of suspension the state shall not be liable for the payment of any claim for salary or expense claimed to have accrued against any such department, commission, board, bureau, institution or agency during any such period of suspension, and neither the auditor nor any disbursing officer shall issue any warrant, or other payment therefor; *provided, however*, that salaries of present incumbent elective officers shall not be subject to the provisions of this act.

(e) To require by executive order the temporary reduction of personnel or the staggering or rotation of time of employment of the employees of any department, office, division or bureau of the government of the state, if in his discretion such action is necessary or advisable to meet any then existing emergency condition of the state treasury or any depletion or probable depletion of revenues of the state. (Sec. 1.)

87-2-9. State Officers to Comply with Orders of Governor.
Neither the state auditor nor any disbursing officer of the state or of any institution or agency of the state shall issue any warrant or make any payment to any person in violation of any order of the governor made by authority of the provisions of this act. No state officer, official, board or employe of the state or of any institution, department, or agency of the state shall make any contract or agreement or attempt to create any liability against the state or any of its departments, institutions, or agencies in violation of any order of the governor authorized by this act. (Sec. 2.)

87-2-10. Effective Date.
This act shall take effect upon approval.
Approved March 21, 1933. (Sec. 3.)

L. 1937, ch. 151; eff. Feb. 24.

RESIDENCE

AN ACT empowering the secretary of state to accept as a gift on behalf of the state from Mrs. Jennie J. Kearns the property and improvements thereon located at 603 East South Temple, Salt Lake City, Utah, to be used as a residence for the governor; providing for an appropriation to defray expenses.

Be it enacted by the Legislature of the State of Utah:

87-2-11. Governor's Residence.
The secretary of state is hereby authorized to accept as a gift, on behalf of the state, from Mrs. Jennie J. Kearns, the property and improvements thereon located at 603 East South Temple, Salt Lake City, Utah, to be used as a residence of the governor of the state of Utah. (Sec. 1.)

87-2-12. Appropriation.
There is hereby appropriated the sum of $100, or as much thereof as may be necessary to defray the legal and other necessary expenses incidental to bringing the abstract of title up to date, recording entries of conveyance and examination of title. (Sec. 2.)

87-2-13. Effective Date.
This act shall take effect upon approval.
Approved February 24, 1937. (Sec. 3.)

CHAPTER 3

SECRETARY OF STATE

87-3-1. Custodian of Archives and Great Seal.
87-3-2. General Duties.
87-3-3. Copies of Acts of Legislature —To Distribute.
87-3-4. Id. To Be Marked—Remain State Property.
87-3-5. Is Superintendent of Capitol.
87-3-6. Record of Elected and Appointed County Officers to Be Kept.
87-3-7. Expenses, How Paid.

87-3-8. Great Seal—Secretary Alone May Affix.
87-3-9. Id. Description of.
87-3-10. Id. Illegal Use, a Felony.
87-3-11. Official Bond.

History of act. This chapter was R. S. 1898, Title 63, ch. 2; Comp. Laws 1907, Title 76, ch. 2.

87-3-1. Custodian of Archives and Great Seal.

The secretary of state is charged with the custody:

(1) Of the enrolled copy of the constitution.

(2) Of the acts and resolutions passed by the legislature.

(3) Of the journals of the legislature, and all bills, resolutions, memorials, petitions and claims introduced in the senate or the house of representatives.

(4) Of the great seal.

(5) Of all books, records, deeds, parchments, maps and papers kept or deposited in his office pursuant to law. (C. L. 17, § 5694.)

Comparable provisions.

Cal. Polit. Code, § 407, Mont. Rev. Codes, § 133 (substantially the same).

Idaho Code, § 65-801 (similar, although "enrolled copy of the constitution" is not specifically mentioned).

Iowa Code 1939, § 85 (secretary of state has charge of acts and resolutions of territorial legislature and of general assembly, enrolled copies of constitutions of the state, bonds, books, records, maps, registers and papers deposited to be kept in his office, including books, records, papers, and property pertaining to state land office).

Cross-references.

Constitutional provisions relating to secretary of state, Const. Art. VII.

Decisions from other jurisdictions.

— Federal.

Cases cited by appellants did not sustain proposition that judiciary, by means of writs of mandamus operating upon officers of legislative bodies, may supervise the making up of the records of the proceedings of those bodies, or cause alterations to be made in such records as prepared by the officer whose duty it was to prepare them; nor would such cited cases justify the court, in a case not involving private rights of litigants, to determine whether particular bodies of persons constituted a lawful legislative assembly; and it was held that the Idaho court properly refused to lay its hands upon what purported to be the record of the proceedings of the legislative assembly of Idaho, in the custody of the secretary of that territory, and to cause changes or alterations to be therein made. Clough v. Curtis, 134 U. S. 361, 33 L. Ed. 945, 10 S. Ct. 573, aff'g Burkhart v. Reed, 2 Idaho 503, 22 P. 1.

87-3-2. General Duties.

In addition to the duties prescribed by the constitution, it is the duty of the secretary of state:

(1) To attend every session of the legislature for the purpose of receiving bills and resolutions thereof, and of performing such other duties as may be devolved upon him by resolution of the two houses, or either of them.

(2) To keep a register of, and attest, the official acts of the governor.

(3) To affix the great seal, with his attestation, to all public instruments to which the official signature of the governor is required.

(4) To record in proper books all conveyances made to the state, and to file all articles of incorporation entitled to be filed in his office.

(5) To receive and record in proper books the official bonds of all state officers required to give bond.

(6) To take and file in his office receipts for all books distributed by him.

(7) To certify to the governor the names of those persons who have received at any election the highest number of votes for any office, the incumbent of which is commissioned by the governor.

(8) To furnish on demand, to any person paying the fees therefor, a certified copy of all or any part of any law, record or other instrument filed or deposited or recorded in his office.

(9) To deliver to the printer entitled to the same, at the earliest day practicable after a final adjournment of each session of the legislature, copies of all laws, resolutions and journals kept, passed or adopted at such session, with proper indexes of the same.

(10) To keep a fee book as provided by law, which book must be verified annually by his affidavit entered therein.

(11) To file in his office descriptions of seals in use by the different state officers, and to furnish such officers with new seals whenever required.

(12) To discharge the duties of a member of all official boards of which he is or may be made a member by the constitution or the laws, and all other duties required of him by law.

(13) To report to the governor, on or before the 1st day of October preceding the biennial session of the legislature, a detailed statement under oath of the manner in which all appropriations for his office have been expended.

(14) To receive, designate and record all trade-marks.

(L. 21, p. 360, § 5695.)

Comparable provisions.

Cal. Polit. Code § 408 (similar).

Mont. Rev. Codes, § 134 (includes substantially the same provisions).

Cross-references.

Constitutional duties, Const. Art. VII; deputies, 87-9-1; great seal, 87-3-9; official oaths and bonds, 65-0-2; fees, 28-1-2; printing and transmission to legislature, 87-10-4; trade marks and names, Title 95.

Decisions from other jurisdictions.

— California.

Secretary of state is a ministerial officer; statute which prescribes his duties does not purport to give him such discretionary powers as are reposed in superintendent of banks or commissioner of corporations, respectively, who are selected because of their special skill, training and knowledge of currency problems and corporation laws; nor is secretary of state clothed with powers of a court of equity, nor could he decide the issue whether or not proposed domestic corporation would become unfair competitor in trade with foreign corporations which opposed filing of petitioner's articles of incorporation. Rixford v. Jordan, 214 Cal. 547, 6 P.2d 959.

— Montana.

Although the secretary of state, in performance of many of his official functions, is a mere ministerial officer, he is clothed with a quasi-judicial judgment in the organization of corporations under the laws of Montana. Barnett Iron Works, Inc. v. Harmon, 87 Mont. 38, 285 P. 191.

A. L. R. notes.

Prohibition as means of controlling action of secretary of state, 115 A. L. R. 14.

87-3-3. Copies of Acts of Legislature—To Distribute.

Immediately after the laws, resolutions and journals mentioned in subdivision (9) of the preceding section are bound, the secretary of state must distribute them as follows:

(1) To each department of the government at Washington and of the government of this state, one copy.

(2) To the library of congress and the state law library, two copies each.

(3) To each of the states and territories, one copy.

(4) To the United States district judge for this state, to each of the judges of the supreme and district courts, and to each of the state officers of this state, one copy.

(5) To each member of the legislature and to the secretary of the senate and the chief clerk of the house of representatives at the session at which such laws were adopted, one copy.

(6) To the incorporated colleges of the state and to the university of Utah, each one copy.

(7) To the county clerk of each county, nine copies for the use of the county.

(8) To each district attorney, one copy; to each county attorney, one copy; and to each clerk of the district court, one copy for each division of the district court in his county.

(9) To each free public library in the state, one copy, to be furnished on the application of the librarian. (C. L. 17, § 5696.)

Comparable provisions.
Cal. Polit. Code, § 410, as amended,
Mont. Rev. Codes, § 135, as amended
(similar in purport).

87-3-4. Id. To Be Marked—Remain State Property.

The secretary of state must indelibly mark each book distributed to officers in this state, except legislative members and officers, with the name of the county to which and the official designation of the officer to whom it is sent. Such marked books remain the property of the state, and must be delivered by the officers receiving them to their successors. (C. L. 17, § 5697.)

Comparable provisions.
Cal. Polit. Code, § 411, Mont. Rev. Codes, § 136 (substantially identical).

87-3-5. Is Superintendent of Capitol.

The secretary of state is the superintendent and has charge of the state capitol, and rooms or buildings hired for that purpose, and he must keep the same and property therein in good order and repair; *provided*, that all expenditures in connection therewith shall be under the direction of the state board of examiners. (L. 21, p. 360, § 5698.)

Cross-references.
Capitol grounds, Title 11.

87-3-6. Record of Elected and Appointed County Officers to Be Kept.

The secretary of state shall prepare the necessary blank forms for the purposes mentioned in section 19-17-5, and forward a supply thereof to each county clerk. The secretary of state shall receive and file in his office all certificates received by him pursuant to said section, and shall keep as one of the records of his office a suitably bound and indexed book, in which he shall enter, in appropriate columns from the information contained in such certified statements received from the several county clerks, the name of the county, the elective officers of each county, excepting justices of the peace and constables, the name of the person holding each office, the date of the officer's election or

appointment, the date of the expiration of the term of such officer, and such other information as said certified statements disclose.
(C. L. 17, § 5703.)

87-3-7. Expenses, How Paid.

The expenses incurred by the secretary of state in carrying into effect the provisions of sections 87-3-2, 87-3-3, 87-3-4 and 87-3-5 must be audited by the board of examiners and paid out of any moneys specially appropriated for that purpose. (C. L. 17, § 5708.)

87-3-8. Great Seal—Secretary Alone May Affix.

The secretary of state alone is authorized to use or affix the great seal of this state to any document whatever, and he only in pursuance of law; and the said secretary is hereby made responsible for its safekeeping. (C. L. 17, § 5709.)

87-3-9. Id. Description of.

The great seal of the state of Utah shall be two and one-half inches in diameter, and of the following device: The center a shield and perched thereon an American eagle with outstretching wings; the top of the shield pierced by six arrows crosswise; under the arrows the motto "Industry"; beneath the motto a beehive, on either side growing sego lilies; below the beehive the figures "1847"; and on each side of the shield an American flag; encircling all, near the outer edge of the seal, beginning at the lower left-hand portion, the words "The Great Seal of the State of Utah," with the figures "1896" at the base.
(C. L. 17, § 5710.)

Cross-references.
Fees for affixing seal, 28-1-2; use of facsimile of seal, 103-4-10; counterfeiting seal, 103-24-3.

87-3-10. Id. Illegal Use, a Felony.

Any person who illegally uses the great seal of this state, or such seal when defaced, is guilty of a felony. (C. L. 17, § 5711.)

87-3-11. Official Bond.

The secretary of state shall give to the state a surety-company bond in the sum of $5,000; the premium of the bond shall be paid by the state. (Code Report.)

A. L. R. notes.
Liability of sureties on bond of public officer as affected by fact that it was not signed by him, 110 A. L. R. 959; statutory conditions prescribed for public officer's bond as part of bond which does not in terms include them, or which expressly excludes them, 109 A. L. R. 501.

CHAPTER 4

AUDITOR

87-4-1. General Duties.
87-4-2, 87-4-3. (Repealed.)
87-4-4. To Compel Accounting by, and State Accounts with, All

Collectors of State Moneys —Escheats.
87–4–5. (Repealed.)
87–4–6. Appropriations Not to Be Diverted from Purposes.
87–4–7. Right of Visitation and Examination in Auditor.
87–4–8. Seal.
87–4–9. Official Bond.

History of act. This was chapter 3 of R. S. 1898, Title 63; Comp. Laws 1907, Title 76, Ch. 3.

87–4–1. General Duties.

It is the duty of the state auditor:

(1) To superintend the auditing of all state accounts including property accounts.

(2) To present to the governor on the first day of October next preceding each regular session of the legislature a verified statement of the funds of the state and its revenues, all of the public expenditures during the two preceding fiscal years and to make a semi-annual report to the governor of the condition of the state treasury.

(3) To accompany his biennial reports with tabular statements showing the amount of each appropriation, including all allotments from every source of revenue, for the two preceding fiscal years, the amount expended, and the balance, if any; also showing the amount of revenue chargeable to each county for such years, the amount paid, and the amount unpaid or due therefrom.

(4) When requested by the governor or by either house of the legislature, to make such audit or verification of the condition of each permanent fund, each special fund, the general fund, and the accounts of any department of the state government and any other matter within or pertaining to the duties of his office in such form and in such detail as the governor or either house of the legislature may require.

(5) To determine whether expenditures have been made in accordance with law.

(6) To make a post-audit of all financial transactions and accounts of the state.

(7) To keep or verify an account of all warrants drawn upon the treasurer.

(8) To verify the accounts of the state treasurer or to keep an account between the state and the state treasurer, and therein charge the state treasurer with the balance in the treasury when he came into office, and with all moneys received by him, and credit him with all warrants drawn on and paid by him.

(9) To keep or verify a register of warrants showing the funds upon which they are drawn and their number, in whose favor, and the appropriations applicable to the payment thereof.

(10) To subpoena such persons as he desires who have had financial transactions with the state to appear before him and to answer under oath either orally or in writing as to any facts concerning such transactions for such purpose the state treasurer is empowered to administer oaths.

(11) To require all persons who have received any moneys belonging to the state and have not accounted therefor to settle their accounts.

(12) To examine and audit at least once each biennium the books and accounts of all persons and institutions charged with the receipt, safekeeping or disbursement of public moneys.

(13) To require, in his discretion, all persons who have received

moneys or securities or have had the disposition or management of any property of this state to render statements thereof to him, and all such persons must render such statements at such times and in such form as he may require.

(14) To direct and superintend the collection of all moneys due the state and except where otherwise provided by law institute suits in its name for all official delinquencies in relation to the assessment, collection and payment of its revenue, and against persons who, by any means, have become entrusted with public moneys or property and have failed to pay over or deliver the same, and against all debtors of the state; of which suits the courts of the county in which the seat of government may be located shall have jurisdiction without regard to the residence of the defendants.

(15) To draw or examine warrants on the state treasurer for the payment of moneys directed by law to be paid out of the treasury; but no warrant shall be drawn unless authorized by law. Every warrant must be drawn upon the fund out of which it is payable and must specify the appropriation applicable to the payment thereof. Warrants shall be forwarded by mail, when the post office address of the payee can be conveniently ascertained and it is inconvenient for such payee to call at the state capitol and receipt for the same, and in all such cases the indorsement of the payee on the warrant shall constitute a receipt, and no further receipt shall be necessary.

(16) To procure and have printed in coöperation with the department of finance all state licenses, stamps, and other documents evidencing the payment of taxes or fees to be issued by the state tax commission or by any other department of the state and furnish them to said state departments and charge them with the payment.

(17) To authenticate with his official seal all drafts and warrants drawn by him, and all copies of papers issued from his office.

(18) To collect and pay into the state treasury all fees received by him.

(19) To perform the duties of a member of all boards of which he is or may be made a member by the constitution or laws of the state, and such other duties as are prescribed by the constitution and by law.

(C. L. 17, § 5715.)

History.

As amended by L. 41, 1st Spec. Sess., ch. 37, eff. July 1; L. 41, 2nd Spec. Sess., ch. 27, eff. July 1, rewriting text of entire section.

This section was R. S. 1898, § 2421; Comp. Laws 1907, § 2421, and though in many respects these subdivisions have been changed, the present legislation in other respects follows very closely the former law.

Formerly under the territorial government this officer was called auditor of public accounts. See Nelson v. Clayton, 2 U. 209.

Comparable provisions.

Cal. Polit. Code, § 433 (similar as to duties of "controller").

Idaho Code, § 65-901 (enumerating auditor's duties).

Mont. Rev. Codes, § 151 (enumerates similar duties of state auditor).

Cross-references.

Constitutional provisions relating to auditor, Const. Art. VII; duties and activities of finance department, 82C-2; pre-audit of claims, 82C-2-21; may appoint deputy, 87-9-1.

1. Subdivision (12).

State auditor held required to examine accounts of state and county officers and become satisfied that accounts rendered by them are correct, and that fees required by law to be collected and paid by them to state treasurer are collected,

reported, and paid accordingly. State v. Stanton, 14 U. 180, 46 P. 1109.

2. Subdivision (14).
Under former statute, state auditor had authority to institute mandamus action against county assessor and county commissioners to correct erroneous assessment of coal lands. Ririe v. Randolph, 51 U. 274, 169 P. 941.

3. Subdivision (16).
Where money is appropriated for particular purpose, and it is attempted to be used for different purpose, it is auditor's duty to interpose objection to such application of funds. State Board of Land Com'rs v. Ririe, 56 U. 213, 190 P. 59.

4. Allocation of funds received from tax redemptions for school purposes.
Mandamus would not lie to compel state fiscal officers to reallocate funds from delinquent taxes levied for school purposes to the year of the levies because the amounts received in such years was less than $25 per person of school age. Board of Education of Ogden City v. Anderson, 93 U. 522, 74 P.2d 681, applying repealed section 87–4–5 of R. S. 1933.

87–4–2, 87–4–3. (Repealed by L. 41, 2nd Spec. Sess., ch. 27, § 3, eff. July 1.)

87–4–4. To Compel Accounting by, and State Accounts with, All Collectors of State Moneys—Escheats.

Whenever any person has received moneys, or has money or other personal property which belongs to the state by escheat or otherwise, or has been intrusted with the collection, management or disbursement of any moneys, bonds, or interest accruing thereon, belonging to or held in trust by the state, and fails to render an account thereof to and make settlement with the state auditor within the time prescribed by law, or, when no particular time is specified, fails to render such account and make settlement, or who fails to pay into the state treasury any moneys belonging to the state, upon being required so to do by the state auditor, within twenty days after such requisition, the state auditor must state an account with such person, charging twenty-five per cent damages, and interest at the rate of ten per cent per annum from the time of failure; a copy of such account in any suit thereon shall be prima facie evidence of the things therein stated. In case the state auditor cannot, for want of information, state such an account, he may in any action brought by him aver the fact, and allege generally the amount of money or other property which is due to or which belongs to the state. (C. L. 17, § 5719.)

A. L. R. notes.
Duty of outgoing officer to see that person to whom money or other property is turned over is a duly qualified successor, 106 A. L. R. 195.

87–4–5. (Repealed by L. 41, 2nd Spec. Sess., ch. 27, § 3, eff. July 1.)

87–4–6. Appropriations Not to Be Diverted from Purposes.

No appropriation and no surplus of any appropriation shall be diverted from any account to any other account, except as provided by law, and the money appropriated, or so much as may be necessary, shall be applied to the payment of the item for which the appropriation is made and nothing else. (C. L. 17, § 2487.)

87–4–7. Right of Visitation and Examination in Auditor.

The state auditor shall have access to all state offices during business hours for the inspection of such books, papers and accounts thereof as may concern his duties. (C. L. 17, § 5720.)

87-4-8. Seal.

The state auditor shall adopt a seal and shall file a description and an impression thereof in the office of the secretary of state.

(Code Report.)

87-4-9. Official Bond.

The state auditor shall give to the state a surety-company bond in the sum of $50,000; the premium of said bond shall be paid by the state.

(L. 21, p. 362, § 5721.)

A. L. R. notes.

Liability of officer or his sureties in respect of public funds as affected by settlement or compromise agreement with other officials or board or committee, 103 A. L. R. 1048; liability of sureties on bond of public officer as affected by fact that it was not signed by him, 110 A. L. R. 959; statutory conditions prescribed for public officer's bond as part of bond which does not in terms include them, or which expressly excludes them, 109 A. L. R. 501.

CHAPTER 5

TREASURER *

87-5-1. General Duties.
87-5-2. General Fund Defined.
87-5-3. (Repealed.)
87-5-4. Redemption [of Warrants] When Unpaid.
87-5-5. Warrants Not Presented Within Two Years, Canceled.
87-5-6. Books to Be Open to Inspection.
87-5-7. Right of Visitation and Examination in Treasurer.
87-5-8. Separate Accounts for Each Fund — Reports to Governor, Publication.
87-5-9. Official Bond.
87-5-10. Delict of Treasurer—Duties of Board of Examiners and Governor—Suspension.
87-5-11. Id. Appointment and Term of Acting Treasurer—Reports to Legislature.
87-5-12. Seal.
L. 1911, 1st Spec. Sess., ch. 38; eff. July 1.
87-5-13. Duty to Keep Bonds, Warrants, and Other Securities.
87-5-14. Id. Insurance Protection.
87-5-15. Effective Date.

* History of act. This chapter was R. S. 1898, Title 63, Ch. 4; Comp. Laws 1907, Title 76, Ch. 5.

87-5-1. General Duties.

It is the duty of the state treasurer:

(1) To receive and keep all moneys belonging to the state and not required to be received and kept by some other person.

(2) To file and keep the certificates of the state auditor delivered to him when moneys are paid into the treasury.

(3) To deliver to each person paying money into the treasury a receipt, and to the state auditor a duplicate thereof, showing the amount, the sources from which the money accrued and the fund into which it is paid, which receipts must be numbered in order, beginning with number 1 at the commencement of each fiscal year; *provided*, where moneys are received from a county treasurer the state treasurer shall issue a receipt therefor in triplicate, one for the county treasurer, one for the county auditor, and the other for the state auditor.

(4) To pay warrants drawn by the state auditor out of the proper funds and in the order in which they are presented.

(5) Upon payment of any warrant, to take, upon the back thereof, the receipt of the person to whom it is paid, to cancel it with a proper stamp, file such warrant with the state auditor on the last day of each month, and take his receipt therefor.

(6) To keep an account of all moneys received and disbursed.

(7) To keep separate accounts of the different funds.

(8) To report to the state auditor on the last day of each month the amount disbursed for the redemption of bonds and in payment of warrants during the month, which reports must show the date and number of such bonds and warrants, the funds out of which they were paid, and the balance of cash on hand in the treasury to the credit of each fund.

(9) On the 1st day of January preceding the biennial session of the legislature, to report to the governor the exact balance in the treasury to the credit of the state, with a summary of the receipts and payments of the treasury during the two preceding fiscal years; and to make a semiannual report to the governor of all moneys received from all sources, and of all moneys disbursed.

(10) At the request of either house of the legislature, or of any committee thereof, to give information in writing as to the condition of the treasury, or upon any subject relating to the duties of his office.

(11) To authenticate with his official seal all writings and papers issued from his office.

(12) To discharge the duties of a member of all official boards of which he is or may be made a member by the constitution or by the laws of the state. (C. L. 17, § 5724.)

Comparable provisions.

Cal. Polit. Code, § 452 (similar).

Idaho Code, § 65–1101 (substantially the same, except that subd. (9), as worded herein, is not included).

Mont. Rev. Codes, § 174 (substantially the same).

Cross-references.

Constitutional provisions relating to treasurer, Const. Art. VII; appointment of deputy, 87–9–1.

A. L. R. notes.

Duty of outgoing officer to see that person to whom money or other property is turned over is a duly qualified successor, 106 A. L. R. 195; liability of officer or his sureties in respect of public funds as affected by settlement or compromise agreement with other officials or board or committee, 103 A. L. R. 1048; liability of public officer in respect of public money paid out in reliance upon unconstitutional statute, 118 A. L. R. 787.

87–5–2. General Fund Defined.

The general fund consists of moneys received into the treasury and not specially appropriated to any other fund. (C. L. 17, § 5726.)

87–5–3. (Repealed by L. 37, ch. 129, § 1, eff. May 11.)

87–5–4. Redemption [of Warrants] When Unpaid.

The state treasurer must quarterly post upon the door of his office a list of all warrants that he may have funds in the treasury to redeem or pay, the payment of which has not been demanded during the last quarter. (C. L. 17, § 5728.)

87-5-5. Warrants Not Presented Within Two Years, Canceled.

State warrants not presented to the state treasurer for payment within a period of two years from the date of issue shall be canceled and the proper fund credited therewith; *provided*, that the provisions of this section shall not apply to reservoir land grant fund principal warrants. (L. 23, p. 116, § 1.)

87-5-6. Books to Be Open to Inspection.

The state treasurer must keep his books open at all times for the inspection of the governor, state auditor, state board of examiners, bank commissioner, members of the legislature, and any committee appointed to examine them by either house thereof. (C. L. 17, § 5729.)

87-5-7. Right of Visitation and Examination in Treasurer.

The state treasurer shall have full access to all offices of the state for inspection of such books, papers and accounts thereof as concern his duties. (C. L. 17, § 5730.)

87-5-8. Separate Accounts for Each Fund—Reports to Governor, Publication.

The state treasurer must keep a separate account of each fund in his hands, and must at the end of each fiscal year report to the governor, in writing, under oath, the amount of all moneys in his hands to the credit of every such fund, and the amount received and paid out of every such fund during the year. The governor must verify said report, and cause the same to be immediately published in at least one newspaper published at the seat of government. (C. L. 17, § 5731.)

87-5-9. Official Bond.

The state treasurer shall give to the state a surety-company bond in the sum of $350,000; the premium of said bond shall be paid by the state. (L. 21, p. 362, § 5732.)

History.

The amount of this bond has remained unchanged for long years. R. S. 1898, § 2435; Comp. Laws 1907, § 2435.

1. Validity.

Constitutionality of this section may be sustained under Const. Art. VII, § 1, requiring state treasurer to perform duties imposed upon him by law. State v. Christensen, 84 U. 185, 35 P.2d 775.

Likewise the principle of police power supports legislature's enactment of this section. State v. Christensen, 84 U. 185, 35 P.2d 775.

Contention that this section was unconstitutional because it was not competent for legislature to add to requirements contained in Const. Art. VII, § 3, with reference to qualifications of treasurer, or in Const. Art. IV, § 10, with reference to oath of office as condition precedent to treasurer's right to assume duties of his office, was held without merit. State v. Christensen, 84 U. 185, 35 P.2d 775. (Moffat, J., dissenting.)

2. Duty to secure bond.

It is the duty of state treasurer and not of state board of supplies and purchase to secure bond under this section. State v. Christensen, 84 U. 185, 35 P.2d 775. (Moffat, J., dissenting.)

3. Time when bond to be furnished.

This section was construed to require treasurer to give bond before he entered office. State v. Christensen, 84 U. 185, 35 P.2d 775. (Moffat, J., dissenting.)

4. Filling vacancy.

Where elected state treasurer failed to give bond required by this section within time required by 74A-0-1, and governor appointed person state treasurer, appointee was entitled to office, and contention of treasurer holding over that he was entitled to office because successor had not been elected

and qualified, was without merit. State v. Christensen, 84 U. 185, 35 P.2d 775. (Moffat, J., dissenting.)

5. Remedies.

Where elected state treasurer failed to give bond required by this section within time required by 74A–0–1, quo warranto did not lie to place him in office, since his right to office had been forfeited. State v. Christensen, 84 U. 185, 35 P.2d 775. (Moffat, J., dissenting.)

A. L. R. notes.

Liability of sureties on bond of public officer as affected by fact that it was not signed by him, 110 A. L. R. 959; statutory conditions prescribed for public officer's bond as part of bond which does not in terms include them, or which expressly excludes them, 109 A. L. R. 501.

87–5–10. Delict of Treasurer—Duties of Board of Examiners and Governor—Suspension.

If the state board of examiners upon examination finds that the books of the state treasurer do not correspond with the amount of funds on hand, or do not show the actual condition of the funds, or if it appears to said board that any moneys belonging to the state have been embezzled, diverted or in any manner taken from the treasury without authority of law, or that the state treasurer has been guilty of negligence in keeping his books, or in taking care of the public moneys, the board must certify the fact to the governor, who, upon receipt of such certificate, must forthwith take possession of all books, moneys, papers and other property belonging to the state which have come into the possession of such state treasurer by virtue of his office or otherwise, and must temporarily suspend him from his office as state treasurer.

(C. L. 17, § 5733.)

87–5–11. Id. Appointment and Term of Acting Treasurer—Reports to Legislature.

The state board of examiners must thereupon procure the services of an expert to examine the books, papers and all matters connected with the office of the state treasurer so suspended, and if it appears to said board on such examination that such state treasurer has embezzled or converted to his own use the public moneys, or has been negligent in keeping his books, or in taking care of the public moneys, the governor, on the certificate of said board of that fact, must appoint another person to fill the place of such suspended state treasurer, and such person so appointed must execute an official bond, and enter upon the office of state treasurer, as provided by law. The governor must report all his acts done under this and the next preceding section to the next succeeding legislature, and the state treasurer so appointed shall hold his office until the suspended state treasurer is restored or until his successor is elected and qualified. (C. L. 17, § 5734.)

87–5–12. Seal.

The state treasurer shall adopt a seal, and shall file a description and an impression thereof in the office of the secretary of state.

(Code Report.)

L. 1941, 1st Spec. Sess., ch. 38; eff. July 1.

AN ACT relating to the duties of the state treasurer.

Be it enacted by the Legislature of the State of Utah:

87-5-13. Duty to Keep Bonds, Warrants, and Other Securities.

Whenever any bonds, warrants, or securities of any kind or nature representing the investment of funds of the state or of any department or agency of the state regardless of the source of such funds are delivered to the custody of the state treasurer, he shall be charged upon his official bond for their safe-keeping. (Sec. 1.)

87-5-14. Id. Insurance Protection.

The state treasurer shall procure such insurance protecting the funds, warrants and securities in his custody against loss from such causes and in such amounts as the commission of finance may from time to time determine. The cost of such insurance shall be paid out of the fund for the protection of which it is carried. (Sec. 2.)

87-5-15. Effective Date.

This act shall take effect upon July 1, 1941 at 12:01 o'clock a. m. or upon proclamation of the governor prior to that date.

Approved April 1, 1941. (Sec. 3.)

CHAPTER 6

ATTORNEY-GENERAL *

87-6-1. General Duties.
87-6-2. Official Bond.

* History of act. This was Chapter 5 of R. S. 1898, Title 63, p. 547; Comp. Laws 1907, Title 76, Ch. 6, p. 857.

87-6-1. General Duties.

It is the duty of the attorney-general:

(1) To attend the supreme court of this state, and all courts of the United States, and prosecute or defend all causes to which the state or any officer, board or commission thereof in an official capacity is a party; and he shall have charge as attorney of all civil legal matters in which the state is in anywise interested.

(2) After judgment on any of the causes referred to in the preceding subdivision, to direct the issuing of such process as may be necessary to carry the same into execution.

(3) To account for, and to pay over to the proper officer, all moneys which may come into his possession belonging to the state.

(4) To keep a register of all cases in which he is required to appear, which must show the court in which the cases have been instituted and tried, and whether they are civil or criminal; if civil, the nature of the demand, the stage of proceedings, and, when prosecuted to judgment, a memorandum of the judgment and of any process issued thereon, and whether satisfied or not, and if not satisfied, the return of the sheriff; and if criminal, the nature of the crime, the mode of prosecution, the stage of proceedings, and, when prosecuted to sentence, a memorandum

of the sentence and of the execution thereof, if the same has been executed, and if not executed, of the reason of the delay or prevention; and he must deliver the same to his successor in office.

(5) To exercise supervisory powers over the district and county attorneys of the state in all matters pertaining to the duties of their offices, and from time to time require of them reports as to the condition of public business intrusted to their charge.

(6) To give his opinion in writing and without fee to the legislature or either house thereof, and to any state officer, board or commission, and to any county attorney, when required, upon any question of law relating to their respective offices.

(7) When required by the public service or directed by the governor, to assist any district or county attorney in the discharge of his duties.

(8) To purchase in the name of the state, under the direction of the state board of examiners, any property offered for sale under execution issued upon judgments in favor of, or for the use of, the state, and to enter satisfaction in whole or in part of such judgments as the consideration of such purchases.

(9) Whenever the property of a judgment debtor in any judgment mentioned in the preceding subdivision has been sold under a prior judgment, or is subject to any judgment, lien or encumbrance taking precedence of the judgment in favor of the state, to redeem such property, under the direction of the state board of examiners, from such prior judgment, lien or encumbrance; all sums of money necessary for such redemption must, upon the order of the state board of examiners, be paid out of any money appropriated for such purposes.

(10) When in his opinion it is necessary for the collection or enforcement of any judgment hereinbefore mentioned, to institute and prosecute in behalf of the state such actions or proceedings as are necessary to set aside and annul all conveyances fraudulently made by the judgment debtors, and the cost necessary to the prosecution must, when allowed by the state board of examiners, be paid out of any money not otherwise appropriated.

(11) To discharge the duties of a member of all official boards of which he is or hereafter may be made a member by the constitution or by the laws of the state, and such other duties as may be prescribed by law.

(12) To report to the governor, on the 1st day of October preceding the regular biennial session of the legislature, the condition of the affairs of his department, stating the number, character, condition and result of the actions prosecuted or defended by him on behalf of the state, and the amount of fines and penalties collected. He shall include in his report copies of the reports of district and county attorneys, and shall also direct attention to any defect in the practical operation of the laws relating to revenue and criminal offenses, and suggest such amendments as in his judgment are necessary to subserve the public interests.

(13) To institute and prosecute proper proceedings in any court of the state or of the United States to restrain and enjoin corporations organized under the laws of this or any other state or territory from acting illegally or in excess of their corporate powers or contrary to

public policy, and in proper cases to forfeit their corporate franchises, dissolve such corporations, and wind up their affairs.

(14) To institute investigations for the recovery of all real or personal property which may have escheated or should escheat to the state; and for that purpose he may cite any and all persons before any of the district courts to answer inquiries and render accounts concerning such property, and may examine all books and papers of any and all corporations. When any real or personal property is discovered which should escheat to the state, the attorney-general must institute suit in the district court of the county where such property is situated for its recovery, and to escheat the same to the state. (C. L. 17, §§ 5736, 5738.)

History.

This section is identical in many of its subdivisions with R. S. 1898, § 2438; Comp. Laws 1907, § 2438.

Comparable provisions.

Cal. Polit. Code, § 470, Mont. Rev. Codes, § 199 (similar to subds. 1 to 12).

Idaho Code, § 65-1301 (similar to subds. 1 to 12; subd. 11, however, reads briefly: "To discharge the other duties prescribed by law"; by amendment, the duties of the attorney-general under this section, for all purposes contemplated by section 55-715, were transferred to department of public investments; section 55-715, as amended, requires department of public investments to foreclose mortgages taken to secure loans from school or other funds).

Iowa Code 1939, § 149 (enumerating duties of attorney-general).

Cross-references.

Constitutional provisions relating to attorney-general, Const. Art. VII; may appoint deputy, 87-9-1; to institute quo warranto actions, 43-9-64, 104-66-3; actions for unclaimed bank deposits, 7-2-17.10 et seq.

1. Subdivision (14).

Under subdivision (14) unclaimed shares of stock or dividends of a dissolved private corporation are not subject to escheat. In re Montello Salt Co., 88 U. 283, 53 P.2d 727.

Decisions from other jurisdictions.

— California.

Attorney-general, as chief law officer of the state, has broad powers derived from the common law, and in the absence of any civil restriction, has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interests. Pierce v. Superior Court of Los Angeles County, 1 Cal. 2d 759, 37 P.2d 460.

It is apparent, upon examination of section 21, article V, of California Constitution, that powers of attorney-general are not without limitation; language, "direct supervision over every district attorney and sheriff and over such law enforcement officers as may be designated by law" does not contemplate absolute control and direction of such officials. People v. Brophy, — Cal. App. 2d —, 120 P.2d 946.

— Idaho.

Idaho's adoption of section 65-1301, after the decision of County of Sacramento v. Central Pac. Ry. Co., 61 Cal. 250, carried with it the meaning that the attorney-general is paramount in control and direction of the district (now prosecuting) attorney. State v. Taylor, 59 Idaho 724, 87 P.2d 454.

A. L. R. notes.

Dismissal of criminal proceedings on motion of attorney-general, 66 A. L. R. 1378.

Power of attorney-general to compromise, settle or dismiss suit or proceeding, 81 A. L. R. 124.

Prohibition as means of controlling attorney-general, 115 A. L. R. 14.

Quo warranto, concurrent or conflicting powers of prosecuting attorney and attorney-general as to bringing action of, 131 A. L. R. 1212.

Right of attorney-general to intervene in divorce suit, 22 A. L. R. 1112.

Right of attorney-general to represent or serve administrative officer or body to exclusion of attorney employed by such officer or body, 137 A. L. R. 818.

Suit by attorney-general to enforce or administer charitable trust, 62 A. L. R. 882.

Voters' registration lists, attorney-general as proper party to bring action to purge, 96 A. L. R. 1047.

Waiver by attorney-general of state's immunity from suit, 42 A. L. R. 1484.

87–6–2. Official Bond.

The attorney-general shall give to the state a surety-company bond in the sum of $5,000; the premium of said bond shall be paid by the state. (L. 21, p. 362, § 5737.)

A. L. R. notes.
Liability of sureties on bond of public officer as affected by fact that it was not signed by him, 110 A. L. R. 959; statutory conditions prescribed for public officer's bond as part of bond which does not in terms include them, or which expressly excludes them, 109 A. L. R. 501.

CHAPTER 7

STATE CHEMIST *

87–7–1 to 87–7–3. (Repealed.)
L. 1941, 1st Spec. Sess., ch. 1; eff. July 1.
87–7–4. State Chemist — Supervision by State Board of Agriculture.
87–7–5. Id. Duties.
87–7–6. Termination of Present Term of Office.
87–7–7. Existing Law Refers to State Chemist Appointed Pursuant Hereto.
87–7–8. Sections Repealed.
87–7–9. Effective Date.

* History of act. This chapter was Comp. Laws 1907, Title 76, Ch. 8, p. 860.

87–7–1 to 87–7–3. (Repealed by L. 41, 1st Spec. Sess., ch. 1, § 5, eff. July 1. See 87–7–8.)

L. 1941, 1st Spec. Sess., ch. 1; eff. July 1.

AN ACT relating to the state chemist; transferring the office of state chemist to the department of agriculture; providing for the method of appointment, salary, term of office, powers, duties, and functions; and repealing Sections 87–7–1, 87–7–2, and 87–7–3, Revised Statutes of Utah, 1933.

Be it enacted by the Legislature of the State of Utah:

87–7–4. State Chemist—Supervision by State Board of Agriculture.

There shall be in the department of agriculture under the supervision of the state board of agriculture, the state chemist, who shall be appointed by the board with the approval of the governor. The state chemist shall qualify by taking and subscribing the constitutional oath. The salary of the state chemist shall be fixed by the board with the approval of the department of finance, and the state chemist shall be provided with all necessary equipment, supplies and assistants by the board. (Sec. 1.)

Cross-references.
Department of agriculture, 3–1.

87–7–5. Id. Duties.

It shall be the duty of the state chemist to analyse all articles of food and drink manufactured, sold or used within the state, when submitted

to him by the state board of agriculture or any other state department or officer when required by the laws of this state, and the state chemist shall make such other chemical analyses as may be required by the state board of agriculture. (Sec. 2.)

Cross-references.
Analysis of commercial feeds, 3-8-9;
in behalf of livestock diseases, 3-5-41;
analysis of foods, 3-10-3.

87-7-6. Termination of Present Term of Office.

The term of office of the state chemist appointed pursuant to Chapter 7, Title 87, Revised Statutes of Utah, 1933, shall terminate upon the appointment and qualification of the state chemist appointed pursuant to this act. (Sec. 3.)

87-7-7. Existing Law Refers to State Chemist Appointed Pursuant Hereto.

Whenever any existing or continuing law refers to or names the state chemist it shall be construed to refer to or name the state chemist appointed pursuant to this act. (Sec. 4.)

87-7-8. Sections Repealed.

Sections 87-7-1, 87-7-2, and 87-7-3, Revised Statutes of Utah, 1933, are repealed. (Sec. 5.)

87-7-9. Effective Date.

This act shall take effect on July 1, 1941, at 12:01 a. m. or upon proclamation by the governor prior to that date. (Sec. 6.)

CHAPTER 8

DISTRICT ATTORNEY *

87-8-1. Election—Term.
87-8-2. Qualifications.
87-8-3. Official Bond.
87-8-4. General Duties.
87-8-5. Id.
87-8-6. Clerk—Salary.
87-8-7. Report of Fines, Forfeitures and Penalties Collected.
87-8-8. Duties Respecting Escheats.
87-8-9. Annual Report to Attorney-General.
87-8-10. Certain Acts Prohibited—Disqualification.
87-8-11. Calling in Substitute in Case of Need.
87-8-12. Failure to Perform Duties—Penalty.
87-8-13. Deputies — Appointment and Qualifications—Terms.

* History of act. This chapter was Comp. Laws 1907, Title 76, Ch. 9, p. 860.

87-8-1. Election—Term.

At the general election in each presidential year there shall be elected in each of the several judicial districts of this state a district attorney, whose term of office shall be for four years, beginning on the first Monday of January succeeding his election. He shall be elected by the qualified electors of the respective judicial districts and under the laws governing the election of the district judges. (C. L. 17, § 6758.)

A. L. R. notes.
Incompatibility of offices of district attorney and captain of volunteers, 26 A. L. R. 145.

87–8–2. Qualifications.

No person shall be eligible to the office of district attorney who, at the time of his election, is not a qualified elector and a bona fide resident of the judicial district for which he may be elected; nor shall any person be eligible to said office who has not been admitted to practice in the supreme court of this state. (C. L. 17, § 5759.)

A. L. R. notes.
Incompatibility of offices of district attorney and captain of volunteers, 26 A. L. R. 145, 40 A. L. R. 654. See also 132 A. L. R. 254.

87–8–3. Official Bond.

Before entering upon the duties of his office each district attorney shall take the constitutional oath and shall give a surety-company bond to the state in the penal sum of $5,000 for the faithful performance of the duties of his office. The premium on such bond shall be paid by the state. (C. L. 17, § 5760.)

A. L. R. notes.
Liability of sureties on bond of public officer as affected by fact that it was not signed by him, 110 A. L. R. 959; statutory conditions prescribed for public officer's bond as part of bond which does not in terms include them, or which expressly excludes them, 109 A. L. R. 501.

87–8–4. General Duties.

The district attorney shall, when it does not conflict with other official duties, attend to all legal business required of him in his district by the attorney-general, without charge, when the interests of the state are involved. All the duties and powers of public prosecutor shall be assumed and discharged by the district attorney, except in cases of prosecutions for misdemeanors and preliminary examinations before justices of the peace, but the district attorney may, whenever he deems it necessary, appear and prosecute for misdemeanors, and in preliminary examinations before justices of the peace and other magistrates. (C. L. 17, § 5762.)

Cross-references.
See annotations under 87–8–5.

A. L. R. notes.
Constitutionality, construction, and application of statute against attorney representing private person in respect of matter involving facts involved in prosecution or proceeding in which attorney represents public as district or prosecuting attorney or otherwise, 123 A. L. R. 1187; disbarment or suspension because of misconduct as prosecuting attorney, 43 A. L. R. 109; privilege of communication to prosecuting officer, 59 A. L. R. 1557.

87–8–5. Id.

The district attorney shall appear and prosecute for the state in the district court of his district in all criminal prosecutions, and in all civil cases in which the state may be interested, and assist in any civil case in which any county of his district may be interested when required to do so by the county commissioners, and render such assistance as may be required by the attorney-general in all such cases that may be appealed to the supreme court; he shall attend the deliberations of the

grand jury; he shall draw all indictments and informations for offenses against the laws of this state within his district, and shall cause all persons indicted or informed against to be speedily arraigned; he shall cause all witnesses for the state to be subpoenaed to appear before the court or grand jury; he shall examine carefully into the sufficiency of all appearance bonds that may be tendered to the district court of his district, and, upon the order of the court, shall institute proceedings in the name of the state for recovery upon the forfeiture of any appearance or other bonds running to the state, and enforce the collection thereof; and shall perform such other duties as may be required by law.
(C. L. 17, § 5763.)

1. Expenses as county charges.
When the office of district attorney was created by this chapter he became the public prosecutor and performed functions formerly performed by county attorneys; therefore subdivision (2) of 19-11-17, providing that necessary expenses incurred by county attorney in criminal cases are county charges, includes expenses incurred by district attorney in procuring services of handwriting expert. Kytka v. Weber County, 48 U. 421, 160 P. 111. See 19-11-17.
Whether the particular services were necessary in a criminal prosecution so as to make them county charges is a mixed question of law and fact. It is a question for the court whether services of a certain class or kind are needful and required, and whether expenditures for them are necessary, and for the jury whether the particular services rendered were actually necessary in view of all conditions and circumstances of the case in which rendered. Kytka v. Weber County, 48 U. 421, 160 P. 111.

2. Actions on forfeited bonds.
Under this section district court has authority to direct district attorney to institute an action on a forfeited bail bond. State v. Davis, 27 U. 368, 76 P. 857, applying Session Laws 1901, p. 70, Ch. 69.

A. L. R. notes.
Disbarment or suspension because of misconduct as prosecuting attorney, 43 A. L. R. 109; privilege of communication to prosecuting officer, 59 A. L. R. 1557.

87-8-6. Clerk—Salary.

The district attorney in judicial districts having a population of 75,000 inhabitants or more may employ a clerk, at such salary as may be fixed by the board of examiners, to be paid quarterly by the state.
(C. L. 17, § 5765.)

A. L. R. notes.
Liability of public officer or his bond for defaults and misfeasances of his clerks, assistants, or deputies, 116 A. L. R. 1064.

87-8-7. Report of Fines, Forfeitures and Penalties Collected.

He shall at the close of every term of the district court prepare a statement of all fines, penalties and forfeitures accruing to the state, adjudged and made final at such term, and also of all fines, penalties and forfeitures accruing to the state that have been collected or received by any officer required to collect or receive the same, stating each case and the amount, and shall transmit such list to the state auditor, and shall proceed against such officer and his sureties for any neglect of duty of which he may be guilty. (C. L. 17, § 5766.)

87-8-8. Duties Respecting Escheats.

It shall be the duty of the district attorney to ascertain, by all practicable means, what estate or property within his district has escheated or reverted to the state, and he shall require the assessor of taxes of each county within his district, to furnish him, annually, a list of all real or personal property that may have so escheated or reverted, and

the district attorney shall file a copy of such list in the office of the state auditor and of the attorney-general. (C. L. 17, § 5767.)

87–8–9. Annual Report to Attorney-General.

He shall also, on the 1st day of August of each year, file a report with the attorney-general covering the preceding fiscal year, stating the number of criminal prosecutions in his district, the character of offenses charged, the number of convictions, the amount of fines and penalties imposed, and the amount collected. He shall call attention to any defect in the operation of the laws, and suggest such amendments as in his judgment are necessary to perfect the same. (C. L. 17, § 5767.)

87–8–10. Certain Acts Prohibited—Disqualification.

No district attorney shall in any manner consult, advise, counsel or defend, within this state, any person charged with any crime, misdemeanor or breach of any penal statute or ordinance; nor shall he be qualified to prosecute or dismiss in the name of the state any case in which he has previously acted as counsel for the accused on the pending charge; nor shall he in any case compromise any cause or enter a nolle prosequi either before or after the filing of an indictment or information without the consent of the court. (C. L. 17, § 5769.)

A. L. R. notes.

Constitutionality, construction, and application of statute against attorney representing private person in respect of matter involving facts involved in prosecution or proceeding in which attorney represents public as district or prosecuting attorney or otherwise, 123 A. L. R. 1187.

87–8–11. Calling in Substitute in Case of Need.

If at the convening of any term of the district court, or the impaneling of any grand jury, in his district the district attorney shall be absent or unable to perform his duties, or in case he shall be disqualified, he shall, if time permits, request some other district attorney of the state to appear and serve during his absence or disqualification, and in case no other district attorney can serve, the court shall forthwith appoint some attorney to act for the state in the place of the district attorney during his absence, inability or disqualification; and the person so appointed shall have full power to discharge all the duties of said office during the absence, inability or disqualification of the district attorney, and shall receive a reasonable compensation for his services, to be allowed by the court and certified to the state auditor, who, upon its allowance by the state board of examiners, shall issue his warrant therefor. Such allowance shall be deducted from the salary of the district attorney. (C. L. 17, § 5770.)

Cross-references.

Appointment of deputy, 87–9–1.

A. L. R. notes.

Validity of contract by attorney to prosecute or assist in prosecution of criminal case on contingent fee, 11 A. L. R. 1192.

87–8–12. Failure to Perform Duties—Penalty.

In case any district attorney shall fail or refuse to perform the duties of his office for a period of thirty consecutive days without reasonable excuse, or in case he shall be absent from the state or the district for ninety days, he shall be deemed to have forfeited his office, except that

such absence may be extended as provided by the constitution in the case of judicial officers. (C. L. 17, § 5771.)

87-8-13. Deputies—Appointment and Qualifications—Terms.

The district attorney in judicial districts having a population of 100,000 or more inhabitants such population to be determined by the last preceding United States census, shall have power to appoint a deputy at a salary of $2,400 per annum, which shall be paid monthly out of the state treasury. Such deputy shall be an attorney at law in good standing, and admitted to practice by the supreme court.
(L. 27, p. 3, § 5773.)

1. Powers of deputy.
Under this section, an information signed by a deputy as "district attorney," while an irregularity, does not invalidate same. State v. Merritt, 67 U. 325, 247 P. 497. See 105-17-1.

A. L. R. notes.
Liability of public officer or his bond for defaults and misfeasances of his clerks, assistants, or deputies, 116 A. L. R. 1064.

CHAPTER 9

DEPUTY STATE OFFICERS *

87-9-1. Appointment—Powers.
87-9-2. Official Bonds.

* History of act. This chapter was R. S. 1898, Title 63, Ch. 9, p. 553; Comp. Laws 1907, Title 76, Ch. 10, p. 863.

87-9-1. Appointment—Powers.

The secretary of state, the state auditor, the state treasurer, the attorney-general and the superintendent of public instruction, and the district attorneys as provided in section 87-8-13, may each appoint a deputy, who may, during the absence or disability of the principal, perform all the duties pertaining to the office, except those required of the principal as a member of any board. The principal shall be answerable for neglect or misconduct in office of his deputy, and may require from him a bond for his own security. The appointment of a deputy shall be in writing, and shall be revocable at the pleasure of the principal; and all such appointments and revocations shall be filed with the secretary of state. (C. L. 17, § 5790.)

A. L. R. notes.
Liability of public officer or his bond for defaults and misfeasances of his clerks, assistants, or deputies, 116 A. L. R. 1064.

87-9-2. Official Bonds.

Where a deputy of any state officer is required to give a bond to the state he shall give a surety-company bond, and the premium therefor shall be paid by the state. (L. 21, p. 362, § 5737x.)

A. L. R. notes.
Liability of sureties on bond of public officer as affected by fact that it was not signed by him, 110 A. L. R. 959; statutory conditions prescribed for public officer's bond as part of bond which does not in terms include them, or which expressly excludes them, 109 A. L. R. 501.

CHAPTER 10

REPORTS OF STATE OFFICERS *

87-10-1. Of Expenditures of Appropriations.
87-10-2. Accounts to Be Closed at End of Fiscal Year.
87-10-3. When Due — Secretary of State to Print.
87-10-4. Copies to Legislature.

* History of act. 87-10-2 to 87-10-4 are practically identical with Comp. Laws 1907, Ch. 11, p. 864, 2460x1 to 2460x3.

87-10-1. Of Expenditures of Appropriations.

Excepting the governor, all state officers, state boards and commissions, and the officers of all state institutions, to whom and for which appropriations other than salaries are made, shall, with their biennial reports, submit a detailed statement, under oath, of the manner in which all appropriations for their respective departments and institutions have been expended. (L. 29, p. 206, § 11.)

87-10-2. Accounts to Be Closed at End of Fiscal Year.

All officers who are required by law to report annually or biennially to the legislature or governor shall close their accounts at the end of the fiscal year, and as soon thereafter as practicable shall prepare and compile their respective reports. (C. L. 17, § 5795.)

87-10-3. When Due—Secretary of State to Print.

All reports intended for the use of the legislature shall be transmitted by the respective officers to the secretary of state on or before the 1st day of October before the assembling of the legislature; and the secretary of state shall cause the same to be printed, in accordance with the laws regulating public printing, before the assembling of the legislature. (L. 25, p. 9, § 5796.)

87-10-4. Copies to Legislature.

Upon the organization of the legislature the secretary of state shall transmit to the senate and house of representatives copies of each printed report for the use of the members of the legislature.
(C. L. 17, § 5797.)

TITLE 88

STATUTES

Chapter 1. REVISION AND REPEAL.
Chapter 1a. COMPILATION.
Chapter 2. CONSTRUCTION.

CHAPTER 1

REVISION AND REPEAL

88-1-1. When Revision Takes Effect.

L. 1933, ch. 76; eff. Feb. 10.

88-1-1.10. Adoption [of Statute Book] for Purpose of Amendment and Repeal.

88-1-1.11. Effective Date.

[Rev. Stats. 1933—Cont.]

88-1-2. General Repeal—Of Prior Laws — Exceptions and Reservations.

88-1-3. Id. Laws of 1933 Deemed Subsequent to Revision.

88-1-4. Id. Tenure of Office Not Affected—Exceptions.

88-1-5. Id. Accrued Rights Not Affected.

88-1-6. Id. Effect on Limitation of Actions.

88-1-7. Id. Effect on Offenses Committed.

88-1-8. Id. Effect on Suits and Prosecutions Pending.

88-1-9. "Hereafter," "Heretofore" Defined.

88-1-1. When Revision Takes Effect.

This revision of the laws of Utah shall be known as the "Revised Statutes of Utah, 1933," and shall take effect at a time designated by the governor by proclamation as may be provided by law.

(Code Report.)

History.

For former analogous provisions, see R. S. 1898, § 2479; Comp. Laws 1907, § 2479.

Cross-references.

Uniformity of legislation, Title 97.

1. Discussion of section.

The counterpart of this section in R. S. 1898 was discussed at length in Pratt v. Swan, 16 U. 483, 52 P. 1092.

2. Identification of statute book.

For the purpose of its identification, and as preliminary to its approval and adoption, the president of the senate and the speaker of the house of representatives were authorized and directed by L. 33, ch. 75, to certify to the secretary of state the statute book containing the text of the Revised Statutes of Utah. 1933, as printed by the Inland Printing Company under the direction of the legislative code committee, theretofore presented to and considered by the legislature at the 1933 regular session.

3. Adoption of statute book for purpose of publication.

The statute book containing the text of the Revised Statutes of Utah, 1933, certified to the secretary of state by the president of the senate and the speaker of the house of representatives by authority and direction of the 1933 regular session of the legislature, was, by L. 33, ch. 77, approved, adopted and legalized as to arrangement of said text by title, chapter, article and section for the

purpose of official publication of said Revised Statutes of Utah, 1933.

4. **Effective date of revision.**

L. 33, ch. 74, provided that the Revised Statutes of Utah, 1933, as enacted by the twentieth regular session of the legislature of Utah, should take effect at 1 o'clock a. m. of the second Monday after said revised statutes were officially published, which date should not be less than sixty days after the adjournment of the twentieth regular session of the legislature, and the governor was authorized, directed and empowered to announce by proclamation the fact and date of such publication, and it was further provided that such proclamation by the governor should be conclusive evidence of the fact and date of the official publication of the Revised Statutes of Utah, 1933. In compliance with the provisions of L. 33, ch. 74, the governor proclaimed the Revised Statutes of Utah, 1933, to be officially published June 17, 1933, which made the effective date thereof June 26, 1933.

5. **Compilation and revision defined and distinguished.**

This revision is not a mere compilation by the Code commissioners, but is an entirely new enactment by the legislature, and such enactment gives force and effect to every provision therein the same as if single chapters had been enacted making changes and amendments. This has been specifically applied to the Inheritance Tax Law, 80–12. State Tax Commission v. Backman, 88 U. 424, 433, 55 P.2d 171. As to effect of mere compilation on the other hand, see Lyman v. Martin, 2 U. 136, 141, and the preface to this compilation.

L. 1933, ch. 76; eff. Feb. 10.

AN ACT approving, adopting and legalizing the statute book containing the text of the Revised Statutes of Utah, 1933, for the purpose of amending or repealing said text in whole or in part.

Be it enacted by the Legislature of the State of Utah:

88–1–1.10. Adoption [of Statute Book] for Purpose of Amendment and Repeal.

The statute book containing the text of the Revised Statutes of Utah, 1933, certified to the secretary of state by the president of the senate and the speaker of the house of representatives by authority and direction of this session of the legislature is approved, adopted and legalized as to arrangement of said text by title, chapter, article and section for the purpose of amendment or repeal of said text in whole or in part by reference thereto. (Sec. 1.)

88–1–1.11. Effective Date.

This Act shall take effect upon approval.
Approved February 10, 1933. (Sec. 2.)

[Rev. Stats. 1933—Cont.]

88–1–2. General Repeal—Of Prior Laws—Exceptions and Reservations.

All acts of a general and permanent nature passed by the legislature of the state of Utah prior to its twentieth regular session are hereby repealed, saving and excepting the following, subject to the limitations and exceptions herein expressed, to wit:

(1) Those providing for the issue, validation, disposition, exchange or redemption of any bonds or warrants of the territory or state of Utah, or of any county, municipality or school district therein, in so far as such acts or resolutions affect any such bonds or warrants now outstanding and unpaid.

(2) Those accepting grants of land, or money, or other property for the territory or state of Utah, or for any subdivision or institution thereof, together with the conditions, restrictions and limitations attached to such grants.

(3) All validating acts.

(4) Acts relating to the transition from territorial to state government.

(5) Title 50 Compiled Laws of Utah 1917, relating to inheritance tax, and all amendments thereof; title 106 Compiled Laws of Utah 1917, relating to taxation, and all amendments thereof; Section 4575 Compiled Laws of Utah 1917, relating to a state tax for high school purposes; chapters 64, 114, 116, 117, 120, 122 and 123 Laws of Utah 1919, relating to taxation; chapters 8, 9 and 18 Laws of Utah 1919, Special Session, relating to taxation; chapters 40, 132, 134, 135, 136, 138, 139 and 140 Laws of Utah 1921, relating to taxation; chapters 2, 7, 22, 68, 96 and 97 Laws of Utah 1923, relating to taxation; chapter 14 Laws of Utah 1925, relating to assessment of shares of stock in banks; chapters 64 and 74 Laws of Utah 1927, relating to taxation; chapter 69 Laws of Utah 1929, relating to a tax rate for county purposes, and chapters 35, 38, 39, 40, 41, 42, 44 and 53 Laws of Utah 1931; with the intent for the purpose and to the end that all existing laws relating to revenue and taxation shall apply to and govern the appraisement of property for taxation, the levy, assessment, equalization, apportionment, lien, collection and enforcement of taxes and the sale, disposition and redemption of property liable to tax, as to taxes authorized, levied and assessed prior to the time this revision is adopted and takes effect, and that the provisions of this revision shall apply to and govern as to taxes authorized, levied and assessed after the time this revision is adopted and takes effect.

(6) Chapter 68, Laws of Utah, 1919, as amended by chapter 73, Laws of Utah, 1921, and by chapter 9, Laws of Utah, 1923, and by chapters 98 and 107, Laws of Utah, 1925, and by chapters 68 and 80, Laws of Utah, 1929; also Title 26, Compiled Laws of Utah, 1917, as amended by chapter 41, Laws of Utah, 1919, and by chapter 47, Laws of Utah, 1921, and by chapters 48 and 73 Laws of Utah, 1923, and by chapters 69 and 109, Laws of Utah, 1925, and by chapters 32, 33 and 82, Laws of Utah, 1929; relating to irrigation, drainage and conservation districts. (Code Report.)

History.

This section is in many respects identical with R. S. 1898, § 2480; Comp. Laws 1907, § 2480.

1. General application of section.

This section, as the successor of section 2480 of R. S. 1898, has been applied in an able opinion in Pratt v. Swan, 16 U. 483, 52 P. 1092.

2. Laws in force before statehood.

Twelve-man jury held legally capable of being impaneled by district court after statehood for trial of defendant indicted for noncapital felony before statehood. State v. Hart, 19 U. 438, 57 P. 415, applying R. S. 1898, § 2480.

88-1-3. Id. Laws of 1933 Deemed Subsequent to Revision.

The enactment of this revision shall not affect or repeal any act of the legislature passed at any time during the twentieth regular session, and all such acts shall have as full effect as if passed after the enact-

ment of this revision, and so far as such acts vary from, or conflict with, any provision contained in this revision they are to have effect as subsequent statutes, and as repealing any portion of this revision inconsistent therewith. (C. L. 17, § 5831.)

88–1–4. Id. Tenure of Office Not Affected—Exceptions.

All persons who at the time when the said repeal shall take effect shall hold any office under the statutes hereby repealed shall continue to hold the same under the tenure thereof, except those offices which are abolished, and those as to which a different provision is made by these revised statutes. (C. L. 17, § 5832.)

History.
This section is practically identical with R. S. 1898, § 2482; Comp. Laws 1907, § 2482.

1. Offices of policemen and firemen.
Similar provision in R. S. 1898 held to have had effect of continuing in office Salt Lake City policemen who were appointed to office prior to time when such statutes became operative (Everill v. Swan, 17 U. 514, 55 P. 68), as, for example, chief of police of Salt Lake City. Pratt v. Swan, 16 U. 483, 52 P. 1092.
The foregoing cases were reviewed and re-affirmed in Moreton v. Swan, 20 U. 79, 57 P. 718, which involved salaries of members of fire department of Salt Lake City.

88–1–5. Id. Accrued Rights Not Affected.

This repeal of existing statutes shall not affect any act done, any right accruing or which has accrued or has been established, or any suit or proceeding had or commenced in any civil cause before the time when such repeal takes effect; but the proceedings in such cases shall be conformed to the provisions of these revised statutes as far as consistent. (C. L. 17, § 5833.)

88–1–6. Id. Effect on Limitation of Actions.

When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before these revised statutes go into effect, and the same or any other limitation is prescribed in these revised statutes, the time which has already run shall be deemed a part of the time prescribed as such limitation by these revised statutes. (C. L. 17, § 5834.)

History.
This section is practically identical with R. S. 1898, § 2484; Comp. Laws 1907, § 2484.

1. Effect of re-enactment.
Re-enactment of statutes of limitation by R. S. 1933 amounted, not to a repeal of the antecedent sections, but to a re-affirmation thereof. Attorney General v. Pomeroy, 93 U. 426, 73 P.2d 1277, 114 A. L. R. 726.

88–1–7. Id. Effect on Offenses Committed.

No offense committed, and no penalty or forfeiture incurred, under any statute hereby repealed before the repeal takes effect shall be affected by the repeal, except that when a punishment, penalty or forfeiture is mitigated by the provisions herein contained such provisions shall be applied to a judgment pronounced after the repeal. (C. L. 17, § 5835.)

History.
This section is practically identical with R. S. 1898, § 2485; Comp. Laws 1907, § 2485.

1. Purpose of section.
The plain intent of this section was to steer clear of any difficulty arising from the enactment of ex post facto laws and

retain in force the former Crimes and Punishment Act so far as it related to offenses committed prior to the time the "Penal Code" went into effect. People v. Sloan, 2 U. 326.

2. **Mitigation of punishment.**
The court, after quoting this provision in R. S. 1898, said: "The punishment for the crime of grand larceny is not mitigated by any of the provisions of the Revised Statutes." State v. Woolsey, 19 U. 486, 491, 57 P. 426.

3. **Effect of pre-statehood provisions.**
Twelve-man jury held legally capable of being impaneled by district court after statehood for trial of defendant indicted for noncapital felony before statehood. State v. Hart, 19 U. 438, 57 P. 415, applying R. S. 1898.

88–1–8. Id. Effect on Suits and Prosecutions Pending.

No suit or prosecution, pending when this repeal takes effect, for an offense committed, or for the recovery of a penalty or forfeiture incurred, shall be affected by the repeal, but the proceedings may be conformed to the provisions of these revised statutes as far as consistent.

(C. L. 17, § 5836.)

History.
This section is practically identical with R. S. 1898, § 2486; Comp. Laws 1907, § 2486.

1. **Operation and effect of saving clause.**
Without this saving clause no judgment could be rendered in the suit. Rhemke v. Clinton, 2 U. 438.

2. **Purpose of section.**
The plain intent of this section was to steer clear of any difficulty arising from the enactment of ex post facto laws and to retain in force the former Crimes and Punishment Act so far as it related to offenses committed prior to the time the "Penal Code" went into effect. People v. Sloan, 2 U. 326.

3. **Blue Sky Law.**
Repeal of certain sections of Blue Sky Law by Laws 1925, with saving clause as to actions already pending, was held not to save cases under section not affected by such repeal, especially as to actions not pending when repealer was enacted. Wilson v. Guaranteed Securities Co., 73 U. 157, 272 P. 946.

4. **Jury.**
Twelve-man jury held legally capable of being impaneled by district court after statehood for trial of defendant indicted for noncapital felony before statehood. State v. Hart, 19 U. 438, 57 P. 415.

88–1–9. "Hereafter," "Heretofore" Defined.

The terms "heretofore" and "hereafter," as used in these revised statutes, have relation to the time when the same take effect.

(C. L. 17, § 5837.)

History.
This section is practically identical with R. S. 1898, § 2487; Comp. Laws 1907, § 2487.

1. **Meaning of "thereafter."**
The word "thereafter" in an amendatory act has been held to mean after the amendment goes into effect, which would occur when there had been a publication of the enactment. Farrel v. Pingree, 5 U. 443, 449, 16 P. 843.

CHAPTER 1a

COMPILATION

L. 1941, ch. 94; eff. May 13.

88–1a–1. Compilation Commission — Membership—Purpose.
88–1a–2. Id. Contract for Compilation —What Compilation Shall Contain.
88–1a–3. Id. To Give Notification on Bidding for Contract.
88–1a–4. Provisions to Be Contained in Contract.
88–1a–5. Governor's Proclamation Announcing Publication.
88–1a–6. Distribution by Secretary of State.
88–1a–7. Appropriation.

L. 1941, ch. 94; eff. May 13.

AN ACT providing for the compilation, publication and annotation of the statutes of the state of Utah and creating and appointing a compilation commission and making appropriation therefor.

Be it enacted by the Legislature of the State of Utah:

88–1a–1. Compilation Commission—Membership—Purpose.

The present governor of the state of Utah, the present attorney general of the state of Utah, and the present president of the Utah state bar association shall constitute a compilation commission for the compilation, annotation and publication of the codes of the state of Utah. (Sec. 1.)

88–1a–2. Id. Contract for Compilation—What Compilation Shall Contain.

Immediately after this act shall become a law, the foregoing commission are directed to enter into a contract with a major, responsible law book publishing company for the compilation, annotation and publication of said codes and statutes of the state of Utah; *provided*, that such law book publishing company shall sublet the printing within the state of Utah if the same may be done as favorably to the state as though such printing were done by said law book publishing company. Said compilation shall contain the constitution of the United States and of Utah, the organic act of the territory of Utah, the laws of the United States providing for the naturalization of citizens, statutes of the United States relative to the authentication of records, the laws of permanent and general nature of the state of Utah, including the enactments of the twenty-fourth session of the legislature of the state of Utah, and special sessions thereof, and a copy of this act. The constitution and laws of permanent and general nature of the state of Utah, including the enactments of the twenty-fourth session of the legislature of the state of Utah, and any special sessions thereof, shall be annotated by notes and references to the decisions of the supreme court of the state of Utah, the federal courts, and the supreme court of the United States, citing or construing the same, the history of each particular section of the constitution and statutes of the state of Utah, and constitutional provisions and statutes of other states of identical or similar character together with cross references and together with a thorough, complete and modern index to the constitution of Utah and the general laws of the state. (Sec. 2.)

88–1a–3. Id. To Give Notification on Bidding for Contract.

The foregoing commission shall immediately notify said major, responsible law book companies as have indicated a desire to bid on the contract authorized in Section 2 hereof, and such other major, responsible law book companies, as in the opinion of said foregoing commission, may desire to submit bids, of a time and place fixed in said notice when bids on said contract will be received. Bids must be in writing, but the right to reject any bid is hereby specifically reserved to the foregoing

commission. Said contract need not be let to the lowest bidder but to the company, or companies, who, in the opinion of said foregoing commission, will best perform the terms and conditions thereof.
(Sec. 3.)

88-1a-4. Provisions to Be Contained in Contract.

The contract with the law book publishing company herein provided for shall provide that said publishing company shall print or have printed and bind in such form as may be prescribed by the foregoing commission, sets of said compilation for the use of the state of Utah, and its municipalities or sub-divisions not to exceed a fixed price per set, said price to be determined and fixed by said commission, and that it shall receive payment therefor upon delivery and approval thereof; said publishing company must agree therein to sell additional sets to the state of Utah for the use of the state in lots of twenty-five or more not to exceed said price per set; said publishing company shall print or have printed, and bind and place on the market a sufficient number of sets to supply the demand therefor within the state of Utah at a price per set to be agreed upon with said publishing company, such price not to exceed the fixed price charged the state per set; that said publishing company shall have said code printed, published, bound and ready for approval at the earliest possible date, but not later than the 1st day of January, 1943. (Sec. 4.)

88-1a-5. Governor's Proclamation Announcing Publication.

Upon certificate of the foregoing commission that such compilation has been completed and published, the governor shall make a proclamation announcing its publication, and from and after such proclamation, said compilation shall be in force and shall be received in all the courts and by all judges, public officers, commissions and departments of the state government as evidence of the statute law of the state of Utah and as an authorized compilation of the statutes and codes of Utah. Said compilation shall be known by such name as may be determined by the foregoing commission. (Sec. 5.)

88-1a-6. Distribution by Secretary of State.

Upon approval of said compilation by the foregoing commission, said law book publishing company shall immediately deliver to the secretary of state at Salt Lake City, Utah, the sets that may have been ordered; said secretary of state shall furnish a set thereof to each member of the twenty-fourth legislature of the state of Utah without cost to him and shall keep sets for the use of the members of the legislature of the state of Utah during the time said legislature is in session and shall distribute the remainder among such state boards, commissions, institutions, officers and offices as shall have been decided upon. All such boards, commissions, institutions, officers and offices, who or which, are self-sustaining or for whom or which appropriation has been made shall pay or be debited for any books so received, in the sum per set determined and fixed by the foregoing commission. The Secretary of State shall likewise furnish to each clerk of the district court at the expense of his county, upon order of the district court or board of

county commissioners, a sufficient number of sets to supply one to each district judge, clerk of the district court, county and district attorneys, sheriff, assessor, treasurer, recorder, superintendent of schools and to each qualified justice of the peace in the county upon receipt of a certificate from such clerk of the district court as to the election and qualification of said justice of the peace; and shall receive payment therefor in a sum to be determined by the foregoing commission but not to exceed the price fixed per set. All funds received from the distribution of said sets shall be paid over to the state treasurer, which, together with any credits allowed shall be placed in the general fund of the state. Any remaining sets shall be kept by said secretary of state for such subsequent distribution as may be directed by law or resolution of subsequent sessions of the Utah legislature. The sets herein provided to be furnished to each public officer of this state shall remain the property of the state of Utah and shall be delivered by them to their successors. (Sec. 6.)

88-1a-7. Appropriation.

That there is appropriated out of the general fund of the state, not otherwise appropriated, the sum of fifty thousand dollars or so much thereof as may be necessary for the payment of the contract authorized to be let hereunder and for such clerical and other assistance as may be employed by the commission hereunder. (Sec. 7.)

CHAPTER 2

CONSTRUCTION

88-2-1. Common Law Adopted.
88-2-2. Id. Statutes in Derogation Liberally Construed—Rules of Equity Prevail.
88-2-3. Revised Statutes Not Retroactive.
88-2-4. Civil and Criminal Remedies Not Merged.
88-2-5. Effect of Repealing a Statute.
88-2-6. Identical Provisions Deemed a Continuation, Not New Enactment.
88-2-7. Time, How Computed.
88-2-8. When a Day Appointed Is a Holiday.
88-2-9. Seal, How Affixed.
88-2-10. Joint Authority Is Authority to Majority.
88-2-11. Rules of Construction—As to Words and Phrases.
88-2-12. Id. As to These Statutes.

88-2-1. Common Law Adopted.

The common law of England so far as it is not repugnant to, or in conflict with, the constitution or laws of the United States, or the constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, is hereby adopted, and shall be the rule of decision in all courts of this state. (C. L. 17, § 5838.)

History.

This section for the most part is identical with R. S. 1898, § 2488; Comp. Laws 1907, § 2488.

The common law of England has been defined in the adopting act of Wyoming. Johnson v. Union Pac. Coal Co., 28 U. 46, 76 P. 1089, 67 L. R. A. 506, applying Wyoming law.

Comparable provisions.

Idaho Code, § 70-116 (common law of England, so far as not repugnant to, or inconsistent with, Constitution or laws of United States, in all cases not provided for in the compiled laws, is the rule of decision in courts of Idaho).

1. Operation and effect of adopting act.

The common law of England was not adopted in this territory or state until this section was enacted. Nor does this section adopt its rigor and harshness, but only so much as was and had been generally recognized and enforced in this country, and as is and was suitable to our conditions. Hatch v. Hatch, 46 U. 116, 121, 148 P. 1096.

This section, by implication at least, excludes common law from all subjects that are regulated by statute. Rio Grande Western Ry. Co. v. Salt Lake Inv. Co., 35 U. 528, 101 P. 586.

2. Champerty.

Common law on subject of champertous contracts held modified by former statute providing that "measure and mode of compensation of attorneys and counselors at law is left to agreement, express or implied, of parties." Croco v. Oregon Short Line R. Co., 18 U. 311, 54 P. 985, 44 L. R. A. 285; Kennedy v. Oregon Short Line R. Co., 18 U. 325, 54 P. 988. Former statute held to have modified force and effect of common law in matter of champertous contracts. Potter v. Ajax Min. Co., 22 U. 273, 61 P. 999. (Baskin, J., dissenting.)

3. Criminal law.

4. — in general.

This applies to criminal law; and statutory enactment covering phase of common law will not be construed as merely restating common law where wording indicates intent to broaden or change common law. Oleson v. Pincock, 68 U. 507, 251 P. 23.

5. — crimes against nature.

Because of this section it was held, prior to the amendment of 103-51-22, that the definition of the "infamous crime against nature" with man or beast must be sought in the common law, in so far as not defined by that section. State v. Johnson, 44 U. 18, 137 P. 632.

6. — criminal procedure.

Common law applies to criminal procedure unless otherwise provided by statute; and 104-49-3, subd. (4), forbidding physician to testify without consent of his patient, does not apply to criminal proceedings notwithstanding 105-45-1, 105-45-2, common law being applicable. State v. Dean, 69 U. 268, 254 P. 142. But see 105-1-2, which has existed in this state since an early date. 2 Comp. Laws 1888, § 4781.

7. Divorce and dower.

Common law respecting dower remained in force during all time Utah remained a territory, and continued in force after it became a state, except as modified by statutory enactment. Hilton v. Thatcher, 31 U. 360, 88 P. 20.

Under this section, common-law rule that a divorce a vinculo bars dower has been adopted. Whitmore v. Hardin, 3 U. 121, 133, 1 P. 465.

8. Married women's laws.

The English common law, with its rigorous limitations imposed upon married women, was not adopted in the Territory of Utah, but only so much thereof as was applicable to the conditions of the new territory. Hatch v. Hatch, 46 U. 116, 148 P. 1096. (Frick, J., disagreeing.)

9. Statute of uses.

Although statute of uses (27 Hen. VIII, Ch. 10) never became part of English common law and has not been adopted by Utah legislature, rule of law, which executes passive or naked trust and vests legal title in person having use, is part of Utah common law. Henderson v. Adams, 15 U. 30, 48 P. 398.

10. Water rights.

The legislature, by this section, did not intend to adopt the common-law doctrine as to riparian owners, thereby divesting itself of title to bed of navigable waters. State v. Rolio, 71 U. 91, 106, 262 P. 987.

11. Writs.

Writ of elegit did not exist in Territory of Utah. Thompson v. Averv, 11 U. 214, 39 P. 829.

88-2-2. Id. Statutes in Derogation Liberally Construed—Rules of Equity Prevail.

The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state.

The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail.

(C. L. 17, § 5839.)

History.

This section was derived from 2 Comp. Laws 1888, § 2987 and is substantially similar thereto, at least so far as the first two sentences are concerned. It is practically identical with R. S. 1898, § 2489; Comp. Laws 1907, § 2489.

Comparable provisions.

Cal. Civil Proc. Code, § 4 (substantially identical, as bearing on Code of Civil Procedure; does not, however, contain concluding sentence herein).

Idaho Code, § 70–102, Mont. Rev. Codes, § 4 (substantially identical, except as to concluding sentence herein).

Iowa Code 1939, § 64 (rule of common law, that statutes in derogation thereof are to be strictly construed, has no application to Iowa Code; its provisions and proceedings thereunder shall be liberally construed with view to promote its objects and assist the parties in obtaining justice).

Cross-references.

Construction of criminal statutes, 103–1–2.

1. **Operation and effect of section.**

This section is mandatory. Hammond v. Wall, 51 U. 464, 171 P. 148.

2. **Rule of liberal construction.**

3. **— in general.**

This section abrogates the common-law rule. In re Garr's Estate, 31 U. 57, 86 P. 757; State v. Barboglio, 63 U. 432, 441, 226 P. 904. Statutes in derogation of common law are strictly construed. Moormeister v. Golding, 84 U. 324, 27 P.2d 447.

Remedial statute must be liberally construed. Castle v. Delta Land & Water Co., 58 U. 137, 197 P. 584.

Phrase "out of and in the course of the employment," as used in a Workmen's Compensation Act, should be liberally construed. Chandler v. Industrial Commission, 55 U. 213, 217, 184 P. 1020, 8 A. L. R. 930.

Under clause of this section, which requires provisions of statutes and proceedings under them to be liberally construed with view to effect statutes' objects and to promote justice, and portion of 104–14–4 relating to amendments, held that, where action for wrongful death was erroneously commenced by intestate's widow and children, who were only parties in interest, instead of properly by personal representative, it was error for trial court not to allow complaint to be amended so as to substitute, as plaintiff, widow in her capacity as administratrix. Pugmire v. Diamond Coal & Coke Co., 26 U. 115, 72 P. 385.

4. **— city law.**

While the rule that statutes in derogation of the common law must be strictly construed has been abrogated in this state, nevertheless if the liability imposed on city by 15–7–76 is limited to failure to keep in repair and unobstructed its streets, etc., this section precludes extension of liability further than clear intendment of statute. Niblock v. Salt Lake City, 100 U. 573, 111 P.2d 800.

5. **— foreign statutes.**

Seemingly, clause of this section, which requires provisions of statutes and proceedings under them to be liberally construed with view to effect statutes' objects and to promote justice, applies, at least in matter of amendment of pleading, as well when it is statutes of another state, as well as when it is statutes of Utah, which are involved. Pugmire v. Diamond Coal & Coke Co., 26 U. 115, 72 P. 385.

6. **— inheritance laws.**

This section has been applied to construction of inheritance laws. In re Garr's Estate, 31 U. 57, 86 P. 757.

7. **— life insurance.**

Statutes governing life insurance contracts must be liberally construed, and so as to protect the public. Utah Ass'n of Life Underwriters v. Mountain States Life Ins. Co., 58 U. 579, 200 P. 673.

8. **— penal statutes.**

Exceptions in penal statutes ought to be liberally construed in favor of one who is charged with violation of provisions of statute. Schuyler v. Southern Pac. Co., 37 U. 581, 109 P. 458, aff'd 227 U. S. 601, 57 L. Ed. 662, 33 S. Ct. 277.

9. **Rules of equity as opposed to rules of common law.**

Under the last sentence of this section, it matters not whether the action is one

in equity or at law; the rules of equity respecting forfeitures must prevail. And both equity and good conscience abhor forfeitures, especially for acts or omissions long past. Moran v. Knights of Columbus, 46 U. 397, 417, 151 P. 353.

10. Questions of novel impression.

Upon a question of the first impression the court is required to give full effect to this section. Houston Real Estate Investment Co. v. Hechler, 44 U. 64, 138 P. 1159.

11. Statutory rights.

Under this section, where the statute creates a right, the possessor thereof is entitled to have the same enforced in accordance with the rules of procedure outlined by our own statutes rather than by those of some other state. Therefore an assignee of a part of a claim may sue thereon in his own name. National Union Fire Ins. Co. v. Denver & R. G. R., 44 U. 26, 137 P. 653.

12. Decisions of foreign courts.

Decisions of courts of other states under statutes differing from those of Utah are not controlling, it being duty of Utah courts to construe statutes of own state and give them such effect as the legislature intended, reasoning from the language used and the purpose in view. State v. Anderton, 69 U. 53, 252 P. 280.

Decisions from other jurisdictions.

— California.

The primary rule of statutory construction, to which every other rule as to interpretation of particular terms must yield, is that the intention of the legislature must be ascertained, if possible, and when once ascertained, will be given effect, even though it may not be consistent with the strict letter of the statute. Struckman v. Board of Trustees of Tracy Union High School, 38 Cal. App. 2d 373, 101 P.2d 151.

One of the cardinal rules to be applied in construing a statute is that the interpretation must be based on the language used, and the court has no power to rewrite a statute to make it conform to an intention not expressed; a strained construction should not, however, be placed on its words, and the interpretation should always be reasonable and according to the common understanding of the language used, with a view to giving effect to all of its provisions if possible. Armstrong v. Smith, — Cal. App. 2d —, 122 P.2d 115.

— Idaho.

A statute written in the plain and ordinary language in common everyday use, dealing with a subject that is neither technical nor scientific, should be construed as the ordinary reading public would read and understand it. Howard v. Grimes Pass Placer Min. Co., 21 Idaho 12, 120 P. 170, Ann. Cas. 1913 C 284.

— Iowa.

Where statutes are revised and some parts of the original are omitted, the parts omitted cannot be revived by construction but are considered annulled. Boyd v. Smyth, 200 Iowa 687, 205 N. W. 522, 43 A. L. R. 1381.

As a general rule, codification does not, by mere change of the language of a statute, alter the meaning or construction to be given to it. State v. Erle, 210 Iowa 974, 232 N. W. 279, 72 A. L. R. 137.

In order to work repeal by implication of old law by new one, there must be absolute repugnancy between the two. DeShaw v. South Fork Township School Dist., 231 Iowa 27, 300 N. W. 650.

Each section of legislative act must be construed with act as a whole, and with every other section. Wood Bros. Thresher Co. v. Eicher, 231 Iowa 550, 1 N. W. 2d 655.

Rules are of value only as aid to construction in case of ambiguity, but ordinarily statute and exception proviso, or saving clause, are to be considered together in endeavoring to ascertain legislative intent. McJimsey v. Des Moines, 231 Iowa 693, 2 N. W. 2d 65.

Any proviso, exemption, or exception in any statute contrary to or in derogation of its general enacting clause must be strictly construed, and all doubts should be resolved in favor of general provision rather than exception. State v. Iowa Southern Utilities Co. of Delaware, 231 Iowa 784, 2 N. W. 2d 372.

— Montana.

In construing a statute the court must elicit the purpose and intent of the statute from the terms and expressions employed, if this is possible, calling to its aid the ordinary rules of grammar, and great weight should not be given to the position of a comma; in case at bar, semicolons between various brackets did not have the suggested effect of constituting the brackets one single sentence, but instead separated distinct sentences. Mills v. State Board of Equalization, 97 Mont. 13, 33 P.2d 563.

A. L. R. notes.

Accounting in equity in case of tort, 53 A. L. R. 815.

Applicability of statute of limitations or doctrine of laches as between husband and wife, 121 A. L. R. 1382.

Doctrine of equitable reconversion, 130 A. L. R. 1379.

Equity jurisdiction for cancellation of insurance policy upon ground within incontestable clause prior to termination of period, 111 A. L. R. 1275.
Failure to perform the duty to make disclosures which rests upon one because of trust or confidential relation as fraud for which equity, in an independent suit, will relieve against a judgment, 5 A. L. R. 672.
He who comes into equity must come with clean hands, 4 A. L. R. 44.
Institution of suit as relieving one of charge of laches precluding relief in equity, 43 A. L. R. 921.
Jurisdiction and power of equity to subject legacy, devise, or distributive share in estate to claim of creditor of legatee, devisee, or distributee, 123 A. L. R. 1293.
Jurisdiction of equity to protect personal rights, 14 A. L. R. 295.
Mistake as to one's interest in land under law of descent as subject of relief, 39 A. L. R. 194.
Original availability to wrongdoer of remedy under declaratory judgment act as affecting defense of laches, mitigation of damages or other equitable defenses in subsequent suit against him, 131 A. L. R. 791.
Power of equity to relieve against forfeiture of lease for nonpayment of rent, 56 A. L. R. 800.

88–2–3. Revised Statutes Not Retroactive.

No part of these revised statutes is retroactive, unless expressly so declared. (C. L. 17, § 5840.)

History.
This section is practically identical with 2 Comp. Laws 1888, § 2986; R. S. 1898, § 2490; Comp. Laws 1907, § 2490.

Comparable provisions.
Idaho Code, § 70-101, Mont. Rev. Codes, § 3 (substantially identical).

1. Operation and effect of section.
This section is merely a statement of well settled rules of statutory construction. Farrel v. Pingree, 5 U. 443, 16 P. 843.
This section is largely declaratory of pre-existing rules of statutory construction. See Mercur Gold Mining & Milling Co. v. Spry, 16 U. 222, 229, 52 P. 382.
In seeking to arrive at legislative intent statutes should be construed in light of existing circumstances. Industrial Commission v. Agee, 56 U. 63, 189 P. 414.
The section has been applied to pension laws established for benefit of disabled firemen. In re Anthony, 71 U. 501, 267 P. 789.

2. Fees.
This rule of construction was applied to a law fixing the fees of jurors and witnesses. It was held that the fees allowed should be those fixed by law at the time service was rendered. People v. Clayton, 5 U. 598, 18 P. 628; People v. Pyper, 6 U. 160, 21 P. 722.

3. Workmen's Compensation Act.
Legislative intent was that, in cases pending and being prosecuted prior to 1919 amendments to Workmen's Compensation Act becoming effective, the rights of claimants were to be determined as provided for in original act of 1917. Industrial Commission v. Agee, 56 U. 63, 189 P. 414.

88–2–4. Civil and Criminal Remedies Not Merged.

When the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other. (C. L. 17, § 5841.)

History.
This section is practically identical with 2 Comp. Laws 1888, § 3000; R. S. 1898, § 2491; Comp. Laws 1907, § 2491.

Cross-references.
Civil liability as not affected by criminal liability, 103-1-5.

88–2–5. Effect of Repealing a Statute.

The repeal of a statute does not revive a statute previously repealed, or affect any right which has accrued, any duty imposed, any penalty incurred, or any action or proceeding commenced under or by virtue of the statute repealed. (C. L. 17, § 5842.)

History.

This section is substantially similar to a part of 2 Comp. Laws 1888, § 2998. And it is practically identical with R. S. 1898, § 2492; Comp. Laws 1907, § 2492.

1. Applicability of section.

This section would apply to abrogation of water rights. See Bacon v. Harris, 71 U. 223, 263 P. 930.

This section has no application to municipal ordinances, or to any proceeding instituted under them. Pleasant Grove City v. Lindsay, 41 U. 154, 161, 125 P. 389.

This section is not applicable where a statute is in effect a proviso or an exception to the provisions of a previous statute, and the subsequent statute is repealed, for in such case the previous statute remains in full force and effect. This rule was applied to the Redd Act, and 103-25-16, now superseded by a later section. Lagoon Jockey Club v. Davis County, 72 U. 405, 270 P. 543.

2. Saving clause of section.

A cause of action commenced under section of Blue Sky Law, but repealed before action commenced, is saved by this section. Buttrey v. Guaranteed Securities Co., 78 U. 39, 50, 300 P. 1040.

3. Effect of invalidity of repealing statute.

In case it is found that an entire statute, or only a particular provision of a statute, is invalid for any reason, and the statute so found invalid has expressly or by necessary implication repealed another statute or provision upon the same subject, so much of the former statute which was superseded by the invalid portion of the later one is not repealed, but continues in full force and effect. Board of Education of Ogden City v. Hunter, 48 U. 373, 387, 159 P. 1019.

4. Effect of repeal or repealer.

If a later statute repeals an earlier one, whether expressly or by implication, then the mere repeal of the repealing statute does not revive or restore the provisions of the earlier statute so repealed. Under this section it requires additional legislation to give force and effect to the earlier statute in so far as it was repealed by the later one. This is applicable to two statutes in irreconcilable conflict. Lagoon Jockey Club v. Davis County, 72 U. 405, 270 P. 543.

5. Operation and effect of repealed statute.

General rule is that repealed part of act, although of no operative force, must be considered in construing unrepealed part thereof. Ogden City v. Boreman, 20 U. 98, 57 P. 843. In other words, propriety of comparing repealed statutes with statutes remaining in force, or subsequently enacted, for purpose of construing latter, is not to be questioned in absence of any reference to repealed statutes in statutes under consideration. Ogden City v. Boreman, 20 U. 98, 57 P. 843.

6. Effective date of repealer.

In case a statute is made effective only from a future date, but in terms repeals the former law upon the subject, repealing clause becomes effective only at the time the statute goes into effect. Board of Education of Ogden City v. Hunter, 48 U. 373, 159 P. 1019.

7. Repeals by implication.

One legislative act is not to be allowed to defeat another if, by reasonable construction, two acts can be made to stand together. University of Utah v. Richards, 20 U. 457, 59 P. 96, 77 Am. St. Rep. 928. Accordingly, it is well settled that repeals by implication are not favored by law. University of Utah v. Richards, 20 U. 457, 59 P. 96, 77 Am. St. Rep. 928.

One act is not to impliedly repeal another if by reasonable construction two acts can be harmonized and made to stand together. Nelden v. Clark, 20 U. 382, 59 P. 524, 77 Am. St. Rep. 917.

Repeal by implication will be measured by extent of conflict or inconsistency between earlier and later statutes. Nelden v. Clark, 20 U. 382, 59 P. 524, 77 Am. St. Rep. 917.

Later act, covering part or all of provisions of earlier act, does not necessarily repeal such earlier act, rule being that if, by fair and reasonable interpretation, two acts which seemingly are contradictory may be enforced and made harmonious and operative, without obscurity or conflict, both acts will be upheld, and later act will not be regarded as repealing earlier act by construction or intendment. University of Utah v. Richards, 20 U. 457, 59 P. 96, 77 Am. St. Rep. 928; Park v. Rives, 40 U. 47, 119 P. 1034.

Where a subsequent statute is so repugnant to a former one that the two cannot be construed reasonably together, the former statute is repealed by implication. A fortiori is this true where there is an express repealer. Bartch v. Meloy, 8 U. 424, 32 P. 694.

As to repeals by implication, consult general works on statutory construction.

A. L. R. notes.

Retroactive application of repeal of statute which operated as limitation of or exception to a substantive right of

action in tort otherwise arising at common law, 120 A. L. R. 943; unconstitutionality of later statute as affecting provision purporting specifically to repeal earlier statute, 102 A. L. R. 802.

88–2–6. Identical Provisions Deemed a Continuation, Not New Enactment.

The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment. (Code Report.)

History.
This section is substantially similar to 2 Comp. Laws 1888, § 2988.

Comparable provisions.
Cal. Civil Proc. Code, § 5 (provisions of Code of Civil Procedure are construed as continuations of existing statutes that are substantially the same); Mont. Rev. Codes, § 5 (idem as to provisions of Political Code).

1. Re-enactment of statute.
Re-enactment of statutes of limitation by R. S. 1933 amounted, not to a repeal of the antecedent sections, but to a reaffirmation thereof. Attorney General v. Pomeroy, 93 U. 426, 73 P.2d 1277, 114 A. L. R. 726.
By re-enacting statute supreme court must assume that legislature was satisfied with construction court placed upon statute before re-enactment. State v. Roberts, 56 U. 136, 190 P. 351.

88–2–7. Time, How Computed.

The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then it also is excluded. (C. L. 17, § 5843.)

History.
This section is substantially similar to 2 Comp. Laws 1888, § 2992. It is identical with R. S. 1898, § 2493; Comp. Laws 1907, § 2493.

Comparable provisions.
Cal. Civil Proc. Code, § 12, Idaho Code, § 70–109 (substantially identical).

Cross-references.
Holidays, Title 37.

1. Status of section.
This section is largely declaratory of pre-existing law. See Tilton v. Sterling Coal & Coke Co., 28 U. 173, 77 P. 758, 107 Am. St. Rep. 689; I. X. L. Furniture & Carpet Installment House v. Berets, 32 U. 454, 91 P. 279.

2. General construction of statutes.
Specification in statute of time for doing of act should be held directory only when doing of act at another time is not forbidden, unless doing of it at another time would unjustly affect private or public interests. Nelson v. Southern Pac. Co., 18 U. 244, 55 P. 364.

3. Computation of time in general.
Where statute requires or permits act to be done within stated number of days from or after a designated day, it is timely if done on the last day of the stated number; but where statute prescribes period within which act may not be done as not less than a certain number of days before designated day, act must be done without such period and cannot be performed on any day within such period, both designated day and most remote day within period being excluded as days on which act may be done. Wood v. Cowan, 68 U. 388, 397, 250 P. 979.

4. Bills of exceptions.
This section will be applied in determining whether 30-day period prescribed by 104–39–4 has expired before application was made for extension of time under 104–42–7. Independent Gas & Oil Co. v. Beneficial Oil Co., 71 U. 348, 266 P. 267.

5. Election laws.
Where filing is to be made under Primary Election Law "not less than 15 days before election," both election day and 15th day before election, counting day immediately preceding election as first, must be excluded in determining timeliness. Wood v. Cowan, 68 U. 388, 250 P. 979.

6. Notice of appeal.
Where motion for new trial was overruled on June 5, 1916, judgment became final, and time for appeal began to run on that date, and notice of appeal served December 6, 1916, was not timely within 104–41–2. Fuller v. Ferrin, 51 U. 105, 168 P. 1179.

7. Pleadings.

In view of this provision, excluding first day and also the last on which an act may be done when last day falls on holiday, complaint filed one day after expiration of limitation period under 104–2–21 is timely where previous day was Sunday. Nelson v. Jorgenson, 66 U. 360, 242 P. 945.

This section has been applied to the computation of the time in which a defendant must appear and answer a summons issued out of justices' court. Ducheneau v. House, 4 U. 363, 10 P. 427.

8. Publication of notices.

This section has been applied to the ten-day notice provided for by 102–14–1. Pearson v. Butler, 79 U. 583, 11 P.2d 972.

Section applicable to publication of notice of intention to make local improvements under 15–7–40. Salt Lake & U. R. Co. v. Payson City, 66 U. 521, 244 P. 138.

9. Public officers.

General rule is that, where statute imposes on public officers duty of performing some act in which public is interested and fixes time for doing such act, requirement as to time is to be regarded as directory and not limitation on exercise of power granted, unless statute contains negative words denying right to exercise power after time named or, from character of act, manner and mode of its performance, or its effect on public interests or private rights, it must be presumed that legislature had in contemplation that act had better not be performed at all than to be performed at time other than that designated. Kennedy v. Oregon Short Line R. Co., 18 U. 325, 54 P. 988.

10. Judicial notice.

In making the computation prescribed by this section supreme court may take judicial notice that a certain date fell on Sunday. Thompson v. Industrial Commission, 73 U. 212, 273 P. 311.

A. L. R. notes.

Inclusion or exclusion of first or last day in computing period of time prescribed by insurance contract, 137 A. L. R. 1155; is Sunday to be included in computation of period within which bill must be presented to governor, 71 A. L. R. 1363.

88–2–8. When a Day Appointed Is a Holiday.

Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next succeeding business day with the same effect as if it had been performed upon the day appointed.

(C. L. 17, § 5844.)

History.

This section is substantially similar to 2 Comp. Laws 1888, § 2993 down to a proviso which excluded negotiable instruments from its operation. It is also substantially identical with R. S. 1898, § 2494; Comp. Laws 1907, § 2494, which, however, also excluded maturity date of negotiable instruments from their operation.

Comparable provisions.

Cal. Civil Proc. Code, § 13, Idaho Code, § 70–110 (identical, except that word "succeeding" is omitted).

Cross-references.

When negotiable instrument falls due on a holiday, 61–1–87.

1. Complaint.

In view of this provision and 88–2–7 complaint is timely though filed one day after expiration of limitation period in 104–2–21, where previous day was Sunday. Nelson v. Jorgenson, 66 U. 360, 242 P. 945.

2. Bill of exceptions.

Where time to serve bill of exceptions was extended and last day to which extension was made fell on Sunday, an order granting further extension on Monday following was in time and valid. Jeremy Fuel & Grain Co. v. Denver & R. G. R. Co., 59 U. 266, 203 P. 863.

88–2–9. Seal, How Affixed.

When the seal of a court or public officer is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, as well as upon wax or a wafer affixed

thereto. In all other cases the word "seal" may include a scroll printed or written. (C. L. 17, § 5845.)

History.
This section differs in no essential particulars from 2 Comp. Laws 1888, § 2994. It is practically identical with R. S. 1898, § 2495; Comp. Laws 1907, § 2495.

Comparable provisions.
Cal. Civil Proc. Code, § 14, Idaho Code, § 70–111, Mont. Rev. Codes, § 13 (when seal of a court, public officer or person is required by law to be affixed to any paper, word "seal" includes impression of such seal upon the paper alone as well as upon wax or a wafer affixed thereto).

Cross-references.
Private seals not necessary, 104–48–4.

88–2–10. Joint Authority Is Authority to Majority.

Words giving a joint authority to three or more public officers, or other persons, are to be construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority. (C. L. 17, § 5846.)

History.
This section is substantially similar to 2 Comp. Laws 1888, § 2995, and to R. S. 1898, § 2496; Comp. Laws 1907, § 2496.

Comparable provisions.
Cal. Civil Proc. Code, § 15, Idaho Code, § 70–112, Iowa Code 1939, § 63, subd. 4, Mont. Rev. Codes, § 14 (substantially identical).

Cross-references.
Majority of executors or administrators may act, 102–11–1; all three referees must meet, but two may act, 104–27–8.

1. Words and phrases defined.
It is not "otherwise expressed" in any statute prescribing the powers and duties of the board of education. Tooele Building Ass'n v. Tooele High School Dist. No. 1, 43 U. 362, 134 P. 894.

88–2–11. Rules of Construction—As to Words and Phrases.

Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition. (C. L. 17, § 5847.)

History.
This section is substantially similar to 2 Comp. Laws 1888, § 2996, and to R. S. 1898, § 2497; Comp. Laws 1907, § 2497.
This section formerly appeared as paragraph 23 of section 1836, Title XXI of the Penal Code adopted by the territorial legislature. See People v. Butler, 2 U. 504.

Scope of annotations.
It is not the purpose of these annotations to include a general discussion of the rules of statutory construction. Standard works should be consulted in that regard.

Comparable provisions.
Cal. Civil Proc. Code, § 16, Idaho Code, § 70–113, Mont. Rev. Codes, § 15 (substantially identical, except that they read, in part: "* * * and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section * * *").
Iowa Code 1939, § 63, subd. 2 (substantially identical, except that it reads in part as follows: "* * * and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such meaning").

1. Operation and effect of section.
This section is merely declaratory of pre-existing rules of statutory construction. State v. Navaro, 83 U. 6, 26 P.2d 955.
Unless contrary appears, terms of legislative enactment must be taken in their ordinary and usual significance as they are generally understood. Emmertson v. State Tax Commission, 93 U. 219, 72 P.2d 467, 113 A. L. R. 1174.

Words and phrases are to be construed according to the context and the approved usage of the language except technical words and phrases, which must be construed according to their plain and ordinary meaning, but technical rules of construction may be disregarded where it is manifest, when the subject of legislation, considered from all points of view, is such as to convince the understanding that the legislature could not have intended a literal interpretation. State v. Hendrickson, 67 U. 15, 245 P. 375, 57 A. L. R. 786.

Meaning of words found in statute must be determined from general context of the same and the intent or object sought to be accomplished by the legislation, and courts in attempting to arrive at the intent of the legislature will disregard mere forms and look to the substance. State v. Franklin, 63 U. 442, 226 P. 674.

Unless technical terms are used, words employed in statute must be given their usual and ordinary meaning. Cache Auto Co. v. Central Garage, 63 U. 10, 221 P. 862, 30 A. L. R. 1217.

2. Court's duty.

In construction of statutes it is duty of courts to ascertain intent of legislative body, and in determining this intent, not only should language of act be considered, but also purposes and objects sought by legislature, and if legislation is within constitutional power, to enforce such intent. Price v. Tuttle, 70 U. 156, 159, 258 P. 1016.

It is court's duty, when possible, to give to every word, phrase, clause, and sentence of statute a consistent, reasonable meaning. Robinson v. Union Pac. R. Co., 70 U. 441, 261 P. 9.

It is duty of courts to enforce plain intent of statute, but courts ought not to construe an act to effect the forfeiture of property of one citizen to another, unless "plain and unequivocal mandate of the legislature admits of no other rational construction." Rospigliosi v. Glenallen Min. Co., 69 U. 41, 252 P. 276 (construing usury statute).

3. Words and phrases defined.

4. — in general.

Definition of word may depend upon the character of its use in a statute. State v. Navaro, 83 U. 6, 26 P.2d 955.

Every word and phrase must be given some force and effect if possible, and this notwithstanding fact that in doing so effect of particular section or statute may thereby be enlarged or restricted. Board of Education of Carbon County School Dist. v. Bryner, 57 U. 78, 192 P. 627.

Where there is doubt respecting true meaning of certain words, then words should be read in light of conditions and necessities which they are intended to meet and objects sought to be attained thereby. United States Smelting, Refining & Milling Co. v. Utah Power & Light Co., 58 U. 168, 197 P. 902.

Presumption is that words are used in their ordinary sense and if a different interpretation is sought it must rest upon something in the character of the legislation or in the context which will justify a different meaning. Deseret Sav. Bank v. Francis, 62 U. 86, 217 P. 1114.

5. — meaning of word "may."

Word "may" as used in 21-6-10, providing that judge of city court "may" employ shorthand reporter upon request of any party, should be construed as discretionary, not mandatory. Purcell v. Wilkins, 57 U. 467, 195 P. 547.

6. — meaning of word "maintain."

In applying this section to the construction of word "maintain," the court said that that which is contained in statute by implication is as much part of statute as that which expressly appears therein. Merrill v. Spencer, 14 U. 273, 46 P. 1096.

7. Words used repeatedly in statute.

Word repeatedly used in statute will be presumed to bear same meaning throughout statute, unless there is something to show that another meaning was intended. Merrill v. Spencer, 14 U. 273, 46 P. 1096; State v. Tingey, 24 U. 225, 67 P. 33.

The same words, especially if found in different statutes, may not always have the same effect, and it follows that in order to determine intention and purpose of lawmaker, and to harmonize conflicting provisions where such occur, it at times becomes necessary for courts to expand or to restrict ordinary and usual meaning of words, phrases, or clauses found in particular section or statute. Board of Education of Carbon County School Dist. v. Bryner, 57 U. 78, 192 P. 627.

8. Supplying omissions.

Court may inquire into purpose sought to be accomplished in order to supply missing words of statute, and words which are obviously necessary to complete sense will be supplied to effect a meaning clearly shown by other parts of statute. Chez ex rel. Weber College v. Utah State Building Commission, 93 U. 538, 74 P.2d 687.

In construing statutes court may supply manifest omissions in order to avoid absurd and mischievous consequences and to effect legislative intent. Gunnison Sugar Co. v. Public Utilities Commission, 69 U. 521, 256 P. 700.

Decisions from other jurisdictions.

— California.

The established rule of statutory construction in California is that, if possible, effect must be given to each sentence, word, and phrase thereof, and that, unless the exigencies of a situation, from a consideration of a statute or charter as a whole, imperatively demand that some word, phrase, or sentence thereof be disregarded, rendered useless, or deprived of meaning, no such word, phrase or sentence should be considered unnecessary or surplusage. Los Angeles County v. Emme, 42 Cal. App. 2d 239, 108 P.2d 695.

— Iowa.

Words and phrases in a statute must be construed according to the context and the approved usage of the language unless they have acquired by custom or usage a peculiar or technical meaning. Seavert v. Cooper, 187 Iowa 1109, 175 N. W. 19.

Ordinarily, in statutory construction, grammatical sense of words is to be adhered to, unless that sense is contrary to clear intent and purpose of statute, or it would result in absurdity, repugnance or inconsistency in different provisions thereof. Haugen v. Humboldt-Kossuth Joint Drainage Dist. No. 2, 231 Iowa 288, 1 N. W. 2d 242.

A. L. R. notes.

Amendments as aid in construction of statute, 70 A. L. R. 22.

Declaratory judgment construing statute, 50 A. L. R. 51.

Mistake in referring to another statute, constitutional provision, public document, record, or the like, 14 A. L. R. 274.

Stipulation of parties as to construction and effect of statute, 92 A. L. R. 669.

Supplying omitted words in statute or ordinance, 126 A. L. R. 1325.

88–2–12. Id. As to These Statutes.

In the construction of these statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the statute:

(1) The word "month" means a calendar month, unless otherwise expressed, and the word "year," or the abbreviation "A.D." is equivalent to the expression "year of our Lord."

(2) The word "oath" includes "affirmation," and the word "swear" includes "affirm." Every oral statement under oath or affirmation is embraced in the term "testify," and every written one, in the term "depose."

(3) The word "signature" includes any name, mark or sign written with the intent to authenticate any instrument or writing.

(4) The word "writing" includes printing, handwriting and typewriting.

(5) The word "person" includes bodies politic and corporate, partnerships, associations and companies.

(6) The singular number includes the plural, and the plural the singular.

(7) Words used in one gender comprehend the other.

(8) Words used in the present tense include the future.

(9) The word "property" includes both real and personal property.

(10) The terms "land," "real estate" and "real property" include land, tenements, hereditaments, water rights, possessory rights and claims.

(11) The term "personal property" includes every description of money, goods, chattels, effects, evidences of rights in action, and all written instruments by which any pecuniary obligation, right or title to property is created, acknowledged, transferred, increased, defeated, discharged or diminished, and every right or interest therein.

(12) The word "will" includes codicils.

(13) The word "writ" signifies an order or precept in writing, issued in the name of the state or of a court or judicial officer; and the word "process," a writ or summons issued in the course of judicial proceedings.

(14) The word "state," when applied to the different parts of the United States, includes the District of Columbia and the territories; and the words "United States" may include the District and the territories.

(15) The words "highway" and "road" include public bridges, and may be held equivalent to the words "county way," "county road," "common road" and "state road."

(16) The words "insane person" include idiots, lunatics, distracted persons and persons of unsound mind.

(17) The words "sheriff," "county attorney," "clerk," or other words used to denote an executive or ministerial officer, may include any deputy, or other person performing the duties of such officer, either generally or in special cases; and the words "county clerk" may be held to include "clerk of the district court."

(18) The word "executor" includes administrator, and the term "administrator" includes executor, when the subject matter justifies such use.

(19) The word "population" shall be taken to be that as shown by the last preceding state or national census, unless otherwise specially provided.

(20) The word "councilman" may include a town trustee or a city commissioner, and "city commissioner" may include a councilman.

(21) The word "town" may mean incorporated town and may include city, and the word "city" may mean incorporated town.

(22) The word "vessel," when used with reference to shipping, includes steamboats, canal boats, and every structure adapted to be navigated from place to place. (C. L. 1, § 5848.)

History.

Some of the subdivisions of this section were taken from the Civil Practice Act of 1870. Comp. Laws 1876, § 1815. It is substantially similar to 2 Comp. Laws 1888, § 2997, which, however, only included seven subdivisions, and is practically identical with R. S. 1898, § 2498; Comp. Laws 1907, § 2498.

Comparable provisions.

Cal. Civil Proc. Code, § 17, Idaho Code § 70-114, Iowa Code 1939, § 63, subds. 5 to 26, Mont. Rev. Codes, § 16 (indicating signification to be attached to certain terms and expressions).

1. Subdivision (4).

In view of provisions of 19-18-7, permitting charging of fees only for words "actually written therein," where printed forms are used in recording, recorder cannot charge for all words in form under 28-2-1 and 28-2-3, notwithstanding provision of this section that word "writing" includes printing. First Sav. Bank of Ogden v. Bramwell, 67 U. 341, 247 P. 573.

Under this provision, typewritten indorsement of check complies with 61-1-32, which provides that indorsement must be written on instrument. Pingree Nat. Bank of Ogden v. McFarland, 57 U. 410, 195 P. 313.

2. Subdivision (7).

Subdivision (7) of this section, which came from the Penal Code adopted by the territorial legislature, was held to warrant a holding that the word "horse" embraces both "mare" and "gelding." People v. Butler, 2 U. 504.

3. Subdivision (10).

Mining claims are real property and pass by deed. Lavagnino v. Uhlig, 26 U. 1, 71 P. 1046, 99 Am. St. Rep. 808, aff'd 198 U. S. 443, 49 L. Ed. 1119, 25 S. Ct. 716. (Brewer, J., concurring in result; McKenna, J., dissenting.)

4. Subdivision (16).

Section not in conflict with 102-13-19 and 102-13-20. In re Lamont's Estate, 95 U. 210, 79 P.2d 649.

5. Subdivision (17).

Deputy treasurer is officer within meaning of 103-26-59, providing for punishment for misuse of public money. McMillin v. Emery, 59 U. 563, 205 P. 898.

6. Subdivision (21).

Word "city" in 86-1-50, giving state land board authority to invest state school funds in bonds of city, means "incorporated town," and hence land board may invest in bonds of incorporated towns. State Board of Land Com'rs v. Ririe, 56 U. 213, 190 P. 59. (Frick, J., dissenting.)

A. L. R. notes.

"And/or," 118 A. L. R. 1307.

"By" as fixing time for performance of act or happening of event, 12 A. L. R. 1168.

"Devise" or "devisee" in statute as including "legacy" or "legatee," and vice versa, 4 A. L. R. 246.

"Etc." or "&c.," meaning, 77 A. L. R. 887.

Meaning of term "issue" when used as word of purchase, 117 A. L. R. 691.

"Owner," scope and import of term as used in statutes relating to real property, 2 A. L. R. 778.

"Similar," meaning of, 17 A. L. R. 94, 101.

Supplying omitted words in statute or ordinance, 126 A. L. R. 1325.

"Until" as word of inclusion or exclusion, 16 A. L. R. 1094.

TITLE 89

STERILIZATION

89-0-1. Authorized in Certain Cases.
89-0-2. Procedure to Obtain Authority.
89-0-3. Id. Notice of Hearing.
89-0-4. Id. Service of Notice—Guardian—Fee.
89-0-5. Id. Hearing.
89-0-6. Id. Evidence — Witnesses—Depositions — Right to Counsel.
89-0-7. Id. Action of Authorities by Order.
89-0-8. Id. Appeal to District Court.
89-0-9. Id. Judgment of District Court—Stay.
89-0-10. Id. Appeal to Supreme Court—Stay.
89-0-11. Legitimate Treatment by Physicians Not Affected by Title.
89-0-12. Unlawful Destruction of Power to Procreate, a Felony.

89-0-1. Authorized in Certain Cases.

Whenever the superintendent of the Utah state hospital or of the Utah state training school, or of the state industrial school, or the warden of the state prison, shall be of the opinion that it is for the best interests of the inmates or of society that any inmate confined in the institution under his care shall be sexually sterilized, such superintendent or warden is authorized to cause to be performed by some capable surgeon the operation of sterilization or sexualization on any such inmate afflicted with habitual degenerate sexual criminal tendencies, insanity, idiocy, imbecility, feeble-mindedness or epilepsy; *provided*, that such superintendent or warden shall have first complied with the requirements of this title. Whenever the word "board" is used in this title it shall mean the governing body of the Utah state hospital, the Utah state training school, the state prison, or the state industrial school, as the case may be by whatever name such body may be known.

(L. 29, p. 75, § 1.)

History.

As amended by L. 41, 1st Spec. Sess., ch. 39, eff. July 1, changing text of last sentence of section.

This law is substantially the same as the Virginia law upheld by the United States Supreme Court. Davis v. Walton, 74 U. 80, 276 P. 921.

Comparable provisions.

Cal. Penal Code, § 2670 (authorizing resident physician of any state prison to call in consultation the general superintendent of state hospitals and secretary of state board of health for joint examination into particulars of proposed asexualization of recidivist lawfully confined in state prison; operation not to be performed unless recidivist has been committed to state prison in California or other state or country, at least two times for rape, assault with intent to commit rape, or seduction, or at least three times for any other crime or crimes; in case of convicts sentenced to state prison for life, provision applies whether they shall have been inmates of a state prison more than one time or not; nothing in this section applies to voluntary patient confined or kept in any state hospital); § 645 (court may direct that operation be performed, for prevention of procreation, whenever any person is adjudged guilty of carnal abuse of female person under age of ten years).

Idaho Code, § 64-601, Iowa Code 1939, § 2437.01 (creating state board of eugenics).

Mont. Rev. Codes, § 1444.1 ("Eugenical Sterilization Law"); § 1444.3 (creating state board of eugenics); § 1444.4 (duty of board to approve or disapprove certificate of sterilization submitted by

chief physician of custodial institution, and to review decision of said chief physician in case of nonconsent on part of guardian or best friend of inmate).

Cross-references.

State hospital, 85–7; industrial school, 85–6; state training school, 85–8; state prison, 85–9.

1. Validity.

The provisions of this title are constitutional. The fact that the law is subject to abuse does not render it unconstitutional. Davis v. Walton, 74 U. 80, 276 P. 921.

2. Nature and purpose.

This act is in no sense a penal statute. The operation provided for is not a punishment for crime. Its purposes are eugenic and therapeutic. Davis v. Walton, 74 U. 80, 276 P. 921.

Decisions from other jurisdictions.

— Federal.

Constitutional requirement of due process of law, the constitutional prohibition against bills of attainder, and the constitutional prohibition against the infliction of cruel and unusual punishments, invalidated former Iowa statute, authorizing the operation of vasectomy or ligation of the Fallopian tubes, as the case might be, on idiots, feebleminded persons, drunkards, drug fiends, epileptics, syphilitics, and moral and sexual perverts, and making such operation mandatory as to criminals who had been twice convicted of a felony. Davis v. Berry, 216 Fed. 413; Decree reversed, and bill dismissed without costs to either party, Berry v. Davis, 242 U. S. 468, 61 L. Ed. 441, 37 S. Ct. 208, the Supreme Court observing: "An appeal was taken to this court in 1914. In 1915 the Act of 1913 was repealed, and the substituted act does not apply to the plaintiff. * * * All possibility or threat of the operation has disappeared now. If not before, by the act of the state. Upon the precedents we are not called upon to consider the propriety of the action of the district court, but the proper course is to reverse the decree and remand the cause, with directions that the bill be dismissed without costs to either party."

— Idaho.

The law in behalf of the general welfare demanded that vasectomy be applied, in case at bar, vasectomy being a comparatively simple surgical operation, neither seriously dangerous or painful, nor at all injurious to the physical health or happiness of the individual upon whom it is performed, but being effective of its purpose, the evidence in the case being clear and convincing that appellant was mentally deficient to the degree of imbecility, and that this condition was native, incurable, and a controlling hereditary trait; and, if there be any natural right for natively mental defectives to beget children, that right must give way to the police power of the state in protecting the common welfare so far as it can be protected, against such an hereditary type of feeblemindedness. State v. Troutman, 50 Idaho 673, 299 P. 668.

The Idaho act applies to all coming within the class defined, whether in state institutions or not; it does not create a class nor discriminate against any within the class affected; and, although sterilization acts of other states have been held unconstitutional where applied only to inmates of institutions of the state, the courts of Virginia (Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A. L. R. 855) and the supreme court of the United States (Buck v. Bell, 274 U. S. 200, 47 S. Ct. 584, 71 L. Ed. 1000) have held that even that restriction did not render the law unconstitutional; and, commenting on this question, the supreme court stated: "The law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow." State v. Troutman, 50 Idaho 673, 299 P. 668.

A. L. R. notes.

Asexualization or sterilization of criminals or defectives, 87 A. L. R. 242.

89–0–2. Procedure to Obtain Authority.

Such superintendent or warden shall first present to the board of his institution a petition stating the facts of the case and the grounds of his opinion, verified by his affidavit to the best of his knowledge and belief, and praying that an order may be entered by such board directing him to have performed by some competent surgeon upon the inmate named in such petition the operation of vasectomy, if upon a male inmate, and of salpingectomy, if upon a female inmate, or asexualization of either. (L. 29, p. 75, § 2.)

Comparable provisions.
Idaho Code, § 64–602, Iowa Code 1939, § 2437.02 (requiring designated officials to report to board of eugenics as to all persons, male or female, who are feeble-minded, insane, habitual criminals, moral degenerates, sexual perverts, who are a menace to society; Idaho designates also epileptic; Iowa designates also syphilitic; Idaho provision also reads, in part: "* * * who are, or in their opinion are likely to become, a menace to society").

89–0–3. Id. Notice of Hearing.

A copy of the petition must be served upon the inmate, together with a notice in writing designating the time, not less than thirty days before the presentation of such petition to such board, and the place in the institution, when and where said board will hear and act upon such petition. (L. 29, p. 75, § 2.)

Comparable provisions.
Iowa Code 1939, § 2437.03 (requiring that written notice be served on person, who has been reported to state board of eugenics, as to such report and as to examination and hearing).

89–0–4. Id. Service of Notice—Guardian—Fee.

A copy of the petition and notice shall also be so served upon the legal guardian of the inmate, if such guardian is known to the superintendent or warden, and, if there is no such guardian or none such is known to him, then he shall apply to the district court of the county in which his institution is situated, or to the judge thereof in vacation, who by a proper order shall appoint some suitable person to act as guardian of such inmate during, and for the purposes of, proceedings under this title, and to defend the rights and interests of such inmate. The guardian so appointed shall be paid by the institution a fee of not exceeding $25, as may be determined by the judge of the court, for his services under such appointment, and such guardian shall be served with a copy of the petition and notice. Such guardian may be removed or discharged at any time by the court, or the judge thereof in vacation, and a new guardian appointed and substituted in his place. (L. 29, p. 75, § 2.)

89–0–5. Id. Hearing.

If the inmate is an infant having a living parent or parents whose names and addresses are known to the superintendent or warden, they or either of them as the case may be shall also be served with a copy of the petition and notice. After the notice required by this title shall have been so given the board at the time and place named therein, with such reasonable continuances from time to time and from place to place as the board may determine, shall proceed to hear and consider the petition and the evidence offered in support of and against the same, and shall see to it that the inmate shall have opportunity to attend the hearings in person, if desired by him, or if requested by his guardian or parent. (L. 29, p. 75, § 2.)

Comparable provisions.
Iowa Code 1939, § 2437.04 (reported person may be represented by counsel at hearing, and may introduce evidence); Idaho Code, § 64–603, Iowa Code 1939, § 2437.05 (pertain to duties of board at hearing).

1. Due process of law.
By this provision, the inmate upon whom it is proposed to perform the operation is given ample opportunity to be heard before the operation may be performed. Davis v. Walton, 74 U. 80, 87, 276 P. 921.

89–0–6. Id. Evidence—Witnesses—Depositions—Right to Counsel.

The board may receive and consider as evidence at the hearing the commitment papers and other records of the inmate with or in the institution as certified by the superintendent or warden thereof, together with such other evidence as may be offered by any party to the proceeding. Any member of the board shall have power to administer oaths to any witnesses at such hearing. Depositions may be taken and used as in civil cases. The board shall preserve all evidence offered at such hearings and shall have reduced to writing in duplicate all oral evidence so heard, to be kept with its records. Any party to the proceedings shall have the right to be represented by counsel at such hearings. (L. 29, p. 75, § 2.)

Comparable provisions.

Iowa Code 1939, § 2437.04 (reported person has right to have witnesses subpoenaed); Idaho Code, § 64–603, Iowa Code 1939, § 2437.06 (board may issue subpoenas).

Cross-references.

Depositions, 104–51.

1. Evidence.

The admissibility of evidence tending to prove or failing to prove the issue of incompetency is discussed at length in a valuable opinion in Rawson v. Hardy, 88 U. 109, 117, 39 P.2d 755, written by Mr. Justice Moffat.

89–0–7. Id. Action of Authorities by Order.

The board may deny the prayer of the petition, or, if it shall find that the inmate is habitually sexually criminal, or is insane, idiotic, imbecile, feeble-minded or epileptic, or is afflicted with degenerate sexual tendencies, and by the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted, and that the inmate may be sexually sterilized or asexualized without detriment to his or her general health, and that the welfare of the inmate and of society will be promoted by such sterilization or asexualization, the board may order such superintendent or warden to have performed by some competent surgeon, to be named in such order, upon the said inmate, after not less than thirty days from the date of such order, the operation of vasectomy, if the inmate is a male, or of salpingectomy, if the inmate is a female, or asexualization of either.

(L. 29, p. 75, § 2.)

Comparable provisions.

Idaho Code, § 64–603, Iowa Code 1939, § 2437.09 (board makes order embodying its conclusions; Iowa board specifies type of sterilization deemed best suited and most likely to produce "beneficial results"; Idaho board orders that "operation of vasectomy be performed upon such persons, if a male person, and the operation of salpingectomy be performed upon such person, if a female person"; Iowa provision embodies also the following: "Nothing contained in this chapter shall be construed to authorize castration nor removal of sound organs from the body").

1. Conditions precedent.

There are six conditions precedent to an order of asexualization. Davis v. Walton, 74 U. 80, 93, 276 P. 921.

It must be made to appear that the welfare of the inmate will in some way be promoted before he can be lawfully asexualized. And the evidence must justify a finding that by the law of heredity such inmate is the probable potential parent of socially inadequate offspring likewise afflicted. The court does not judicially know this. Davis v. Walton, 74 U. 80, 89, 276 P. 921.

Decisions from other jurisdictions.

— Federal.

Although there are differences between the two operations of castration and vasectomy, and although the effect upon the man would be different in several respects, nevertheless the purpose and the shame and humiliation and degradation and mental torture are the same in one case as in the other; the

infliction of this penalty is in violation of the Constitution, which provides that cruel and unusual punishment shall not be inflicted. Davis v. Berry, 216 Fed. 413, decree reversed and bill dismissed without costs to either party, without any consideration of propriety of district court's action, due to repeal of former Iowa statute, Berry v. Davis, 242 U. S. 468, 61 L. Ed. 441, 37 S. Ct. 208.

89-0-8. Id. Appeal to District Court.

From any order so entered by the board the superintendent or warden, or the inmate or his guardian, parent or next friend, may within thirty days after the date of such order appeal to the district court of the county in which such institution is situated; which appeal may be taken by giving notice thereof in writing to any member of the board and to the other parties to the proceeding. Whereupon the superintendent or warden shall forthwith cause a copy of the petition, notice, evidence and orders of the board, certified by its presiding officer or in his absence by any other member thereof, to be transmitted to the clerk of said district court, who shall file the same and docket the appeal, which shall be heard and determined by the court as soon thereafter as may be practicable. (L. 29, p. 75, § 3.)

Comparable provisions.

Mont. Rev. Codes, § 1444.6 (all decisions of state board of eugenics are appealable to district court).

89-0-9. Id. Judgment of District Court—Stay.

The district court in determining such appeal may consider the record of the proceedings before the board, including the evidence therein appearing, together with such other evidence as the court may consider pertinent and proper that may be offered by any party to the appeal. Upon such appeal the district court may affirm, reverse or modify the order of the board appealed from, and may enter such order as it deems just and right, which it shall certify to the board. The pendency of such appeal shall stay proceedings under the order of the board until the appeal is determined. (L. 29, p. 75, § 3.)

Comparable provisions.

Idaho Code, § 64-607, Iowa Code 1939, § 2437.15 (if person does not consent, within 20 days from service of order upon him, to performance of operation, board of eugenics files transcript of its proceedings, findings, conclusions and order with district court clerk); Idaho Code, § 64-608, Iowa Code 1939, § 2437.17 (issue raised is whether findings and conclusions of the board shall be affirmed by the court; tried as special proceeding in same manner as civil action at law).

Mont. Rev. Codes, § 1444.6 (on appeal to district court, sterilization proceedings are suspended until final disposition of case by the court).

Decisions from other jurisdictions. — Idaho.

Findings and conclusions of the Idaho board are only recommendatory; the person concerned may or may not give written consent thereto, and if written consent be not given, then the board of eugenics must proceed in court where a purely judicial proceeding is had, with complete final determination of all rights in the courts; this is held not an infringement upon the province of the judicial department. State v. Troutman, 50 Idaho 673, 299 P. 668.

89-0-10. Id. Appeal to Supreme Court—Stay.

Any party to such appeal in the district court may, within ninety days after entry of the final order therein, appeal to the supreme court, which shall hear and determine the same upon the record made in the

district court and enter such order as it may find that the district court should have entered. The pendency of an appeal in the supreme court shall operate as a stay of proceedings until the appeal is determined by the supreme court. (L. 25, p. 159, § 4.)

Comparable provisions.
Idaho Code, § 64–610, Iowa Code 1939, § 2437.19 (authorizing the taking of an appeal from district court to supreme court).

89–0–11. Legitimate Treatment by Physicians Not Affected by Title.

Nothing in this title shall be construed to prevent the medical or surgical treatment, for sound therapeutic reasons, of any person by a physician or surgeon licensed by this state, which treatment may incidentally involve the destruction of the reproductive functions. (L. 25, p. 159, § 6.)

89–0–12. Unlawful Destruction of Power to Procreate, a Felony.

Except as authorized by this title, every person who performs, encourages, assists in or otherwise promotes the performance of any of the operations described in this title for the purpose of destroying the power to procreate the human species, unless the same shall be a medical necessity, is guilty of a felony. (L. 25, p. 159, § 7.)

TITLE 90

SUPPLIES AND PURCHASE—BOARD OF

90–0–1 to 90–0–7. (Repealed by L. 41, 1st Spec. Sess., ch. 10, § 45, eff. July 1. See 82C–2–45.)

TITLE 91

SUPPORT OF POOR BY RELATIVES*

91-0-1. Liability of Relatives—County Commissioners to Enforce.

91-0-2. Id. Order in Which They Are Liable—Liability of Married Women.

* History of act. This title was R. S. 1898, Title 66, § 2499, p. 576; Comp. Laws 1907, Title 79, §§ 2409, 2500, p. 877.

91–0–1. Liability of Relatives—County Commissioners to Enforce.

Every poor person who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy or other unavoidable cause, shall be supported by the father, grandfathers, mother, grandmothers, children, grandchildren, brothers and sisters of such poor person, if they or any of them be of sufficient ability; and if any person shall fail or refuse to support his or her father, grandfather, mother, grandmother, child, grandchild, sister or brother, having the ability to do so, when directed by the board of county commissioners of the county where such poor person shall be found, whether such relative shall reside in the same county or not, and the burden of supporting such poor person shall fall upon the county, such relative shall forfeit and pay to the board of county commissioners for the use of the poor of the county such sums as may be by the board of county commissioners deemed adequate and proper to be paid, not exceeding $20 a month for each and every month during which the county may be charged with the support of such poor person; *provided*, that whenever any person becomes a pauper from intemperance or other bad conduct he shall not be entitled to the support from any relative except parent or child. (C. L. 17, § 5853.)

Comparable provisions.

Cal. Welf. and Inst. Code, § 2576, as amended by Laws of 1941 (aid rendered by county is charge against spouse, parent and adult child of recipient; county board of supervisors determines their financial ability to support or contribute to support of recipient); § 2577, formerly section 2579, but renumbered and amended by Laws of 1941 (court may by order require showing of cause for failure to make payments; orders may be modified, altered or revoked at court's discretion).

Iowa Code 1939, § 3828.074 (father, mother, and children of poor person, who is unable to maintain himself or herself by labor, must jointly and severally relieve or maintain such person in manner directed by township trustees); § 3828.077 (in absence or inability of nearer relatives, same liability extends to grandparents, if of ability without personal labor, and to male grandchildren who are of ability by personal labor or otherwise); § 3828.078 (district court may issue compulsory order).

Mont. Rev. Codes, § 4522 (designated relatives, in order named, if of sufficient ability, must pay to county $30 per month for use of person without means, who is unable to earn livelihood in consequence of bodily infirmity, idiocy, lunacy, or other cause).

Cross-references.

County provision for poor, 19–5–55 et seq.; liability of relatives for support of needy blind, 19–5–70; old age pensions, 19–12; old age assistance, 76A–3–4 et seq.; desertion of family, 103–13–1.

Decisions from other jurisdictions.

— California.

The legislature recognized that so far as the assistance of one's relatives is

concerned, at common law no legal liability rested upon one relative to support another, however strong the moral duty might be, and that the duty to provide such support must arise by statute. Los Angeles County v. Frisbie, — Cal. App. 2d —, 115 P.2d 900.

It was the intention of the legislature, in enacting the California provision, that before a liability to support an indigent relative arose, that liability must be fixed by a court in a proceeding brought for that purpose; and, until such an adjudication of liability and ability to furnish such support has been had, a county is without authority to commence an action to recover for aid money expended by it, at least for other than "emergency aid." Los Angeles County v. Frisbie, — Cal. App. 2d —, 115 P.2d 900.

— Iowa.

Evidence held to sustain jury's finding of ability on part of parents to furnish support to son; held also that evidence of payment of monthly sum to such son by trustees was proper evidence of indigency. Polk County v. Owen, 187 Iowa 220, 174 N. W. 99.

In suit to compel parents to furnish support to their son who was alleged to be a pauper, held that, since the son owned a $6,600 interest in Iowa farm lands, free from all encumbrance save the life estate of a woman 58 years old and in bad health, and since he had made practically no effort to borrow on or to sell such interest, a finding that he was destitute, helpless and a pauper was unwarranted. Polk County v. Owen, 187 Iowa 220, 174 N. W. 99.

A. L. R. notes.

Adoption as affecting duty of support or assistance otherwise owed by natural parent to child, or by child to natural parent, 114 A. L. R. 494.

Constitutionality of statute imposing liability upon estate or relatives of insane person for his support in asylum, 48 A. L. R. 733.

Labor or services performed by one while inmate of government institution as basis of deduction or set-off in respect of the liability of his estate or his relatives, 114 A. L. R. 981.

Liability for medical or surgical services rendered inmates of public institutions, 44 A. L. R. 1285.

Right of public to reimbursement from recipient, his estate or relatives, of old age assistance payments, 125 A. L. R. 712.

Statute imposing duty to maintain or aid indigent relative as supporting action by third person, 116 A. L. R. 1281.

Survival of statutory liability for support of relative, 96 A. L. R. 537.

91–0–2. Id. Order in Which They Are Liable—Liability of Married Women.

Children shall first be called upon to support their parents, if they are of sufficient ability; if there are none of sufficient ability, the parents of such poor person shall be next called upon; if there are neither parents nor children, the brothers and sisters shall next be called upon; and if there are neither brothers nor sisters, the grandchildren of such poor person shall next be called upon, and then the grandparents; *provided*, that a married woman shall not be liable in an action for such maintenance beyond the income of the estate of such married woman held in her own right. (C. L. 17, § 5854.)

TITLE 92

TELEGRAPHIC AND TELEPHONIC TRANSACTIONS *

92–0–1. Notice by, Authorized.
92–0–2. Transmitting Written Instruments by, Authorized—Entitled to Record—Force and Effect of Copies.
92–0–3. Id. Agreements for Payment of Money—Burden of Proof.
92–0–4. Id. Certified Instruments—Burden of Proof.

*History of act. This title was R. S. 1898, Title 68, p. 610; Comp. Laws 1907, Title 81, p. 921.

92–0–1. Notice by, Authorized.

Whenever any notice, information or intelligence is required to be given the same may be given by telegraph or telephone. Any such notice, information or intelligence shall be delivered to the telegraph or telephone operator in writing and shall be delivered to the person for whom it is intended in writing by the operator at the receiving office, who shall, on request, certify thereon that the writing so delivered is a true copy of the original. Notice by telegraph or telephone shall be deemed actual notice. (C. L. 17, § 6117.)

Comparable provisions.

Cal. Civil Proc. Code, § 1017, Idaho Code, § 12–507, Mont. Rev. Codes, § 9785 (summons, writ or order in civil suit or proceeding, and all other papers requiring service, may be transmitted by telegraph for service in any place); Cal. Penal Code, § 850, Idaho Code, § 19–616, Mont. Rev. Codes, § 11767 (justice of supreme court, or probate judge [Idaho], or judge of district court [Montana], or judge of superior court [California] may, by an indorsement under his hand upon a warrant of arrest, authorize service thereof by telegraph, and thereafter a telegraphic copy of such warrant may be sent by telegraph to one or more peace officers).

Cross-references.

Service of papers by telegraph, 104–43–9; service of warrant by telephone or telegraph, 105–13–18, 105–13–19.

1. Notice of appeal.

Under this section, notice of appeal may be served by telegraph as follows: Telegraph notice to clerk of trial court as provided for in 104–41–6, who will file the telegraph copy. Then file the original. Salina Canyon Coal Co. v. Klemm, 76 U. 372, 378, 290 P. 161.

92–0–2. Transmitting Written Instruments by, Authorized—Entitled to Record—Force and Effect of Copies.

Any power of attorney or other instrument in writing duly proved or acknowledged and certified so as to be entitled to record may, together with the certificate of its proof or acknowledgment, be sent by telegraph or telephone, and the telegraphic or telephonic copy shall prima facie have the same force and effect in all respects, and may be admitted to record and recorded in the same manner and with the same effect, as the original. (C. L. 17, § 6118.)

92–0–3. Id. Agreements for Payment of Money—Burden of Proof.

Checks, duebills, promissory notes, bills of exchange and all orders or agreements for the payment or delivery of money or other thing of

value may be made or drawn by telegraph, and when so made or drawn shall have the same force and effect to charge the maker, drawer, indorser or acceptor thereof, and shall create the same rights and equities in favor of the payee, drawee, indorsee, acceptor, holder or bearer thereof, as if duly made or drawn and delivered in writing. Except as in the next succeeding section otherwise provided, whenever the genuineness or execution of any such instrument received by telegraph shall be denied on oath by or on behalf of the person sought to be charged thereby it shall be incumbent upon the party claiming under or alleging the existence of the same to prove the existence and execution of the original writing from which the telegraphic copy was transmitted. The original message shall in all cases be preserved in the telegraph office from which the same is sent. (C. L. 17, § 6119.)

Cross-references.
Contracts by telegraph deemed in writing under statute of frauds, 33–5–7.

92–0–4. Id. Certified Instruments—Burden of Proof.

Except as hereinbefore otherwise provided, any instrument in writing, duly certified under his hand and official seal by a notary public, commissioner of deeds or clerk of a court of record to be genuine to the personal knowledge of such officer, may, together with such certificate, be sent by telegraph or telephone. The telegraphic or telephonic copy thereof shall, prima facie only, have the same force, effect and validity in all respects as the original, and the burden of proof shall be on the party denying the genuineness or due execution of the original.
(C. L. 17, § 6120.)

TITLE 93

TOBACCO [AND OLEOMARGARINE]

Chapter 1. CIGARETTE [AND OLEOMARGARINE DEALERS'] LICENSES.
Chapter 2. ADVERTISING CIGARETTES AND TOBACCO.
Chapter 3. UNLAWFUL USE.

CHAPTER 1

CIGARETTE [AND OLEOMARGARINE DEALERS'] LICENSES

93-1-1. Cigarette and Oleomargarine Dealers' License—Term—Not Transferable—Revocation — Violations — Penalty.
93-1-2. Annual Fees—Credited to General Fund.
93-1-3. Bond a Condition Precedent to Licensing—Exception.
93-1-4. Excise Tax.
93-1-5. Stamps to Be Affixed—Time — Exceptions — Bonds — Violations — Penalty — Unstamped Container as Evidence.
93-1-6. Id. Violations—Goods Declared Contraband—Seizure—Sale.
93-1-7. Id. Disposition of Proceeds.
93-1-8. Inspection—Rules and Regulations to Assist—Violations—Penalty.
93-1-9. Stamps — Making, Revising, Counterfeiting a Felony.
93-1-10. Stamps — Preparation — Distribution — Redemption — Refunding — Dealers Exempt — Discount Allowed—Trafficking in Forbidden.
93-1-11. Duties of Attorney-General, City, County or District Attorneys or Peace Officers.
93-1-12. Furnishing Cigarettes to Minors Forbidden.
93-1-13. Imported Products—Duplicate Invoices or Receipts Furnished Tax Commission.
93-1-14. Tax Commission to Enforce Provisions.
93-1-15. Collection of Delinquent Tax or Penalties.
93-1-16. Oleomargarine Defined.
93-1-17. Carriers to Report Shipments.
93-1-18. Tobacco Vending Machine Accessible to Minors—Unlawful.
93-1-19. Violation a Nuisance—Abatement.

93-1-1. Cigarette and Oleomargarine Dealers' License—Term—Not Transferable—Revocation—Violations—Penalty.

It shall be unlawful for any person to barter, sell, or offer for sale in this state, cigarettes, cigarette papers, (or oleomargarine, as defined in Section 93-1-16) without first having obtained a license therefor, which license may be granted and issued by the state tax commission, and shall be in force and effect until the 30th day of June following the date of issue, unless sooner revoked. It shall be granted only to a person owning or operating the place from which such sales are to be made, and in case sales are made at two or more separate places by

such person, a separate license for each place of business shall be required; *provided further*, that any common carrier shall be required to obtain one license only for sales on all trains operated by such carrier within this state, and for the purpose of this act, all trains of such common carriers shall be considered as one place of business. A separate license shall be required to handle cigarettes (and oleomargarine). Each license shall be numbered and shall show the residence and place of business of the licensee and shall not be transferable. The state tax commission shall on reasonable notice and after a hearing, revoke the license of any person violating any provisions of this title, and no license can be issued to such person within a period of two years thereafter. Any person engaging in the business of selling or offering for sale within this state any of the products referred to above, without having secured a license therefor shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than twenty dollars ($20) nor more than two hundred ninety-nine dollars ($299), or by imprisonment not exceeding six months, or by both such fine and imprisonment for each offense.

History.

As amended by L. 33, 2nd Spec. Sess., ch. 17, eff. Aug. 5, which amended this entire chapter, making material changes throughout text and inserting clause after "made" in eighth line.

Comparable provisions.

Cal. Agric. Code, § 611, as amended by Laws of 1941 (requiring separate licenses in order to engage in business or occupation of manufacturing, selling, dealing in or furnishing, or to have in one's possession for purposes other than consumption in one's own family, or for transportation in case of boat or railroad company, or for storage in case of warehouse or cold storage company, (a) imitation milk, (b) oleomargarine, renovated butter or substitute for butter, or (c) imitation cheese or substitute for cheese, (d) imitation ice cream or imitation ice milk).

Iowa Code 1939, § 1556.08 (every distributor, wholesaler and retailer engaged in sale or use of cigarettes, upon which tax is required to be paid, must obtain state and/or retail cigarette permit; section contains tabulation of fees); § 3100.07 (imposing inspection fee and excise tax of five cents on each pound of oleomargarine sold, offered or exposed for sale, or given or delivered to a consumer).

Mont. Rev. Codes, § 2620.45 (requiring license in order to sell, exchange, offer for sale, or have in one's possession with intent to sell or offer for sale or exchange, any oleomargarine, imitation or filled cheese or any substitute for any dairy product made from milk or cream; license must be posted in each store or place of business; separate license must be obtained for each place of business).

Cross-references.

Powers of cities and towns, 15–8–47, 15–12–9; disposition of fines, 20–4–27, 105–36–18; auditor to prepare licenses, 87–4–1; failure to obtain license as crime, 103–26–67; regulation of sale of oleomargarine, 3–10–19 to 3–10–32; sales by weight only, 3–13–20; state tax commission, Title 80.

1. State policy.

It is the policy of this state to discourage the use of cigarettes and tobacco. This act is an exercise of the state's police power, and is not a revenue measure. State v. Packer Corp., 77 U. 500, 505, 297 P. 1013, followed in 78 U. 177, 2 P.2d 114, aff'd 285 U. S. 105, 76 L. Ed. 643, 52 S. Ct. 273.

2. Power of legislature.

The traffic in and use of cigarettes and tobacco being a proper subject to be dealt with by the legislature, it is a legislative function primarily to determine the manner in which and extent to which it will deal with such subject matter. State v. Packer Corp., 77 U. 500, 297 P. 1013, followed in 78 U. 177, 2 P.2d 114, aff'd 285 U. S. 105, 76 L. Ed. 643, 52 S. Ct. 273.

Decisions from other jurisdictions.

— California.

Provisions of state law, not to mention federal laws and regulations on the subject, embrace a complete scheme for regulation of manufacture and sale of oleomargarine; and a county ordinance was invalid, the title of which disclosed its sole and only purpose, namely, to require a license and the payment of a license tax, and whose only semblance of a regulatory provision was one requir-

ing that county license as well as state license be conspicuously displayed, this purported added regulation being but a pretense inserted in the ordinance in an attempt to justify the imposition of a tax; and a $200 tax, imposed upon every retailer thereby, irrespective of amount of sales, was clearly excessive and prohibitory. Ex parte Bock, 125 Cal. App. 375, 13 P.2d 836.

— Iowa.

A statutory provision making unlawful the sale of cigarettes, without having paid a mulct tax, was not unconstitutional on ground that, although it related to some extent to imposition of a mulct tax, it was included in the criminal code, nor on the ground that it was a statute not of uniform operation. Cook v. Marshall County, 119 Iowa 384, 93 N. W. 372, 104 Am. St. Rep. 283, aff'd 196 U. S. 261, 49 L. Ed. 471, 25 S. Ct. 233.

Mulct tax on business of selling cigarettes is levied to meet burdens imposed upon the general public by what is thought to be the result upon the human race, and particularly upon children, of the use of cigarettes. Hodge v. Muscatine County, 121 Iowa 482, 96 N. W. 968, 67 L. R. A. 624, 104 Am. St. Rep. 304, aff'd 196 U. S. 276, 49 L. Ed. 477, 25 S. Ct. 237.

Statutes regulating sale of substitutes for butter are not unconstitutional. State v. Armour Packing Co., 124 Iowa 323, 100 N. W. 59, 2 Ann. Cas. 448.

If there is any material jurisdictional error in proceedings under the cigarette law, it will be subject to review and correction on appeal, but will not justify equitable interference by injunction. Gaspari v. Madison County, 195 Iowa 1103, 192 N. W. 855.

That the officers, having charge of collection of tax, required payment when a wholesaler sold cigarettes to another wholesaler, or to a jobber or retailer, and such practice was acquiesced in by wholesalers and jobbers and was recognized as a correct interpretation of the law, was not controlling on the court in determining whether or not the accused had been guilty of violating such criminal statute in selling cigarettes as a wholesaler or jobber. State v. Lagomarcino-Grupe Co., 207 Iowa 621, 223 N. W. 512.

Under statute providing that permits to sell cigarettes may be granted by the council of a city or town, a permit is a privilege, and not a right, and may be granted or refused upon consideration of the merits, in the discretion of the council. Bernstein v. City of Marshalltown, 215 Iowa 1168, 248 N. W. 26, 86 A. L. R. 782.

A statute which authorized a city council to grant permits for the sale of cigarettes did not repeal another statute prohibiting such sales, but only allowed an exception to the general prohibition where a permit was so issued. Ford Hopkins Co. v. Iowa City, 216 Iowa 1286, 248 N. W. 668, superseding 240 N. W. 687.

93–1–2. Annual Fees—Credited to General Fund.

No license shall be issued until the applicant shall have paid to the state tax commission an annual license fee of $10 per year or fraction thereof for the sale of cigarettes or cigarette papers and $5 per year or fraction thereof for the sale of oleomargarine. All such license fees shall be credited to the general fund of the state.

History.

As amended by L. 33, 2nd Spec. Sess., ch. 17, eff. Aug. 5, which amended this entire chapter, inserting clause after "thereof" in third line.

93–1–3. Bond a Condition Precedent to Licensing—Exception.

No license shall be granted until the applicant therefor shall file with the state tax commission in such form and in such amount as it shall prescribe a bond, the minimum amount of which shall be $500, duly executed by such applicant as principal and with a corporate surety which bond shall be payable to the state of Utah, conditioned upon the faithful performance of all the requirements of this act including the payment of all taxes, penalties and other obligations of such applicant arising under the act; *provided*, that applicants who will purchase during the license year only products which have the proper state stamp affixed as required by the act and who file an affidavit with their application attesting to this fact shall not be required to post such a bond.

History.
As amended by L. 33, 2nd Spec. Sess., ch. 17, eff. Aug. 5, which amended this entire chapter; L. 39, ch. 109, eff. May 9, rewriting text of entire section.

Comparable provisions.
Iowa Code 1939, § 1556.09 (no retail permit, state permit, or manufacturer's permit, may be issued until applicant files bond in favor of state of Iowa, for benefit of county, city, or town, as the case may be, and conditioned upon payment of taxes, damages, fines, penalties and costs adjudged against permit holder for violation of provisions of cigarette statute).

93-1-4. Excise Tax.

There is hereby imposed and there shall be collected by and paid to the state tax commission upon the sale of the following articles in the state of Utah, a tax at the rate hereinafter set forth, such tax to be paid by the manufacturer, jobber, distributor, or retailer:

1. On cigarettes weighing not more than three pounds per thousand, one mill on each cigarette;

2. On cigarettes weighing more than three pounds per thousand, two mills on each such cigarette;

3. On cigarette papers, or wrappers, or any papers made or prepared for the purpose of making cigarettes, made up in packages, books, or sets; on each such package, book, or set one-half cent for each fifty papers or fractional part thereof.

4. On tubes, one cent for each fifty paper tubes or fractional part thereof.

5. Upon oleomargarine, as defined in Section 93-1-16, not artificially colored, five cents per pound or fractional part thereof;

6. Upon oleomargarine, as defined in Section 93-1-16, artificially colored, ten cents per pound or fraction thereof.

History.
As amended by L. 33, 2nd Spec. Sess., ch. 17, eff. Aug. 5, which amended this entire chapter, changing text after "sale" in second line.

Comparable provisions.
Idaho Code, § 36-1002 (imposing, upon oleomargarine sold to or removed for consumption or used by consumers or persons purchasing or removing same for use and not for re-sale as dealers or merchants, tax at rate of five cents per pound to be paid by merchant, dealer or manufacturer; tax at rate of ten cents per pound in case of oleomargarine which is yellow in color).

Iowa Code 1939, § 1556.01 (imposing tax on cigarettes used or otherwise disposed of in Iowa for any purpose whatsoever, as follows: one mill on each cigarette, where cigarettes weigh not more than three pounds per thousand; two mills on each cigarette, where they weigh more than three pounds per thousand; one-half cent on each package, book or set of papers or wrappers containing 50 papers or less; one cent, where more than 50 but not more than 100 papers are contained therein; one-half cent for each 50 or fractional part thereof, where more than 100 papers are contained therein; on tubes, one cent for each 50 tubes or fractional part thereof).

1. Nature of legislation.
This act is a police measure, even though revenue is derived therefrom. State v. Packer Corp., 77 U. 500, 297 P. 1013, followed in 78 U. 177, 2 P.2d 114, aff'd 285 U. S. 105, 76 L. Ed. 643, 52 S. Ct. 273.

93-1-5. Stamps to Be Affixed—Time—Exceptions—Bonds—Violations—Penalty—Unstamped Container as Evidence.

The taxes imposed by this chapter shall be paid by affixing stamps in the manner and at the time herein set forth, unless otherwise required by regulation of the state tax commission.

1. In the case of cigarettes and cigarette papers the stamps shall be securely affixed to each individual package;

2. In the case of oleomargarine, the stamps shall be securely affixed at the time and in the manner which the state tax commission may, by regulation, require.

Such stamps shall be affixed, as hereinabove specified, within seventy-two hours after any of the above commodities are received by any wholesaler, distributor or retailer within this state; *provided however*, that all such commodities must be stamped before being sold within the state. In the event any such products are manufactured within the state, they shall be stamped by the manufacturer when and as sold.

The state tax commission, may, in its discretion, where it is practical and reasonable for the enforcement of the collection of taxes provided hereunder, promulgate such rules and regulations as to permit any of the articles, upon which an excise is imposed by this chapter, to remain unstamped in the hands of wholesaler or distributor until the original case or crate is broken, unpacked, or sold, or it may permit any manufacturer, wholesaler, or distributor to sell and export, to a regular dealer in such articles outside the state, any of such articles, without affixing the stamps thereto, as herein required; *provided however*, that where such articles are allowed to remain unstamped in the hands of such wholesaler or distributor, the state tax commission may require a surety bond from such wholesaler or distributor, such bond to be executed by a surety company authorized to do business in this state, and conditioned to secure the payment of all taxes and penalties provided in this chapter.

It is the intent and purpose of this chapter to require all manufacturers, jobbers, distributors and retail dealers securely to affix the stamps provided for in this section to the packages or containers of products referred to in Section 1, but when the stamps have been affixed as required herein, no further or other stamp shall be required under the provisions of this chapter, regardless of how often such articles may be sold or resold in this state. Any person failing properly to affix and cancel stamps to the products enumerated in Section 93–1–1, as provided herein or by regulations promulgated by the state tax commission as provided in this chapter, shall be required to pay as a part of the tax imposed hereunder, a penalty of not less than ten dollars ($10) nor more than two hundred ninety-nine dollars ($299) for each offense, to be assessed and collected by the state tax commission as provided in Section 93–1–15. Each article, package or container not having proper stamps affixed thereto as herein required shall be deemed a separate offense. The presence of any package or container in the place of business of any person required by the provisions of this chapter to stamp the same shall be prima facie evidence that they are intended for sale and subject to tax under this chapter.

History.
As amended by L. 33, 2nd Spec. Sess., ch. 17, eff. Aug. 5, which amended this entire chapter, rewriting text of entire section.

93–1–6. Id. Violations—Goods Declared Contraband—Seizure—Sale.

Any products referred to in Section 93–1–1 found at any point in this state which shall have been within this state for a period of seventy-two hours or longer in the possession of any wholesaler, distributor or

retailer or having been sold by such wholesaler, distributor or retailer not having affixed to the package or container the stamps as above provided, are hereby declared to be contraband goods and the same may be seized by the state tax commission or its employees or by any peace officer of the state of Utah, or any political subdivision thereof, without a warrant. Such goods shall be delivered to the state tax commission for sale at public auction to the highest bidder, after due advertisement. The state tax commission, before delivering any of said goods so seized and sold, shall require the person receiving said goods to affix the proper amount of stamps to the individual packages or containers as above provided.

History.
As amended by L. 33, 2nd Spec. Sess., ch. 17, eff. Aug. 5, which amended this entire chapter, rewriting text of entire section.

93-1-7. Id. Disposition of Proceeds.

The proceeds of any goods sold hereunder, after the payment therefrom of the cost of confiscation and sale, shall be turned over to the state treasurer for the credit of the state general fund.

History.
As amended by L. 33, 2nd Spec. Sess., ch. 17, eff. Aug. 5, which amended this entire chapter, and materially altered text.

93-1-8. Inspection—Rules and Regulations to Assist—Violations—Penalty.

The state tax commission may provide, by regulations, the method of breaking packages, (the forms and kinds of containers) and the methods of affixing and canceling stamps that shall be employed by persons engaged in the sale of any of the products subject to the tax imposed by this chapter, which regulations will make possible the enforcement of payment by inspection. Any person who shall engage in or permit any practice which is prohibited by law or by regulations of the state tax commission and which shall make it difficult to enforce the provisions of this chapter by inspection, or who shall refuse to allow full inspection of his premises upon the demand of any peace officer or of any agent of the state tax commission, or who shall hinder or in anywise delay or prevent such inspection when demand is made therefor, shall be guilty of a misdemeanor and shall, upon conviction, be fined not less than twenty dollars ($20) nor more than two hundred dollars ($200) or be imprisoned for a period not exceeding thirty (30) days, or both, for each offense.

History.
As amended by L. 33, 2nd Spec. Sess., ch. 17, eff. Aug. 5, which amended this entire chapter, and materially altered text.

1. Validity.
The former section was declared unconstitutional not because the legislature delegated to the state tax commission a judicial rather than an administrative power, but a legislative function to determine the amount of the penalty for violation of the law. Tite v. State Tax Commission, 89 U. 404, 416, 57 P.2d 734.

93-1-9. Stamps—Making, Revising, Counterfeiting a Felony.

Whoever willfully removes or otherwise prepares any adhesive stamp with the intent to use or cause to be used after it has already been used,

or knowingly or willfully buys, sells, offers for sale or gives away any such washed or restored stamp to any person, or knowingly uses the same or has in his possession any washed or restored stamp which has been removed from the package or article to which it had been previously affixed, or whoever, for the purpose of indicating the payment of any tax hereunder, reuses any stamp which has heretofore been used for the purpose of paying any tax provided in this chapter, or whoever buys, sells or offers for sale or has in his possession any counterfeit stamp, is guilty of a felony and upon conviction shall be punished by a fine of not more than $1,000 or by imprisonment for not more than five years or both.

History.
As amended by L. 33, 2nd Spec. Sess., ch. 17, eff. Aug. 5, which amended this entire chapter, and materially altered text.

Cross-references.
Forging and counterfeiting, 103–24.

93–1–10. Stamps — Preparation — Distribution — Redemption — Refunding—Dealers Exempt—Discount Allowed—Trafficking in Forbidden.

The state auditor is hereby authorized to have prepared, according to such specifications and designs and in such denominations as may be submitted to him by the state tax commission, stamps for use on packages and containers of any of the products enumerated in Section 93–1–1, the sale of which is subject to tax under this chapter, and upon requisition from the state tax commission, the state auditor shall deliver to its order the stamps designated in such requisition and shall keep an accurate record of all stamps coming into and leaving his hands. The cost of said stamps shall be charged to any appropriation made to defray the administration of this chapter.

The state tax commission shall sell the stamps herein provided for only to persons holding licenses issued as provided in this chapter, and the moneys received from the sale of such stamps shall be turned into the general fund of the state. The state tax commission may deliver stamps in face value not to exceed 90% of the penal sum of licensee's bond to any licensee without payment therefor; provided that licensee shall make payment for stamps so delivered upon consignment within sixty days of the date stamps were delivered to licensee. Unused stamps may be redeemed, within two years after such stamps shall have been purchased from the state tax commission, by presentation to the state tax commission of a claim therefor, by the person to whom they were originally sold, accompanied by the unused stamps. The state tax commission shall certify said claim with its approval to the state auditor, who shall draw a warrant upon the state treasurer for the payment of such claim.

When any articles, the sale of which is taxable under this chapter, and upon which such taxes have been paid, are sold and shipped to a regular dealer in such articles in another state, the seller in this state, if he be a licensed dealer in such products, shall be entitled to a refund of the actual amount of the taxes which he has paid, upon condition that the seller in this state shall make affidavit that the goods were so

sold and shipped, and that he shall furnish from the purchaser a written acknowledgment that he has received such goods and the amount of stamps thereon, together with the name and address of the purchaser. The taxes shall be refunded in the manner provided above for the redemption of unused stamps.

When such articles, upon which no tax has been paid, are sold for export, and in due course so exported, to a regular dealer in such articles in another state, the wholesaler or distributor in this state shall be exempt from the payment of any tax upon the sale of such articles, if and when he shall have furnished such proof of said sale and exportation as the state tax commission may require.

The state tax commission shall allow a discount of ten per cent (10%) to any licensee upon the entire amount of each single purchase of stamps amounting to twenty-five dollars ($25) or over.

It shall be unlawful for any person to sell or dispose of such stamps to any other person whomsoever, except that whenever a person owns or operates more than one place of sale, stamps may be distributed to the various places of sale by the main office, but each place of sale must have a separate license and cancellation stamp.

History.
As amended by L. 33, 2nd Spec. Sess., ch. 17, eff. Aug. 5, which amended this entire chapter, and materially altered text.

93-1-11. Duties of Attorney-General, City, County or District Attorneys or Peace Officers.

The state tax commission in the enforcement of any tax laws which it administers may call to its aid the attorney-general, or any city, county or district attorney, or any peace officer.

History.
As amended by L. 33, 2nd Spec. Sess., ch. 17, eff. Aug. 5, which amended this entire chapter, and materially altered text.

93-1-12. Furnishing Cigarettes to Minors Forbidden.

Any person who furnishes to any minor by gift, sale or otherwise, any cigarette or cigarette paper or wrapper, or any paper made or prepared for the purpose of making cigarettes, or any tobacco of any kind whatsoever, is guilty of a misdemeanor.

History.
As amended by L. 33, 2nd Spec. Sess., ch. 17, eff. Aug. 5, which amended this entire chapter, and materially altered text.

93-1-13. Imported Products—Duplicate Invoices or Receipts Furnished Tax Commission.

All persons dealing in the products referred to in Section 93-1-1, purchasing or receiving such commodities from without the state, whether the same shall have been delivered through a wholesaler, distributor or jobber in this state, or by drop shipment or otherwise, shall, within ten days after receipt of the same, mail or deliver a duplicate invoice of all such purchases or receipts to the state tax commission. Failure to furnish duplicate invoices or receipts as so required shall be a misdemeanor.

History.
As amended by L. 33, 2nd Spec. Sess., ch. 17, eff. Aug. 5, which amended this entire chapter, and materially altered text.

Cross-references.
Intoxicating liquor nuisances, 46–0–237 et seq.; nuisances generally, Title 64.

93–1–14. Tax Commission to Enforce Provisions.

The state tax commission shall administer and enforce the taxes imposed by this chapter. It shall have the power to enter upon the premises of any taxpayer and to examine or cause to be examined by any agent or representative designated by it for that purpose, any books, papers, records or memoranda bearing upon the taxes payable, and to secure any other information directly or indirectly concerned in the enforcement of this chapter and it may, in its discretion, upon making a record of its reasons therefor, waive, reduce or abate any of the penalties provided for in this chapter, or it may compromise the same.

History.
L. 33, 2nd Spec. Sess., ch. 17, eff. Aug. 5, which amended this entire chapter, contained this section as section 93–1–14.

93–1–15. Collection of Delinquent Tax or Penalties.

If the taxes or penalties imposed by this chapter, or any portion thereof, are not paid when the same become due, the collection shall be made, except as herein provided, in the same manner as is provided for the collection of delinquent taxes in Sections 80–13–54 and 80–13–55, Revised Statutes of Utah, 1933.

History.
L. 33, 2nd Spec. Sess., ch. 17, eff. Aug. 5, which amended this entire chapter, contained this section as section 93–1–15.

93–1–16. Oleomargarine Defined.

For the purposes of this title certain manufactured substances, certain extracts and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as "oleomargarine," namely: all substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, suine and neutral; (all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral;) all lard extracts and tallow extracts, and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, fish oil or fish fat, vegetable oil, intestinal fat or offal fat, with annatto, or other coloring matter, of (1) made in imitation or semblance of butter, or (2) calculated or intended to be sold as butter or for butter, or (3) churned, emulsified, or mixed in cream, milk, water or other liquid, and containing moisture in excess of one per cent. This section shall not apply (1) to puff-pastry shortening not churned or emulsified in milk or cream and having a melting point of one hundred and eighteen or more degrees Fahrenheit, or (2) to any of the following preparations containing condiments and spices; salad dressing, mayonnaise dressings or mayonnaise products; or (3) to pharmaceutical preparations.

History.
L. 33, 2nd Spec. Sess., ch. 17, eff. Aug. 5, which amended this entire chapter, contained this section as section 93–1–16.

93-1-17. Carriers to Report Shipments.

Every common carrier hauling, transporting, or shipping into or out of the state of Utah from or to any other state or foreign country any of the products, articles or commodities which if sold in the state of Utah is subject to an excise tax, shall, when so required by the state tax commission, report in writing all such shipments or deliveries to the state tax commission on blanks furnished by it, giving the date, to whom the same was consigned and delivered, and the quantity as shown by the bill of lading, and such other information as the state tax commission may require. Power to exact such information from carriers is hereby expressly conferred on the state tax commission.

History.
L. 33, 2nd Spec. Sess., ch. 17, eff. Aug. 5, which amended this entire chapter, contained this section as section 93-1-17.

Comparable provisions.
Iowa Code 1939, § 1556.19 (requiring every common carrier in Iowa, having custody of books or records showing transportation of cigarettes, both interstate and intrastate, to give and allow state tax commission free access to such books and records).

93-1-18. Tobacco Vending Machine Accessible to Minors—Unlawful.

Any person who maintains after June 30, 1941, in his place of business a tobacco vending machine accessible to minors or provides any method of self-help for the disposition to minors by gift, sale or otherwise of any cigarette or cigarette paper or wrapper, or any paper made or prepared for the purpose of making cigarettes, or tobacco in any form whatsoever, is guilty of a misdemeanor.

History.
Added by L. 41, ch. 95, eff. May 13.

Comparable provisions.
Cal. Penal Code, § 308 (misdemeanor to sell or give or in any way furnish to person, who is in fact under age of 18 years, any tobacco, cigarette or cigarette papers, or any other preparation of tobacco; copy of act must be posted in place of business).

Idaho Code, § 17-2726 (misdemeanor to give, sell or furnish to minor persons, directly or indirectly, cigarettes, cigars or tobacco in any form, or cigarette paper or wrapper, or tobacco compound used in filling or makeup of cigarettes).

Iowa Code 1939, § 1556.31, subd. 6 (unlawful to sell or vend cigarettes by means of device known as vending machine); § 1553 (unlawful to furnish to minor under 21 years of age by gift, sale or otherwise, any cigarette or cigarette paper, or any paper or other substance made or prepared for purpose of use in making of cigarettes; no person shall directly or indirectly by himself or agent sell, barter, or give to a minor under 16 years of age, any tobacco in any other form, except on written order of parent, guardian, or person in whose custody he is).

Mont. Rev. Codes, § 11047 (misdemeanor to sell or give tobacco, cigars, cigarettes, or cigarette paper to minor under 18 years of age).

93-1-19. Violation a Nuisance—Abatement.

Any person violating any of the provisions of Section 93-1-18 of this act shall be deemed guilty of keeping and maintaining a nuisance, and such persons may be enjoined from maintaining such nuisance and such building or place may be abated as a nuisance.

History.
Added by L. 41, ch. 95, eff. May 13.

CHAPTER 2

ADVERTISING CIGARETTES AND TOBACCO

93-2-1. A Misdemeanor—Exceptions.

It is a misdemeanor for any person to display on any billboard, street car sign, street car, placard, or on any other object or place of display, any advertisement of cigarettes, cigarette papers, cigars, chewing tobacco or smoking tobacco, or any disguise or substitute of either, except that a dealer in cigarettes, cigarette papers, tobacco or cigars, or their substitutes, may have a sign on the front of his place of business stating that he is a dealer in such articles; *provided*, that nothing herein shall be construed to prohibit the advertising of cigarettes, cigarette papers, chewing tobacco or smoking tobacco, or any substitute of either, in any newspaper, magazine or periodical printed or circulating in this state.

(L. 29, p. 173, § 2.)

Cross-references.

Advertising offenses, 103-4.

1. Validity.

This section is valid; it does not violate either State or Federal Constitution; nor is there any unjust discrimination in the law because only advertising by billboards, street car signs, placards, etc., is prohibited. State v. Packer Corp., 77 U. 500, 514, 297 P. 1013, followed in 78 U. 177, 2 P.2d 114, aff'd 285 U. S. 105, 76 L. Ed. 643, 52 S. Ct. 273.

It is the policy of this state to discourage the use of cigarettes and tobacco. This act is an exercise of the state's police power, and is not a revenue measure, though much revenue is derived therefrom. State v. Packer Corp., 77 U. 500, 505, 297 P. 1013, followed in 78 U. 177, 2 P.2d 114, aff'd 285 U. S. 105, 76 L. Ed. 643, 52 S. Ct. 273.

This section is not invalid as taking property without due process of law or as imposing unreasonable restraint upon interstate commerce or as being discriminatory. Packer Corp. v. Utah, 285 U. S. 105, 76 L. Ed. 643, 52 S. Ct. 273, aff'g 78 U. 177, 2 P.2d 114. (Straup and Elias Hansen, JJ., dissenting.)

Provision of this section (prior to amendment by Laws 1929, Ch. 92) forbidding newspaper advertising of cigarettes was held unconstitutional as undue interference with interstate commerce, since cigarettes in original packages were legally salable in interstate commerce, as were other cigarettes under state regulation, and since newspaper used for advertisement circulated outside state although published within Utah. State v. Salt Lake Tribune Pub. Co., 68 U. 187, 249 P. 474, 48 A. L. R. 553, distinguished in State v. Packer Corp., 77 U. 500, 297 P. 1013.

A. L. R. notes.

Statute or ordinance in relation to advertising as interference with interstate commerce, 57 A. L. R. 105.

CHAPTER 3

UNLAWFUL USE

93-3-1. Proprietors Not to Allow Minors to Use in Place of Business—"Place of Business" Defined.

93-3-2. Smoking in Inclosed Public Place Forbidden—"Inclosed Public Place" Defined.

93-3-1. Proprietors Not to Allow Minors to Use in Place of Business—"Place of Business" Defined.

It is a misdemeanor for the proprietor of any place of business to knowingly permit minors to frequent such place of business while they

are using tobacco. The term "place of business" as here used shall apply to any and all such places as shops, stores, factories, public garages, offices, theaters, recreation and dance halls, pool rooms, cafes, cafeterias, cabarets, restaurants, hotels, lodging houses, street cars, interurban and railway passenger coaches and waiting rooms.

(L. 23, p. 110, § 3.)

Comparable provisions.

Idaho Code, § 17–2726 (misdemeanor for person to permit minor persons to frequent premises owned, held or managed by him, for purpose of indulging in use of cigarettes, cigars or tobacco in any form).

Cross-references.

Employment of minors in tobacco establishment, 14–6–1; use of tobacco by minors, 103–40–5.

1. Validity.

There can be little doubt of the constitutionality of this legislation; furthermore, the various businesses enumerated in this section are, for the most part, affected with a public interest. See State v. Packer Corp., 77 U. 500, 297 P. 1013, followed in 78 U. 177, 2 P.2d 114, aff'd 285 U. S. 105, 76 L. Ed. 643, 52 S. Ct. 273.

93–3–2. Smoking in Inclosed Public Place Forbidden—"Inclosed Public Place" Defined.

It is a misdemeanor for any person to smoke cigars, cigarettes or tobacco in any form in any inclosed public place, except in extra rooms, compartments or coaches specially provided for smoking purposes. The term "inclosed public place" as here used shall be construed to mean the dining rooms in hotels, restaurants, cafes and cafeterias, theaters, passenger elevators, street cars, interurban and railway passenger coaches, motor and other passenger vehicles used by common carriers, railway station waiting rooms, and state, county and city buildings; but the owner or proprietor of any hotel dining room, restaurant, cafe or cafeteria may designate the same as a public smoking room by a conspicuous sign at or near the entrance, and in any state, county or city building any public officer, who has a private office separate and apart from his public office, may, if he so desires, designate such private office as a place where smoking may be permitted, and, so long as such private office is so designated, smoking therein shall not be considered in violation of this section. (L. 23, p. 110, § 4.)

TITLE 94

TOWNSITES *

94-0-1. Disposition of Lots to Persons Entitled After Entry.
94-0-2. Notice of Entry.
94-0-3. Claims to Lots to Be Filed—Time and Place.
94-0-4. Adverse Claims—Determination.
94-0-5. Proof of Claims When No Adverse Claim Advanced.
94-0-6. Conveyance and Deed to Proper Claimant.
94-0-7. Id. When Judge Is Claimant.
94-0-8. Id. When City or Town Officer Is Claimant.
94-0-9. Change of Venue.
94-0-10. Statement of Expenses.
94-0-11. Payment—To Be Made Before Conveyance.
94-0-12. Id. Within Six Months—Lien for Nonpayment—Sale to Satisfy.
94-0-13. Errors in Measurement Not to Invalidate Proceedings.
94-0-14. Death of Officer—Authority to Complete Trust Vests in Successor.
94-0-15. Disposition of Unclaimed Lands.
94-0-16. Id.
94-0-17. Reservation of Lands for Public Uses.
94-0-18. Disposition of Proceeds of Sales.
94-0-19. Possession for Ten Years Entitles Claimant to Deed.

* History of act. This title was 2 Comp. Laws 1888, Ch. 5, § 2815 et seq.; R. S. 1898, Title 69, p. 611; Comp. Laws 1907, Title 82, p. 922. The act was reviewed in Pratt v. Young, 1 U. 347, aff'd 99 U. S. 619, 25 L. Ed. 446.

94-0-1. Disposition of Lots to Persons Entitled After Entry.

When the corporate authorities of any city or town, or the district judge of any county in which any city or town may be situated, shall have entered at the proper land office the land or any part of the land settled and occupied as the site of such city or town pursuant to and by virtue of the provisions of the act of congress entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2, 1867, and acts amendatory thereof and supplementary thereto, it shall be the duty of such corporate authorities or judge, as the case may be, to dispose of and convey the title to such land, or to the several blocks, lots, parcels or shares thereof, to the persons entitled thereto, who shall be ascertained as hereinafter prescribed.

(C. L. 17, § 6121.)

Former law.

Under this "Townsite Law" as it was when first enacted, the proceedings were before the probate judge and not the district court. In many respects, however, the former law is identical with the present section. See Rogers v. Thompson, 9 U. 46, 33 P. 234.

Comparable provisions.

Cal. Gen. Laws, Act 5046a, § 1 (in case of town lands mentioned in act of congress entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2, 1867, grants or deeds are hereby confirmed, as though certain acts regarding "city of Placerville" had never been enacted); § 4 (all cities, towns, and their corporate authorities to be bound by provisions of act of congress approved March 24, 1868).

Idaho Code, § 56-701 (duty of corporate authorities of city or incorporated town, or of probate judge of county in which is situated any unincorporated town, to enter at proper land office of United States such quantity of land as inhabitants of such city or town may be entitled to claim); § 56-702 (pertaining to conveyances, by corporate authorities or judge, to persons entitled thereto).

Mont. Rev. Codes, § 5310 (duty of city or town council to enter at proper

land office of United States such quantity of land as inhabitants may be entitled to claim); § 5331 (similar duty entailed upon judge of district court of county, on behalf of inhabitants of unincorporated town).

Cross-references.
Validating acts generally, 78-4.

1. Entry by mayor.
If the mayor of a city makes the entry, he is a trustee. Pratt v. Young, 1 U. 347, aff'd 99 U. S. 619, 25 L. Ed. 446.

Decisions from other jurisdictions.
— California.
Town board of trustees was a mere trustee for the occupants, and by terms of act of congress, entitled "An act for the relief of the inhabitants of cities and towns" passed March 2, 1867, were to execute their trust under such regulations as might be prescribed by the legislature, the act of congress providing that corporate authorities might enter the lands "in trust for the several use and benefit of the occupants thereof, according to their respective interests." Cerf v. Pfleging, 94 Cal. 131, 29 P. 417.

Rights of bona fide occupants could not be affected by terms of statutes having reference to making of survey or map of town; and, as stated in earlier case of Alemany v. City of Petaluma, 38 Cal. 553, "The map which they were authorized to make was a map representing the existing streets, alleys, and squares, and such others as the occupants of the property might consent to. But it was not within the contemplation of the act that the persons getting up a map of an existing town might wholly disregard the former plan, lay out new streets, alleys, and squares, upon property before then devoted to private use, without the consent of the occupants. Such a power, in the hands of a few persons proceeding to secure the benefits of the act of July 1, 1864, to an already existing town, would have been liable to the grossest abuses, and destructive of the private rights which the act was mainly designed to foster." Gervasoni v. City of Petaluma, 189 Cal. 306, 208 P. 120.

Although filing of declaratory statement is not necessary to location of townsite, it is proper, under act of congress of 1867, to take that course as the initial step for making a townsite entry in preference over the making of a cash entry as the first step looking to the pre-emption of lands for such a purpose; and, although the declaratory statement may not be an actual entry in the same sense that a cash entry is, and, although to effectually serve purpose for which it is intended, it must be kept alive by following it up within proper time, after it has been filed, by other steps essential under the law to the establishment of a townsite, yet the effect of such filing is, even if not as against the government, certainly as against the claims of others, to vest in those who are actual or bona fide settlers upon and occupants of portions of such lands at time of filing of such statement an inceptive right to the portions so settled upon and occupied. Placer County v. Lake Tahoe Railway & Transportation Co., 58 Cal. App. 764, 209 P. 900.

— Idaho.
Occupants possessed certain rights in and to the lots occupied by them before the entry, and the only authority the surveyor had was to plat the town in conformity to the use and occupancy of the lots and blocks; the plat must be made for the benefit and use of the occupants; the surveyor's power was limited; he had no authority to establish streets through and over buildings, nor to cut off any portions or parts of buildings for that purpose. Scully v. Squier, 13 Idaho 417, 90 P. 573, 30 L. R. A. (N. S.) 183.

— Montana.
Regulations of local legislature as to disposition of lots could not enlarge or diminish the rights or interests of occupants of the lots. Parcher v. Ashby, 5 Mont. 68, 1 P. 204, aff'd 119 U. S. 526, 30 L. Ed. 469, 7 S. Ct. 308.

Probate judge became trustee of occupants for all their interest or right in or pertaining to the lots; act of congress, authorizing conveyance to probate judge in trust for use and benefit of occupants of the lots according to their respective rights and interests, was a grant, and carried with it everything necessary and requisite to make it operative; all powers of probate judge, as trustee, are exhausted when he has conveyed to occupants their lots according to their several rights and interests. Parcher v. Ashby, 5 Mont. 68, 1 P. 204, aff'd 119 U. S. 526, 30 L. Ed. 469, 7 S. Ct. 308.

94-0-2. Notice of Entry.

Within thirty days after the entry of any such lands the corporate authorities or judge entering the same shall give public notice of the entry in at least five public places within such city or town, and shall publish the notice in some newspaper printed and published in this

state and having a general circulation in such city or town. The notice shall be published once a week for at least three successive months, and shall contain an accurate description of the lands so entered as stated in the certificate of entry or the duplicate receipt received from the officer of the land office. (C. L. 17, § 6122.)

History.

This section is much like that appearing in Act of February 17, 1869 (2 Comp. Laws 1888, p. 1441, § 2816). West v. Child, 8 U. 223, 228, 30 P. 755. And it is almost identical with R. S. 1898, § 2702; Comp. Laws 1907, § 2702.

Comparable provisions.

Idaho Code, § 56–703 (at any time after entry of such lands, and before three months from date of receipt of patent therefor, corporate authorities or judge must give public notice of entry by posting notice in at least three public places, and by publication in newspaper).

1. Notice.

Section contemplates giving of notice, not within 30 days after application for entry is made, but only within 30 days after final certificate of entry is issued. Holland v. Buchanan, 19 U. 11, 56 P. 561.

94–0–3. Claims to Lots to Be Filed—Time and Place.

Every person claiming any lot or parcel of such land shall, within six months after the first publication of the notice, in person or by his agent or attorney, sign a statement in writing containing an accurate description of the particular lot or parcel of land in which he claims to have an interest and the specific right, interest or estate therein which he claims to be entitled to receive, and he shall deliver the same to the clerk of the district court of the county in which such city or town is situated. Such clerk shall enter the statements in a book to be kept for that purpose, and shall file and preserve them in his office, noting the day of filing. The filing of each statement shall be considered notice to all persons claiming any interest in the lands described therein of the claim of the party filing the same, and any person failing to make and deliver a statement within the time limited in this section shall be forever barred of the right of claiming or recovering such land, or any interest or estate therein or in any part thereof, in any court; *provided*, that when good cause is shown why such statement could not be filed within the time herein specified the judge may extend the time, not exceeding one year from the first publication of such notice. (C. L. 17, § 6123.)

History.

This section is almost a counterpart of section appearing in Act of February 17, 1869 (2 Comp. Laws 1888, p. 144, § 2817). West v. Child, 8 U. 223, 228, 30 P. 755. It is in many respects identical with R. S. 1898, § 2703; Comp. Laws 1907, § 2703.

Comparable provisions.

Idaho Code, § 56–704 (claimants must, within 60 days after first publication of notice, sign statement in writing and deliver same to corporate authorities or judge; persons failing to sign and deliver such statement, within time specified, are, as against any claimant, forever barred the right of claiming or recovering such lands or interest therein).

Mont. Rev. Codes, § 5318 (verified affidavit of claim must be presented to council within six months after plat has been filed in office of county clerk).

1. Statement in writing.

When statement is signed by attorney in fact in his own name without disclosing his principal, it is proper to allow statement to be amended to accord with fact, provided adverse claimants are not in any manner prejudiced by amendment. Clark v. Kirby, 18 U. 258, 55 P. 372.

Statement must be treated by court as complaint, and material facts may be denied and issues tried. Clark v. Kirby, 18 U. 258, 55 P. 372.

Failure to deliver the statement within the time specified in this section is an

absolute bar to recovery of the same. Heirs and remaindermen have no superior rights to others, and must suffer for negligence of life tenant. Drake v. Reggel, 10 U. 376, 37 P. 583.

Unless statement is filed as required by this section, claimants would be precluded from claiming or recovering the land in question under any right or title existing at time when such statements should have been filed. And statute contains no express exception as to persons under disabilities, and, of course, no such exception can be ingrafted on it by construction. Furthermore, where a right vests in a class as such, the action or laches of the members of the class in being binds those yet unborn. Drake v. Reggel, 10 U. 376, 383, 37 P. 583.

Under this section it will be presumed that court properly allowed the filing, and that sufficient cause was shown, where application was indorsed: "By permission cause considered sufficient." Kinney v. Lewis, 2 U. 512, applying Comp. Laws 1876, § 1168, whose proviso is identical with that of this section.

2. Adverse claim.

Claim to incorporeal right, such as easement, held not adverse claim within meaning of former statute and not required to be set up for adjudication by probate court. Clawson v. Wallace, 16 U. 300, 52 P. 9.

3. Equitable right.

Occupant in possession may sell and transfer his equitable right to lot under townsite entry before patent. Clawson v. Wallace, 16 U. 300, 52 P. 9. However, the word "occupant" no longer appears in this section. See Hussey v. Smith, 1 U. 129, rev'd 99 U. S. 20, 25 L. Ed. 314; Cooke v. Young, 2 U. 254.

94-0-4. Adverse Claims—Determination.

If at the expiration of six months after the first publication of such notice it shall be found by the statements filed that there are adverse claimants to any lot or parcel of land, it shall be the duty of the district judge, taking up each case in the order of filing, to cause notice to be served upon the claimants thereto, or their agents or attorneys, to appear before the district court and prosecute their claims upon a day to be appointed by the court, not less than five nor more than thirty days from the service of such notice. The statements filed as aforesaid shall stand in the place of pleadings, and an issue may be made thereon. On the day set for the hearing the court shall proceed to hear the evidence adduced in support of the allegations of the parties and shall decide according to the justice of the case. (C. L. 17, § 6125.)

History.

This section is in many respects identical with section appearing in Act of February 17, 1869 (2 Comp. Laws 1888, p. 144, § 2817). West v. Child, 8 U. 223, 228, 30 P. 755. It is practically identical with R. S. 1898, § 2704; Comp. Laws 1907, § 2704.

Comparable provisions.

Idaho Code, § 56-711 (in case there are adverse claimants, either party may bring suit against adverse claimant in district court; no judge of district court who has been adverse claimant, directly or indirectly, or who is party to action brought to determine right to conveyance of any portion of lands within such town, may entertain, hear or determine action).

1. Operation and effect of section.

This proceeding before the district court and his decision must be regarded as having the effect of a judgment. Rogers v. Thompson, 9 U. 46, 33 P. 234.

Under this section the court's adjudication has the force and effect of a judgment, which cannot be collaterally attacked on the ground that the person not presenting his claim was ignorant of his rights. Rogers v. Thompson, 9 U. 46, 33 P. 234.

2. Pleadings.

Complaint in action by child of original occupant of part of townsite, after death of original occupant, for relief, must allege that widow and children of deceased occupant had continued their occupancy up to time of entry of lands in townsite by municipal authorities. West v. Child, 8 U. 223, 30 P. 755. And see West v. Utah Nat. Bank, 8 U. 374, 31 P. 987.

Application may be amended. In re Faust, 1 U. 197.

94–0–5. Proof of Claims When No Adverse Claim Advanced.

After the expiration of the six months for filing statements, if there are no adverse claimants, the court, taking up the cases in the order of filing, shall cause a summons to be issued and served upon each party filing a statement, or his agent, requiring him to appear before the court upon a day designated, not less than three nor more than ten days from the service of such summons and make proof of his statement.

(C. L. 17, § 6126.)

History.

This section is much like the first part of section 2819 of 2 Comp. Laws 1907, p. 146, and is almost identical with R. S. 1898, § 2705; Comp. Laws 1907, § 2705.

1. Operation and effect of section.

This proceeding before the district judge and his decision must be regarded as having the effect of a judgment. Rogers v. Thompson, 9 U. 46, 33 P. 234.

94–0–6. Conveyance and Deed to Proper Claimant.

Where the entry of the townsite shall have been made by the district judge the conveyance shall be made by him in accordance with the judgment entered. Where the corporate authorities shall have made the entry the court shall certify its judgment to the city commissioners or mayor of the city, or to the president of the board of trustees of the town, who shall accordingly make to the party claimant the proper deed. (C. L. 17, § 6127.)

History.

This section is practically identical with R. S. 1898, § 2706; Comp. Laws 1907, § 2706.

1. Mayor's deed.

The mayor's deed, executed under the authority of this section, need not be witnessed. Townsend v. Hooper, 2 U. 548, aff'd 109 U. S. 504, 27 L. Ed. 1012, 3 S. Ct. 357; Kinney v. Lewis, 2 U. 512, 517.

94–0–7. Id. When Judge Is Claimant.

If the district judge shall be a claimant of lands in any city or town in his county, he may file the statement required in section 94–0–3 in the district court of an adjoining district, and a copy of the statement in that of his own county. The judge of the district court of the adjoining county shall then proceed as provided for in sections 94–0–4 or 94–0–5, as the case may be; and he shall, moreover, give notice to the city commissioners or mayor of such city or the president of the board of trustees of such town, or, in case of an unincorporated town, to the justice of the peace of the precinct in which such town may be situated. The court shall thereafter proceed as in other cases provided for in this title, and a deed to the land shall be made to the party entitled thereto. (C. L. 17, § 6128.)

94–0–8. Id. When City or Town Officer Is Claimant.

If a city commissioner or the mayor of any city or the president of the board of trustees of any town shall be a claimant of lands in such city or town, the recorder or the clerk thereof, as the case may be, shall, upon the certificate of the district court made as in the case of other claimants, execute a deed of conveyance to such claimant for the lands finally adjudged to him by the court. (C. L. 17, § 6130.)

94-0-9. Change of Venue.

A change of venue as in actions at law shall be allowed in all cases arising under this title. (C. L. 17, § 6131.)

Cross-references.
Change of venue, 104-4.

94-0-10. Statement of Expenses.

Within thirty days after the expiration of the six months prescribed in section 94-0-3 for filing statements the corporate authorities, or the judge, and the board of county commissioners shall render in writing a true account of all moneys expended in the acquisition of the title to the land and in the administration or execution of the trust up to that time, including purchase money, necessary traveling expenses, and the costs for posting and publishing notices. Such account shall be filed in the office of the clerk of the district court of the county in which such city or town may be situated, and shall during ordinary business hours be open for inspection to all persons interested. (C. L. 17, § 6132.)

94-0-11. Payment—To Be Made Before Conveyance.

Before the corporate authorities or judge shall be required to execute, acknowledge or deliver any deed of conveyance to any person adjudged to be entitled thereto such person shall pay or tender to the city commissioners, the mayor, the president of the board of trustees or the judge, as the case may be, the sum of money chargeable on the land to be conveyed by such deed. To ascertain the sum chargeable, streets and public grounds must be deducted from all the land entered, and then such sum shall be the proportionate costs of the land conveyed and the proportionate expenses thereof, with interest together with a reasonable charge for the preparation, execution and acknowledgment of the deed. (C. L. 17, § 6133.)

94-0-12. Id. Within Six Months—Lien for Nonpayment—Sale to Satisfy.

Full payment for land shall be made to the district judge, the city commissioners, the mayor or the president of the board of trustees, as the case may be, within six months after the certificate is issued to the claimant. In case of nonpayment within the time herein specified, the amount due shall be deemed a judgment lien upon the land claimed, and the judge, the city commissioners, the mayor or the president of the board of trustees, as the case may be, shall proceed to sell it by sheriff's sale in the same manner as land is sold under execution, subject, however, to redemption as provided by law. (C. L. 17, § 6134.)

Cross-references.
Execution sales, 104-37-18.

94-0-13. Errors in Measurement Not to Invalidate Proceedings.

Errors in measurement or computation shall not invalidate any proceedings under this title. (C. L. 17, § 6135.)

94–0–14. Death of Officer—Authority to Complete Trust Vests in Successor.

In case of death or disability of the district judge, the city commissioners, the mayor or the president of the board of trustees before the complete execution of the trust, the same shall vest in their successors in office. (C. L. 17, § 6136.)

94–0–15. Disposition of Unclaimed Lands.

If there shall remain any unclaimed lands within such city or town after the expiration of six months from the publication of the notice provided for in section 94–0–2, the city commissioners, the mayor or the president of the board of trustees, in cases where lands have been entered for a municipal corporation, or the district judge, in cases where lands have been entered in trust by him, shall cause the same to be surveyed and platted into suitable blocks, lots, streets and alleys. A certified plat of such surveyed lands shall be filed for record in the office of the county recorder of the county. (C. L. 17, §§ 6137, 6139.)

History.
This was formerly laws of Utah, approved February 17, 1869, § 10 (Session Laws, 1869, p. 6), 2 Comp. Laws 1888 § 2824, and is in many respects identical therewith, and with R. S. 1898, § 2716; Comp. Laws 1907, § 2716.

94–0–16. Id.

The city commissioners, the mayor, the president of the board of trustees or district judge may sell or cause to be sold such blocks or lots at public auction to the highest bidder for cash, after public notice of the time and place of such sale published at least forty days in some newspaper published in the county, if there is any, otherwise in a newspaper having general circulation in the county. If any of such lands remain unsold for want of a bidder, the city commissioners, the mayor, the president of the board of trustees or district judge may sell or cause the same to be sold at public or private sale, on such terms as may be deemed for the best interest of the city or town; *provided*, that none of such lands shall be sold for less than $5 per acre.
(C. L. 17, §§ 6137, 6138.)

1. Remedies.
Anyone claiming to have been unjustly or unfairly treated by the manner in which this section was administered may go into equity and assert his rights. Linck v. Salt Lake City, 6 U. 109, 21 P. 469.

94–0–17. Reservation of Lands for Public Uses.

Lots or parcels of land necessary for streets, public squares, parks, schoolhouses, hospitals, asylums, fire engine and hose houses, pesthouses, state or other public buildings, or public use, may be reserved by the city commissioners, the mayor, the president of the board of trustees or the district judge, as the case may be; and he may execute and deliver to the proper party a deed for any property set aside for such purposes. (C. L. 17, § 6139.)

94–0–18. Disposition of Proceeds of Sales.

All moneys arising from the sale of lands, after deducting the costs and charges of such sales, shall be paid into the city or town treasury

in cases where such lands have been entered in trust by corporate authority, or into the county treasury in cases where such lands have been entered in trust by the district judge; and the same shall be set apart and applied by the city commissioners or city council, or by the board of trustees of an incorporated town, or by the board of county commissioners in case of an unincorporated town, for the improvement of public squares and streets, the construction of sewers or procuring a supply of water for the use and benefit of the inhabitants of the city or town. (C. L. 17, § 6140.)

94–0–19. Possession for Ten Years Entitles Claimant to Deed.

Whenever any lot, piece or parcel of land shall have passed from the United States to the district judge of any county in this state or to the probate judge of any county in the late territory of Utah, under and by virtue of the provisions of an act of congress entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2, 1867, or any amendments thereto, and there is no record of any conveyance from such judge or his successor in office to the claimants thereof, any person, who by himself or by or through his predecessors in interest shall have had continuous and exclusive possession of such lot, piece or parcel of land for the period of ten years before the filing of the petition hereinafter mentioned and who shall have paid the taxes thereon during said time, shall be deemed the rightful owner of such land, and it shall be conclusively presumed that he has complied with all of the provisions of law for obtaining title thereto; and such person may at any time apply to the judge of the district court of the county wherein said land may be situated for a conveyance of the legal title to such land to him, and such judge of the district court is hereby vested with power and authority to execute such conveyance and carry out the trust, and he shall execute a conveyance to such person of such lot, piece or parcel of land without any expense to such person, except the ordinary costs of court. Such conveyance, when so executed by any judge of the district court, shall pass to such person all the right, title and interest so held in trust to such lot, piece or parcel of land to all intents and purposes and with the same effect as if a proper conveyance had been executed after proper proceedings in the manner provided by law. (C. L. 17, § 6141.)

1. **When interests of occupants attach.**
Under the act of congress of March 2, 1867 (14 Stat. 541), the interests of the occupants attach simultaneously with the making of a townsite entry, and no person who may have occupied land on the townsite previous thereto, or may occupy such lands thereafter, but who was not a settler and occupant at the time of the entry, is a beneficiary under the act, nor can such person derive any benefit directly by reason of the entry. Lockwitz v. Larson, 16 U. 275, 52 P. 279.

2. **Townsite entry under act of congress.**
By the term "entry," under the act, is meant the filing of an application by the proper officer with the register of the land office, and proof showing the performance of the statutory conditions respecting the settlement and occupancy of the land as a townsite. Lockwitz v. Larson, 16 U. 275, 52 P. 279.

No delay on the part of the government in allowing the entry can affect the rights of those who were bona fide occupants at the time of filing the application and proof, or of those claiming through such occupants, provided the entry is ultimately made on the proof submitted with the application Lockwitz v. Larson, 16 U. 275, 52 P. 279

TITLE 95

TRADE-MARKS AND TRADE NAMES

Chapter 1. TRADE-MARKS, TRADE NAMES AND TRADE DEVICES.
Chapter 2. NAMING, MARKING OR BRANDING CONTAINERS, RECEPTACLES, EQUIPMENT OR SUPPLIES.

CHAPTER 1

TRADE-MARKS, TRADE NAMES AND TRADE DEVICES *

95–1–1. Definitions.
95–1–2. Claim to Ownership—Filing and Publication—Fee.
95–1–3. Id. On Containers in Distribution of Product.
95–1–4. Record of Claims to Ownership.
95–1–5. Similarity Apt to Cause Confusion—Claim to Be Denied.
95–1–6. Right of Property in—Transfer—Wrongful Use; Injunction, Damages.
95–1–7. Wrongful Use—Penalty.

*History of act. This chapter was R. S. 1898, Title 70, p. 614; Comp. Laws 1907, Title 83, p. 927.

95–1–1. Definitions.

"Trade-mark," "trade name" or "trade device" as used in this title includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label or wrapper usually affixed by any producer, mechanic, manufacturer, druggist, merchant or tradesman, or association or union whether incorporated or unincorporated, to denote any goods to be imported, manufactured, produced, compounded or sold by him or by such association or union, other than a name, word or expression generally denoting goods to be of some particular class or description. (C. L. 17, § 6145.)

Comparable provisions.

Cal. Bus. and Prof. Code, § 14229, added to the Code by laws of 1941 (defining "trade-mark" as herein, except that following bracketed words and phrases are omitted: "* * * usually affixed by any [producer], mechanic * * * or tradesman [or association or union whether incorporated or unincorporated], to denote any goods * * * compounded or sold by him"; the remainder of the section, as worded herein, is also omitted, and in lieu thereof, the California provision concludes as follows: "and also any name or names, marks or devices, branded, stamped, engraved, etched, blown, or otherwise attached or produced upon any cask, keg, bottle, vessel, siphon, can, case, or other package, used by any mechanic, manufacturer, druggist, merchant, or tradesman, to hold, contain or inclose the goods so imported, manufactured, produced, compounded or sold by him").

Idaho Code, § 17–3717, Mont. Rev. Codes, § 11202 (these sections of the Penal Codes define "trade-mark" as herein, except that following bracketed words and phrases are omitted: "* * * nflixed by any [producer], mechanic * * * or tradesman [or association or union whether incorporated or unincorporated] to denote * * * sold by him [or by such association or union] other than a name, word * * *"); Idaho

Code, § 43-501 (this provision of the General Laws declares that it is unlawful to counterfeit or imitate label, trade-mark, term, design, device or form of advertisement adopted or used by any person, or association or union of workingmen); Mont. Rev. Codes, § 4286 (defines "trade-mark" as defined in section 11202; however, to this provision there is added the following phrase: "or the designation or name for any mill, hotel, factory, or other business"); Mont. Rev. Codes, § 11204 (provision of Penal Code prohibiting counterfeiting or imitation of label, trade-mark, or form of advertisement adopted by any person, association or union of workingmen).

Iowa Code 1939, § 9867 (label, trade-mark or form of advertisement must be of distinctive character and not of identical form or in any near resemblance to any label, trade-mark, or form of advertisement previously filed for record in office of secretary of state); § 9878 (authorizing state manufacturers' association to adopt label or trade-mark bearing words "Made in Iowa," together with other appropriate design or inscription; such label or trade-mark may be registered in office of secretary of state); § 9881 (association's board of awards grants to manufacturers the right to use said label or trade-mark).

Cross-references.

Criminal provisions relating to trade-marks, 103-34, 103-56; fair trade and unfair trade practices relating to, 16A-3, 16A-4; commercial feeding stuffs, 3-8-6; signing instrument in trade name, 61-1-19.

1. **Number of telephone company's "trouble department."**

Where telephone company had established for convenience of patrons department designated as "Trouble Department," and assigned number 888 for such department, it could not enjoin competition which subsequently entered telephone business from using same number for its trouble department on ground of unfair competition or that such number was trade-mark or trade name. Rocky Mountain Bell Tel. Co. v. Utah Independent Tel. Co., 31 U. 377, 88 P. 26, 8 L. R. A. (N. S.) 1153.

Decisions from other jurisdictions.

— California.

Although a person may confer rights by consent upon another to use his personal name as a trade-mark, ordinarily personal names may not become trade-marks because, as between persons of the same or similar names, each has an equal right to use his own name in his own business; the right to consent to the use of a personal name by another party as a trade-mark is in conflict with the principle that trade-marks become property rights which are necessarily exclusive in their nature. Ida May Co., Inc. v. Ensign, 20 Cal. App. 2d 339, 66 P.2d 727.

Generic terms and words descriptive of place are not subject to exclusive appropriation. Academy of Motion Picture Arts and Sciences v. Benson, 15 Cal. 2d 685, 104 P.2d 650.

— Iowa.

A trade-mark is an arbitrary, distinctive name, symbol or device to indicate or authenticate the origin of the product to which it is attached. Surtor v. Schaden, 125 Iowa 696, 101 N. W. 511.

A valid trade-mark must, either by itself or by association, point distinctively to the origin or ownership of the article to which it is applied or to the particular business carried on under it. Iowa Auto Market v. Auto Market & Exchange, 197 Iowa 420, 197 N. W. 321.

Trade name ordinarily is name, sign or symbol used to designate goods manufactured or sold, or place of business of manufacturer or dealer in such goods, but is not limited to use in connection with manufacture or sale of some particular article, but may serve as a protection to other lines of business. Iowa Auto Market v. Auto Market & Exchange, 197 Iowa 420, 197 N. W. 321.

95-1-2. Claim to Ownership—Filing and Publication—Fee.

Any person may adopt any trade-mark, trade name or device by filing in the office of the secretary of state a description thereof, with an affidavit attached thereto setting forth that affiant, or the corporation, firm or association of which he is an officer or member, is the exclusive owner of such trade-mark, trade name or device, and causing a copy of such description and affidavit to be published once a week for two successive weeks in a weekly or daily newspaper published and having general circulation in this state, and by filing proof of such publication in the office of the secretary of state. The fee of the secretary of state for filing such description and affidavit shall be $3.

(C. L. 17, §§ 6146, 6147.)

Comparable provisions.

Cal. Bus. and Prof. Code, § 14230 (any person may register any trade-mark used by him in California by filing claim to it with secretary of state).

Idaho Code, § 43–503 (label, trade-mark, term, design, device or form of advertisement may be filed for record in office of secretary of state).

Iowa Code 1939, § 9867 (label, trade-mark or form of advertisement may be filed for record in office of secretary of state).

Mont. Rev. Codes, § 4287 (any person may record trade-mark or name by filing with secretary of state his claim to same, with copy or description, and affidavit of exclusive ownership); § 11206 (person, association, or union may file label, trade-mark, or form of advertisement, for record, in office of secretary of state).

95–1–3. Id. On Containers in Distribution of Product.

Any person engaged in manufacturing, preparing, packing, canning, bottling, handling, selling or distributing any article of food or commerce which is distributed or sold in containers or carriers bearing or having impressed or produced thereon the name of such person or a trade name or device used by him in such business may adopt such name, trade name or device by filing in the office of the secretary of state a statement sworn to by such person (if an association by a member thereof, and if a corporation by its president, secretary or manager), setting forth that such name, trade name or device (giving a copy or description thereof) is in use by such person, and specifying the nature of the business within this state in which it is used, and claiming such name, trade name or device as the name, trade name or device under which goods or merchandise, manufactured, prepared, packed, canned, bottled, handled, sold or distributed by him is or is to be so manufactured, prepared, packed, canned, bottled, sold or distributed. A copy of such statement shall be published once a week for two successive weeks in a daily or weekly newspaper of general circulation published in this state, and proof of the publication thereof shall be filed in the office of the secretary of state. Three dollars shall be charged by the secretary of state for filing such statement.

(C. L. 17, § 6150.)

A. L. R. notes.

Right of producer or distributor to protection against use of his containers, 60 A. L. R. 285.

95–1–4. Record of Claims to Ownership.

The secretary of state must keep for public examination a record of the claims to all trade-marks, trade names and devices filed in his office, with the date when filed and the name of the claimant.

(C. L. 17, § 6147.)

95–1–5. Similarity Apt to Cause Confusion—Claim to Be Denied.

The secretary of state shall refuse to file a claim to any trade-mark, trade name or device which is a duplicate of any trade-mark, trade name or device specified in any statement or description then on file in his office, and he shall not receive for filing any claim to any trade-mark, trade name or device which is so similar to any trade-mark, trade name or device contained in any description or statement then on file as would likely mislead the public. (L. 31, p. 17, § 3.)

Comparable provisions.

Cal. Bus. and Prof. Code, § 14244 (similar as to trade-mark).

95-1-6. Right of Property in—Transfer—Wrongful Use; Injunction, Damages.

Any person who has first adopted and used a trade-mark, trade name or device, whether within or beyond the limits of this state, is its original owner. Such ownership may be transferred in the same manner as personal property and is entitled to the same protection. Any court of competent jurisdiction may restrain by injunction and award damages for any use of trade-marks, trade names or devices in violation of this chapter. (C. L. 17, § 6148.)

Comparable provisions.

Cal. Bus. and Prof. Code, §§ 14400, 14401 and 14402 (similar as to "trade name"); §§ 14270, 14272 and 14300 (similar as to "trade-mark").

Iowa Code 1939, § 9871 (proceeding may be had to enjoin manufacture, use, display, or sale of counterfeits or imitations of adopted label, trade-mark or form of advertisement).

Decisions from other jurisdictions.

— California.

The reviewing court, on plaintiff's appeal, reversed judgment which had been entered by trial court on findings made in defendant's favor, the said appellate court pointing out that, as one looked upon the jars containing cooking fat packed by the respective parties, the first impression derived was that they bore labels of one manufacturer varying in color only, the court therewith enumerating various indicia of similarity or identity, such as the jars being identical in size, labels being of substantially same size, all lines and dimensions thereon being exactly the same except as otherwise pointed out, expressions contained on the labels being in Yiddish, in blue and red respectively, and being identical when translated, and the words "Nyafat" and "Nufat" appearing written across the middle of the respective labels on rectangles, the ends of which were bent backwards. I. Rokeach & Sons, Inc. v. Kubetz, 10 Cal. App. 2d 537, 52 P.2d 567.

Plaintiff stated a cause of action which, if supported by proof, would entitle it to the relief sought, or which would require defendant, doing business as "The Hollywood Motion Picture Academy," to alter her trade name by some designation calling attention to the limited scope of her school in order to prevent confusion with the institution or society represented by plaintiff; and, although case at bar was novel, it did not follow that plaintiff might not be entitled to some relief, plaintiff depending, not upon deceptive use of a trade-mark, but on allegedly deceptive and injurious use of what might be designated as a trade name, and seeking to have the secondary meaning, which it had built up, protected from encroachments and deceptive use by defendant, to plaintiff's injury. Academy of Motion Picture Arts and Sciences v. Benson, 15 Cal.2d 685, 104 P.2d 650.

— Iowa.

In order to authorize the interference of chancery, it is not necessary that the trade-mark should be copied with the fullest accuracy; the use of an imitation which is calculated to deceive and which may be taken for the original will be restrained, though it varies from the original in some particulars. Shaver v. Shaver, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194.

The courts recognize the right of owners of trade-marks or trade names to protect them against piracy, regardless of the residence of such owners. Atlas Assur. Co., Ltd. v. Atlas Ins. Co., 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 16 L. R. A. (N. S.) 625, 128 Am. St. Rep. 189.

Even where the name, symbol or device used is not one that can be protected as a trade name or mark, equity will protect one in the use of it where it has, by long use, obtained a secondary meaning as designating the goods of one particular person, and where by the use of it, the public has come to know his goods by that name or symbol. Motor Accessories Mfg. Co. v. Marshalltown Motor Material Mfg. Co., 167 Iowa 202, 149 N. W. 184.

95-1-7. Wrongful Use—Penalty.

It shall be unlawful for any person to adopt or use any trade-mark, trade name or device, claim to which has already been filed in accordance with this title, or before March 6, 1931, as provided by Chapter 2, Title 109, Compiled Laws of Utah, 1917, or as provided by Section 8452,

Compiled Laws of Utah, 1917; or to deface or remove any such trademark, trade name or device. (C. L. 17, § 6152.)

CHAPTER 2

NAMING, MARKING OR BRANDING CONTAINERS, RECEPTACLES, EQUIPMENT OR SUPPLIES

95-2-1. Claim to Ownership—Filing and Publication—Fee.
95-2-2. Character of Name, Brand or Device Subject to Adoption.
95-2-3. Unlawful Adoption or Use by One Not Owner.
95-2-4. Unlawful Use of Marked Containers — Defacing or Removing Marks.
95-2-5. Record of Claims to Ownership.
95-2-6. Similarity Apt to Cause Confusion—Claim to Be Denied.
95-2-7. Wrongful Use—Penalty.
95-2-8. Id. Trafficking in—Penalty.
95-2-9. (Repealed.)
95-2-10. Wrongful Use—Search and Seizure — Procedure After Seizure.
95-2-11. Transfer of Ownership to Be in Writing.
95-2-12. Taking Security for Return Not a Sale.
95-2-13. Certified Copies of Record, Evidence.
95-2-14. Duties of Commissioner of Agriculture.
95-2-15. Remedies Under Chapter Cumulative.
95-2-16. Penalty — Omnibus Provision.

95-2-1. Claim to Ownership—Filing and Publication—Fee.

Any person engaged in the transportation, manufacture, packing, canning, bottling or selling of any product or substance may adopt a name, mark, brand or device to be stamped, impressed or produced upon any can, bottle, cask, keg, barrel, receptacle, container, carrier or box, or upon any equipment or supplies, owned or used by him in the handling or transportation of such product or substance, or in his business, by filing in the office of the secretary of state a description, copy or facsimile of the name, mark, brand or device so used by him and a statement of the use to be made of any such receptacle, container, carrier, box, equipment or supplies, and causing a copy of such description and statement to be published once a week for two successive weeks in a daily or weekly newspaper having general circulation in this state, and by filing proof of such publication in the office of the secretary of state. The fee of the secretary of state for filing such description and statement shall be $3. (L. 31, p. 17, § 1.)

Comparable provisions.

Cal. Bus. and Prof. Code, § 14427, added to the Code by Laws of 1941 (description of name, mark or device used as brand may be filed in office of county clerk and also in office of secretary of state); § 14428 (description to be printed once a week for three successive weeks in newspaper); § 14429 (words "Registered in California," or abbreviation "Reg. Cal." must be included as part of each brand).

Idaho Code, § 36-601 (persons, companies and corporations engaged in transportation or manufacture of dairy product or ice cream, or in bottling milk and cream for sale and use, may file in office of secretary of state a description of name or marks used, and of the use to be made of receptacles, and cause same to be published for two successive weeks in weekly newspaper).

Mont. Rev. Codes, § 4291 (person engaged in manufacturing, bottling, or selling soda, mineral, or aerated waters cider, ginger ale, or other aerated, non-

intoxicating beverages, with his name or other marks or devices on the receptacles, may have a trade-mark for same, as provided by statute).

A. L. R. notes.
Right of producer or distributor to protection against use of his containers, 60 A. L. R. 285.

95–2–2. Character of Name, Brand or Device Subject to Adoption.

The name, brand, mark or device so selected and adopted may consist of a name, design, mark or marks, or some particular color, used upon the can, bottle, cask, keg, barrel, receptacle, container, carrier, box, equipment or supplies, used in the business of the person filing such claim. (C. L. 17, § 6151.)

Comparable provisions.
Idaho Code, § 36–602 (similar).

95–2–3. Unlawful Adoption or Use by One Not Owner.

It shall be unlawful for any person to adopt or use any name, brand, mark or device, claim to which has been filed and published as provided herein. (C. L. 17, § 6152.)

Comparable provisions.
Idaho Code, § 36–603 (similar, and applicable to "any person, company or corporation").

95–2–4. Unlawful Use of Marked Containers—Defacing or Removing Marks.

It shall be unlawful for any person, other than the owner thereof, to use, destroy or conceal or to possess with intent to deprive the owner of the use or possession thereof, or to have in his possession with intent, in violation of any statute of this state, to use, destroy, conceal, deface, traffic in or otherwise deal with, any can, bottle, cask, keg, barrel, receptacle, container, carrier, box, equipment or supplies, bearing, or upon which there is stamped, impressed or produced, any name, mark, brand or device, claim to which has been filed and published as provided by law, for any purpose whatsoever; or to deface, erase, obliterate, cover up or otherwise remove, destroy or conceal any such name, brand, mark or other device put upon such can, bottle, cask, keg, barrel, receptacle, container, carrier, box, equipment or supplies; *provided, however,* that nothing contained in this act shall be construed to apply to or restrict the transfer or use of wooden boxes, or burlap or cotton bags or sacks. (C. L. 17, §§ 6153, 6154.)

History.
As amended by L. 39, ch. 110, eff. May 9, making certain changes in text, inserting clause after "use" in second line and adding proviso.

Comparable provisions.
Cal. Bus. and Prof. Code, § 14403 (having in one's possession, or using, receptacle, brand, or other thing related to trade name of another, with intent to deceive or defraud, is misdemeanor); § 14404 (defacing, obliterating or removing trade name with intent to defraud owner is misdemeanor).

Idaho Code, § 36–604 (unlawful for person, other than rightful owner, to use receptacle, marked or branded as provided by statute, for any other purpose, or for transportation or handling of product other than designated or provided for by such branding); § 36–605 (unlawful for person other than rightful owner to deface or remove brand or mark or stamp from receptacle).

A. L. R. notes.
Right of producer or distributor to protection against use of his containers, 60 A. L. R. 285.

95-2-5. Record of Claims to Ownership.

The secretary of state must keep for public examination a record of the claims to all names, brands, marks or devices filed in his office pursuant hereto, with the date when filed and the name of the claimant.

(L. 31, p. 17, § 2.)

95-2-6. Similarity Apt to Cause Confusion—Claim to Be Denied.

The secretary of state shall refuse to file a claim to any name, brand, mark or device which is duplicate of any name, brand, mark or device then on file in his office, and he shall not receive for filing a claim to any name, mark, brand or device which is so similar to any name, brand, mark or device then on file as would likely mislead the public.

(L. 31, p. 17, § 3.)

95-2-7. Wrongful Use—Penalty.

Every person who has in his possession or who uses, with intent to deceive or defraud, any receptacle, container, carrier, box, equipment or supplies bearing, or having stamped, impressed or produced thereon, the name, brand, mark or device of another, claim to which has been filed and published as provided in this title, or before March 6, 1931, as provided by Chapter 2, Title 109, Compiled Laws of Utah, 1917, or as provided by Section 8452, Compiled Laws of Utah, 1917, for the purpose of disposing of any article or substance other than that which the owner of such name, mark, brand or device shall have placed therein is guilty of a misdemeanor. (L. 31, p. 17, § 4.)

Cross-references.

Criminal provisions relating to trademarks and trade names, 103-34, 103-56; fair trade and unfair trade practices relating to, 16A-3, 16A-4; commercial feeding stuffs, 3-8-6; signing instruments in trade name, 61-1-19.

A. L. R. notes.

Right of producer or distributor to protection against use of his containers, 60 A. L. R. 285.

95-2-8. Id. Trafficking in—Penalty.

Every person who knowingly sells or trafficks in any receptacle, container, carrier, box, equipment or supplies, bearing, or having stamped, impressed or produced thereon the name, brand, mark or device of another, claim to which has been filed and published as provided in this title, or before March 6, 1931, as provided by Chapter 2, Title 109, Compiled Laws of Utah, 1917, or as provided by Section 8452, Compiled Laws of Utah, 1917, with intent to defraud the owner thereof, or without the written consent of the owner thereof, or unless the same shall have been purchased from the owner thereof, is guilty of a misdemeanor. (L. 31, p. 17, § 5.)

Comparable provisions.

Cal. Bus. and Prof. Code, § 14405 (similar; word "wilfully" used in lieu of "knowingly").

A. L. R. notes.

Right of producer or distributor to protection against use of his containers, 60 A. L. R. 285.

95-2-9. (Repealed by L. 39, ch. 110, § 2, eff. May 9.)

95-2-10. Wrongful Use—Search and Seizure—Procedure After Seizure.

Any person may make affidavit before a court of competent jurisdiction that he has reason to believe, and does believe, setting forth the facts upon which such belief is based that any receptacle, container, carrier, box, equipment or supplies bearing or having stamped, impressed or produced thereon, the name, mark, brand or device, claim to which has been filed and published as provided by law, is, or are, in the possession of any person other than the owner thereof in violation of the provisions of any statute or that any such receptacle, container, carrier, box, equipment or supplies is, or are secreted in any place specified in such affidavit. The court may thereupon examine on oath the complainant and any witnesses that may be produced or subpoenaed and take their depositions in writing. If it shall appear from the affidavit or from the affidavit and deposition or depositions that there is probable cause to believe that any such property is unlawfully possessed or secreted as aforesaid, the court shall issue a search and seizure warrant for such property.

The warrant shall be directed generally to any peace officer of the state of Utah and shall require him to take such property into his possession and hold the same subject to the order of the court.

Any peace officer to whom such warrant is delivered shall execute the same in the daytime anywhere within the state; *provided*, that if the warrant is issued out of a justice of the peace court it may not be executed outside the county in which the issuing court sits unless the county clerk of that county shall first endorse thereon his certificate that the signature affixed to the warrant is the true signature of the person who is duly qualified and acting as justice of the peace of the issuing court.

If the officer when executing the warrant finds there is contained in any receptacle or other container seized by him under the warrant any personal property of such nature that it can be handled only in receptacles or containers, the officer may take such property with the receptacles described in the warrant and hold the same until the person from whose possession it was taken produces other receptacles or containers to receive it and then demands its return or the officer may at his option furnish receptacles or containers for receiving such property and deliver the same to such person. In the latter case, the person to whom such receptacles or containers are furnished shall redeliver the same to the officer within forty-eight hours of his receipt thereof and shall be guilty of a misdemeanor for a wilful or negligent failure so to do.

When the officer takes the property pursuant to the warrant he shall give a detailed receipt therefor to the person found in possession thereof or if no such person is found he shall leave such receipt in the place in which the property is found. After taking the property into his possession the officer must forthwith return the warrant to the court with a written inventory of the property seized thereunder.

Upon the filing of the officer's return the court shall order him to hold the property seized pursuant to the warrant until otherwise ordered by the court. The court shall thereupon give notice of a hearing to be held to determine the right to the possession of said property. Notice of said hearing shall be given by posting notice of such hearing at the place where said property was seized and notice shall be served upon the person, if known, from whose possession the property was taken by the officer seizing the same. Notice shall also be served upon the owner of said property as shown by the records of the secretary of state and upon such other persons as the court shall have reason to believe have any interest in the seized property.

At the hearing any person appearing and asserting any interest in writing to any of the seized property, shall be made a party defendant. The court shall then proceed to the trial of the issues as made by the claims of the parties to said action and shall determine the party entitled to possession of said property and shall order the return of same to said party. (L. 31, p. 17, § 10.)

History.

As amended by L. 39, ch. 110, eff. May 9, making material changes in text and adding six paragraphs.

Comparable provisions.

Cal. Bus. and Prof. Code, § 14435 (magistrate issues search warrant when registrant takes oath before him; punishment is imposed on person found guilty of violating statute; award of possession of containers, equipment, or supplies, is made to owner).

1. Validity.

This section did not violate constitutional prohibition of unreasonable searches and seizures, as statute implied that warrant would issue only when court should find probable cause therefor. Allen v. Trueman, 100 U. 36, 110 P.2d 355.

But this section, permitting issuance of search warrant on affidavit on information and belief, held invalid as contrary to provision of Constitution requiring "probable cause" before issuance. Allen v. Lindbeck, 97 U. 471, 93 P.2d 920.

And this section operated to provide an essentially criminal procedure for the attainment of private and civil ends, and was therefore void as permitting unreasonable search and seizure. Allen v. Trueman, 100 U. 36, 110 P.2d 355.

This section, in permitting owners of trade-marks and trade names to invoke criminal procedure of search and seizure to protect their civil rights, granted a special privilege and was unconstitutional. Allen v. Trueman, 100 U. 36, 110 P.2d 355.

A. L. R. notes.

Right of producer or distributor to protection against use of his containers, 60 A. L. R. 285.

95–2–11. Transfer of Ownership to Be in Writing.

(1) The ownership of or right to use any such name, mark, brand or device may be transferred only by an instrument in writing, duly acknowledged by the vendor, and filed in the office of the secretary of state. Until such instrument shall have been filed as aforesaid the ownership in and right to the use of such name, mark, brand or device shall be deemed not to have passed and any intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose.

(2) No property rights whatsoever or interest or right of possession or use in or to any receptaele, container, carrier, box, equipment or supplies, bearing or having stamped, impressed or produced thereon, any name, mark, brand or device, claim to which has been filed and published as aforesaid, shall be granted, assigned, surrendered or declared otherwise than by act or operation of law or by bill of sale or other conveyance in writing subscribed by the party granting, assign-

ing or surrendering the same or by his lawful agent thereunto authorized by writing. (L. 31, p. 17, § 7.)

History.
As amended by L. 39, ch. 110, eff. May 9, making material changes in text and adding subd. (2).

95–2–12. Taking Security for Return Not a Sale.

Whenever the owner of any such receptacle, container, carrier, box, equipment or supplies, bearing or having stamped, impressed or produced thereon such name, mark, brand or device, shall accept or require the taking or accepting of any security for the return of the same, the delivery of the same to such person upon the deposit of such security shall not constitute a sale of such property, but the title thereto shall at all times remain in such owner with full right of possession upon the return of such deposit. (L. 31, p. 17, § 8.)

95–2–13. Certified Copies of Record, Evidence.

A certified copy of the statement or description of the name, mark, brand or device filed in the office of the secretary of state and of the affidavit of publication thereof shall be prima facie evidence of the exclusive ownership of such name, mark, brand or device by the claimant or his assigns. (L. 31, p. 17, § 12.)

95–2–14. Duties of Commissioner of Agriculture.

For the purpose of preventing the use of receptacles, containers, carriers, boxes, equipment or supplies contrary to the provisions of this title, and to insure the wholesomeness and high quality of products and the sanitary condition of such receptacles, containers, carriers, boxes, equipment or supplies, in which the same are handled, distributed, or sold, it shall be the duty of the commissioner of agriculture to enforce the provisions hereof. (L. 31, p. 17, § 13.)

95–2–15. Remedies Under Chapter Cumulative.

Nothing in this chapter shall prevent, lessen, impeach or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any name, mark, brand or device might have had, if the provisions hereof had not been enacted. (L. 31, p. 17, § 14.)

95–2–16. Penalty—Omnibus Provision.

Whoever violates any of the provisions of this title is guilty of a misdemeanor. (C. L. 17, § 6156.)

A. L. R. notes.
Right of producer or distributor to protection against use of his containers, 60 A. L. R. 285.

TITLE 96

TRADING STAMPS *

96–0–1. Conditions of Unlawful Issue —Process Agent—Bond.
96–0–2. Bond — Actions — Parties — Limitation of Action.
96–0–3. Trading Stamps, etc., to Show Redeemable Value in Cents.
96–0–4. Redemption in Cash or Merchandise by Issuer.
96–0–5. Id. By Distributor.
96–0–6. Violation—Penalty.

L. 1935, ch. 102; eff. May 14.

* **Validity of act.** Trading Stamp Act which taxed stamps of merchant who obtained them from another, but did not apply to cases where merchant issued his own stamps, held invalid as unreasonably discriminatory. State v. Holtgreve, 58 U. 563, 200 P. 894, 26 A. L. R. 696.

96–0–1. Conditions of Unlawful Issue—Process Agent—Bond.

It shall be unlawful for any person to sell, issue, transfer or deliver to any other person within this state any trading stamp or stamps to be sold, issued, transferred or delivered by such other person upon, in connection with, or as the result of, a sale of any goods, wares, merchandise, or other commodity or thing of value, unless and until the person in the first instance so selling, issuing, transferring or delivering the same shall have established an office within this state where all books of account relating to the sale, issue, transfer or delivery of trading stamps in this state shall be kept, and shall have filed with the secretary of state an appointment of a process attorney upon whom process in all civil actions may be served, and a good and sufficient bond as hereinafter specified. Any person violating any provision of this section is guilty of a misdemeanor. (C. L. 17, § 6160.)

Comparable provisions.

Cal. Bus. and Prof. Code, § 17700, added to the Code by Laws of 1941 ("coupon" includes certificates, cards, package labels, wrappers, can covers, bottle caps or other and similar devices which may be exchanged for or redeemed in goods, wares or merchandise free of charge or for less than retail price thereof); § 17701 (unlawful to issue coupons unless there is specified therein the person by whom coupon is exchangeable or redeemable).

Mont. Rev. Codes, § 2430 (requiring separate license from treasurer of each county wherein furnishing or selling or using of premiums or bonuses "shall take place" for each store or place of business in the county from which such furnishing or selling of premiums or bonuses, as herein enumerated, or in which same shall take place; pertains to "any premiums or bonus, including stamps, coupons, tickets, certificates, cards or other similar devices * * * [and to] premiums or bonuses of goods, wares or merchandise * * *"); § 2431 (to obtain such license there must be paid to county treasurer the sum of six thousand dollars; license is issued for one year).

Decisions from other jurisdictions.

— California.

Petitioner was entitled to a writ of supersedeas staying all proceedings in the court below until final determination by this court of the cause on appeal, where it appeared that petitioner operated ten retail drug stores, that he gave trading stamps redeemable either in cash or merchandise, that plaintiff trade association was merely proceeding under the broad equitable provisions of section 10 of the Unfair Practices Act, that the trial court had granted a preliminary injunction, that petitioner had appealed from said decree and asked that opera-

tion of temporary injunction be stayed pending the appeal, and that upon denial of application for a stay, this original proceeding for writ of supersedeas was instituted, the court herein pointing out that the merchandising practice employed by petitioner was one of long standing, and that its abrupt abolishment would cause disruption in the orderly conduct of his business and a loss of patronage and customer good will, possibly so irreparable as to deprive him of the fruits of a meritorious appeal. Food & Grocery Bureau of Southern California v. Garfield, 18 Cal. 2d 174, 114 P.2d 579.

— Montana.

The fundamental policy of the Montana act is to regulate the giving of premiums and bonuses; however, the language employed in section 1 is so worded and contains so many meaningless words and phrases that it all but defies analysis; the act seems to be aimed against the use of goods as a premium, and does not appear to deny to a merchant the right to sell goods for cash at a discount from the general market price, nor to prohibit the use of trading stamps redeemable only in cash. State v. Lutey Bros., 55 Mont. 545, 179 P. 457.

A. L. R. notes.

Constitutionality of statutes prohibiting giving of premiums or trading stamps, 133 A. L. R. 1087.

96-0-2. Bond—Actions—Parties—Limitation of Action.

Said bond shall be in the sum of $20,000 payable to the state of Utah, and shall be executed by the person furnishing the same as principal, together with at least one corporate surety, and shall provide that the principal shall, upon presentation by the lawful holder of the required quantity of trading stamps in the proper form, redeem the same according to the terms of the contract under which they were issued, and that the said principal shall pay all taxes imposed by law and all fines and penalties imposed for a violation of any law of this state. Said bond shall be in such form as the secretary of state shall prescribe. Whenever any such bond shall become forfeited for breach of any condition therein contained, any person injured thereby may sue thereon, or all persons so injured may join in prosecuting one action, but any such action must be commenced within one year after the cause of action accrued. (C. L. 17, § 6161.)

L. 1935, ch. 102; eff. May 14.

AN ACT to require the redeemable cash value of a trading stamp, cash discount stamp, check, ticket, coupon, or other similar device to be legibly printed or written upon the face thereof in cents; to require the redemption of such devices either in merchandise or in cash at the option of the holder; to require that any number of them shall be redeemed when presented; to require the distributor to thus redeem them if the issuer does not; and providing a penalty.

Be it enacted by the Legislature of the State of Utah:

96-0-3. Trading Stamps, etc., to Show Redeemable Value in Cents.

No person shall sell or issue any stamps, trading stamp, cash discount stamp, check, ticket, coupon or other similar device, which will entitle the holder thereof, on presentation thereof, either singly or in definite number, to receive, either directly from the vendor or indirectly through any other person, money or goods, wares or merchandise, unless each of said stamps, trading stamps, cash discount stamps, checks, tickets, coupons or other similar devices shall have legibly printed or

written upon the face thereof the redeemable value thereof in cents. (Sec. 1.)

96–0–4. Redemption in Cash or Merchandise by Issuer.

Any person who shall sell or issue to any person engaged in any trade, business or profession, any stamp, trading stamp, cash discount stamp, check, ticket, coupon, or other similar device which will entitle the holder thereof, on presentation thereof either singly or in definite number, to receive either directly from the vendor or indirectly through any other person, money or goods, wares or merchandise, shall upon presentation, redeem the same either in goods, wares or merchandise, or in cash, good and lawful money of the United States, at the option of the holder thereof, and any number of such stamps, trading stamps, cash discount stamps, checks, tickets, coupons, or other similar devices shall be redeemed as hereinbefore set forth, at the value in cents printed upon the face thereof, and it shall not be necessary for the holder thereof to have any stipulated number of the same before demand for redemption may be made, but they shall be redeemed in any number, when presented, at the value in cents printed upon the face thereof, as hereinbefore provided. (Sec. 2.)

96–0–5. Id. By Distributor.

Any person engaged in any trade, business or profession who shall distribute, deliver or present to any dealing with him, in consideration of any article or thing purchased, any stamp, trading stamp, cash discount stamp, check, ticket, coupon or other similar device, which will entitle the holder thereof, on presentation thereof, either singly or in definite number, to receive, either directly from the person issuing or selling the same, as set forth in section 2, or indirectly through any other person, shall, upon the refusal or failure of the said person issuing or selling same to redeem the same, as set forth in section 2, be liable to the holder thereof for the face value thereof, and shall upon presentation redeem the same, either in goods, wares or merchandise, or in cash, good and lawful money of the United States of America, at the option of the holder thereof, and in such case any number of such stamps, trading stamps, cash discount stamps, checks, tickets, coupons or other similar devices, shall be redeemed as hereinbefore set forth, at the value in cents printed upon the face thereof, and it shall not be necessary for the holder thereof to have any stipulated number of the same before demand for redemption may be made, but they shall be redeemed in any number, when presented, at the value in cents printed upon the face thereof, as hereinbefore provided. (Sec. 3.)

96–0–6. Violation—Penalty.

Any person, firm or corporation who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor. (Sec. 4.)

TITLE 97

UNIFORMITY OF LEGISLATION*

97-0-1. Board of Commissioners — Number — Term — Vacancies.
97-0-2. Id. Duties.
97-0-3. Records and Reports.
97-0-4. Id. To Receive No Compensation—Expenses.

* History of act. This was Title 84 of Comp. Laws 1907, p. 928.

97-0-1. Board of Commissioners—Number—Term—Vacancies.

The Utah Board of Commissioners for the Promotion of Uniformity of Legislation in the United States shall consist of three competent persons to be appointed by the governor, by and with the consent of the senate, for a term of two years. Any vacancy in said board shall be filled by appointment by the governor. (C. L. 17, § 6180.)

Comparable provisions.
Cal. Gen. Laws, Act 8106, § 1, as amended by Laws of 1941, Idaho Code, § 65-1601, Iowa Code 1939, § 65 (governor appoints three commissioners, members of bar in good standing, to be known as commission on uniform state laws).

97-0-2. Id. Duties.

It shall be the duty of said board to examine the subjects upon which uniformity of legislation in the various states of the Union is desirable, but which are without the jurisdiction of the congress of the United States; to confer upon these matters with the commissioners appointed by other states for the same purpose; to consider and draft uniform laws to be submitted for approval and adoption by the several states; and generally to devise and recommend such other or further course of action as shall accomplish the purposes of this title.
(C. L. 17, § 6181.)

Comparable provisions.
Cal. Gen. Laws, Act 8106, § 4, Idaho Code, § 65-1604, Iowa Code 1939, § 68 (duty of commissioners to attend meetings of national conference of commissions on uniform state laws, or to arrange for attendance of at least one of their number at such conference; commission reports to legislature accounts of its transactions and its advice and recommendations for legislation; California commission is under further duty to bring about, as far as practicable, the passage of various uniform acts recommended by national conference; further duty of Idaho and Iowa commissions is to bring about, as far as practicable, the uniform judicial interpretation of all uniform laws; all three commissions must devise and recommend such additional legislation, or other or further course of action, as shall tend to accomplish purposes of the act).

97-0-3. Records and Reports.

The said board shall keep a record of all its transactions, and shall at each session of the legislature make a report of its doings and of its recommendations. (C. L. 17, § 6182.)

97-0-4. Id. To Receive No Compensation—Expenses.

No member of said board shall receive any compensation for his services, but each member shall be paid from the state treasury the amount of his actual traveling and other necessary expenses incurred in the discharge of his official duties after an itemized and verified account thereof has been audited, approved and allowed by the board of examiners. Said board of commissioners shall keep a full account of its expenditures, and shall report it in each biennial report.

(C. L. 17, § 6183.)

TITLE 98

VETERANS

Chapter 1. APPROPRIATIONS.
Chapter 2. CIVIL WAR VETERANS.
Chapter 3. G. A. R. ENCAMPMENT FUND.
Chapter 4. USE OF STATE ARMORIES.
Chapter 5. VETERANS' GUARDIANSHIP.

CHAPTER 1

APPROPRIATIONS

98-1-1. For Memorials—By Cities and Towns.
98-1-2. Id. By Counties.
98-1-3. Id. Tax for.

98-1-1. For Memorials—By Cities and Towns.

The boards of city commissioners, city councils and town boards, respectively, may appropriate from any fund of the city or town available for general purposes such sums as they may deem expedient for the purpose of erecting or contributing to the erection of, a memorial to commemorate the achievements of soldiers, sailors and marines of the state of Utah in the Great World War, where such memorial is erected within their respective cities or towns. The city commissioners, city council or town board may, when authorized by the qualified electors of such city or town, issue general obligation bonds of such city or town and devote the proceeds of the same to the erection of such memorial.

(L. 19, p. 19, § 1.)

98-1-2. Id. By Counties.

The board of county commissioners of the several counties may erect and maintain, and contribute to the erection and maintenance of, memorials to the memory of veterans of the several wars in which the United States of America shall have been a belligerent; *provided*, that no board of county commissioners may erect and maintain, or assist in, or contribute to, the erection or maintenance of any such memorial which shall have its site outside of the boundaries of the county.

(L. 27, p. 48, § 1.)

98-1-3. Id. Tax for.

For the raising of funds with which to carry out the provisions of the next preceding section, and for such use only, the county commissioners

may levy and collect an annual tax upon the property situate within the county not to exceed one mill on the dollar. (L. 27, p. 48, § 2.)

CHAPTER 2

CIVIL WAR VETERANS

98–2–1. Annual Appropriation for.
98–2–2. Disbursements.
98–2–3. Id.
98–2–4. Burial Expenses.
98–2–5. Not to Be Buried in Potter's Field.

98–2–1. Annual Appropriation for.

For the purposes of providing a fund to enable certain veterans of the Civil War and their widows and also army nurses, who are heads of families, and who have been actual and bona fide residents of the state of Utah for not less than two years, to remain in their own homes in this state, and of providing for other Civil War veterans, who by reason of sickness or other disability are in need, and of providing for the burial of such veterans under the provisions of this chapter, there is hereby appropriated and set aside, annually, the sum of $6,000, or so much thereof as may be necessary. (L. 21, p. 111, § 1.)

98–2–2. Disbursements.

Such funds shall be disbursed under the supervision of the department commander of the Grand Army of the Republic, department of Utah, to the beneficiaries under this chapter; and the said department commander and the attorney-general are hereby empowered to make all necessary rules and regulations for the distribution of said funds. (L. 21, p. 111, § 2.)

98–2–3. Id.

Whenever it is shown that any person coming under the provisions of section 98–2–1 is entitled to any of such funds, the said department commander shall present his written requisition in behalf of the beneficiary, approved by the attorney-general, for such sum or sums as may be necessary, not to exceed in any one case $15 per month, to the state auditor, who shall draw his warrant on the state treasurer in favor of such beneficiary. (L. 21, p. 111, § 3.)

98–2–4. Burial Expenses.

A sum not exceeding $100 shall be allowed from said fund for the burial expenses of any such Civil War veteran who shall die a resident of this state, upon application therefor by the family of the deceased soldier or said department commander. Upon satisfactory proof that the deceased soldier was within the purview of this chapter the department commander shall certify the fact to the state auditor, who, on approval by the attorney-general, shall issue his warrant on the state treasurer for the amount specified in this section payable to the undertaker in charge of the burial of such deceased soldier. (L. 21, p. 111, § 4.)

98-2-5. Not to Be Buried in Potter's Field.

The body of no person coming under the provisions of this chapter shall be buried in any portion of any cemetery or burial ground used for the burial of paupers. (L. 21, p. 111, § 5.)

CHAPTER 3

G. A. R. ENCAMPMENT FUND

98-3-1. Annual Appropriation.
98-3-2. Id. Requisitions.
98-3-3. (Repealed.)

98-3-1. Annual Appropriation.

For the purposes of providing a permanent annual fund for the regular and contingent expenses of the department of Utah of the Grand Army of the Republic, including the annual encampments and the printing of the proceedings thereof, and of providing funds for the department commander and an attendant to be selected by him, subject to the approval of the adjutant general of the national guard of Utah, to attend the annual national encampments, and for reasonable compensation for the services of a secretary for the department of Utah Grand Army of the Republic, there is hereby appropriated and set aside, annually, the following sums, out of any monies in the state treasury not otherwise appropriated, to wit:

For the expenses of the department commander and the attendant chosen by him.....$400

For the expenses of the secretary.....$25

For the expenses of the annual state encampments and printing of the proceedings thereof.....$50

For such other necessary or contingent expenses as may be approved by the said adjutant general of the national guard of Utah and the attorney-general $25

(L. 21, p. 213, § 1.)

History.
As amended by L. 35, ch. 103, eff. Mar. 26, making material changes in text and adding all matter after "appropriated" in eleventh line.

98-3-2. Id. Requisitions.

The adjutant general of the national guard of the state of Utah and the attorney-general of the state of Utah shall present written requisition for such sums herein provided, or such portion of such sums as are needed for the purposes specified, to the state auditor, who shall draw his warrant on the state treasurer for such sums.

(L. 21, p. 213, § 2.)

History.
As amended by L. 35, ch. 103, eff. Mar. 26, rewriting text of entire section.

98-3-3. (Repealed by L. 35, ch. 103, § 3, eff. Mar. 26.)

CHAPTER 4

USE OF STATE ARMORIES

98–4–1. By Veterans' Organizations Permitted.

Under such regulations as the state armory board may prescribe, any organization of veterans of the Civil War, the war with Spain or the World War shall have the right to the free use of armories owned or leased by the state; *provided*, such use shall not interfere with the use of the same by the national guard or organized militia of this state.

(L. 23, p. 154, § 1.)

Cross-references.
Armory board, 54–2.

CHAPTER 5

VETERANS' GUARDIANSHIP

98–5–1. Definitions.
98–5–2. When Required by Director of United States Bureau.
98–5–3. Number of Wards One Guardian May Represent.
98–5–4. Petition for Appointment—By Whom—Contents.
98–5–5. Certificate of Director—Evidence of Necessity for Appointment—In Case of Minor Wards.
98–5–6. Id. In Case of Incompetent Wards.
98–5–7. Notice of Hearing.
98–5–8. Guardians' Bond.
98–5–9. Guardians' Annual Account—Hearing.
98–5–10. Id. Failure to File—Removal.
98–5–11. Guardians' Compensation.
98–5–12. Investment of Estate Funds.
98–5–13. Funds to Be Used for Ward Only—Exceptions.
98–5–14. Certified Copies of Public Records to Be Furnished Without Charge.
98–5–15. Commitment to Veterans' Hospitals.
98–5–16. Discharge of Guardian—Accounting.
98–5–17. Rule for Construction of Chapter.

98–5–1. Definitions.

As used in this chapter:

The term "bureau" means the United States veterans' bureau or its successor.

The terms "estate" and "income" include only moneys received by the guardian from the bureau, and all earnings, interest and profits derived therefrom.

The term "benefits" means all moneys payable by the United States through the bureau.

The term "director" means the director of the United States veterans' bureau or his successor.

The term "ward" means a beneficiary of the bureau.

The term "guardian" means any person acting as a fiduciary for a ward. (L. 29, p. 3, § 1.)

Comparable provisions.

States that have adopted the Uniform Veterans' Guardianship Act are as follows: Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia and Wyoming.

98-5-2. When Required by Director of United States Bureau.

Whenever, pursuant to any law of the United States or regulation of the bureau, the director requires, prior to payment of benefits, that a guardian be appointed for a ward, such appointment shall be made in the manner hereinafter provided. (L. 29, p. 3, § 2.)

98-5-3. Number of Wards One Guardian May Represent.

Except as hereinafter provided, it shall be unlawful for any person to accept appointment as guardian of any ward, if such proposed guardian shall at that time be acting as guardian for five wards. In any case, upon presentation of a petition by an attorney of the bureau alleging that a guardian is acting in a fiduciary capacity for more than five wards and requesting his discharge for that reason, the court, upon proof of such fact, shall require a final accounting forthwith from such guardian, and shall discharge such guardian in said case.

The limitations of this section shall not apply where the guardian is a bank or trust company acting for wards' estates only. An individual may be guardian of more than five wards, if they are all members of the same family. (L. 29, p. 3, § 3.)

98-5-4. Petition for Appointment—By Whom—Contents.

A petition for the appointment of a guardian may be filed in any court of competent jurisdiction by any person who is entitled to priority of appointment in other cases. If there is no person so entitled, or if the person so entitled shall neglect or refuse to file such a petition within thirty days after mailing of notice by the bureau to the last known address of such person indicating the necessity for the same, a petition for such appointment may be filed in any court of competent jurisdiction by any responsible person residing in this state.

The petition for appointment shall set forth the name, age and place of residence of the ward, the name and place of residence of the nearest relative, if known, and the fact that such ward is entitled to receive moneys payable by or through the bureau, and shall set forth the amount of moneys then due and the amount of probable future payments.

The petition shall also set forth the name and address of the person or institution, if any, having actual custody of the ward.

In the case of a mentally incompetent ward the petition shall show that such ward has been rated incompetent on examination by the bureau in accordance with the laws and regulations governing the bureau. (L. 29, p. 3, § 4.)

98–5–5. Certificate of Director—Evidence of Necessity for Appointment—In Case of Minor Wards.

Where a petition is filed for the appointment of a guardian for a minor ward, a certificate of the director, or his representative, setting forth the age of such minor as shown by the records of the bureau and the fact that the appointment of a guardian is a condition precedent to the payment of any moneys due the minor by the bureau, shall be prima facie evidence of the necessity for such appointment.

(L. 29, p. 3, § 5.)

98–5–6. Id. In Case of Incompetent Wards.

Where a petition is filed for the appointment of a guardian of a mentally incompetent ward, a certificate of the director, or his representative, setting forth the fact that such person has been rated incompetent by the bureau on examination in accordance with the laws and regulations governing such bureau, and that the appointment of a guardian is a condition precedent to the payment of any moneys due such person by the bureau, shall be prima facie evidence of the necessity for such appointment. (L. 29, p. 3, § 6.)

98–5–7. Notice of Hearing.

Upon the filing of a petition for the appointment of a guardian under the provisions of this chapter, the court shall cause such notice to be given as is provided by law. (L. 29, p. 3, § 7.)

98–5–8. Guardians' Bond.

Before making an appointment under the provisions of this chapter, the court shall be satisfied that the guardian whose appointment is sought is a fit and proper person to be appointed. Upon the appointment the guardian shall execute and file a bond to be approved by the court in an amount not less than the sum then due and estimated to become payable during the ensuing year. The court may from time to time require the guardian to file an additional bond.

Where a bond is tendered by a guardian with personal sureties, such sureties shall file with the court a certificate under oath, which shall describe the property owned by them, both real and personal, and that they are each worth the sum named in the bond as the penalty thereof over and above all their debts and liabilities, exclusive of property exempt from execution. (L. 29, p. 3, § 8.)

98–5–9. Guardians' Annual Account—Hearing.

Every guardian who shall receive on account of his ward any moneys from the bureau shall file with the court annually, on the anniversary date of his appointment, in addition to such other accounts as may be required by the court, a full, true and accurate account, under oath, of all moneys received by him, and of all disbursements thereof, and showing the balance thereof in his hands at the date of such account and how invested. A certified copy of each of such accounts filed with the court shall be sent by the guardian to the office of the bureau having jurisdiction over the area in which such court is located. The court shall fix a time and place for the hearing on such account, not less than fif-

teen days nor more than thirty days from the date of filing same, and notice thereof shall be given by the court to the aforesaid bureau office not less than fifteen days prior to the date fixed for the hearing. Notice of such hearing shall in like manner be given to the guardian.

(L. 29, p. 3, § 9.)

98–5–10. Id. Failure to File—Removal.

If any guardian shall fail to file any account of the moneys received by him from the bureau on account of his ward within thirty days after such account is required by either the court or the bureau, or shall fail to furnish the bureau a copy of his accounts as required by this chapter, such failure shall be grounds for removal. (L. 29, p. 3, § 10.)

98–5–11. Guardians' Compensation.

Compensation payable to guardians shall not exceed five per cent of the income of the ward during any year. In the event of extraordinary services rendered by such guardian the court may, upon petition and after hearing thereon, authorize additional compensation therefor payable from the estate of the ward. Notice of such petition and hearing shall be given the proper office of the bureau in the manner provided in section 98–5–9. No compensation shall be allowed on the corpus of an estate received from a preceding guardian. The guardian may be allowed from the estate of his ward reasonable premiums paid by him to any corporate surety upon his bond. (L. 29, p. 3, § 11.)

98–5–12. Investment of Estate Funds.

Every guardian shall invest the funds of the estate in such securities, in which the guardian has no interest, as may be approved by the court. (L. 29, p. 3, § 12.)

Cross-references.
Legal investments, Title 46A.

98–5–13. Funds to Be Used for Ward Only—Exceptions.

A guardian shall not use any portion of the estate of his ward for the support and maintenance of any person other than his ward, except upon order of the court after a hearing, notice of which has been given the proper office of the bureau in the manner provided in section 98–5–9. (L. 29, p. 3, § 13.)

98–5–14. Certified Copies of Public Records to Be Furnished Without Charge.

Whenever a copy of any public record is required by the bureau to be used in determining the eligibility of any person to participate in benefits made available by such bureau, the official charged with the custody of such public record shall, without charge, provide the applicant for such benefits, or any person acting on his behalf, or the representative of such bureau, with a certified copy of such record.

(L. 29, p. 3, § 14.)

98–5–15. Commitment to Veterans' Hospitals.

Whenever it appears that a mentally incompetent veteran of any war, military occupation or expedition is eligible for treatment in a United

States veterans' bureau hospital, and commitment to such hospital is necessary for the proper care and treatment of such veteran, the district courts are hereby authorized to communicate with the official in charge of such hospital with reference to available facilities and eligibility, and upon receipt of a certificate from the official in charge of such hospital the court may then direct such veteran's commitment to such United States veterans' bureau hospital. Thereafter such veteran upon admission shall be subject to the rules and regulations of such hospital, and the officials of such hospital shall be vested with the same powers as are exercised by superintendents of state hospitals for mental diseases within this state with reference to the retention of custody of the veteran so committed. Notice of such pending proceedings shall be furnished the person to be committed and his right to appear and defend shall not be denied. (L. 29, p. 3, § 15.)

Cross-references.
Utah State Hospital, 85–7; State Training School, 85–8.

98–5–16. Discharge of Guardian—Accounting.

When a minor ward for whom a guardian has been appointed under the provisions of this chapter or other laws of this state shall have attained his or her majority, and, if incompetent, shall be declared competent by the bureau and the court, and when any incompetent ward, not a minor, shall be declared competent by said bureau and the court, the guardian shall upon making a satisfactory accounting be discharged upon a petition filed for that purpose. (L. 29, p. 3, § 16.)

98–5–17. Rule for Construction of Chapter.

This chapter shall be construed liberally to secure the beneficial intents and purposes thereof and shall apply only to beneficiaries of the bureau. (L. 29, p. 3, § 17.)

TITLE 99

WAREHOUSE RECEIPTS

99-0-1. Persons Who May Issue Receipts.
99-0-2. Form of Receipts—Essential Terms.
99-0-3. Id. What Terms May Be Inserted.
99-0-4. Definition of Non-negotiable Receipt.
99-0-5. Definition of Negotiable Receipt.
99-0-6. Duplicate Receipts Must Be So Marked.
99-0-7. Failure to Mark "Not Negotiable."
99-0-8. Obligation of Warehouseman to Deliver.
99-0-9. Justification of Warehouseman in Delivering.
99-0-10. Warehouseman's Liability for Misdelivery.
99-0-11. Negotiable Receipts Must Be Canceled When Goods Delivered.
99-0-12. Negotiable Receipts Must Be Canceled or Marked When Part of Goods Delivered.
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99-0-15. Effect of Duplicate Receipts.
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99-0-17. Interpleader of Adverse Claimants.
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99-0-19. Adverse Title Is No Defense Except as Above Provided.
99-0-20. Liability for Non-existence or Misdescription of Goods.
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99-0-24. Liability of Warehouseman to Depositors of Commingled Goods.
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99-0-33. Satisfaction of Lien by Sale.
99-0-34. Perishable and Hazardous Goods.
99-0-35. Other Methods of Enforcing Liens.
99-0-36. Effect of Sale.
99-0-37. Negotiation of Negotiable Receipts by Delivery.
99-0-38. Negotiation of Negotiable Receipts by Indorsement.
99-0-39. Transfer of Receipts.
99-0-40. Who May Negotiate a Receipt.
99-0-41. Rights of Person to Whom a Receipt Has Been Negotiated.
99-0-42. Rights of Persons to Whom a Receipt Has Been Transferred.
99-0-43. Transfer of Negotiable Receipt Without Indorsement.
99-0-44. Warranties on Sale of Receipt.
99-0-45. Indorser Not a Guarantor.
99-0-46. No Warranty Implied from Accepting Payment of a Debt.
99-0-47. When Negotiation Not Impaired by Fraud, Mistake, or Duress.
99-0-48. Subsequent Negotiations.
99-0-49. Negotiation Defeats Vendor's Lien.
99-0-50. Issue of Receipt for Goods Not Received—Penalty.
99-0-51. Issue of Receipt Containing False Statement—Penalty.
99-0-52. Issue of Duplicate Receipt Not So Marked—Penalty.
99-0-53. Issue for Warehouseman's Goods of Receipts Which Do Not State that Fact—Penalty.
99-0-54. Delivery of Goods Without Obtaining Negotiable Receipt—Penalty.
99-0-55. Negotiation of Receipt for Mortgaged Goods.
99-0-56. Definitions.

99–0–1. Persons Who May Issue Receipts.

Warehouse receipts may be issued by any warehouseman.

(C. L. 17, § 6201; Unif. Act, § 1.)

Comparable provisions.

The Uniform Warehouse Receipts Act has been adopted by the following states: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

States that have adopted the amendments to the Uniform Warehouse Receipts Act are as follows: Alabama, Arizona, California, Colorado, Idaho, Louisiana, Michigan, Nevada, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Utah, Vermont and Wisconsin.

Uniform Warehouse Receipts Act, § 1 (identical).

A. L. R. notes.

Legal effect of transaction by which grain or other commodity is received for storage by one who has not complied with statutory conditions necessary to become a public warehouseman, 108 A. L. R. 928; validity as against third persons of sale or pledge of goods, or receipts issued for goods, retained in warehouse on premises of seller or pledgor (field warehousing), 133 A. L. R. 209.

99–0–2. Form of Receipts—Essential Terms.

Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms:

(1) The location of the warehouse where the goods are stored.

(2) The date of issue of the receipt.

(3) The consecutive number of the receipt.

(4) A statement whether the goods received will be delivered to bearer, to a specified person, or to a specified person or his order.

(5) The rate of storage charges.

(6) A description of the goods or of the packages containing them.

(7) The signature of the warehouseman, which may be made by his authorized agent.

(8) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership.

(9) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

A warehouseman shall be liable to any person injured thereby for all damages caused by the omission from a negotiable receipt of any of the terms herein required. (C. L. 17, § 6202; Unif. Act, § 2.)

Comparable provisions.

Uniform Act, § 2 (identical, except that, in subd. d, equivalent of subd. (4) herein, "the" is inserted, thus reading in part: "* * * delivered to the bearer * * *").

99–0–3. Id. What Terms May Be Inserted.

A warehouseman may insert in a receipt issued by him any other terms and conditions; *provided*, that such terms and conditions shall not:

(1) Be contrary to the provisions of this title; or,

(2) In anywise impair his obligation to exercise that degree of care in the safe-keeping of the goods intrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.

(C. L. 17, § 6203; Unif. Act, § 3.)

Comparable provisions.
Uniform Act, § 3 (identical; word "act" is used throughout the act, in lieu of word "title"; "entrusted" used throughout, in lieu of "intrusted").

A. L. R. notes.
"Warehouse purchase receipt" as bailment or contract of sale, 91 A. L. R. 907.

99–0–4. Definition of Non-negotiable Receipt.

A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a nonnegotiable receipt. (C. L. 17, § 6204; Unif. Act, § 4.)

Comparable provisions.
Uniform Act, § 4 (identical).

99–0–5. Definition of Negotiable Receipt.

A receipt in which it is stated that the goods received will be delivered to bearer, or to the order of any person named in such receipt, is a negotiable receipt. No provision shall be inserted in a negotiable receipt that it is nonnegotiable. Such provision, if inserted, shall be void.

(C. L. 17, § 6205; Unif. Act, § 5.)

Comparable provisions.
Uniform Act, § 5 (identical; "* * * delivered to the bearer * * *").

99–0–6. Duplicate Receipts Must Be So Marked.

When more than one negotiable receipt is issued for the same goods, the word "duplicate" shall be plainly placed by the warehouseman upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damages caused by his failure so to do to any one who purchased the subsequent receipt for value, supposing it to be an original, even though the purchase is after the delivery of the goods by the warehouseman to the holder of the original receipt.

(C. L. 17, § 6206; Unif. Act, § 6.)

Comparable provisions.
Uniform Act, § 6 (identical except that the following bracketed words are omitted: "* * * shall be plainly placed [by the warehouseman] upon the face of every such receipt * * *; "be" is used in lieu of "is," thus reading in part: "* * * though the purchase be after the delivery * * *").

99–0–7. Failure to Mark "Not Negotiable."

A nonnegotiable receipt shall have plainly placed upon its face by the warehouseman issuing it "nonnegotiable," or "not negotiable." In case of the warehouseman's failure so to do, a holder of the receipt who purchased it for value, supposing it to be negotiable, may, at his option, treat such receipt as imposing upon the warehouseman the same liabilities as he would have incurred had the receipt been negotiable. This section shall not apply, however, to letters, memoranda or written acknowledgments of an informal character.

(C. L. 17, § 6207; Unif. Act, § 7.)

Comparable provisions.
Uniform Act, § 7 (identical).

99–0–8. Obligation of Warehouseman to Deliver.

A warehouseman, in the absence of some lawful excuse provided for by this title, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with:

(1) An offer to satisfy the warehouseman's lien;

(2) An offer to surrender the receipt, if negotiable, with such indorsements as would be necessary for the negotiation of the receipt; and,

(3) An expressed readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman.

In case the warehouseman refuses or fails to deliver the goods in compliance with such a demand by the holder or depositor, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal. (C. L. 17, § 6208; Unif. Act, § 8.)

Comparable provisions.

Uniform Act, § 8 (identical, except as follows: "for" is omitted from opening paragraph, reading in part, "* * * in the absence of some lawful excuse provided by this act * * *"; "expressed" is omitted from subd. c, equivalent of subd. (3) herein, thus reading in part, "A readiness and willingness * * *"; in the closing paragraph the words "so accompanied" are inserted, and word "such" is omitted, reading in part, "* * * with a demand by the holder or depositor so accompanied, the burden shall be * * *").

A. L. R. notes.

Liability of warehouseman, and of surety on bond, in respect of collection and remittance of proceeds of sale of merchandise, 121 A. L. R. 1155; relationship of bailor and bailee as between owner of goods in bonded warehouse and proprietor of warehouse, 77 A. L. R. 1502; right of purchaser of warehouse receipt against warehouseman, 38 A. L. R. 1205.

99–0–9. Justification of Warehouseman in Delivering.

A warehouseman is justified in delivering the goods, subject to the provisions of the three following sections, to one who is:

(1) The person lawfully entitled to the possession of the goods, or his agent;

(2) A person who is either himself entitled to delivery by the terms of a nonnegotiable receipt issued for the goods, or who has written authority from the person so entitled either indorsed upon the receipt or written upon another paper; or,

(3) A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been indorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt, or by his mediate or immediate indorsee. (C. L. 17, § 6209; Unif. Act, § 9.)

Comparable provisions.

Uniform Act, § 9 (identical).

99–0–10. Warehouseman's Liability for Misdelivery.

Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods, if he delivers the goods otherwise than as authorized by

subdivisions (2) and (3) of the preceding section; and, though he delivers the goods as authorized by said subdivisions, he shall be so liable, if prior to such delivery he either:

(1) Has been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery; or,

(2) Has had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods.

(C. L. 17, § 6210; Unif. Act, § 10.)

Comparable provisions.
Uniform Act, § 10 (substantially identical; "delivered" used in lieu of "delivers," in fourth and fifth lines).

1. Liability for conversion.
Warehouseman issuing receipt to one other than consignee in bill of lading, without authority, and upon request of person presenting bill of lading, is guilty of conversion in delivering goods to holder of receipt. Gibbs v. Redman Fireproof Storage Co., 68 U. 298, 249 P. 1032.

A warehouseman who issues a receipt to one not the owner and delivers goods to such person is released from liability to owner by agreement between owner and holder of warehouse receipt releasing latter from liability; since latter and warehouseman were jointly and severally liable for conversion, the release of one released both. Gibbs v. Redman Fireproof Storage Co., 68 U. 298, 249 P. 1032.

99–0–11. Negotiable Receipts Must Be Canceled When Goods Delivered.

Except as provided in section 99–0–36, where a warehouseman delivers goods for which he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he shall be liable to anyone who purchases such receipt for value in good faith for failure to deliver the goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman.

(C. L. 17, § 6211; Unif. Act, § 11.)

Comparable provisions.
Uniform Act, § 11 (identical).

99–0–12. Negotiable Receipts Must Be Canceled or Marked When Part of Goods Delivered.

Except as provided in section 99–0–36, where a warehouseman delivers part of the goods for which he had issued a negotiable receipt, and fails either to take up and cancel such receipt or to place plainly upon it a statement of what goods or packages have been delivered, he shall be liable to anyone who purchases such receipt for value in good faith for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman.

(C. L. 17, § 6212; Unif. Act, § 12.)

Comparable provisions.
Uniform Act, § 12 (identical).

99–0–13. Altered Receipts.

The alteration of a receipt shall not excuse the warehouseman who issued it from any liability, if such alteration:

(1) Was immaterial;

(2) Was authorized; or,

(3) Was made without fraudulent intent.

If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt as they were before alteration. Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration, and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman as such purchaser would have acquired, if the receipt had not been altered at the time of the purchase.

(C. L. 17, § 6213; Unif. Act, § 13.)

Comparable provisions.
Uniform Act, § 13 (substantially identical).

99–0–14. Lost or Destroyed Receipts.

Where a negotiable receipt has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods, upon satisfactory proof of such loss or destruction, and upon the giving of a bond, with sufficient sureties to be approved by the court to protect the warehouseman from any liability or expense which he or any person injured by such delivery may incur by reason of the original receipt remaining outstanding. The court may also in its discretion order the payment of the warehouseman's reasonable costs and counsel fees. The delivery of the goods under an order of the court as provided in this section shall not relieve the warehouseman from liability to a person to whom the negotiable receipt has been or shall be negotiated for value, without notice of the proceedings or of the delivery of the goods. (C. L. 17, § 6214; Unif. Act, § 14.)

Comparable provisions.
Uniform Act, § 14 (identical, except that "a" is used in lieu of "the," so as to read, in part, "* * * The court may also in its discretion order the payment of a warehouseman's reasonable costs and counsel fees. * * *").

99–0–15. Effect of Duplicate Receipts.

A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such receipt is an accurate copy of an original receipt properly issued and uncanceled at the date of the issue of the duplicate, but shall impose upon him no other liability. (C. L. 17, § 6215; Unif. Act, § 15.)

Comparable provisions.
Uniform Act, § 15 (identical).

99–0–16. Warehouseman Cannot Set Up Title in Himself.

No title or right to possession of the goods on the part of the warehouseman shall excuse him from liability for refusing to deliver the

goods according to the terms of the receipt unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien. (C. L. 17, § 6216; Unif. Act, § 16.)

Comparable provisions.
Uniform Act, § 16 (substantially identical).

A. L. R. notes.
Right of purchaser of warehouse receipt against warehouseman, 38 A. L. R. 1205.

99-0-17. Interpleader of Adverse Claimants.

If more than one person claims the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for nondelivery of the goods or by an original action, whichever is appropriate, require all known claimants to interplead. (C. L. 17, § 6217; Unif. Act, § 17.)

Comparable provisions.
Uniform Act, § 17 (substantially identical).

Cross-references.
Interpleader, 104-3-23.

A. L. R. notes.
Uniform Warehouse Receipts Act as affecting liens on the property represented by the receipts, 61 A. L. R. 949; warehouseman's right to interplead rival claimants of goods stored or their proceeds, 100 A. L. R. 425.

99-0-18. Warehouseman Has Reasonable Time to Determine Validity of Claims.

If some one other than the depositor or person claiming under him has a claim to the title or possession of the goods and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. (C. L. 17, § 6218; Unif. Act, § 18.)

Comparable provisions.
Uniform Act, § 18 (identical).

A. L. R. notes.
Uniform Warehouse Receipts Act as affecting liens on the property represented by the receipts, 61 A. L. R. 949.

99-0-19. Adverse Title Is No Defense Except as Above Provided.

Except as provided in the two preceding sections and in sections 99-0-9 and 99-0-36, no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt. (C. L. 17, § 6219; Unif. Act, § 19.)

Comparable provisions.
Uniform Act, § 19 (identical).

A. L. R. notes.
Uniform Warehouse Receipts Act as affecting liens on the property represented by the receipts, 61 A. L. R. 949.

99-0-20. Liability for Non-existence or Misdescription of Goods.

A warehouseman shall be liable to the holder of a receipt issued by him, or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of warehouse receipts, for damages caused by the nonexistence of the goods, or by the failure of

the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them, or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that the packages containing the goods are said to contain goods of a certain kind, or by words of like purport, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor. (L. 29, p. 93, § 6220; Unif. Act, § 20.)

Comparable provisions.
Uniform Act, § 20, as amended (identical).

99–0–21. Liability for Care of Goods.

A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care. (C. L. 17, § 6221; Unif. Act, § 21.)

Comparable provisions.
Uniform Act, § 21 (identical).

A. L. R. notes.
Liability of warehouseman for damage to or destruction of property by fire, 16 A. L. R. 280; liability of warehouseman for deterioration of goods due to improper temperature, 55 A. L. R. 1103.

99–0–22. Goods Must Be Kept Separate.

Except as provided in the following section, a warehouseman shall keep the goods so far separate from the goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued, as to permit at all times the identification and redelivery of the goods deposited. (C. L. 17, § 6222; Unif. Act, § 22.)

Comparable provisions.
Uniform Act, § 22 (identical).

99–0–23. Fungible Goods May Be Commingled if Warehouseman Authorized.

If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common, and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole. (C. L. 17, § 6223; Unif. Act, § 23.)

Comparable provisions.
Uniform Act, § 23 (identical).

1. Sale, and passage of title.
The fact that sugar under contract of sale was stored in different warehouses used in operation of business did not render inapplicable ordinary rules respecting sale and passage of title to part of fungible property without separation or segregation. United States v. Amalgamated Sugar Co., 72 F.2d 755.

99–0–24. Liability of Warehouseman to Depositors of Commingled Goods.

The warehouseman shall be severally liable to each depositor for the care and redelivery of his share of such mass to the same extent and under the same circumstances as if the goods had been kept separate. (C. L. 17, § 6224; Unif. Act, § 24.)

Comparable provisions.
Uniform Act, § 24 (identical).

99–0–25. Attachment or Levy Upon Goods for Which Negotiable Receipt Has Been Issued.

If goods are delivered to a warehouseman by the owner, or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt is first surrendered to the warehouseman, or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court.
(C. L. 17, § 6225; Unif. Act, § 25.)

Comparable provisions.
Uniform Act, § 25 (identical).

1. Construction of section.
The supreme court of this state has referred to Kershaw v. Booth Fisheries Co., 177 Ill. App. 117 "for a construction of this section." Warner v. Tyng Warehouse Co., 71 U. 303, 312, 265 P. 748.

A. L. R. notes.
Lien on property stored by officer who had seized it under attachment or execution, 95 A. L. R. 1529; Uniform Warehouse Receipts Act as affecting liens on the property represented by the receipts, 61 A. L. R. 949.

99–0–26. Creditors' Remedies to Reach Negotiable Receipts.

A creditor whose debtor is the owner of a negotiable receipt shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such receipt, or in satisfying the claim by means thereof, as is allowed at law or in equity in regard to property which cannot be readily attached or levied upon by ordinary legal process. (C. L. 17, § 6226; Unif. Act, § 26.)

Comparable provisions.
Uniform Act, § 26 (identical).

A. L. R. notes.
Uniform Warehouse Receipts Act as affecting liens on the property represented by the receipts, 61 A. L. R. 949.

99–0–27. What Claims Are Included in the Warehouseman's Lien.

Subject to the provisions of section 99–0–30, a warehouseman shall have a lien on goods deposited, or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, cooperage and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien.
(C. L. 17, § 6227; Unif. Act, § 27.)

Comparable provisions.
Uniform Act, § 27 (identical, except that word "coopering" is used in lieu of "cooperage").

Cross-references.
Warehouseman's lien in aid of carrier's lien, 52–4–4, 52–4–5.

1. History of lien.
Prior to adoption of the Uniform Act, a warehouseman was likewise given a lien for reasonable charges for storing personal property. Howard v. J. P. Paulson Co., 41 U. 490, 127 P. 284, applying Comp. Laws 1907.

A. L. R. notes.
Storage of automobile, lien for, 31 A. L. R. 834.

99–0–28. Against What Property the Lien May Be Enforced.

Subject to the provisions of section 99–0–30, a warehouseman's lien may be enforced.

(1) Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted; and

(2) Against all goods belonging to others, which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted, if such person had been so intrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid. (C. L. 17, § 6228; Unif. Act, § 28.)

Comparable provisions.
Uniform Act, § 28 (identical).

99–0–29. How the Lien May Be Lost.

A warehouseman loses his lien upon goods:

(1) By surrendering possession thereof; or,

(2) By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this title.

(C. L. 17, § 6229; Unif. Act, § 29.)

Comparable provisions.
Uniform Act, § 29 (identical).

99–0–30. Negotiable Receipt Must State Charges for Which Lien Is Claimed.

If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerates other charges for which a lien is claimed. In such case, there shall be a lien for the charges enumerated so far as they are within the terms of section 99–0–27, although the amount of the charges so enumerated is not stated in the receipt.

(C. L. 17, § 6230; Unif. Act, § 30.)

Comparable provisions.
Uniform Act, § 30 (identical).

99–0–31. Warehouseman Need Not Deliver Until Lien Is Satisfied.

A warehouseman having a lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied. (C. L. 17, § 6231; Unif. Act, § 31.)

Comparable provisions.
Uniform Act, § 31 (identical).

99–0–32. Warehouseman's Lien Does Not Preclude Other Remedies.

Whether a warehouseman has or has not a lien upon the goods, he is entitled to all remedies allowed by law to a creditor against his debtor for the collection from the depositor of all charges and advances which the depositor has expressly or impliedly contracted with the warehouseman to pay. (C. L. 17, § 6232; Unif. Act, § 32.)

Comparable provisions.
Uniform Act, § 32 (identical).

1. Remedies of warehouseman.
Statutory remedies given the warehouseman are, it would seem, merely cumulative. Howard v. J. P. Paulson Co., 41 U. 490, 127 P. 284, construing Comp. Laws 1907.

99–0–33. Satisfaction of Lien by Sale.

A warehouseman's lien for a claim which has become due may be satisfied as follows:

The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain:

(1) An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due;

(2) A brief description of the goods against which the lien exists;

(3) A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice, if it is personally delivered, or from the time when the notice should reach its destination according to the due course of post, if the notice is sent by mail; and

(4) A statement that unless the claim is paid within the time specified the goods will be advertised for sale, and sold by auction at a specified time and place.

In accordance with the terms of a notice so given a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold and stating the name of the owner or person on whose account the goods are held and the time and place of the sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held within fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein. From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement and sale. The balance, if any, of such proceeds shall be held by the warehouseman and delivered on demand to the person to whom he would have been

bound to deliver or justified in delivering the goods. At any time before the goods are so sold, any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouseman shall deliver the goods to the person making such payment, if he is a person entitled under the provisions of this title to the possession of the goods on payment of charges thereon. Otherwise, the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit. (C. L. 17, § 6233; Unif. Act, § 33.)

Comparable provisions.
Uniform Act, § 33 (identical, except that words "less than" are used in lieu of "within," thus reading, in part, "* * * The sale shall not be held less than fifteen days from the time of the first publication. * * *").

1. Enforcement of lien.
Enforcement of the warehouseman's lien by advertisement and sale was also provided for prior to adoption of the Uniform Act. Howard v. J. P. Paulson Co., 41 U. 490, 127 P. 284, applying Comp. Laws 1907.

2. Sale of goods.
Private sale of goods may be arranged by stipulation between the parties. See Warner v. Tyng Warehouse Co., 71 U. 303, 265 P. 748.

99–0–34. Perishable and Hazardous Goods.

If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability or explosive nature will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods and to remove them from the warehouse; and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made under the terms of this section shall be disposed of in the same way as the proceeds of sales made under the terms of the preceding section.
(C. L. 17, § 6234; Unif. Act, § 34.)

Comparable provisions.
Uniform Act, § 34 (identical).

99–0–35. Other Methods of Enforcing Liens.

The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property, nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property. (C. L. 17, § 6235; Unif. Act, § 35.)

Comparable provisions.
Uniform Act, § 35 (identical).

1. Other remedies to enforce lien.
This section gives the lien claimant what are known as concurrent or cumulative remedies, and he may pursue either without in any way waiving the other, except that he cannot receive more than satisfaction of his claim. Such a lien may be foreclosed in an equitable action. Howard v. J. P. Paulson Co.

41 U. 490, 494, 127 P. 284, applying Comp. Laws 1907, repealed by Laws 1911, Ch. 139.

The lien may be enforced to the extent of amount found due, by way of counterclaim in replevin action brought to recover property. Howard v. J. P. Paulson Co., 41 U. 490, 127 P. 284.

2. Election of remedies.

Prior to adoption of Uniform Act, it was held that a warehouseman, by presenting a claim against an estate for storage charges without mentioning his lien, and, after rejection of claim, by suing thereon to recover amount thereof, which action was dismissed, does not make an election of remedies so as to bar assertion of his warehouseman's lien by way of counterclaim, in a subsequent action by executor to recover the property. Howard v. J. P. Paulson Co., 41 U. 490, 127 P. 284, applying Comp. Laws 1907, § 1406, which is in many particulars similar to present section.

99-0-36. Effect of Sale.

After the goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman shall not thereafter be liable for failure to deliver the goods to the depositor, or to the owner of the goods, or to a holder of the receipt given for the goods when they were deposited, even if such receipt is negotiable.

(C. L. 17, § 6236; Unif. Act, § 36.)

Comparable provisions.

Uniform Act, § 36 (substantially identical).

99-0-37. Negotiation of Negotiable Receipts by Delivery.

A negotiable receipt may be negotiated by delivery:

(1) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to bearer; or,

(2) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the receipt has indorsed it in blank or to bearer.

Where, by the terms of a negotiable receipt, the goods are deliverable to bearer, or where a negotiable receipt has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the receipt shall thereafter be negotiated only by the indorsement of such indorsee.

(C. L. 17, § 6237; Unif. Act, § 37.)

Comparable provisions.

Uniform Act, § 37 (substantially identical).

99-0-38. Negotiation of Negotiable Receipts by Indorsement.

A negotiable receipt may be negotiated by the indorsement of the person to whose order the goods are, by the terms of the receipt, deliverable. Such an indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner. (C. L. 17, § 6238; Unif. Act, § 38.)

Comparable provisions.

Uniform Act, § 38 (substantially identical).

99–0–39. Transfer of Receipts.

A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A nonnegotiable receipt cannot be negotiated, and the indorsement of such a receipt gives the transferee no additional right.

(C. L. 17, § 6239; Unif. Act, § 39.)

Comparable provisions.
Uniform Act, § 39 (identical).

99–0–40. Who May Negotiate a Receipt.

A negotiable receipt may be negotiated by any person in possession of the same, however such possession may have been acquired, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of such person, or, if at the time of negotiation the receipt is in such form that it may be negotiated by delivery.

(L. 29, p. 93, § 6240; Unif. Act, § 40.)

Comparable provisions.
Uniform Act, § 40, as amended (identical).

99–0–41. Rights of Person to Whom a Receipt Has Been Negotiated.

A person to whom a negotiable receipt has been duly negotiated acquires thereby:

(1) Such title to the goods as the person negotiating the receipt to him had, or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor, or person to whose order the goods were to be delivered by the terms of the receipt, had, or had ability to convey to a purchaser in good faith for value; and,

(2) The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him.

(C. L. 17, § 6241; Unif. Act, § 41.)

Comparable provisions.
Uniform Act, § 41 (identical).

A. L. R. notes.
Right of purchaser of warehouse receipt against warehouseman, 38 A. L. R. 1205.

99–0–42. Rights of Persons to Whom a Receipt Has Been Transferred.

A person to whom a receipt has been transferred, but not negotiated, acquires thereby as against the transferor the title of the goods, subject to the terms of any agreement with the transferor. If the receipt is nonnegotiable, such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt. Prior to the notification of the warehouseman by the transferor or transferee of a nonnegotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by

the transferor, or a subsequent purchaser from the transferor, of a subsequent sale of the goods by the transferor.

(C. L. 17, § 6242; Unif. Act, § 42.)

Comparable provisions.
Uniform Act, § 42 (identical).

A. L. R. notes.
Passing of title to goods by acceptance of draft for purchase price, with warehouse receipt attached, or by transfer of draft with receipt, 55 A. L. R. 1116; right of purchaser of warehouse receipt against warehouseman, 38 A. L. R. 1205.

99-0-43. Transfer of Negotiable Receipt Without Indorsement.

Where a negotiable receipt is transferred for value by delivery and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the receipt, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

(C. L. 17, § 6243; Unif. Act, § 43.)

Comparable provisions.
Uniform Act, § 43 (identical).

A. L. R. notes.
Lack of indorsement or irregular indorsement of warehouse receipt or bill of lading as affecting pledge of goods, 18 A. L. R. 588.

99-0-44. Warranties on Sale of Receipt.

A person, who for value negotiates or transfers a receipt by indorsement or delivery, including one who assigns for value a claim secured by a receipt, unless a contrary intention appears, warrants:

(1) That the receipt is genuine;

(2) That he has a legal right to negotiate or transfer it;

(3) That he has knowledge of no fact that would impair the validity or worth of the receipt; and,

(4) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a receipt the goods represented thereby.

(C. L. 17, § 6244; Unif. Act, § 44.)

Comparable provisions.
Uniform Act, § 44 (identical).

99-0-45. Indorser Not a Guarantor.

The indorsement of a receipt shall not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfill their respective obligations.

(C. L. 17, § 6245; Unif. Act, § 45.)

Comparable provisions.
Uniform Act, § 45 (substantially identical).

99-0-46. No Warranty Implied from Accepting Payment of a Debt.

A mortgagee, pledgee, or holder for security of a receipt who in good faith demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or

from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such receipt, or the quantity or quality of the goods therein described. (C. L. 17, § 6246; Unif. Act, § 46.)

Comparable provisions.
Uniform Act, § 46 (identical).

99–0–47. When Negotiation Not Impaired by Fraud, Mistake, or Duress.

The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was deprived of the possession of the same by loss, theft, fraud, accident, mistake, duress or conversion, if the person to whom the receipt was negotiated, or the person to whom the receipt was subsequently negotiated, paid value therefor, in good faith, without notice of the breach of duty, or of the loss, theft, fraud, accident, mistake, duress or conversion. (L. 29, p. 93, § 6247; Unif. Act, § 47.)

Comparable provisions.
Uniform Act, § 47, as amended (substantially identical).

A. L. R. notes.
Doctrine of "business compulsion," 79 A. L. R. 655; threat of withdrawal or withholding of banking accommodation as duress, 33 A. L. R. 127.

99–0–48. Subsequent Negotiations.

Where a person having sold, mortgaged or pledged goods which are in a warehouse, and for which a negotiable receipt has been issued, or having sold, mortgaged or pledged the negotiable receipt representing such goods continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale, or other disposition thereof, to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage or pledge shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiations.
(C. L. 17, § 6248; Unif. Act, § 48.)

Comparable provisions.
Uniform Act, § 48 (identical, except that concluding word is in the singular; "negotiation").

99–0–49. Negotiation Defeats Vendor's Lien.

Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation is prior or subsequent to notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage in transitu. Nor shall the warehouseman be obliged to deliver or be justified in delivering the goods to an unpaid seller, unless the receipt is first surrendered for cancellation.
(C. L. 17, § 6249; Unif. Act, § 49.)

Comparable provisions.
Uniform Act, § 49 (identical).

Cross-references.
Seller's lien and stoppage in transitu, 81–4–2 to 81–4–6.

A. L. R. notes.
Uniform Warehouse Receipts Act as affecting liens on the property represented by the receipts, 61 A. L. R. 949.

99–0–50. Issue of Receipt for Goods Not Received—Penalty.

A warehouseman, or any officer, agent or servant of a warehouseman, who issues or aids in issuing a receipt, knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under his actual control at the time of issuing such receipt, is guilty of a felony, and shall be punished for each offense by imprisonment in the state prison not exceeding five years, or by a fine not exceeding $5000, or by both.

(C. L. 17, § 6250; Unif. Act, § 50.)

Comparable provisions.

Uniform Act, § 50 (identical, except that concluding language is as follows: "* * * shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.")

99–0–51. Issue of Receipt Containing False Statement—Penalty.

A warehouseman, or any officer, agent or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods, knowing that it contains any false statement, is guilty of a misdemeanor, and shall be punished for each offense by imprisonment in the county jail not exceeding one year or by a fine not exceeding $1000, or by both. (C. L. 17, § 6251; Unif. Act, § 51.)

Comparable provisions.

Uniform Act, § 51 (identical, except that concluding language is as follows: "* * * shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both").

99–0–52. Issue of Duplicate Receipt Not So Marked—Penalty.

A warehouseman, or any officer, agent or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods, knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without plainly placing upon the face thereof the word "duplicate," except in the case of a lost or destroyed receipt after proceedings as provided for in section 99–0–14, is guilty of a felony, and shall be punished for each offense by imprisonment in the state prison not exceeding five years, or by a fine not exceeding $5000, or by both.

(C. L. 17, § 6252; Unif. Act, § 52.)

Comparable provisions.

Uniform Act, § 52 (identical, except that concluding language is as follows: "* * * shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both").

99–0–53. Issue for Warehouseman's Goods of Receipts Which Do Not State that Fact—Penalty.

Where there are deposited with or held by a warehouseman goods of which he is owner, either solely or jointly or in common with others, such warehouseman, or any of his officers, agents or servants, who, knowing this ownership, issues or aids in issuing a negotiable receipt for such goods which does not state such ownership, is guilty of a misdemeanor, and shall be punished for each offense by imprisonment in

the county jail not exceeding one year, or by a fine not exceeding $1000, or by both. (C. L. 17, § 6253; Unif. Act, § 53.)

Comparable provisions.
Uniform Act, § 53 (identical, except as to following closing language: "* * * shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both").

99–0–54. Delivery of Goods Without Obtaining Negotiable Receipt—Penalty.

A warehouseman, or any officer, agent or servant of a warehouseman, who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt, the negotiation of which would transfer the right to the possession of such goods, is outstanding and uncanceled, without obtaining the possession of such receipt at or before the time of such delivery, is, except in the cases provided for in sections 99–0–14 and 99–0–36, guilty of a misdemeanor, and shall be punished for each offense by imprisonment in the county jail not exceeding one year, or by a fine not exceeding $1000, or by both.
(C. L. 17, § 6254; Unif. Act, § 54.)

Comparable provisions.
Uniform Act, § 54 (identical, except that concluding language is as follows: "* * * shall, except in the cases provided for in §§ 14 and 36, be found guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding $1,000, or by both").

99–0–55. Negotiation of Receipt for Mortgaged Goods.

Any person who deposits goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable receipt which he afterwards negotiates for value, with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage, is guilty of a misdemeanor, and shall be punished for each offense by imprisonment in the county jail not exceeding one year, or by a fine not exceeding $1000, or by both.
(C. L. 17, § 6255; Unif. Act, § 55.)

Comparable provisions.
Uniform Act, § 55 (identical, except that concluding language is as follows: "* * * shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding $1,000, or by both").

A. L. R. notes.
Uniform Warehouse Receipts Acts as affecting liens on the property represented by the receipts, 61 A. L. R. 949.

99–0–56. Definitions.

In this title, unless the context or subject matter otherwise requires:
"Action" includes counterclaim, set-off, and suit in equity.
"Delivery" means voluntary transfer of possession from one person to another.
"Fungible goods" means goods of which any unit is from its nature or by mercantile custom treated as the equivalent of any other unit.
"Goods" means chattels or merchandise in storage, or which has been or is about to be stored.

"Holder of a receipt" means a person who has both actual possession of such receipt and a right of property therein.

"Order" means an order by indorsement on the receipt.

"Owner" does not include mortgagee or pledgee.

"Person" includes a corporation, a partnership or two or more persons having a joint and common interest.

To "purchase" includes to take as mortgagee or as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Receipt" means warehouse receipt.

"Value" is any consideration sufficient to support a simple contract. An antecedent or preëxisting obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor.

"Warehouseman" means a person lawfully engaged in the business of storing goods for profit.

A thing is done "in good faith," within the meaning of this title, when it is in fact done honestly, whether it is done negligently or not. (C. L. 17, § 6258; Unif. Act, § 58.)

Comparable provisions.

Uniform Act, § 58 (substantially identical).

1. Transfer and delivery of receipt.

Past due note is valuable consideration for transfer and delivery of warehouse receipt as security for note. Warner v. Tyng Warehouse Co., 71 U. 303, 265 P. 748.

TITLE 100

WATER AND IRRIGATION

Chapter 1. GENERAL PROVISIONS.
Chapter 2. STATE ENGINEER.
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Chapter 6. WATER STORAGE COMMISSION. (Repealed.)
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CHAPTER 1

GENERAL PROVISIONS

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L. 1933, ch. 81; eff. Mar. 20.

DETERMINATION OF VALIDITY OF CONTRACTS OF WATER USERS' ASSOCIATIONS

100-1-17. Petition for Hearing to Determine Validity—Notice—Service — Pleading — Costs—Review.
100-1-18. Effective Date.

L. 1933, ch. 82; eff. Mar. 18.

DRAINAGE AND IRRIGATION DISTRICTS, EMPOWERED TO BORROW MONEY

100-1-19. Purpose—Agency.
100-1-20. To Issue Bonds—Interest—Lien.
100-1-21. Effective Date.

History of act. The early laws relating to irrigation and water rights will be found in 2 Comp. Laws 1888, Ch. 2, p. 132; R. S. 1898, Title 33, p. 342; Comp. Laws 1907, Title 40, p. 541.

The history of our water laws is traced in Little Cottonwood Water Co. v. Kimball, 76 U. 243, 260, 289 P. 116.

For further discussion of history of water legislation in this state, see Wrathall v. Johnson, 86 U. 50, 40 P.2d 755.

100-1-1. Waters Declared Property of Public.

All waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof. (L. 19, p. 177, § 1.)

History.

As amended by L. 35, ch. 105, eff. Mar. 22, making material changes in text.

This section was apparently first adopted in 1903. Little Cottonwood Water Co. v. Kimball, 76 U. 243, 260, 289 P. 116; Comp. Laws 1907, § 1288x18.

The amendments of this section in 1935, referred to above, were no doubt due to the decision in Wrathall v. Johnson, 86 U. 50, 40 P.2d 755, and more especially opinion of Mr. Justice Folland.

Comparable provisions.

Cal. Gen. Laws, Act 9091, § 11 (waters flowing in any river, stream, canyon, ravine or other natural channel, excepting so far as put to useful and beneficial purpose, or needed therefor, upon lands riparian thereto, or otherwise appropriated, are hereby declared to be public waters of State of California, and subject to appropriation within provisions of statute); Cal. Civil Code, § 1410 (all water or use of water within State of California is property of people of State of California, but right to use of running water flowing in river or stream or down canyon or ravine may be acquired by appropriation in manner provided by law).

Idaho Code, § 41-101 (declaring control of "water" to be in the state, which, in providing for its use, "shall equally guard all the various interests involved"; all waters of the state, when flowing in their natural channels, including waters of all natural springs and lakes within state's boundaries, are declared to be the property of the state).

Cross-references.

Befouling waters, 35-4-4, 35-4-6, 103-41; ownership of beds of navigable waters, 86-1-14; water users' associations, 18-2-6 et seq.; county water supply districts, 19-6a.

1. Validity.

Former act (Laws 1919, Ch. 67) held not a special act regulating practice of courts of justice in contravention of Const. Art. VI, § 26. Eden Irr. Co. v. District Court of Weber County, 61 U. 103, 211 P. 957.

Act of 1919 was not unconstitutional as containing a multiplicity of subjects. Eden Irr. Co. v. District Court of Weber County, 61 U. 103, 211 P. 957.

Title of 1919 Act held sufficient. Eden Irr. Co. v. District Court of Weber County, 61 U. 103, 211 P. 957.

2. Public policy of state.

It is contrary to public policy of Utah to permit waste of water. Albion-Idaho Land Co. v. Naf Irr. Co., 97 F.2d 439; Wrathall v. Johnson, 86 U. 50, 59, 40 P.2d 755, opinion of Mr. Justice Moffat; Little Cottonwood Water Co. v. Kimball, 76 U. 243, 267, 289 P. 116, opinion of Bramel, J., district judge.

3. Operation and effect of section.

This section does not vest title to water in state, and water is community property available upon compliance with law. Wrathall v. Johnson, 86 U. 50, 40 P.2d 755.

Water from source to point where appropriator or user captures or diverts it into his conveying channels or containers is publici juris, and others have same right to use it as appropriator so long as they do not interfere with appropriator's use, by diminishing his quantity or impairing the quality. Wrathall v. Johnson, 86 U. 50, 40 P.2d 755.

A landowner under whose land there exists a source of water supply may draw therefrom to the full supply of his needs as long as no prior appropriator's supply is appreciably or sensibly diminished; but when rights have vested, there may not then be a diminution of

natural supply by cutting off at or near source a quantity sufficiently appreciable to visibly diminish in quantity a prior appropriation or use to the injury of the appropriator or user. Wrathall v. Johnson, 86 U. 50, 40 P.2d 755.

"Water rights," as acquired by private persons or companies, means right to use thereof, and does not, except under certain limited conditions, vest any title to corpus of water in appropriator or user. Hammond v. Johnson, 94 U. 20, 66 P.2d 894. Water right has been said to be in effect usufruct in stream, consisting of right to have water flow so that legal portion of it may be reduced to possession and be made private property. Ronzio v. Denver & R. G. W. R. Co., 116 F.2d 604.

The rights of the public guaranteed by this section are in no way affected by private contract, which merely fixes parties' title and right with respect to quantity of water they may use. Minersville Reservoir & Irrigation Co. v. Rocky Ford Irr. Co., 90 U. 283, 294, 61 P.2d 605.

4. Common-law doctrine of waters.

5. —in general.

"Neither the common law relating to riparian rights nor the so-called English rule of percolating or underground waters has any recognition in this state." Wrathall v. Johnson, 86 U. 50, 93, 40 P.2d 755; Hardy v. Beaver County Irr. Co., 65 U. 28, 234 P. 524.

6. —the doctrine of riparian proprietors.

Notwithstanding the provisions of 88-2-1, the common-law doctrine as to riparian owners does not and has never existed in this state (State v. Rolio, 71 U. 91, 100, 262 P. 987, a leading case reviewing the law at length on this point; Stowell v. Johnson, 7 U. 215, 225, 26 P. 290; Robinson v. Thomas, 75 U. 446, 450, 286 P. 625; Bountiful City v. De Luca, 77 U. 107, 118, 292 P. 194; Hardy v. Beaver County Irr. Co., 65 U. 28, 40, 234 P. 524; Albion-Idaho Land Co. v. Naf Irr. Co., 97 F.2d 439), "for the appropriation of water for the purpose of irrigation is entirely and unavoidably in conflict with the common-law doctrine of riparian proprietorship." Stowell v. Johnson, 7 U. 215, 225, 26 P. 290. Or as otherwise expressed: The common-law doctrine of riparian rights is "in the main, at war with the law of appropriation." Whitmore v. Salt Lake City, 89 U. 387, 398, 57 P.2d 726, reviewing earlier cases. The reasons why such a doctrine is not suited to the conditions of such a state as Utah are forcibly pointed out in Stowell v. Johnson, 7 U. 215, 225, 26 P. 290. In arid and semi-arid sections, corpus of water of natural stream is not subject to private ownership but is property of public or of state, subject to existing and vested rights of those appropriating them and making beneficial use of them. Oldroyd v. McCrea, 65 U. 142, 235 P. 580, 40 A. L. R. 230.

This has always been the law in this state, and a landowner may not successfully assert a right to water merely because it is flowing in a natural stream which passes over his land. To hold otherwise would render impotent the law of appropriation. Whitmore v. Salt Lake City, 89 U. 387, 396, 57 P.2d 726.

Under both common-law doctrine of riparian right or ownership and doctrine of appropriation, one located nearer to source was not permitted to cut off or interrupt or diminish or pollute source, and right once established upon a stream or source of supply vested in the owner of such right an interest in the stream to the source. Wrathall v. Johnson, 86 U. 50, 40 P.2d 755. Therefore, where defendants by drilling wells on their land which adjoined that of plaintiff's caused flow from plaintiff's wells to diminish, plaintiff, as prior appropriator, was entitled to enjoin defendants' diminishing of plaintiff's flow of water. Justesen v. Olsen, 86 U. 158, 40 P.2d 802. (Hansen and Folland, JJ., dissenting.)

This pioneer case of Stowell v. Johnson, 7 U. 215, 225, 26 P. 290, cited supra, has been repeatedly re-affirmed by our supreme court.

7. —sub-surface or percolating waters.

Water intermingling with ground or flowing through it by filtration or percolation, or by chemical attraction, is but component part of earth, and has no characteristic of ownership distinct from land itself; in eye of law, water so commingled and flowing, or motionless, underneath surface, is not subject of ownership apart and distinct from soil; if, however, subsurface streams of water flow in clearly defined channels, it is otherwise, for then rules of law applicable to surface streams and waters apply. Willow Creek Irr. Co. v. Michaelson, 21 U. 248, 60 P. 943, 51 L. R. A. 280, 81 Am. St. Rep. 687. The general doctrine of percolating waters is ably discussed in Garns v. Rollins, 41 U. 260, 125 P. 867, Ann. Cas. 1915 C 1159. And see concurring opinion of Folland, J., in Wrathall v. Johnson, 86 U. 50, 139, 40 P.2d 755.

Contention that 100-3-1 et seq., with reference to appropriation, was not

applicable to initiate right to use of subterranean waters unless flowing in known or defined channels, held without support. Wrathall v. Johnson, 86 U. 50, 40 P.2d 755.

Complaint setting forth that for 35 years plaintiff had used water from wells pumping water from basin supplied by percolating waters under premises for domestic and irrigation purposes, that such wells produced 15 gallons of water per minute, that defendants upon their land, which adjoined plaintiff's, drilled wells withdrawing water from the artesian basin, and as a result, plaintiff had been deprived of water theretofore used by him, stated cause of action, and court erred in sustaining a demurrer to it. Wrathall v. Johnson, 86 U. 50, 40 P.2d 755.

8. Title of Utah to navigable waters.

Findings that certain sections of Green, Grand, and Colorado rivers were navigable, and that title to beds of these sections of rivers vested in Utah when that state was admitted to Union, held justified by evidence. United States v. State, 283 U. S. 64, 75 L. Ed. 844, 51 S. Ct. 438.

9. Waters subject to law of appropriation.

This section includes all public or unappropriated water that flows. Wrathall v. Johnson, 86 U. 50, 40 P.2d 755.

Water reaching a stream, lake, pond, artesian area, or other source, and constituting a supply from which it may be diverted or drawn, and which continues to reach point of diversion by movement from natural source or artificial source so remote as to be considered natural source of supply, is subject to law of appropriation. Wrathall v. Johnson, 86 U. 50, 40 P.2d 755.

Decisions from other jurisdictions.

— California.

Legislation with respect to water affects the public welfare, and the right to legislate in regard to its use and conservation is referable to the police power of the state. Ex parte Maas, 219 Cal. 422, 27 P.2d 373.

The state has a definite interest in seeing that none of the valuable waters from any of the streams of the state should go to waste. Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 81 P.2d 533.

Neither upper riparian nor lower riparian was entitled to full flow of stream as it existed in a state of nature, each one being required to make a reasonable use of the waters of the stream; and either or both could be required to endure a reasonable inconvenience or incur a reasonable expense in order that water might be reasonably used by the other; but lower owner could not be expected or required to endure an unreasonable inconvenience or to incur an unreasonable expense in order to make more water available for the use of the upper riparian. Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 81 P.2d 533.

— Idaho.

The waters of natural springs, which form a natural stream or streams flowing off the premises on which they arise, are public waters subject to acquirement by appropriation, diversion and application to a beneficial use; however, appellants, plaintiffs below, in case at bar, were without right to enter on lands of respondent without consent for the purpose of cleaning out springs, digging trenches or ditches to convey waters to and upon appellants' land, inasmuch as appellants' right to the use of the waters of the springs was limited to such waters as naturally flowed from the springs to and upon their lands. Jones v. McIntire, 60 Idaho 338, 91 P.2d 373.

A. L. R. notes.

Constitutionality and construction of statutes and ordinances for protection of municipal water supply, 72 A. L. R. 673.

Constitutionality of statute limiting or controlling exploitation or waste of subterranean waters, 78 A. L. R. 842.

Gas, pollution of water by escape of, 90 A. L. R. 1108.

Joint liability for stream pollution, 91 A. L. R. 763.

Landlord's liability for stream pollution by tenant, 53 A. L. R. 336.

Mining operations, pollution due to, 39 A. L. R. 891.

Oil wells, pollution from, 34 A. L. R. 263.

Percolating water, pollution, 55 A. L. R. 1429.

Periodical, seasonal, or intermittent stream as watercourse, 40 A. L. R. 839.

Remedies for pollution, 55 A. L. R. 1483.

Rights of ownership in respect of changes by accretion or reliction due to artificial conditions, 134 A. L. R. 467.

Subterranean and percolating waters; springs; wells, 109 A. L. R. 395.

Subterranean streams, pollution of, 55 A. L. R. 1498.

Title to beds of natural lakes or ponds, 112 A. L. R. 1108.

Wells, pollution of, 55 A. L. R. 1548.

100-1-2. Unit of Measurement—Of Flow—Of Volume.

The standard unit of measurement of the flow of water shall be the discharge of one cubic foot per second of time, which shall be known as a second foot; and the standard unit of measurement of the volume of water shall be the acre foot, being the amount of water upon an acre covered one foot deep, equivalent to 43,560 cubic feet.

(L. 19, p. 177, § 2.)

History.

This section was 2 Comp. Laws 1888, § 2782; R. S. 1898, § 1282; Comp. Laws 1907, § 1288x19.

Formerly the right to use water was measured by fractional parts of the whole; or by cubic inches with a limitation specifying the depth, width, and declination of the water at the point of measurement. A decree using the words "good irrigation stream" is void. Smith v. Phillips, 6 U. 376, 24 P. 932, applying 2 Comp. Laws 1888, p. 135, § 2782; City of Springville v. Holley, 6 U. 378, 23 P. 933.

Comparable provisions.

Idaho Code, § 41-102, Mont. Rev. Codes, § 7107 (cubic foot of water per second of time is legal standard for measurement of water).

1. Purpose of section.

The purpose of fixing a standard of measurement is to determine exactly the quantity of water to which a party is entitled; but where a party alleges and proves that he is entitled to all the waters of a certain stream, certainly as against his adversary who proves no right whatever, such allegation and proof is sufficiently certain as to quantity upon which to base a judgment; therefore in such case it is unnecessary at the trial to establish the exact quantity in second feet or acre feet which, under our law, are the standards of measurement. Anderson v. Hamson, 50 U. 151, 154, 167 P. 254.

2. Amendment of judgment.

The supreme court may amend the judgment of the district court in so far as it awarded a certain flow of cubic feet per second, by increasing or diminishing the award, provide for the manner of measuring the water which is diverted, for the construction and maintenance of measuring devices, and for the appointment of a commissioner. Jensen v. Birch Creek Ranch Co., 76 U. 356, 365, 289 P. 1097.

100-1-3. Beneficial Use Basis of Right to Use.

Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state. (L. 19, p. 177, § 3.)

History.

This section is identical with Comp. Laws 1907, § 1288x20.

1. Scope and operation of section.

In Utah the doctrine of prior appropriation for beneficial use is the basis of acquisition of water rights. Gunnison Irr. Co. v. Gunnison Highland Canal Co., 52 U. 347, 174 P. 852. This is a cardinal principle of the law of water rights. Big Cottonwood Lower Canal Co. v. Cook, 73 U. 383, 274 P. 454. This has always been the law in this state. Therefore a landowner may not successfully assert a right to water merely because it is flowing in a natural channel which passes over his land. To hold otherwise might in many cases render impotent the law of appropriation. Whitmore v. Salt Lake City, 89 U. 387, 396, 57 P.2d 726. In other words, it is a cardinal principle of law of prior appropriation that while prior rights to its use are obtained by those who first apply it to a beneficial use, those rights are limited to the quantities reasonably necessary for the uses to which it is applied. Little Cottonwood Water Co. v. Kimball, 76 U. 243, 247, 289 P. 116. Accordingly, only to use of waters for beneficial purpose may property rights in waters of natural stream be acquired. Oldroyd v. McCren, 65 U. 142, 235 P. 580, 40 A. L. R. 230. Under this section any excess in the stream, or any increase therein over his preferential right, is subject to appropriation or to the general rights of the public therein. And even though the flow be within the quantum of water to the use of which an appropriator has a preferential right,

during any time it is not being used beneficially and economically, it still is, remains, or becomes publici juris, subject to all common rights of the public and to appropriation and use by another, for the appropriator's right is merely a preferential right to the beneficial and economical use of the water up to his given quantity. Adams v. Portage Irrigation, Reservoir & Power Co., 95 U. 1, 72 P.2d 648.

Mere fact that a city had for many years diverted water from a creek did not give it the right to the use of such water or establish a right thereto, since it was necessary that it appear that water diverted had been put to beneficial use, and as bearing upon that question, "area irrigated and the duty of water on land irrigated are of controlling importance," so that where there was no such evidence, judgment for city in action to determine rights to water in stream was reversed. Richfield Cottonwood Irr. Co. v. City of Richfield, 84 U. 107, 117, 34 P.2d 945.

2. Title and rights of appropriator.

As a consequence of this section, prior appropriator of water does not acquire title thereto but merely obtains right to use of a specific quantity of water from a certain stream upon condition that the water shall be used for a beneficial purpose. United States v. Caldwell, 64 U. 490, 231 P. 434. (Kimball, J., dissenting.)

3. Purposes and uses for which taken.

The right of grazers of sheep to take water for camp and grazing purposes is a lawful right recognized by the Constitution and statute, unless in so doing the quality or quantity of the waters due to others is appreciably diminished. Adams v. Portage Irrigation, Reservoir & Power Co., 95 U. 1, 72 P.2d 648.

4. Quantity of water subject to appropriation.

The actual amount of water needed for the use to which it is to be applied is the limit to which a party is entitled to water for irrigation. Even a prescriptive right to waters gives no right except to put the same to a beneficial use. Big Cottonwood Tanner Ditch Co. v. Shurtliff, 49 U. 569, 578, 164 P. 856, applying Comp. Laws 1907, § 1288x20, which is identical with present section; Cleary v. Daniels, 50 U. 494, 167 P. 820.

The quantity of water that an appropriator of water for irrigation purposes is entitled to have decreed to him, when his right is brought in question, depends in great part upon the amount of land that such appropriator has irrigated with the water diverted. Generally, the greater the area to be irrigated, the greater will be the quantity of water required. Jensen v. Birch Creek Ranch Co., 76 U. 350, 361, 280 P. 1007.

The quantity necessary for irrigation of and domestic uses on land is measure of right of successor of one conveying by deed all waters flowing from certain spring, the deed excepting that used on one and one-half acres of ground near it. He is not entitled to use all waters of spring which he may desire on such acreage, so as to entitle grantee of land only to waste or surplus permitted to flow off land. Big Cottonwood Lower Canal Co. v. Cook, 73 U. 383, 274 P. 454.

Right of control exercised by virtue of 15-8-16 giving city power to control water and water courses did not give city any proprietary right to use of such waters, since beneficial use is measure of all rights to use of water. Mt. Olivet Cemetery Ass'n v. Salt Lake City, 65 U. 193, 235 P. 876.

Under this section the rights of prior appropriators of the water of a lake as against subsequent applicants to appropriate water therefrom depends, not on how much the prior appropriators required, but on the amount they have applied to an original and beneficial purpose within a reasonable time after making their appropriation and prior to the time defendants applied for an appropriation. Salt Lake City v. Gardner, 39 U. 30, 114 P. 147.

5. Disposition of surplus appropriated.

The rights of prior appropriator are measured and limited by extent of his appropriation and application to beneficial use, and if he diverts more water than he is entitled to, he must return such surplus to stream for use of subsequent appropriators. Gunnison Irr. Co. v. Gunnison Highland Canal Co., 52 U. 347, 174 P. 852.

6. Who may complain.

Prior appropriator cannot prevent use of surplus waters; that is, he cannot prevent another from using water while he cannot use it or make it available for use. Cleary v. Daniels, 50 U. 494, 167 P. 820.

The grantor of water rights will not be heard to say that his grantee cannot make beneficial use thereof. Campbell v. Nunn, 78 U. 316, 2 P.2d 899.

100–1–4. Reversion to Public by Abandonment or Failure to Use Within 5 Years—Extending Time.

When an appropriator or his successor in interest shall abandon or cease to use water for a period of five years the right shall cease, and thereupon such water shall revert to the public, and may be again appropriated as provided in this title, unless before the expiration of such five-year period the appropriator or his successor in interest shall have filed with the state engineer a verified application for an extension of time, not to exceed five years, within which to resume the use of such water and unless pursuant to such application the time within which such nonuse may continue is extended by the state engineer as hereinafter provided. The provisions of this section are applicable whether such unused or abandoned water is permitted to run to waste or is used by others without right. The filing of such application for extension of time shall extend the time during which nonuse may continue until the order of the state engineer thereon. Such application shall be on a blank to be furnished by the state engineer and shall set forth such information as he may require, including but not limited to the following: The name and address of applicant; the name of the source from which the right is claimed and the point on such source where the water was last diverted; evidence of the validity of the right claimed by reference to application number in the state engineer's office; date of court decree and title of case; or the date when the water was first used; the place, time and nature of past use; the flow of water which has been used in second feet or the quantity stored in acre feet and the time the water was used each year; the extension of time applied for, together with a statement of the reason for the nonuse of such water. Similar applications may be made from time to time, before the date of expiration of the extension next theretofore granted.

Upon receipt of such application the state engineer shall cause to be published at applicant's expense, to be paid in advance, once each week for three successive weeks, in a newspaper of general circulation in the county in which the source of water supply is located, a notice of the application, which notice shall contain, among other matters, the following: The name and address of applicant; the name of the source from which the right is claimed and the point on such source where the water was last diverted; the place, time and nature of past use; the flow of water which has been used in second feet or the quantity stored in acre feet; and the extension of time applied for.

Any person interested may at any time after the first publication of such notice and prior to the thirtieth day after completion of publication, file with the state engineer a verified written protest, together with a copy thereof, against the granting of such extension of time, stating the reasons therefor, which shall be duly considered by the state engineer, and after such further investigation as the state engineer deems necessary, he shall allow or reject the application.

Such applications for extension shall be granted by the state engineer for periods not exceeding five years each, upon a showing of reasonable cause for such nonuse. Financial crisis, industrial depression, opera-

tion of legal proceedings or other unavoidable cause, or the holding of a water right without use by any municipality, metropolitan water districts or other public agencies to meet the reasonable future requirements of the public, shall constitute reasonable cause for such nonuse.

Sixty days before the expiration of any such period of extension of time, the state engineer shall notify the applicant by registered mail of the date when such period of extension will expire. Before such date of expiration such applicant shall file a verified statement with the state engineer setting forth the date on which use of the water was resumed, and such further information as may be relevant and be required by the blank form which shall be furnished by the state engineer for said purpose, or such applicant shall make application for further extension of time in which to resume use of the water as provided in this section, otherwise such water right shall cease and thereupon the water shall revert to the public; *provided*, that nothing in this section shall apply to underground or subterranean waters.

(L. 19, p. 177, § 6.)

History.

As amended by L. 35, ch. 104, eff. Mar. 8; L. 39, ch. 111, eff. Mar. 20, adding entire text after "title" in fourth line.

This section was Comp. Laws 1907, § 1288x23.

1. Manner of forfeiting rights.

2. — in general.

Abandonment, as applied to doctrine of appropriation of water to a beneficial use, means an intentional relinquishment of a known right. Hammond v. Johnson, 94 U. 20, 66 P.2d 894. But abandonment of water rights is not based upon a time element, and mere nonuser will not establish abandonment for any less time, at least, than the statutory period, the controlling element being a matter of intent. Hammond v. Johnson, 94 U. 20, 66 P.2d 894.

In order to constitute an abandonment of a water right, there must be an intent to abandon, coupled with some act of relinquishment by which the intent is carried out. Promontory Ranch Co. v. Argile, 28 U. 398, 79 P. 47.

Neither abandonment nor forfeiture of a water right by nonuser takes cognizance of or applies to situation where third party has entered scene, since one may obtain rights to use of public waters by appropriation or private rights by purchase, lease, grant or adverse possession. Hammond v. Johnson, 94 U. 20, 66 P.2d 894.

Nonuser of appropriated waters for statutory period, as well as intentional abandonment, results in loss of rights thereto. Deseret Live Stock Co. v. Hooppiania, 66 U. 25, 239 P. 479.

Forfeiture of a water right for nonuser during statutory time may occur despite a specific intent not to surrender the right, since it is based, not upon an act done, or an intent had, but upon failure to use right for statutory time. Hammond v. Johnson, 94 U. 20, 66 P.2d 894.

Where ditch across land has not been used or repaired for statutory period, this constitutes an abandonment and forfeiture of water right, and person may be enjoined as a trespasser from entering upon land. Stalling v. Ferrin, 7 U. 477, 27 P. 686, applying 2 Comp. Laws 1888, § 2783.

3. — intent to abandon.

There can be no abandonment of a water right unless there is a concurrence of the acts of the party with his intent to desert, forsake or abandon the right. Hammond v. Johnson, 94 U. 20, 66 P.2d 894.

In action to quiet title to waters of a spring, finding of court that defendants said plaintiff was stealing their water negatived an abandonment of the water by defendants, so it could not revert to public and again be subject to appropriation. Hammond v. Johnson, 94 U. 20, 66 P.2d 894.

In action to determine title to waters of a spring having its source on plaintiffs' land, fact that neither plaintiffs nor their grantors made any use of the water, and permitted it to continue to flow through an artificial watercourse which they had purchased from one having a right thereto, was not sufficient to show abandonment, so as to render the water subject to appropriation, especially in view of other affirmative acts of plaintiffs tending to show that they had no intention of abandoning their rights. Gill v. Malan, 29 U. 431, 82 P. 471.

4. Natural streams.
This has always been the law in this state. Thereunder natural streams may be appropriated, notwithstanding the point of diversion is upon privately owned land. Whitmore v. Salt Lake City, 89 U. 387, 397, 57 P.2d 726.

5. Waste water.
Portion of appropriated water allowed to run waste cannot be appropriated by another unless owner intentionally abandons right to its use, or fails to apply it to beneficial purpose for statutory period, and owner may reclaim exclusive rights to such water by applying same to beneficial use at any time before elapse of statutory period, in absence of earlier intentional abandonment of rights thereto. Torsak v. Rukavina, 67 U. 166, 246 P. 367.

6. Findings and conclusions of law.
If the findings of the court under this section are not against a fair preponderance of the evidence, then the court is justified as a matter of law in rendering and entering a decree upon such findings. Utah Power & Light Co. v. Richmond Irr. Co., 79 U. 602, 609, 12 P.2d 357.

100–1–5. Use of Water a Public Use.

The use of water for beneficial purposes, as provided in this title, is hereby declared to be a public use. (L. 19, p. 177, § 4.)

History.
This section is identical with first sentence of Comp. Laws 1907, § 1288x21.

Comparable provisions.
Mont. Const., Art. III, § 15 (use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution or other beneficial use, shall be held to be a public use).

1. Right to take.
This has always been the law in this state. Therefore a natural stream may be appropriated, even though point of diversion is upon privately owned land. Whitmore v. Salt Lake City, 89 U. 387, 396, 57 P.2d 726.

2. "Public use."
As to what are public uses, see 104–61–1 et seq.

3. Condemnation proceedings.
Condemnation proceedings under 104–61–1, subd. (5) may be resorted to for purpose of building pipe line on adjoining lands to divert waters impregnated with copper from plaintiff's mine dump. Utah Copper Co. v. Montana-Bingham Consol. Min. Co., 69 U. 423, 255 P. 672.

100–1–6. Eminent Domain—For Ditches, Reservoirs, etc.

Any person shall have a right of way across and upon public, private and corporate lands, or other rights of way, for the construction, maintenance, repair and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels, pipe lines and areas for setting up pumps and pumping machinery or other means of securing, storing, replacing and conveying water for domestic, culinary, industrial and irrigation purposes or for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not unnecessarily to impair the practical use of any other right of way, highway or public or private road, or to injure any public or private property. (L. 19, p. 177, § 4.)

History.
As amended by L. 35, ch. 105, eff. Mar. 22, making only minor changes in text.
This section does not differ radically from R. S. 1898, § 1277; Comp. Laws 1907, § 1288x21.

Cross-references.
Eminent domain, 104–61; right of way across state lands for ditches, 86–2–1, 86–2–3.

1. Easement.
In view of this section and 104–61–1, subd. (5), giving the right of eminent domain in such cases, no easement for passage of water through an irrigation ditch across private lands, upon the theory of an implied reservation, exists in Utah. Alcorn v. Reading, 66 U. 509, 243 P. 922.
In view of this section and 104–61–1, subd. (5), giving right of eminent domain in such cases, no "way of necessity" for passage of water through irrigation ditch across private lands can be asserted under the common law. Alcorn v. Reading, 66 U. 509, 243 P. 922.
For the general law of easements, con-

sult standard textbooks and Tripp v. Bagley, 74 U. 57, 276 P. 912, 69 A. L. R. 1417; Holm v. Davis, 41 U. 200, 125 P. 403, 44 L. R. A. (N. S.) 89.

2. Loss of right of way.

If water right is lost by abandonment of ditch by nonuser or failure to repair, the right of way is thereby lost, and entry upon land is a trespass. Stalling v. Ferrin, 7 U. 477, 27 P. 686.

A. L. R. notes.

Eminent domain: combination of public and private uses or purposes; storage reservoirs; irrigation, 53 A. L. R. 18, 19; exercise of eminent domain for purpose of irrigating land of private owner, 27 A. L. R. 519.

100–1–7. Id. For Joint Use of Ditch.

When any person desires to convey water for irrigation or any other beneficial purpose and there is a canal or ditch already constructed that can be used or enlarged to convey the required quantity of water, such person shall have the right to use or enlarge such canal or ditch already constructed, by compensating the owner of the canal or ditch to be used or enlarged for the damage caused by such use or enlargement, and by paying an equitable proportion of the maintenance of the canal or ditch jointly used or enlarged; *provided*, that such enlargement shall be made between the 1st day of October and the 1st day of March, or at any other time that may be agreed upon with the owner of such canal or ditch. The additional water turned in shall bear its proportion of loss by evaporation and seepage. (L. 19, p. 177, § 5.)

History.

This section is more or less in the same language as R. S. 1898, § 1278; Comp. Laws 1907, § 1288x22.

1. Validity.

This section is not invalid because it does not provide for making compensation contemplated by Const. Art. I, § 22, for taking or damaging private property for public use. Salt Lake City v. East Jordan Irr. Co., 40 U. 126, 121 P. 592. (Straup, J., dissenting.)

2. Proceeding to enlarge irrigation canal.

In proceeding by city against irrigation company to obtain right to enlarge irrigating canal owned by defendant so as to convey water from river for use of its inhabitants, it was held that use that city sought to make of canal when enlarged was public use, that proceeding was controlled by principles involved in exercise of right of eminent domain, that the measure of damages which defendant was entitled to was amount of decrease, if any, in value of use of canal, for canal purposes, which was caused by enlargement thereof by city for its purposes and the use by city for its purposes being exercised jointly with use of defendant for its canal purposes. Salt Lake City v. East Jordan Irr. Co., 40 U. 126, 121 P. 592. (Straup, J., dissenting.)

3. Maintenance of proceeding.

In proceeding to obtain permission to enlarge certain irrigating canals belonging to irrigation company, held it was no objection to maintenance of proceeding that plaintiff's right was right to divert water at point farther upstream than point of diversion of defendants' canals, or that plaintiff had not shown that he had an actual and subsisting right to use of water which he sought to convey through canals, where he had some water and had made application to appropriate portion of surplus waters of river, or that his application for unappropriated water was made by plaintiff in his official capacity as state engineer. Tanner v. Provo Bench Canal & Irrigation Co., 40 U. 105, 121 P. 584, aff'd 239 U. S. 323, 60 L. Ed. 307, 36 S. Ct. 101. (Straup, J., dissenting.)

4. Compensation or damages.

In proceeding to obtain permission to enlarge certain irrigating canals belonging to irrigation company, held irrigation company was limited in its recovery by amount of damages suffered and could not recover for any benefit plaintiff might receive. Tanner v. Provo Bench Canal & Irrigation Co., 40 U. 105, 121 P. 584, aff'd 239 U. S. 323, 60 L. Ed. 307, 36 S. Ct. 101. (Straup, J. dissenting.)

In proceeding to obtain permission to enlarge certain irrigating canals belonging to irrigation company, that de-

fendants would be affected in control of canals and in making repairs if any were necessary, held not to entitle defendants to substantial damages, where defendants were neither unduly interfered with nor hampered in their control work of canals, and hence could not be injured or damaged in that regard. Tanner v. Provo Bench Canal & Irrigation Co., 40 U. 105, 121 P. 584, aff'd 239 U. S. 323, 60 L. Ed. 307, 36 S. Ct. 101. (Straup, J., dissenting.)

Where, in proceeding in state court to obtain permission to enlarge certain irrigating canals, canal owners were allowed only nominal damages because no substantial damages were incurred, supreme court of United States held it would not consider on writ of error objection that canal owners had been deprived of property without due process of law. Provo Bench Canal & Irrigation Co. v. Tanner, 239 U. S. 323, 60 L. Ed. 307, 36 S. Ct. 101, aff'g 40 U. 105, 121 P. 584. (Straup, J., dissenting.)

5. Exchange of water.

Water may be diverted by a subsequent appropriator from a stream, and water from the same stream or another stream, if equal in quantity and quality, may be returned into the stream or into the ditch or canal of the prior appropriator, if that is done at a point where the prior appropriator can make full use of the water without injury or damage to him. United States v. Caldwell, 64 U. 490, 231 P. 434. (Kimball, J., dissenting.)

6. Additional water turned in.

Under last sentence of this section, reasonable losses from evaporation and seepage are not classified as willful waste or a wrongful use of water. Little Cottonwood Water Co. v. Kimball, 76 U. 243, 261, 289 P. 116.

100–1–8. Duties of Owners of Ditches—Safe Condition—Bridges.

The owner of any ditch, canal, flume or other water course shall maintain the same in repair so as to prevent waste of water or damage to the property of others, and is required, by bridge or otherwise, to keep such ditch, canal, flume or other water course in good repair where the same crosses any public road or highway so as to prevent obstruction to travel or damage or overflow on such public road or highway, except where the public maintains or may hereafter elect to maintain devices for that purpose. (L. 19, p. 177, § 12.)

History.

This section was R. S. 1898, § 1279; Comp. Laws 1907, § 1288x29.

1. Operation and effect of section.

This section imposes upon owners of canals or ditches used for irrigation the duty of exercising ordinary care so as to prevent injury and damage to others; failure to exercise ordinary care and prudence may constitute actionable negligence. Subsequent alterations and repairs are competent upon issue of negligence. Jensen v. Davies & Weber Counties Canal Co., 44 U. 10, 137 P. 635.

2. Pleading and proof.

Under this section, plaintiff claiming damages caused by seepage must allege and prove negligence or want of ordinary care on defendant's part in the construction, operation or maintenance of irrigation ditch. The degree of care required is commensurate with the damage or injury that will probably result if water does escape. Mackay v. Breeze, 72 U. 305, 310, 269 P. 1026, applying Comp. Laws 1917, § 3474, and cases cited.

3. Issues, proof and variance.

The action to recover for injuries resulting from overflow is grounded on negligence. The issue is whether there was a duty to repair. Chipman v. American Fork City, 46 U. 134, 148 P. 1103; s. c. 54 U. 93, 179 P. 742.

4. Action against land commissioners.

An action against board of land commissioners is governed by general principles of law. Wilkinson v. State, 42 U. 483, 134 P. 626.

100–1–9. Contribution Between Joint Owners of Ditch or Reservoir.

When two or more persons are associated in the use of any dam, canal, reservoir, ditch, lateral, flume or other means for conserving or conveying water for the irrigation of land or for other purposes, each of them shall be liable to the other for the reasonable expenses of main-

taining, operating and controlling the same, in proportion to the share in the use or ownership of the water to which he is entitled.

(L. 19, p. 177, § 13.)

History.

This section is more or less identical with R. S. 1898, § 1280; Comp. Laws 1907, § 1288x30.

1. Operation and effect of section.

This section was not intended to abrogate or disturb the rights of parties in an irrigation canal founded upon a valid and existing contract, and hence where rights of parties were so founded, irrigation company was not entitled to contribution for maintenance of a canal. West Union Canal Co. v. Thornley, 64 U. 77, 228 P. 199.

2. Nature of proceeding and jurisdiction.

Action under this section is not an action involving water rights under 100-4-1 and may be brought in city court. Thomas v. District Court of Box Elder County, 66 U. 300, 242 P. 348.

3. Division of cost of maintenance and operation.

Under our statute it is proper to divide the cost of maintenance and operation of an irrigation ditch on the basis of ownership of the water. If anyone infringes upon the rights of parties so entitled, depriving them of their water, they may, of course, have redress in a proper action. Perry Irr. Co. v. Thomas, 74 U. 193, 200, 278 P. 536, applying Laws 1919, Ch. 67, § 13.

4. Pleas and defenses.

In action under this section, determination of water rights under 100-4-1 is res adjudicata. Thomas v. District Court of Box Elder County, 66 U. 300, 242 P. 348.

100-1-10. Conveyance of Water Right—By Deed.

Water rights shall be transferred by deed in substantially the same manner as real estate, except when they are represented by shares of stock in a corporation; and such deeds shall be recorded in books kept for that purpose in the office of the recorder of the county where the place of diversion of the water from its natural channel is situated and in the county where the water is applied. Every deed of a water right so recorded shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof, and subsequent purchasers, mortgagees and lien holders shall be deemed to purchase and take with notice thereof. (L. 19, p. 177, § 16.)

History.

This section is more or less identical with Comp. Laws 1907, § 1288x33.

Comparable provisions.

Idaho Code, § 41-2204 (contracts and deeds for sale of water rights must be of the form approved by department of reclamation; must be numbered plainly and consecutively; owner of irrigation works must file for record in proper county recorder's office all such contracts or deeds, or duplicate copies thereof, in order in which same are issued to purchasers); § 41-2201 (department of reclamation determines capacity of irrigation works, and number of acres that may be irrigated therefrom, upon the filing, with the department, of a petition for certificate of authority to sell water rights in such works).

Cross-references.

Conveyance of beds of navigable waters, 86-1-14; conveyance of real estate, 78-1.

1. Reservations in conveyance.

Reservation, in conveyance to water company, of right to winter waters theretofore used for irrigation, is limited to use of same amount of water and same land previously irrigated thereby, and waters may not be used to irrigate land formerly irrigated by summer waters, though in using such winter waters on lands formerly irrigated by same, user is not limited to same ditches used prior to date of conveyance and reservation of rights. East Grouse Creek Water Co., v. Frost, 66 U. 587, 245 P. 338.

Decisions from other jurisdictions.

— Idaho.

A water right may be transferred separately from the lands on which it has been used, provided that to do so does not prejudice the rights of another water user; and the right to segregate a water right from the lands to which it may be appurtenant inheres in the right

of property and ownership in Idaho. Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist., 57 Idaho 403, 66 P.2d 115.

A. L. R. notes.

Assignability and divisibility of easement in gross or license in respect of water, 130 A. L. R. 1253.

100-1-11. Id. As Appurtenance.

A right to the use of water appurtenant to land shall pass to the grantee of such land, and, in cases where such right has been exercised in irrigating different parcels of land at different times, such right shall pass to the grantee of any parcel of land on which such right was exercised next preceding the time of the execution of any conveyance thereof; subject, however, in all cases to payment by the grantee in any such conveyance of all amounts unpaid on any assessment then due upon any such right; *provided*, that any such right to the use of water, or any part thereof, may be reserved by the grantor in any such conveyance by making such reservation in express terms in such conveyance, or it may be separately conveyed. (L. 19, p. 177, § 15.)

History.

This section is more or less identical with 2 Comp. Laws 1888, § 2783; R. S. 1898, § 1281; Comp. Laws 1907, § 1288x33.

1. Conveyances.

2. — deeds.

A conveyance of land passes an appurtenant water right unless the same is expressly reserved (Cortella v. Salt Lake City, 93 U. 236, 72 P.2d 630), at least where beneficial use of water upon land conveyed is shown. Anderson v. Hamson, 50 U. 151, 167 P. 254, applying Comp. Laws 1907. Under this section, a deed to land in statutory form, without reservation of the water, conveys whatever right the grantor has to the water appurtenant to the land. Anderson v. Hamson, 50 U. 151, 167 P. 254, applying Comp. Laws 1907, § 1288x32.

3. — tax deed.

Since deed to land in statutory form without reservation of water conveys whatever right grantor has to water appurtenant to land, tax deed conveyed such water rights. Black v. Johanson, 81 U. 410, 18 P.2d 901.

4. — mortgage.

Mortgage in statutory form, without reservation of water, conveys whatever rights grantor has to water appurtenant to land. Thompson v. McKinney, 91 U. 89, 63 P.2d 1056.

Water rights which were found to be appurtenant to land, and which were not reserved to mortgagor in mortgage or otherwise separately conveyed to another, were included in the mortgage and passed with the land on foreclosure. Thompson v. McKinney, 91 U. 89, 63 P.2d 1056.

5. — devises.

Where land devised was of little value without water rights, water rights passed to devisees as appurtenant to, and part of, the land. In re Johnson's Estate, 64 U. 114, 228 P. 748.

6. Appurtenances to land.

Perpetual right to take water from city's canal, in exchange for water rights in creek which had formerly been used for irrigation, was for benefit of irrigation of land, and would be in the nature of an appurtenance to the land. Cortella v. Salt Lake City, 93 U. 236, 72 P.2d 630.

Where owner of land conveyed it to defendant's predecessor in title, reserving minerals on or in land conveyed, and subsequently conveyed mineral rights to plaintiff, held, in action by plaintiff to quiet title to water containing copper, that such water was not mineral, and hence, defendant was entitled to remove copper from water. Stephens Hays Estate, Inc., v. Togliatti, 85 U. 137, 38 P.2d 1066.

7. Rights of strangers.

Under former statute, held that, where deed included appurtenances to land, right to water passed to grantee, and that absolute stranger to conveyance was not in position to dispute title to water right obtained under deed by grantee who, as to third persons, might exercise all of rights of absolute owner without regard to whether, as between parties to deed, transaction was mortgage or conditional sale. Smith v. North Canyon Water Co., 16 U. 194, 52 P. 283.

8. Findings.

Finding that water rights were appurtenant to land, and passed with the land by mortgage thereon, was sup-

ported by the record. Thompson v. McKinney, 91 U. 89, 63 P.2d 1056.

A. L. R. notes.
Character of easement in respect of water as one in gross or appurtenant, 89 A. L. R. 1187; fee or easement, deed involving water rights as conveying, 136 A. L. R. 404; rights in ditch company as appurtenance of land irrigated, 70 A. L. R. 1008.

100-1-12. Id. Failure to Record, Effect.

Every deed of a water right which shall not be recorded as provided in this title shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same water right, or any portion thereof, where his own deed shall be first duly recorded.

(L. 19, p. 177, § 17.)

100-1-13. Corporations—One Water Company May Own Stock in Another.

Any irrigation or reservoir company incorporated and existing under the laws of this state may purchase or subscribe for the capital stock of any other similar corporation which at the time of such purchase or subscription shall be or is about to be incorporated; *provided*, that such purchase or subscription shall be made only when permitted by the articles of incorporation, and such corporations are hereby permitted and authorized to amend their articles of incorporation so as to authorize such purchase or subscription. (L. 19, p. 177, § 11.)

100-1-14. Federal Projects—Water Rights Appurtenant to Land Specified—Transfer to Other Lands.

All water hereafter appropriated for irrigation purposes in works constructed or controlled by the United States shall be appurtenant to specified lands owned or occupied by the person claiming the right to use the water, so long as the water is used beneficially thereon; *provided*, if for any reason it should at any time become impracticable to use water beneficially or economically for the irrigation of any land to which the right of the same is appurtenant, said right may, on application to the state engineer, be severed from said land and simultaneously transferred to and become appurtenant to other land without losing priority of right theretofore established, if such change can be made without detriment to existing rights. All changes shall be made only in the manner provided by section 100-3-3, Revised Statutes of Utah, 1933, as amended by this act, and not otherwise.

(L. 19, p. 177, § 14.)

History.
As amended by L. 37, ch. 130, eff. Mar. 19, adding final sentence of text.

Cross-references.
See 100-1-11.

A. L. R. notes.
Priority as between contract holders under Carey Act project, 26 A. L. R. 296; right of owner of land within reclamation project in respect of which water right was allowed on application pursuant to Reclamation Act to perpetual right beyond control of federal government for sufficient amount beneficially to irrigate land, 115 A. L. R. 1320.

100-1-15. Interfering with Water Works or Apportioning Official—Penalty and Liability.

Any person, who in any way unlawfully interferes with, injures, destroys or removes any dam, head gate, weir, casing, valve, cap or

other appliance for the diversion, apportionment, measurement or regulation of water, or who interferes with any person authorized to apportion water while in the discharge of his duties, is guilty of a misdemeanor, and is also liable in damages to any person injured by such unlawful act. (L. 19, p. 177, § 18.)

History.
As amended by L. 35, ch. 105, eff. Mar. 22, making only minor changes in text.

Cross-references.
Other criminal provisions, 103–41, 103–59.

1. Action for malicious destruction of dam, etc.
This action is governed by the general principles of the law of torts; as, for example, the right to recover exemplary damages. Falkenberg v. Neff, 72 U. 258, 269 P. 1008.

A. L. R. notes.
Highway officers' personal liability for interference with water rights in construction or maintenance of highway, 90 A. L. R. 1491.

100–1–16. Obstructing Ditches or Right of Way—Penalty.

Whenever any person has a right of way for any canal or other water course it shall be unlawful for any person to place or maintain in place any obstruction, by fence or otherwise, along or across such canal or watercourse, without providing gates sufficient for the passage of the owner of such canal or water course. Any person violating the provisions of this section is guilty of a misdemeanor. (L. 19, p. 177, § 19.)

A. L. R. notes.
Highway officers' personal liability for interference with water rights in construction or maintenance of highway, 90 A. L. R. 1491.

L. 1933, ch. 81; eff. Mar. 20.

DETERMINATION OF VALIDITY OF CONTRACTS OF WATER USERS' ASSOCIATIONS

AN ACT concerning water users' association formed to acquire reclamation projects constructed by the United States of America and providing for the determination of the validity of contracts between water users' associations and the United States of America.

Be it enacted by the Legislature of the State of Utah:

100–1–17. Petition for Hearing to Determine Validity—Notice—Service—Pleading—Costs—Review.

Where any water users' association, irrigation company, canal company, ditch company, reservoir company, or other corporation of like character or purpose, organized under the laws of this state has entered into or proposes to enter into a contract with the United States for the payment by such association or company of the construction and other charges of a federal reclamation project constructed, under construction, or to be constructed within this state, and where funds for the payment of such charges are to be obtained from assessments levied upon the stock of such association or company, or where a lien

is created or will be created against any of the land, property, canals, water rights or other assets of such association or company or against the land, property, canals, water rights or other assets of any stockholder of such association or company to secure the payment of construction or other charges of a reclamation project, the water users' association, irrigation company, canal company, ditch company, reservoir company or other corporation of like character or purpose may file in the district court of the county wherein is situated the office of such association or company a petition entitled "..... Water Users' Association" or "..... Company," as the case may be, "against the stockholders of said association or company and the owners and mortgagees of land within the ..... Federal Reclamation Project." No other or more specific description of the defendants shall be required. In the petition it may be stated that the water users' association, irrigation company, canal company, ditch company, reservoir company or other corporation of like character and purpose has entered into or proposes to enter into a contract with the United States, to be set out in full in said petition, with a prayer that the court find said contract to be valid, and a modification of any individual contracts between the United States and the stockholders of such association or company, or between the association or company, and its stockholders, so far as such individual contracts are at variance with the contract or proposed contract between the association or company and the United States.

Thereupon a notice in the nature of a summons shall issue under the hand and seal of the clerk of said court, stating in brief outline the contents of said petition, and showing where a full copy of said contract or proposed contract may be examined, such notice to be directed to the said defendants under the same general designations, which shall be deemed sufficient to give the court jurisdiction of all matters involved and parties interested. Service shall be obtained (a) by publication of such notice once a week for three consecutive weeks (three times) in a newspaper published in each county where the irrigable land of such federal reclamation project is situated, and (b) by the posting at least three weeks prior to the date of the hearing on said petition of the notice and a complete copy of the said contract or proposed contract in the office of the plaintiff association or company, and at three other public places within the boundaries of such federal reclamation project. Any stockholder in the plaintiff association, or company, or owner, or mortgagee of land within said federal reclamation project affected by the contract proposed to be made by such association or company, may demur to or answer said petition before the date set for such hearing or within such further time as may be allowed therefor by the court. The failure of any persons affected by the said contract to answer or demur shall be construed, so far as such persons are concerned as an acknowledgment of the validity of said contract and as a consent to the modification of said individual contracts if any with such association or company or with the United States, to the extent that such modification is required to cause the said individual contracts if any to conform to the terms of the contract or proposed

contract between the plaintiff and the United States. All persons filing demurrers or answers shall be entered as defendants in said cause and their defense consolidated for hearing or trial. Upon hearing the court shall examine all matters and things in controversy and shall enter judgment and decree as the case warrants, showing how and to what extent, if any, the said individual contracts of the defendants or under which they claim are modified by the plaintiff's contract or proposed contract with the United States. In reaching his conclusion in such causes, the court shall follow a liberal interpretation of the laws, and shall disregard informalities or omissions not affecting the substantial rights of the parties, unless it is affirmatively shown that such informalities or omissions led to a different result than would have been obtained otherwise. The code of civil procedure shall govern matters of pleading and practice as nearly as may be. Costs may be assessed or apportioned among contesting parties in the discretion of the trial court. Review of the judgment of the district court by the supreme court may be had as in other civil causes. (Sec. 1.)

History.
As amended by L. 35, ch. 108, eff. Mar. 8, rewriting text of entire section.

100-1-18. Effective Date.

This act shall take effect upon approval.
Approved March 20, 1933. (Sec. 2.)

L. 1933, ch. 82; eff. Mar. 18.

DRAINAGE AND IRRIGATION DISTRICTS, EMPOWERED TO BORROW MONEY

AN ACT authorizing irrigation companies, drainage districts, and irrigation districts to borrow money from the Reconstruction Finance Corporation, organized pursuant to an act of congress of the United States or from any other government loaning agency or agencies.

Be it enacted by the Legislature of the State of Utah:

100-1-19. Purpose—Agency.

That irrigation companies, drainage districts, and irrigation districts heretofore organized under the laws of the state of Utah be and they are hereby authorized and empowered to borrow money from the Reconstruction Finance Corporation, organized pursuant to an act of congress of the United States, or from any other governmental loaning agency or agencies to aid them in refunding or refinancing their obligations outstanding on the date of enactment by the congress of the United States of the emergency relief and construction act of 1932 through the purchase and retirement of such obligations at a discount, or otherwise, if such obligations were issued in connection with irrigation and/or drainage projects of such companies and or districts, respectively, which are self-liquidating in character, or where the loan can be repaid by the applicant for such loan by assessment on the issued and outstanding capital stock of the irrigation company, or by assessment on the land or lands within the exterior boundaries of the drainage

district, or by assessments on the lands and/or water allotted to lands within the exterior boundaries of the irrigation district. (Sec. 1.)

Cross-references.
Borrowing power generally of drainage districts, 24A–0–39.

100–1–20. To Issue Bonds—Interest—Lien.

The money so borrowed shall be evidenced by the bond or bonds or other obligations of the irrigation companies, drainage districts, or irrigation districts borrowing the same and shall constitute and be secured by a first lien on the water rights, canal rights and all assets of the irrigation companies, and on all lands within the exterior boundaries of drainage districts, and on all lands and/or water allotted to lands within the exterior boundaries of the irrigation districts, and shall bear such rate of interest and mature at such time or times as the contracting parties may agree upon. (Sec. 2.)

100–1–21. Effective Date.

This act shall take effect upon approval.
Approved March 18, 1933. (Sec. 3.)

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CHAPTER 2

STATE ENGINEER *

100–2–1. State Engineer — Term — Powers and Duties—Qualification and Duties.
100–2–2. Oath and Bond.
100–2–3. Salary and Expenses.
100–2–4. Deputy, Assistants and Equipment.
100–2–5. To Aid District Court.
100–2–6. Office at Capitol—Place of Hearings.
100–2–7. To Aid Federal Court.
100–2–8. Powers Relating to Interstate Streams—Interstate Agreements — Ratification.
100–2–9. Power of Arrest.
100–2–10. Reports to Governor.
100–2–11. Records—Certified Copies—Evidence.
100–2–12. Seal.
100–2–13. Attorney-General, District and County Attorneys to Counsel.
100–2–14. Fees of State Engineer.
100–2–15. Agreements with Federal and State Agencies—Investigations, Surveys of Adjudications.
100–2–16. Arbitration — Confirmation by District Court.

L. 1935, ch. 106; eff. May 14.

SURVEY OF GROUND-WATER SUPPLY

100–2–17. Authorization of Coöperative Investigations of Ground-Water Resources.
100–2–18. Contingent State Appropriation—Payment of Expenses.
100–2–19. Appropriation by United States.
100–2–20. Authorizing Employees to Enter and Cross Lands—Injuring Monuments a Misdemeanor.

* History of act. This chapter was Comp. Laws 1907, Title 40, Ch. 1.

100–2–1. State Engineer—Term—Powers and Duties—Qualification and Duties.

There shall be a state engineer, who shall be appointed by the governor by and with the consent of the senate. He shall hold his office for

the term of four years and until his successor is appointed and qualified. He shall have general administrative supervision of the waters of the state, and of the measurement, appropriation, apportionment and distribution thereof. He shall have power to make and publish such rules and regulations as may be necessary from time to time fully to carry out the duties of his office, and particularly to secure the equitable and fair apportionment and distribution of the water according to the respective rights of appropriators. He shall have full authority to bring suit in courts of competent jurisdiction to enjoin the unlawful appropriation, diversion, and use of both surface and underground water and to prevent waste, loss, or pollution thereof and to otherwise enable him to carry out the duties of his office. The state engineer may establish water districts and define the boundaries thereof, such districts to be so constituted as to secure the best protection to the claimants of water and the most economical supervision on the part of the state. No person shall be appointed to the office of state engineer who has had less than five years' experience as a practical engineer, or who has been less than three years an actual and bona fide resident of this state, or who has not such theoretical knowledge and practical experience and skill as shall fit him for the position. (L. 21, p. 185, § 7.)

History.

As amended by L. 41, ch. 96, eff. May 13, inserting sentence after "appropriators" in tenth line.

Comparable provisions.

Idaho Code, § 65–3301 (abolishing, inter alia, office of state engineer); § 65–3201 (department of reclamation exercises the rights, powers and duties vested by law in state engineer); § 41–1501 (enumerating duties of department of reclamation).

Mont. Rev. Codes, § 1954 (state engineer appointed by governor, and confirmed by the senate); § 1955 (state engineer is required to become conversant with state's waterways and needs of state as to irrigation matters).

Cross-references.

Engineering commission, 82C–1; state engineer subject to orders of commission, 82C–1–19.

1. Termination of existing office.

L. 41, 1st Spec. Sess., ch. 40, eff. July 1, which amended certain sections of this chapter, contained a section 2 which read as follows: "The term of office of the present state engineer shall terminate upon the appointment and qualification of his successor."

2. Powers of engineer.

Clearly, the state engineer has no powers except such as are expressly conferred upon him by statute. Little Cottonwood Water Co. v. Kimball, 76 U. 243, 276, 289 P. 116.

Under former statute held that the section did not limit jurisdiction of engineer to unappropriated waters or waters belonging to the state, and that "waters of the state" and "waters in the state" were interchangeable terms. Caldwell v. Erickson, 61 U. 265, 213 P. 182.

State engineer is without power to grant right to use of water which in some way interferes with rights of others that have become fixed by long and continued use and enjoyment; it is only in event that engineer finds unappropriated water, that applicants may obtain rights to use of water. In re Jones' Estate, 59 U. 99, 202 P. 206.

Under former statute state engineer had authority to grant extension of time for appropriation that he had fixed for completing power plant and pipe line if not beyond ultimate limit fixed by statute, although application therefor was not made until after time first fixed by engineer had elapsed. Pool v. Utah County Light & Power Co., 36 U. 508, 105 P. 289.

100–2–2. Oath and Bond.

Before entering upon the duties of his office the state engineer shall take and subscribe the constitutional oath of office. He shall file with the secretary of state said oath and his official bond in the penal sum of $5,000, with not less than two sureties, to be approved by the state

board of examiners, conditioned for the faithful discharge of the duties of his office and for the delivery to his successor, or other officer appointed by the governor to receive the same, of all moneys, books and other property belonging to the state then in his hands or under his control, or with which he may be legally chargeable as such officer. (L. 19, p. 177, § 61.)

Cross-references.
Constitutional oath, Art. IV, § 10; official oaths and bonds, Title 65.

100-2-3. Salary and Expenses.

The salary of the state engineer shall be $4000 per annum payable in equal monthly installments. When the state engineer is away from his office on official business he shall be entitled to his actual traveling expenses. (L. 19, p. 177, § 59.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 40, eff. July 1, rewriting text of entire section.

100-2-4. Deputy, Assistants and Equipment.

For the purpose of performing the duties of the office of the state engineer, the engineering commission shall upon the recommendation of the state engineer appoint a chief deputy and employ all necessary assistants and fix their salaries in accordance with salary standards adopted by the department of finance and may purchase all necessary equipment. (L. 19, p. 177, § 58.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 40, eff. July 1, making material changes in text.

100-2-5. To Aid District Court.

In aid of the district court the state engineer shall have power to collect facts and make surveys and do all other necessary things, the cost of which shall be paid by the state upon presentation to the state auditor of monthly statements, certified by the state engineer and approved by the state board of examiners. (L. 19, p. 177, § 58.)

100-2-6. Office at Capitol—Place of Hearings.

The state engineer shall keep his office at the state capitol, but all proceedings and hearings requiring the attendance of water users and witnesses shall be held within the county where the land is located. (L. 19, p. 177, § 60.)

100-2-7. To Aid Federal Court.

The state engineer, when requested by the district court of the United States for the district of Utah, may assist said court in any matter relating to the distribution and use of any of the waters of the state, and may when so requested coöperate with any water commissioner appointed by said court in any such matter. (L. 19, p. 177, § 66.)

100-2-8. Powers Relating to Interstate Streams—Interstate Agreements—Ratification.

The state engineer is hereby authorized and empowered to receive and grant applications to appropriate water from interstate streams, in Utah, where such water is to be conveyed and used for beneficial purposes within any border state, and to issue certificates of appropriation thereon; *provided*, the law of such border state in like manner permits the appropriation of water therein for use in Utah. The state engineer shall coöperate with the state engineer or other proper officer of any adjoining state in the determination, supervision, regulation and control of all water and water rights in interstate streams; and to that end the state engineer, by and with the consent of the governor, may enter into the necessary and lawful agreements with the proper officer, duly authorized thereto, of any adjoining state to carry out the purposes of this section. The state engineer is hereby authorized to represent the state of Utah in all interstate conferences held for the purpose of negotiating and entering into compacts between the state of Utah and one or more sister states for the division of the waters of interstate rivers, lakes, or other sources of supply; *provided, however*, that any such compact signed by the state engineer shall not become binding upon the state of Utah until it has been ratified and approved by the legislature of Utah and the legislatures of other states which are parties thereto. (L. 21, p. 186, § 1.)

History.
As amended by L. 41, ch. 96, eff. May 13, changing text of first proviso and adding last sentence.

100-2-9. Power of Arrest.

The state engineer, or any water commissioner within his district, may arrest any person violating any of the provisions of this title, and turn such person over to the sheriff of the proper county, and immediately upon delivering any such person so arrested into the custody of the sheriff it shall be the duty of the state engineer or water commissioner making such arrest to make complaint in writing and upon oath before the proper court against the person so arrested.
(L. 19, p. 177, § 67.)

100-2-10. Reports to Governor.

The state engineer shall prepare and render to the governor biennially, and oftener if required, full and true reports of his work relating to the matters and duties devolving upon him by virtue of his office, which report shall be delivered to the governor on or before the 1st day of October of the year preceding regular sessions of the legislature. He shall become conversant with the waterways of the state, and its needs as to irrigation matters, and in his reports to the governor he shall make such suggestions as to the amendment of existing laws or the enactment of new laws as his information and experience shall suggest.
(L. 19, p. 177, § 71.)

Comparable provisions.
Idaho Code, § 41-1504 (reports to be made to governor by department of reclamation); § 41-1501 (department is required to become familiar with waterways and irrigable land in the state and needs of state as to irrigation matters).

100-2-11. Records—Certified Copies—Evidence.

He shall keep on file in his office full and proper records of his work, including all field notes, computations and facts made or collected by him, all of which shall be part of the records of his office and the property of the state. All records, maps and papers recorded or filed in the office of the state engineer shall be open to the public during business hours. The office of the state engineer is hereby declared to be an office of public record, and none of the files, records or documents shall be removed therefrom, except in the custody of the state engineer or one of his deputies. Certified copies of any record or document shall be furnished by the state engineer on demand, upon payment of the reasonable cost of making the same, together with the legal fee for certification. Such copies shall be competent evidence, and shall have the same force and effect as the originals. (L. 19, p. 177, § 71.)

100-2-12. Seal.

The state engineer shall have a seal which he shall affix to all certificates issued from his office, and he shall file a description and an impression of the same in the office of the secretary of state.

(L. 19, p. 177, § 72.)

100-2-13. Attorney-General, District and County Attorneys to Counsel.

In all matters requiring legal advice in the performance of his duties and the prosecution or defense of any action growing out of the performance of his duties, the attorney-general, and the district or county attorney of the county in which any legal question arises, shall be the legal advisers of the state engineer, and they are hereby required to perform any and all legal services required of them by him without other compensation than their salaries. (L. 19, p. 177, § 76.)

100-2-14. Fees of State Engineer.

The state engineer shall collect the following fees which shall be paid by him monthly into the state treasury to the credit of the general fund.

For examining and filing applications:

To appropriate any quantity of water up to and including 10 second-feet, for each application, $2.50, and in addition, $1 for each second-foot or fraction thereof above 10;

To appropriate for storage any quantity of water up to and including 500 acre-feet, $2.50, and in addition, two cents for each acre-foot above 500;

For a permanent change of point of diversion, place or purpose of use, $2.50;

For temporary change of point of diversion, place or purpose of use, $1;

For exchange, replacement or segregation, $2.50;

For a well driller's permit, $1;

For extensions of time in which to resume use of any quantity of water up to and including 10 second-feet, for each such application, $5, and in addition, $2 for each second-foot above 10;

For extensions of time in which to resume use of any quantity of

storage water up to and including 500 acre-feet, $5, and in addition, two cents for each acre-foot above 500;

When the filing fee for any application shall exceed $1,000, the balance of the fee in excess of $1,000, may, at the option of the applicant, be paid at the time when proof of the completion of works is submitted.

The following additional fees shall be charged:

For approving a completed application to appropriate water, to permanently change the point of diversion, place or nature of use, to exchange or replace water, or to segregate, $2.50.

For examining and approving plans and specifications for any dam, $1 for each foot or fraction thereof in height above the point where the longitudinal axis of the dam crosses the center of the stream bed, or if the dam is constructed across the outlet of a lake, $1 for each foot or fraction thereof in height above the point where the longitudinal axis of the dam crosses the subgrade of the outlet; *provided*, no fee shall be paid or charge made for inspection of the site where the dam is to be built or for examining and approving plans and specifications for dams submitted by the United States or any agency or department thereof.

For examining maps, profiles and drawings which are part of the proof of appropriation, permanent change, replacement or exchange, $5.

For filing written proofs of appropriation, permanent change, replacement or exchange, $1.

For examining and filing report of well and tunnel drillers, $1.

For examining and filing each notice of claim to underground waters, $2.50.

For examining and filing any paper not specifically described in this section, $1.

For issuing certificate of appropriation, permanent change, replacement or exchange, $1.

For copy of any paper, except application, proof, claim or certificate, for each 100 words 20 cents, if one page or less; 25 cents for each page of any document consisting of more than one and less than five pages; 75 cents an hour for copying documents consisting of more than five pages; for copy of application, proof, claim or certificate, without flyleaf, $1; for copy of flyleaf, 20 cents for each 100 words; for carbon copies, 5 cents for each page.

For one copy of blueprint from tracing of a map, profile or drawing, per square foot 10 cents; for additional copies, per square foot 5 cents.

For each certification, 50 cents.

The cost of field examinations, including the examination of dam sites authorized by this title shall be paid in advance by the applicant; *provided*, that such charge shall not exceed $10 per day and expenses to be paid to the state engineer or his deputy, and $5 per day and expenses for each assistant.

No fee shall be paid or charge made for examining and filing applications of the United States bureau of reclamation to appropriate water, to change the point of diversion, place or purpose of use thereof,

to segregate pending applications or to exchange water, or for approving such applications. (L. 19, p. 177, § 77.)

History.
As amended by L. 35, ch. 105, eff. Mar. 22; L. 37, ch. 130, eff. Mar. 19; L. 39, ch. 111, eff. Mar. 20, rewriting text of entire section.

100–2–15. Agreements with Federal and State Agencies—Investigations, Surveys of Adjudications.

The state engineer, for and on behalf of the state of Utah, with the approval of the governor, is authorized to enter into agreements with any federal or state agency, subdivision or institution for coöperation in making snow surveys and investigations of both underground and surface water resources of the state. The state engineer is further authorized to coöperate with such agencies, subdivisions and institutions, with the approval of the governor, for the investigation of flood and erosion control and for the adjudication of water rights. The expenses of such investigations, surveys and adjudications shall be divided between the coöperating parties upon an equitable basis.

History.
Added by L. 37, ch. 130, eff. Mar. 19; as amended by L. 41, 1st Spec. Sess., ch. 40, eff. July 1, making no material change in text.

100–2–16. Arbitration—Confirmation by District Court.

The state engineer is authorized to conduct informal proceedings for the arbitration or settlement of disputes over water or the distribution thereof; *provided* all persons having an interest in the water in controversy shall in writing agree to any settlement effected thereby, *and provided further* that settlements shall be confirmed by decree of a court of competent jurisdiction.

History.
Added by L. 41, ch. 96, eff. May 13.

L. 1935, ch. 106; eff. May 14.

SURVEY OF GROUND-WATER SUPPLY

AN ACT authorizing and directing the state engineer to enter into an agreement with the United States geological survey or any other federal or state agency to make a survey of the ground-water supply of the state of Utah and to investigate the sources of supply, the quantity of water available and the methods of conserving such waters, and to make an appropriation therefor.

Be it enacted by the Legislature of the State of Utah:

100–2–17. Authorization of Coöperative Investigations of Ground-Water Resources.

That the state engineer, for and on behalf of the state of Utah, with the written consent of the governor, is authorized and directed to enter into an agreement with the United States geological survey, or any other federal or state agency, for coöperation in making investigations of the ground-water resources of the state of Utah and reporting thereon. (Sec. 1.)

History.
As amended by L. 41, 1st Spec. Sess., ch. 41, eff. July 1, inserting clause after "Utah" in first line.

100–2–18. Contingent State Appropriation—Payment of Expenses.

That the sum of $10,000, or so much thereof as may be necessary, is hereby appropriated out of any monies in the state treasury, not otherwise appropriated, for the purpose of defraying the cost of such coöperative investigations and reports provided in section 1 of this act. All payments hereunder shall be made on the warrant of the state auditor supported by proper voucher approved by the state engineer. (Sec. 2.)

100–2–19. Appropriation by United States.

This appropriation shall be contingent upon the United States making a like appropriation for such purpose to be expended within the state. (Sec. 3.)

100–2–20. Authorizing Employees to Enter and Cross Lands—Injuring Monuments a Misdemeanor.

In order to carry out the purposes of this act any person or persons properly employed hereunder are authorized to enter and cross all lands within the state; *provided*, that in so doing no damage is done to private property. It shall be a misdemeanor for any person or persons willfully and maliciously to remove or injure any equipment, permanent marks or monuments made or installed for the purpose of carrying on these investigations. (Sec. 4.)

CHAPTER 3

APPROPRIATION

100–3–1. Appropriation — Manner of Acquiring Water Rights.
100–3–2. Application for Right to Use Unappropriated Public Water—Contents.
100–3–3. Change of Place of Diversion or Use—Application —Notice—Protests.
100–3–4. "Received," "Filed" Defined.
100–3–5. Action by Engineer on Applications—Amended Applications—Fees for Drilling Culinary Wells.
100–3–6. Id. Notice of Application.
100–3–7. Protests.
100–3–8. Approval or Rejection—Contract to Pay Royalties—If for Removal of Salt or Minerals.
100–3–9. Conflict in Land Areas—Preference to Homesteaders, Desert Entrymen and Purchasers from State.
100–3–10. Approval or Rejection to Be Indorsed on Application—Time for Commencing Work.
100–3–11. Statement of Financial Ability of Applicants.
100–3–12. Time for Constructing Work —Extension.
100–3–13. Id. Protests — Hearings and Notice.
100–3–14. Review by Courts of Engineer's Decisions.
100–3–15. [Id.] Trial De Novo—Dismissal of Action.
100–3–16. Proof of Appropriation or Permanent Change—Form —Contents.
100–3–17. Certificate of Appropriation —Evidence.
100–3–18. Lapse of Application—Reinstatement — Priorities —Transfers Pending Issuance of Certificates.

100–3–19. Right of Entry on Private Property—By Applicant—Bond—Priority.
100–3–20. Right to Convey Appropriated Waters Into Natural Streams and to Impound.
100–3–21. Priorities Between Appropriators.
100–3–22. Underground Water—Report of Well and Tunnel Drillers—Failure to Comply—Penalty.
100–3–23. Id. Replacement of Water.
100–3–24. Definitions.
100–3–25. Wells—Permit to Drill—Bond for Compliance with Law.
100–3–26. Id. Violations—Penalty.
100–3–27. Requests for Segregation of Pending Applications.

100–3–1. Appropriation—Manner of Acquiring Water Rights.

Rights to the use of the unappropriated public waters in this state may be acquired only as provided in this title. No appropriation of water may be made and no rights to the use thereof initiated and no notice of intent to appropriate shall be recognized except application for such appropriation first be made to the state engineer in the manner hereinafter provided, and not otherwise. The appropriation must be for some useful and beneficial purpose, and, as between appropriators, the one first in time shall be first in rights; *provided*, that when a use designated by an application to appropriate any of the unappropriated waters of the state would materially interfere with a more beneficial use of such water, the application shall be dealt with as provided in section 100–3–8. No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession. (L. 19, p. 177, § 41.)

History.

As amended by L. 35, ch. 105, eff. Mar. 22; L. 39, ch. 111, eff. Mar. 20, inserting sentence after "title" in second line of text and adding last sentence.

This section was R. S. 1898, § 1261; Comp. Laws 1907, § 1288x5.

The history of our water laws is given in Little Cottonwood Water Co. v. Kimball, 76 U. 243, 260, 289 P. 116.

Comparable provisions.

Cal. Gen. Laws, Act 9091, § 1, as amended by Laws of 1939 (pertaining to beneficial use of the water resources of the state; Division of Water Resources of Department of Public Works as statutory successor to State Water Commission is regarded as performing governmental function in carrying out statute provisions; duty of chief of the division to consider and act upon all applications for permits to appropriate water under provisions of Water Commission Act).

Idaho Code, § 41–201 (pertains to acquirement and confirmation of rights to divert and use waters of the state for beneficial purposes); 1940 Supp., § 41–202 (application must be made to department of reclamation for permit to make appropriation).

Mont. Rev. Codes, § 7093 (the right to the use of unappropriated water may be acquired by appropriation); § 7094 (the appropriation must be for some useful or beneficial purpose; when appropriator or his successor in interest abandons and ceases to use the water for such purpose, the right ceases).

Cross-references.

Reservation of water rights, Const. Art. XVII; water resources development division, 82C–3–14.

Analysis of Note.

I. Manner of Acquiring Water Rights, 1–12.

II. The Appropriation, 13–25.

I. MANNER OF ACQUIRING WATER RIGHTS.

1. Operation and effect of section.

This section and 100–3–2 have no reference to water rights which have passed to private ownerships until they have been abandoned and thereby reverted to the public. Hammond v. Johnson, 94 U. 20, 66 P.2d 894.

2. Water subject to appropriation.

3. — in general.

Water intermingling with ground or flowing through it by filtration or percolation, or by chemical attraction, is but component part of earth, and has no characteristic of ownership distinct from land itself; in eye of law, water so commingled and flowing, or motionless,

underneath surface, is not subject of ownership apart and distinct from soil; if, however, sub-surface streams of water flow in clearly defined channels, it is otherwise, for then rules of law applicable to surface streams and waters apply. Willow Creek Irr. Co. v. Michaelson, 21 U. 248, 60 P. 943, 51 L. R. A. 280, 81 Am. St. Rep. 687.

Water reaching a stream, lake, pond, artesian area, or other source and constituting a supply from which it may be diverted or drawn, and which continues to reach point of diversion by movement from natural source or artificial source so remote as to be considered natural source of supply, is subject to law of appropriation. Wrathall v. Johnson, 86 U. 50, 40 P.2d 755.

4. — partial appropriation.

There may be partial appropriation. Salina Creek Irrigation Co. v. Salina Stock Co., 7 U. 456, 27 P. 578, aff'd 163 U. S. 109, 41 L. Ed. 90, 16 S. Ct. 1036.

5. — water on public domain.

Water may be appropriated and used on the public domain, and right acquired thereby will be recognized and sustained though appropriator never acquires title to the land. East Grouse Creek Water Co., Ltd. v. Frost, 66 U. 587, 245 P. 338.

There is distinction between initiating or acquiring right to use of unappropriated public waters on public domain, and right or interest in or to public lands themselves, and former is not dependent on latter. Sowards v. Meagher, 37 U. 212, 108 P. 1112.

The right or lack of right to make a filing on public waters of this state is not affected by the contour of the earth's surface at or near the proposed point of diversion. The right to the use of water is independent of the right to the land. Whitmore v. Salt Lake City, 89 U. 387, 400, 57 P.2d 726.

Application could be made to appropriate water in Indian reservation for beneficial use though at time application was made reservation was still part of public domain where proclamation had been issued restoring lands to public domain. Sowards v. Meagher, 37 U. 212, 108 P. 1112.

Prior appropriator has rights over subsequent one, irrespective of whether water was percolating in the land or flowing through it in subterranean streams; where water was appropriated prior to 1880, when the land was government domain. Peterson v. Wood, 71 U. 77, 262 P. 828.

6. — percolating waters.

Common-law rule that underground waters, where not moving in known and defined channel, are part of land in which they are found and belong absolutely to its owner is not applicable to conditions in Utah, which has always regarded waters percolating underground, where within public lands, as open to appropriation for irrigation or other beneficial uses, subject only to reasonable use. Snake Creek Mining & Tunnel Co. v. Midway Irr. Co., 260 U. S. 596, 67 L. Ed. 423, 43 S. Ct. 215.

Contention that this chapter was not applicable to initiate right to use of subterranean waters unless flowing in known or defined channels, held without support. Wrathall v. Johnson, 86 U. 50, 40 P.2d 755.

In absence of valid claim by either prior appropriator under federal or state law or owner of adjacent land claiming right by virtue of any common or correlative interest, percolating waters intercepted and brought to surface by owner of freehold are property of such landowner, who may use such waters as he sees fit even to the taking of them away for use elsewhere. Silver King Consol. Min. Co. v. Sutton, 85 U. 297, 39 P.2d 682.

Where percolating waters are intercepted and collected by landowner, they may not be diverted away from land where found to be used elsewhere if by so doing sources of supply of natural springs and streams, waters of which have been appropriated by prior appropriators when lands in or through which they percolate were public lands at time of appropriation, are diminished or depleted or otherwise adversely affected by such diversion. Silver King Consol. Min. Co. v. Sutton, 85 U. 297, 39 P.2d 682.

Burden is upon one who has discovered subterranean waters and claims such as his own to prove by preponderance of evidence that he is not intercepting tributaries of appropriated streams or sources of supply of prior appropriators. Silver King Consol. Min. Co. v. Sutton, 85 U. 297, 39 P.2d 682.

7. — springs.

Spring water which flows in a natural water channel from plaintiff's land onto defendant's land is subject to appropriation by any person who can put the same to beneficial use, whether the lands upon which the springs are located are a part of the public domain or have passed into private ownership. Holman v. Christensen, 73 U. 389, 396, 274 P. 457.

Waters from springs insufficient to run into or create a natural channel and which would not flow to another's land without being fed by water from other sources, are percolating waters, and if the springs are located upon private lands the waters arising therefrom are not subject to appropriation hereunder.

Deseret Live Stock Co. v. Hooppiania, 66 U. 25, 239 P. 479. (Distinguished, Peterson v. Wood, 71 U. 77, 262 P. 828.)

Whether springs are located upon public domain, so that waters arising therefrom are subject to appropriation, is question of fact and not of law. Deseret Live Stock Co. v. Hooppiania, 66 U. 25, 239 P. 479.

8. — run-off, waste and seepage.

Under former statute, run-off, waste, and seepage from irrigation were not subject to appropriation as against owner of land irrigated who desired to recapture it and apply it on his own land. Stookey v. Green, 53 U. 311, 178 P. 586.

One may not acquire a permanent right to have seepage water kept up, but when seepage water finds its way back into the natural stream from which it was originally taken, such water may be appropriated and again diverted and used upon other land. Clark v. North Cottonwood Irrigation & Water Co. of Farmington, 79 U. 425, 433, 11 P.2d 300.

9. Useful and beneficial purpose.

10. — in general.

In case decided before limiting phrase, "and not otherwise," was contained in this section, it was held that right to use of water in Utah has always depended upon whether person claiming water applied it to beneficial use, and notice and record required by statute was merely prima facie evidence of facts recited therein, namely, that he was applying water to some beneficial use; and any person, however, who actually used water for useful or beneficial purpose, acquired right to take water so used as against all subsequent claimants, regardless of whether user had posted notices or not. Patterson v. Ryan, 37 U. 410, 108 P. 1118.

Right of control exercised by virtue of 15-8-16, giving city power to control water and watercourses, did not give city any proprietary right to use of such waters, since beneficial use is measure of all rights to use of water. Mt. Olivet Cemetery Ass'n v. Salt Lake City, 65 U. 193, 235 P. 876.

11. — springs.

Where landowner has appropriated waters of spring and has used such waters for beneficial purpose, then landowner would have acquired right to use of waters flowing from springs which could not be interfered with without his consent. Peterson v. Lund, 57 U. 162, 193 P. 1087.

Where defendant appropriated waters of spring and applied them to beneficial use while soil upon which spring was located was still part of public domain, held, under former statute, that person other than owner of land could not, over protest of defendant, acquire any right to waters in spring by making application to state engineer's office. Peterson v. Eureka Hill Min. Co., 53 U. 70, 176 P. 729.

12. Quantity subject to appropriation.

An appropriation will be measured by quantity of water actually used for proposed beneficial purpose. Sowards v. Meagher, 37 U. 212, 108 P. 1112.

Where there is a claimed diminution in the supply of water appropriated by prior users on account of interception of percolating waters claimed to feed the sources of supply, court should, if possible, determine the quantity of water that prior appropriator is entitled to, and, if quantity varies in different seasons of year, determine it for each season and award such prior appropriators quantity so determined. Silver King Consol. Min. Co. v. Sutton, 85 U. 297, 39 P.2d 682.

Use of water by adjoining owner, to be reasonable use, especially in artesian district, should be limited first to his just proportion according to his surface area, and second, he should not be entitled even to his quantity to injury of others similarly situated, unless it is reasonably necessary for beneficial purposes to which he devotes water. Horne v. Utah Oil Refining Co., 59 U. 279, 202 P. 815, 31 A. L. R. 883.

Under former statutes, held that water might be appropriated to be used or sold for any useful purpose and that quantity named as appropriated might be sufficient for appropriator's greatest need, but that such part thereof as was not actually needed at any time must go back to source for use of subsequent appropriators in order of their rights. Manning v. Fife, 17 U. 232, 54 P. 111.

II. THE APPROPRIATION.

13. What constitutes valid appropriation.

14. — In general.

Method of acquiring any rights to the unappropriated public waters of the state is limited to the method or means prescribed in this act. Deseret Live Stock Co. v. Hooppiania, 66 U. 25, 239 P. 479.

An appropriation is the act of turning, setting aside, taking possession of, or applying to a particular use a definitely ascertained quantity of water to a particular and beneficial purpose. Wrathall v. Johnson, 86 U. 50, 40 P.2d 755.

Essentials of valid appropriation of water consist of an intent to appropriate and use, however manifested, an actual diversion of water, and application of a definite quantity of water to a useful and beneficial purpose. Wrathall v. Johnson, 86 U. 50, 40 P.2d 755; Bountiful City v. De Luca, 77 U. 107, 118, 292 P. 194, 72 A. L. R. 657. To constitute valid appropriation of water, there must be intent to apply it to some beneficial use, a diversion from natural channel by means of ditch, canal, or other structure, and application of it within reasonable time to some useful industry. Sowards v. Meagher, 37 U. 212, 108 P. 1112.

Right of appropriator obtains as a limitation on public use, and it must be exercised by a statutory appropriation since the enactment of this statute, or by a diversion from its natural channel prior to the enactment of the statute. Adams v. Portage Irrigation, Reservoir & Power Co., 95 U. 1, 13, 72 P.2d 648.

In order to acquire legal right to use of water, claimant must show that it was public water, subject to appropriation, and that he complied with statutory provisions relating to its appropriation; and mere beneficial use of waters which another allowed to run waste, does not establish a right thereto, in absence of intentional abandonment thereof by owner or owners' failure to apply same to beneficial use for statutory period (100–1–4), since owner may reclaim right to exclusive use of such water by applying same to beneficial use at any time prior to elapse of statutory period, in absence of earlier intentional abandonment of rights thereto. Torsak v. Rukavina, 67 U. 166, 246 P. 367.

15. — what law governs.

To initiate and acquire right in and to use of unappropriated public water, whether on public domain or within reservation or elsewhere, is dependent upon laws or customs of state in which such water is found. Sowards v. Meagher, 37 U. 212, 108 P. 1112.

16. — necessity for taking, diverting and using.

Rights to use of unappropriated waters are not acquired without taking and diverting and using them, and mere making of survey and posting of notice neither conferred nor initiated any such rights. Corny v. Holbrook, 40 U. 325, 121 P. 572.

If a riparian proprietor or his predecessors made no diversion of the waters of a creek for watering livestock or for any other purpose, but without any diversion merely permitted their animals to drink directly from the creek, this gave them no right to or possession of the use of the waters. There had to be an actual diversion of the water from its natural channel. Bountiful City v. De Luca, 77 U. 107, 118, 292 P. 194, 72 A. L. R. 657.

17. — tacking appropriations.

Where appropriations are made at different points of diversion on stream and by means of different ditches, the diversion made by each ditch is of necessity an independent appropriation, and the appropriation made by one ditch cannot be tacked on to that of another so as to make appropriation contemporaneous; where one ditch is abandoned after appropriation is made, the same right may be transferred to another ditch subsequently made without losing its priority. Spring Creek Irr. Co. v. Zollinger, 58 U. 90, 197 P. 737.

Landowner who made valid appropriation of portion of waters of stream would have right to change his point of diversion at any subsequent time unless he thereby interfered with prior appropriator on that particular stream. Spring Creek Irr. Co. v. Zollinger, 58 U. 90, 197 P. 737.

18. The appropriator.

19. — who may be.

One may appropriate water for irrigation purposes without owning the land upon which the water has been, or is about to be, applied. Jensen v. Birch Creek Ranch Co., 70 U. 356, 362, 280 P. 1097.

Even trespassers upon land may acquire exclusive right to use of water that is used either to irrigate such land or is used thereon for other purposes, and such right, when once acquired, is paramount to right of true owner or claimant of land, and water claimant, when he is dispossessed of land, may divert and use water elsewhere than on land if he can so divert and use it. Patterson v. Ryan, 37 U. 410, 108 P. 1118.

The appropriator must, however, have some sort of possessory right, good as against everybody but the government. He need not acquire title to the land, and his right to the water may be respected and upheld even after he is dispossessed of the land upon which the water was used. Lake Shore Duck Club v. Lake View Duck Club, 50 U. 70, 166 P. 309, L. R. A. 1918 B 620.

20. — title and rights of appropriator.

Appropriators of water do not acquire title to the corpus of the water but only acquire a right to use such quantity as is reasonably necessary to mature crops

and for other beneficial purposes, regardless of the amount of water originally appropriated and regardless of the amount of water theretofore used for the purposes for which the appropriations were made. Garner v. Anderson, 67 U. 553, 248 P. 406. Water from source to point where appropriator or user captures or diverts it into his conveying channels or containers is publici juris, and others have same right to use it as appropriator so long as they do not interfere with appropriator's use, by diminishing his quantity or impairing the quality. Wrathall v. Johnson, 86 U. 50, 40 P.2d 755.

In absence of a superior right, cemetery association, which actually diverted water from certain source and used it for necessary and beneficial irrigation of its grounds without interruption or interference and with intent to appropriate it, acquired legal right to water thus diverted and used, limited in quantity to its necessities. Mt. Olivet Cemetery Ass'n v. Salt Lake City, 65 U. 193, 235 P. 876.

Appropriators of waters of natural springs and streams, by virtue of their appropriations, acquire an interest or right in and to waters which feed or supply such springs or streams, even though percolating in privately owned ground, where lands supplying such waters were part of public domain at time of appropriation by such prior users. Silver King Consol. Min. Co. v. Sutton, 85 U. 297, 39 P.2d 682.

Extent of right of an appropriator is limited to his reasonable necessities. Mt. Olivet Cemetery Ass'n v. Salt Lake City, 65 U. 193, 235 P. 876.

An appropriation when made follows the water to its original source, whether through surface or subterranean streams or through percolation. Justesen v. Olsen, 86 U. 158, 40 P.2d 802.

Under both common-law doctrine of riparian right or ownership and doctrine of appropriation, one located nearer to source was not permitted to cut off or interrupt or diminish or pollute source, and right once established upon a stream or source of supply vested in the owner of such right an interest in the stream to the source. Wrathall v. Johnson, 86 U. 50, 40 P.2d 755.

21. Subsequent appropriators.

A prior appropriator of water from a natural stream may not so increase his demand and use of the water appropriated by him as to deprive a subsequent appropriator of any right which he may have acquired before such increased demand and use is made by said prior appropriator. Jensen v. Birch Creek Ranch Co., 76 U. 356, 362, 280 P. 1097.

In action to determine right of subsequent appropriators to appropriate specific quantity of water from lake, it was held that if there was the amount of water applied for by subsequent appropriators unappropriated and which could be drawn from lake and applied to beneficial use, without interfering with prior appropriator's rights, then subsequent appropriators would be permitted to take water they asked for and apply same to beneficial purpose. Salt Lake City v. Gardner, 39 U. 30, 114 P. 147. (Straup, J., dissenting.)

Where one claims he has developed water by means of tunnels or other underground works in close proximity to source of stream or spring, waters of which have been previously appropriated by others, he is charged with burden of proving that his claimed development of water does not interfere with waters theretofore appropriated; burden is on such person to show by satisfactory proof that water so intercepted and to be diverted is in fact developed water, which would not, but for such interception, have supplied sources of such prior appropriators. Silver King Consol. Min. Co. v. Sutton, 85 U. 297, 39 P.2d 682.

Where defendants, who were prior appropriators of water, interfered with dam constructed by plaintiffs, subsequent appropriators, by means of which water was diverted by plaintiffs onto their lands for purpose of irrigation, such interference by defendants preventing diversion of water claimed by plaintiffs, held injunction was properly granted on evidence that plaintiffs had not diverted any water to which defendants were entitled as prior appropriators, and plaintiffs' dam did not interfere with defendants' rights. Fuller v. Sharp, 33 U. 431, 94 P. 813.

22. Easements.

Under former statute, held that, where person appropriated source of water, either on surface of or under public lands, such person and his successors acquired easement and right to take and use water from such source to extent indicated by original appropriation; that private owner who subsequently acquired land on which source of water was located took such land burdened with such easement, and that easement carried with it such rights of ingress and egress by first appropriator as were necessary to easement's proper enjoyment, but that first appropriator's rights were subject to rule of law which permitted owner of water-source land to sink his own well on such land, notwithstanding he thereby dried up well of first appropriator. Sullivan v. Northern Spy Min. Co., 11 U. 438, 40 P. 709, 30 L. R. A. 186.

23. Adverse use or adverse possession.

Notwithstanding this and next succeeding section, as between private claimants, water rights can be acquired by adverse user and possession. Hammond v. Johnson, 94 U. 20, 66 P.2d 894.

It is more probable that right by adverse use may be acquired by parties on upper portions of stream than by parties below, but presumption is against acquisition of title in any such manner. Spring Creek Irr. Co. v. Zollinger, 58 U. 90, 197 P. 737.

Where all supreme court decided was that plaintiff had established title by adverse possession to waters of a spring, superior to, or good as against that of defendants', such decision did not bar, or affect, any rights which state or any person not a party or claiming under a party had or could assert in or to such waters. Hammond v. Johnson, 94 U. 35, 75 P.2d 164. (Wolfe, J., and Folland, C. J., dissenting.)

24. Equitable relief.

Complaint by owners of land within artesian district alleging that owner of parcel of land within such district had driven large wells, and threatened to place large pumps upon its wells, and by means thereof totally deprive plaintiffs of water to which they were entitled, and that defendant did not intend to use water for purpose of improving land upon which wells were sunk, but contemplated conveying water beyond boundaries of artesian district, there to be used for commercial and manufacturing purposes, held sufficient to warrant equitable relief. Horne v. Utah Oil Refining Co., 59 U. 279, 202 P. 815, 31 A. L. R. 883.

Where defendants by drilling wells on their land which adjoined that of plaintiff's caused flow from plaintiff's wells to diminish, plaintiff, as prior appropriator, was entitled to enjoin defendants' diminishing of plaintiff's flow of water. Justesen v. Olsen, 86 U. 158, 40 P.2d 802. (Hansen and Folland, JJ., dissenting.)

Contemplated appropriators of water under state law have right of action in direct proceeding to cancel and annul state engineer's certificate of appropriation on some recognized equitable grounds for cancellation. Warren Irr. Co. v. Charlton, 58 U. 113, 197 P. 1030.

25. Raising and waiving objections.

In action between cemetery and city for determination of water rights, city could not object to claim of cemetery on ground that application with state engineer had not been filed where city had filed none, and cemetery's appropriation being prior in time, prevailed. Mt. Olivet Cemetery Ass'n v. Salt Lake City, 65 U. 193, 202, 235 P. 876.

Decisions from other jurisdictions.

— California.

A water right is to be distinguished from the water itself and from the right to use a ditch, dam or reservoir as a conduit or place of storage for it; findings in case at bar, which was an action to quiet title to and enjoin the use of certain portions of a water distribution system known as the Shady Creek Dam and the Pine Grove Reservoir, clearly involved the title to water in storage—the corpus of the water; not the usufructuary right. San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n, 34 Cal.App.2d 159, 93 P.2d 582.

The main purpose of the Water Commission Act was to provide an orderly method for the appropriation of the unappropriated waters of the state, and, to that end, a state water commission was created and was vested with certain powers; the act contains nothing purporting to enlarge the rights of riparian owners as such or to curtail the rights of appropriators, but, on the contrary, the language employed in the act shows an intention to declare the waters of the state to be subject to appropriation in so far as that can be done without interfering with vested rights. Bloss v. Rahilly, 16 Cal.2d 70, 104 P.2d 1049.

Foreign waters, so-called, are subject to appropriation. Bloss v. Rahilly, 16 Cal.2d 70, 104 P.2d 1049.

An appropriator of waters of a stream, as against upper owners with inferior rights of user, is entitled to have the water at his point of diversion preserved in its natural state of purity, and any use which corrupts the water so as to essentially impair its usefulness for the purposes to which he originally devoted it, is an invasion of his rights; and any material deterioration of the quality of the stream by subsequent appriators or others without superior rights entitles him to both injunctive and legal relief. Wright v. Best, — Cal. 2d —, 121 P.2d 702.

The courts of California have manifested a reluctance to apply the doctrine of balancing the conveniences of a situation where, as in case at bar, the act complained of is in its incidents willfully tortious, excepting cases where an injunction to restrain a nuisance will produce some great public mischief, appellant asserting that as owner of a water right by appropriation she was entitled to enjoin defendant from polluting a creek in connection with certain mining operations, and also to recover from defendant damages for such pollu-

tion. Wright v. Best, — Cal.2d —, 121 P.2d 702.

— Idaho.

A water right cannot be initiated in trespass upon private lands. Jones v. McIntire, 60 Idaho 338, 91 P.2d 373.

— Montana.

A water right acquired by virtue of appropriation is property; and a judgment which in some measure determines or affects one's water right is admissible as against a stranger, not to conclude him, but to evidence the right of one in whose favor it is rendered. Wills v. Morris, 100 Mont. 514, 50 P.2d 862.

An appropriation of water may be made for purposes of sale or rental. Sherlock v. Greaves, 106 Mont. 206, 76 P.2d 87.

One of the essential elements of a completed appropriation is the diversion of water. Sherlock v. Greaves, 106 Mont. 206, 76 P.2d 87.

A. L. R. notes.

Covenant against encumbrances, irrigation canals as breach of, 64 A. L. R. 1499; notice of water rights, when purchaser of servient estate charged with, 74 A. L. R. 1250; railroad company's right to permit construction of irrigation ditch over part of its right of way, 94 A. L. R. 530.

100-3-2. Application for Right to Use Unappropriated Public Water —Contents.

Any person who is a citizen of the United States, or who has filed his declaration of intention to become such as required by the naturalization laws, or any association of such citizens or declarants, or any corporation, or the state of Utah by the chairman of the commission of publicity and industrial development, the fish and game commissioner, the executive secretary of the state land board or the chairman of the state road commission for the use and benefit of the public, or the United States of America, in order hereafter to acquire the right to the use of any unappropriated public water in this state shall, before commencing the construction, enlargement, extension or structural alteration of any ditch, canal, well, tunnel or other distributing works, or performing similar work tending to acquire such rights or appropriation, or enlargement of an existing right or appropriation, make an application in writing to the state engineer. Such application shall be upon a blank to be furnished by the state engineer, and shall set forth the name and post office address of the person, corporation or association making the application; the nature of the proposed use for which the appropriation is intended; the quantity of water in acre feet or the flow of water in second feet to be appropriated, and the time during which it is to be used each year; the name of the stream or other source from which the water is to be diverted; the place on such stream or source where the water is to be diverted and the nature of the diverting works; the dimensions, grade, shape and nature of the proposed diverting channel; and such other facts as will clearly define the full purpose of the proposed appropriation. If the proposed use is for irrigation, the application shall show the legal subdivisions of the land proposed to be irrigated, with the total acreage thereof and the character of the soil. If the proposed use is for developing power, the application shall show the number, size and kind of water wheels to be employed and the head under which each wheel is to be operated; the amount of power to be produced and the purposes for which and the places where it is to be used; also, the point where the water is to be returned to the natural stream or source. If the proposed use is for milling or mining, the application shall show the name of the mill and its location or the name

of the mine and the mining district in which it is situated, its nature, and the place where the water is to be returned to the natural stream or source. The place of diversion and place of return of the water shall be designated with the reference to the United States survey corners or mineral monuments, when either the point of diversion or the point of return is situated within six miles of the nearest United States survey corner. The storage of water by means of a reservoir shall be regarded as a diversion, and the point of diversion in such cases shall be the point where the longitudinal axis of the dam crosses the center of the stream bed. The point where released storage water is taken from the stream shall be designated as the point of rediversion. The lands to be inundated by any reservoir shall be described as nearly as may be, and by government subdivisions, if upon surveyed land, the height of the dam, the capacity of the reservoir, and the area of the surface thereof when the reservoir is filled shall be given. If the water is to be stored in an underground area or basin the applicant shall designate, with reference to the nearest United States survey corner if situated within six miles thereof, the point or area of intake, the location of such underground area or basin and the points of collection therefrom.

Applications for the appropriation of water filed prior to the enactment hereof, by the United States of America or any officer or agency thereof, or the state of Utah or any officer or agency thereof, are validated, subject to any action thereon by the state engineer.

(L. 19, p. 177, § 42.)

History.

As amended by L. 35, ch. 105, eff. Mar. 22; L. 39, ch. 111, eff. Mar. 20; L. 41, ch. 96, eff. May 13; L. 41, 1st Spec. Sess., ch. 40, eff. July 1, making material changes in first sentence of text and adding last two sentences.

This section was Comp. Laws 1907, § 1288x6.

1. Purpose and applicability.

The purpose of the law is to endow the appropriator of the water with all the insignia of private ownership. Lake Shore Duck Club v. Lake View Duck Club, 50 U. 76, 166 P. 309, L. R. A. 1918 B 620.

This section and 100–3–1 have no reference to water rights which have passed to private ownership until they have been abandoned and thereby reverted to the public. Hammond v. Johnson, 94 U. 20, 66 P.2d 894.

2. Compliance with section.

The provisions of this law must be complied with to perfect an appropriation of public water. Jensen v. Birch Creek Ranch Co., 76 U. 356, 362, 289 P. 1097.

3. Application to state engineer.

An application to the state engineer under this section is an application to appropriate as distinguished from an application to exchange under 100–3–20. Little Cottonwood Water Co. v. Kimball, 76 U. 243, 289 P. 116.

Mere filing of application in state engineer's office is not an appropriation of water, appropriation not being complete until water has been actually applied to a beneficial use. Deseret Live Stock Co. v. Hooppiania, 66 U. 25, 239 P. 479.

Failure to make application as required by this section or posting notice as required by former statute denied claimant of water rights, right to rely upon any work done or effort made in initiating or completing an appropriation antedating the completed appropriation, since although merely filing application under this section does not amount to an appropriation and there still is required the appropriation to beneficial use, completed appropriation cannot be had without filing such application. Robinson v. Schoenfeld, 62 U. 233, 218 P. 1041.

Under former statute, applicant to state engineer for appropriation of certain alleged unappropriated waters of stream was entitled, as matter of right, to have his application approved and allowed if unappropriated water existed. Brady v. McGonagle, 57 U. 424, 195 P. 188.

Possibly title to a water right may no longer be acquired by adverse use or after it has been abandoned, without

filing in office of state engineer as provided by this section. See Clark v. North Cottonwood Irrigation & Water Co. of Farmington, 79 U. 425, 437, 11 P.2d 300.

The filing of an application in state engineer's office gives applicant an incomplete or inchoate right which he may defend in a court of law. Tanner v. Provo Reservoir Co., 78 U. 158, 170, 2 P.2d 107, following Robinson v. Schoenfeld, 62 U. 233, 218 P. 1041.

The filing of application with state engineer, as required by statute, does not establish appropriation of water. Sowards v. Meagher, 37 U. 212, 223, 108 P. 1112.

1. Propriety of "proposed use."

Under this section, an appropriation of water cannot be made for the irrigation of unsurveyed, uninclosed, and unoccupied public domain of the United States for the sole production of food for wild water fowl, since to effect a valid appropriation of water the beneficial use must be one that inures to the exclusive benefit of the appropriator subject to his complete control. Lake Shore Duck Club v. Lake View Duck Club, 50 U. 76, 166 P. 309, L. R. A. 1918 B 620, applying Comp. Laws 1907, § 1288x6, as amended by Laws 1915, Ch. 83.

As against a contention that water in question could not be diverted above riparian owner's land because he has right in the water of said creek for power to operate his oxygen plant, such right is satisfied when the water reenters the creek at the tailrace of his oxygen plant. Whitmore v. Salt Lake City, 89 U. 387, 399, 57 P.2d 726.

100-3-3. Change of Place of Diversion or Use—Application—Notice—Protests.

Any person entitled to the use of water may change the place of diversion or use and may use the water for other purposes than those for which it was originally appropriated, but no such change shall be made if it impairs any vested right without just compensation. Such changes may be permanent or temporary. Changes for an indefinite length of time with an intention to relinquish the original point of diversion, place or purpose of use are defined as permanent changes. Temporary changes include and are limited to all changes for definitely fixed periods of not exceeding one year. Both permanent and temporary changes of point of diversion, place or purpose of use of water including water involved in general adjudication or other suits, shall be made in the manner provided herein and not otherwise.

No permanent change shall be made except on the approval of an application therefor by the state engineer. Such applications shall be made upon blanks to be furnished by the state engineer and shall set forth the name of the applicant, the quantity of water involved, the stream or source from which the appropriation has been made, the point on the stream or source where the water is diverted, the point to which it is proposed to change the diversion of the water, the place, purpose and extent of the present use, and the place, purpose and extent of the proposed use and such other information as the state engineer may require. The procedure in the state engineer's office and the rights and duties of the applicant with respect to applications for permanent changes of point of diversion, place or purpose of use shall be the same as provided in this title for applications to appropriate water.

No temporary change shall be made, except upon an application filed in duplicate with the state engineer upon forms to be provided by him, which shall set forth the name of the water user, a description of his water right, the nature and time of the change sought, the reason for the change, and such other information as the state engineer may require. The state engineer shall make an investigation and

if such temporary change does not impair any vested rights of others he shall make an order authorizing the change. If he shall find that the change sought might impair such rights he shall give notice of the application to all persons whose rights may be effected thereby and shall give them an opportunity to be heard before authorizing the change. Such notice may be given by regular mail five days before the hearing or by one publication in a newspaper of general circulation in the county in which the original point of diversion or place of use is located five days before such hearing. Before making an investigation or giving notice the state engineer may require the applicant to deposit a sum of money sufficient to pay the expenses thereof.

Applications for either permanent or temporary changes shall not be rejected for the sole reason that such change would impair vested rights of others, but if otherwise proper, they may be approved as to part of the water involved or upon condition that such conflicting rights be acquired.

Any person holding an approved application for the appropriation of water may in like manner, either permanently or temporarily, change the point of diversion, place or purpose of use, but no such change of approved application shall affect the priority of the original application; *provided*, that no change of point of diversion, place or nature of use set forth in an approved application shall operate to enlarge the time within which the construction of work shall begin or be completed. The determination of the state engineer shall be final, unless an action to review his decision is filed within the time and in the manner provided by section 100–3–14.

Any person who changes or who attempts to change a point of diversion, place or purpose of use, either permanently or temporarily without first applying to the state engineer in the manner herein provided, shall obtain no right thereby and shall be guilty of a misdemeanor, each day of such unlawful change constituting a separate offense, separately punishable. (L. 19, p. 177, § 8.)

History.

As amended by L. 37, ch. 130, eff. Mar. 19; L. 39, ch. 111, eff. Mar. 20, rewriting text of entire section.

This section was Comp. Laws 1907, § 1288x24; R. S. 1898, § 1263.

1. Change of place of diversion.

Prior appropriator could make change in place of diversion and use of water which neither enlarged nor diminished any existing right but merely made use of existing right at another place, without detriment or impairment of any vested right of junior appropriator. Lehmitz v. Utah Copper Co., 118 F.2d 518.

Where corporation distributed water to its shareholders by means of ditches, transfer of water to shareholders from one ditch to another, held, not change of place of diversion. Arnold v. Huntington Canal & Reservoir Ass'n, 64 U. 534, 231 P. 622.

2. Change of use.

In a case decided prior to 1919, it was held that a landowner could not appropriate water from a ditch for one purpose and then apply it or any part of it to another purpose. Big Cottonwood Tanner Ditch Co. v. Shurtliff, 49 U. 569, 164 P. 856.

3. Extent of right.

Prior appropriator's right to change the place of diversion is not absolute or vested right, but is only conditional, since no such change can be made if public, or any other appropriator, prior or subsequent, is adversely affected, and neither can a prior appropriator prevent a subsequent appropriator from using any of the unappropriated waters of the state to the fullest extent possible merely because prior appropriator in future may desire to change his place of diversion. United States v. Caldwell,

64 U. 490, 231 P. 434. (Kimball, J., dissenting.)

1. Retransfer of water.

Where corporation distributing water to shareholders by means of ditches granted plaintiff shareholders' application to transfer water to shareholders from one ditch to another in accordance with by-laws of the corporation, and permitted plaintiffs to expend moneys for irrigation canal in reliance upon the transfer, threatened retransfer of water to old ditch was enjoined. Arnold v. Huntington Canal & Reservoir Ass'n, 64 U. 534, 231 P. 622.

5. Pleading and evidence.

In action to change point of diversion of water from a river to tributaries upon which power company's dam was located and to change use from an irrigation to a domestic or municipal purpose, court erred in nonsuiting plaintiff on ground that plaintiff's use would be enlarged, since decree could prevent such enlargement. Tanner v. Humphreys, 87 U. 164, 48 P.2d 484.

In action to change point of diversion of water from a river to tributaries upon which power company's dam was located, if exchange of waters could be made without affecting vested right of power company or if decree can be entered with conditions that will safeguard rights of power company, plaintiff should succeed. Tanner v. Humphreys, 87 U. 164, 48 P.2d 484.

In action to change point of diversion of water from a river to tributaries upon which power company's dam was located, burden of proving a prima facie case rested on plaintiff. Tanner v. Humphreys, 87 U. 164, 48 P.2d 484.

6. Raising and waiving objections.

Junior appropriator could not be heard to complain of change in place of diversion and use of water where such appropriator was not impaired or adversely affected and such change was expressly authorized by statute. Lehmitz v. Utah Copper Co., 118 F.2d 518.

100–3–4. "Received," "Filed" Defined.

Whenever in this title the word "received" is used with reference to any paper deposited in the office of the state engineer, it shall be deemed to mean the date when such paper was first deposited in the state engineer's office; and whenever the term "filed" is used, it shall be deemed to mean the date when such paper was acceptably completed in form and substance and filed in said office. (L. 19, p. 177, § 44.)

History.

This section does not differ very materially from Comp. Laws 1907, § 1288x43.

100–3–5. Action by Engineer on Applications—Amended Applications —Fees for Drilling Culinary Wells.

On receipt of each application containing the information required by Section 100–3–2, and payment of the filing fee, it shall be the duty of the state engineer to make an indorsement thereon of the data of its receipt, and to make a record of such receipt in a book kept in his office for that purpose. It shall be his duty to examine the application and determine whether any corrections, amendments, or changes are required for clarity and if so, the application shall be returned to the applicant within thirty days after its receipt with a statement of corrections, amendments or changes required, and sixty days shall be allowed for the filing thereof. If filed, corrected, amended or changed as required, within said time, the application shall, upon being accepted, take priority as of the date of its original receipt, subject to compliance with the further requirements of the law and the regulations thereunder. If not returned within said time it shall lapse and may be reinstated only upon compliance with the provision of Section 100–3–18. The date of the return of the application shall be indorsed

on the application, and a record made thereof in a book kept for recording applications. Like entries shall be made of the date when corrected applications are received by the state engineer. All applications which shall comply with the provisions of this chapter and with the regulations of the state engineer shall be filed and recorded in a suitable book kept for that purpose.

The state engineer may issue a temporary permit to drill a well at any time after the filing of an application to appropriate water therefrom, as provided by this section if all fees be advanced and if in his judgment there is unappropriated water available in the proposed source and there is no likelihood of impairment of existing rights; *provided, however*, that the issuance of such temporary permits shall not dispense with the publishing of notice and the final approval or rejection of such application by the state engineer, as provided by this chapter. Total fees of all kinds connected with driving a well for culinary purposes of individuals shall not exceed $10.00. This shall include permits, filings, advertising and permit of well driver to drive the well.

The state engineer may send the necessary notices and addresses all correspondence relating to each application to the owner thereof as shown by the state engineer's records, or to his attorney in fact or agent *provided* a written power of attorney is filed in the state engineer's office. (L. 19, p. 177, § 45.)

History.
As amended by L. 39, ch. 111, eff. Mar. 20; L. 41, ch. 96, eff. May 13, making many material changes in text and adding two paragraphs.

100–3–6. Id. Notice of Application.

When an application is filed in compliance with this title the state engineer shall at the expense of the applicant, to be paid in advance, publish in a newspaper having general circulation within the boundaries of the river system or near the water source from which the appropriation is to be made a notice of the application showing by whom made; the quantity of water sought to be appropriated; the stream or water source from which the appropriation is to be made and at what point on the stream or water source; the use for which it is to be appropriated and by what means; which notice shall be published at least five times, once a week for a period of five successive weeks. Clerical errors, ambiguities and mistakes which do not prejudice the rights of others may be corrected by order of the state engineer either before or after the publication of notice. After publication of notice to water users, the state engineer may authorize amendments or corrections which involve a change of point of diversion, place or purpose of use of water, only upon compliance with the provisions of section 100–3–3. Any person aggrieved by an order of the state engineer authorizing any alteration of an application may file an action for review thereof as provided by section 100–3–14. (L. 19, p. 177, § 46.)

History.
As amended by L. 35, ch. 105, eff. Mar. 22; L. 39, ch. 111, eff. Mar. 20, making many material changes in text and adding last sentence.

100–3–7. Protests.

Any person interested may, at any time within thirty days after the completion of the publication of such notice, file with the state engineer a duly verified written protest together with a copy thereof against the granting of the application, stating the reasons therefor, which shall be duly considered by the state engineer, and he shall approve or reject the application. (L. 19, p. 177, § 47.)

History.
As amended by L. 35, ch. 105, eff. Mar. 22, making various changes in text.

1. Power of state engineer.
Notwithstanding provision of this section for filing of protests to any application to appropriate water, state engineer has no authority to fix and determine the rights of the parties to the proceeding. Eardley v. Terry, 94 U. 367, 77 P.2d 362.

2. Raising and waiving objections.
The fact that the one objecting to the approval of the application to appropriate the water was not the owner of the property when the filing was made seems to be immaterial. Whitmore v. Salt Lake City, 89 U. 387, 400, 57 P.2d 726.

100–3–8. Approval or Rejection—Contract to Pay Royalties—If for Removal of Salt or Minerals.

It shall be the duty of the state engineer, upon the payment of the approval fee, to approve an application if: (1) There is unappropriated water in the proposed source; (2) The proposed use will not impair existing rights, or interfere with the more beneficial use of the water; (3) The proposed plan is physically and economically feasible unless the application is filed by the United States bureau of reclamation and would not prove detrimental to the public welfare; and (4) The applicant has the financial ability to complete the proposed works and the application was filed in good faith and not for purposes of speculation or monopoly; *provided*, that where the state engineer, because of information in his possession obtained either by his own investigation or otherwise, has reason to believe that an application to appropriate **water will interfere with is [its] more beneficial use for irrigation, do**mestic or culinary, stock watering, power or mining development or manufacturing, or will prove detrimental to the public welfare, it shall be his duty to withhold his approval or rejection of the application until he shall have investigated the matter. The cost of such inquiry shall be paid by the person making the application, as provided by Section 100–2–14, if such application is approved. If an application does not meet the requirements of this section, it shall be rejected.

Before the approval of any application for the appropriations of water from navigable lakes or streams of the state which contemplates the recovery of salts and other minerals therefrom by precipitation or otherwise, the applicant shall file with the state engineer a copy of a contract for the payment of royalties to the state of Utah; *provided* that approval of any such application shall be revoked in the event of failure of the applicant to comply with the terms of his royalty contract. (L. 19, p. 177, § 48.)

History.
As amended by L. 39, ch. 111, eff. Mar. 20; L. 41, ch. 96, eff. May 13, making many material changes in text and adding clause after "water" in fourth line.

1. Extent of power of state engineer.

The determination of existing rights, in many cases, involves intricate and difficult questions of both law and fact, and is peculiarly a judicial function. It cannot, therefore, be said that the legislature intended, by this section, to vest the power to make such adjudication in the state engineer. Little Cottonwood Water Co. v. Kimball, 76 U. 243, 247, 289 P. 116.

When an application to appropriate water is filed, the state engineer is required to determine whether there is unappropriated water in proposed source of supply which can be put to beneficial use and diverted from source of supply without doing material injury to prior rights of others. Eardley v. Terry, 94 U. 367, 77 P.2d 362.

2. Necessity for approval of application.

Unless his application has been approved, applicant is without interest in the subject matter, and unable to prosecute his claim or to question prior claims. The statute only applies where it clearly appears that there is no unappropriated water in the proposed source. Little Cottonwood Water Co. v. Kimball, 76 U. 243, 248, 289 P. 116.

3. Duty to approve application.

In a doubtful case the application should be approved, since the policy of the law is to prevent waste and promote the largest beneficial use of water. Therefore new appropriations should be favored and not hindered. If it is apparent from the findings that there is a substantial quantity of unappropriated water in the source, it is erroneous to deny application. Little Cottonwood Water Co. v. Kimball, 76 U. 243, 248, 289 P. 116.

4. Hearing and determination by state engineer.

An application under this section may be called "the application to appropriate." When a dispute arises between an applicant for a new appropriation and the prior appropriators as to whether there is unappropriated water in the source of supply, two questions naturally arise, viz.: (1) What is the total supply? and (2) What is the extent of existing rights? Little Cottonwood Water Co. v. Kimball, 76 U. 243, 246, 289 P. 116, applying former section before its amendment.

When application to appropriate water is filed, state engineer is called upon to determine preliminarily whether there is probable cause to believe that an application can be perfected, having due regard to whether there is unappropriated water available for appropriation, whether it can be put to beneficial use, and whether it can be diverted and so used without injuring or conflicting with prior rights of others, which if determined, application is approved, and applicant proceeds to demonstrate by actual use of rights sought to be acquired that he is entitled to such rights. Eardley v. Terry, 94 U. 367, 77 P.2d 362.

Under this section it is not a prerequisite to the approval of an application that the state engineer find affirmatively that there is unappropriated water in the proposed source. Stated negatively, it is only when there is no unappropriated water in the source that the application is to be rejected. Little Cottonwood Water Co. v. Kimball, 76 U. 243, 248, 289 P. 116.

Of course, the extent of prior rights must be determined before there can be any exercise of secondary rights, but it is premature and impracticable to make such determination before any secondary claim is initiated. Little Cottonwood Water Co. v. Kimball, 76 U. 243, 247, 289 P. 116.

When application to appropriate water is up for approval or rejection, applicant is not required to prove to state engineer that he can make an appropriation by the same kind and quantum of proof that would be required were he making final proof under 100–3–16. Eardley v. Terry, 94 U. 367, 77 P.2d 362.

In determining whether application to appropriate water should be approved or rejected, general negative by applicant as to injury to protestant would be sufficient to put protestant on proof that he would be injured. Eardley v. Terry, 94 U. 367, 77 P.2d 362.

5. Operation and effect of approval.

The approval of an application to appropriate is only a preliminary step. It confers upon the applicant no perfected right to use the water. It does not in any degree impair or diminish the existing rights of others. It merely clothes the applicant with authority to proceed and perfect, if he can, his proposed appropriation by the actual diversion and application of the water claimed to a beneficial use. Little Cottonwood Water Co. v. Kimball, 76 U. 243, 247, 289 P. 116.

Any application to appropriate water is subject to all rights which have accrued prior to filing, and filing application does not give applicant right or license to proceed to the injury of prior rights. Eardley v. Terry, 94 U. 367, 77 P.2d 362.

6. Proceeding to change place, nature and use.

In action to change point of diversion of water from a river to tributaries upon which power company's dam was located and to change use from an irrigation to a domestic or municipal purpose, court erred in nonsuiting plaintiff on ground that plaintiff's use would be enlarged, since decree could prevent such enlargement. Tanner v. Humphreys, 87 U. 164, 170, 48 P.2d 484, applying this section prior to its amendment.

7. Mandamus.

Under this section a landowner is not entitled to mandamus to compel state engineer to grant the right to perfect the irrigation ditch of a third person, so as to avoid waste of water by seepage and to permit the landowner to use the water saved. Tanner v. Beers, 49 U. 536, 165 P. 465, applying Comp. Laws 1907, § 1288x10.

100–3–9. Conflict in Land Areas—Preference to Homesteaders, Desert Entrymen and Purchasers from State.

When an application is made to use water on certain land and subsequently a homesteader, desert entryman, or person in possession of land under a contract to purchase the same makes an application to appropriate water for use on the same land or any part thereof, the latter application, on proper showing, may be approved notwithstanding the conflict in the land areas, and the land covered by such subsequent application shall thereupon be excluded from such prior application.

(L. 19, p. 177, § 49.)

100–3–10. Approval or Rejection to Be Indorsed on Application—Time for Commencing Work.

The approval or rejection of an application shall be indorsed thereon and a record made of such indorsement in the state engineer's office. The application so indorsed shall be returned to the applicant; if approved, the applicant shall be authorized, on receipt thereof, to proceed with the construction of the necessary works and take all steps required to apply the water to the use named in the application and to perfect the proposed appropriation; if the application is rejected, the applicant shall take no steps toward the prosecution of the proposed work or the diversion and use of the public water so long as such rejection shall continue in force. In his indorsement of approval on any application the state engineer shall require that actual construction work must begin within six months from the date of such approval, and shall state the time within which the construction work shall be completed and the time within which the water shall be applied to beneficial use.

(L. 19, p. 177, §§ 50, 52.)

1. Extensions of time.

State engineer may grant reasonable extensions of time within 14-year period as provided by 100–3–12. In re Application 7600 to Appropriate 30 Second Feet of Water, 63 U. 311, 225 P. 605.

2. Findings as to construction work.

Supreme court will not disturb finding that actual construction work was commenced at point of diversion within the six-month period, and that such work was not sham and frivolous. Whitmore v. Salt Lake City, 89 U. 387, 401, 57 P.2d 726.

100–3–11. Statement of Financial Ability of Applicants.

Before either approving or rejecting an application the state engineer may require such additional information as will enable him properly to guard the public interests, and may require a statement of the

following facts: In case of an incorporated company, he may require the submission of the articles of incorporation, the names and places of residence of its directors and officers, and the amount of its authorized and its paid-up capital. If the applicant is not a corporation, he may require a showing as to the names of the persons proposing to make the appropriation and a showing of facts necessary to enable him to determine whether or not they are qualified appropriators and have the financial ability to carry out the proposed work, and whether or not the application has been made in good faith. (L. 19, p. 177, § 51.)

100–3–12. Time for Constructing Work—Extension.

The construction of the works and the application of water to beneficial use shall be diligently prosecuted to completion within the time fixed by the state engineer. Extensions of time, not exceeding forty years from the date of approval of the application, may be granted by the state engineer on proper showing of diligence or reasonable cause for delay. Extensions not exceeding fourteen years after the date of approval may be granted by the state engineer upon a sufficient showing by affidavit. But extensions beyond fourteen years shall be granted only after application, publication of notice and a hearing before the state engineer. Such notice shall be published at the expense of the applicant three times, once each week for three successive weeks, in a newspaper of general circulation in the county in which the source of supply is located. The notice of the proposed hearing shall contain the name and address of the applicant, the number of the application, the amount and source of supply of the water filed on, the purpose for which it is to be used, the approximate expenditures already made, an estimate of the future expenditures required and the additional time asked for, and the date and place of the hearing before the State Engineer. Whereupon any person interested may, at any time within thirty days after completion of publication of such notice, file with the state engineer a written protest against the granting of such extension of time, stating the reasons therefor, and may appear and adduce testimony at the hearing in support of such protest, all of which shall be considered by the state engineer. The decision of the state engineer shall be final, unless an action to review such decision is filed in the district court as provided by Section 100–3–14. An application upon which proof has not been submitted shall lapse and have no further force or effect after the expiration of forty years from the date of its approval; *provided, however,* that if the works be constructed with which to make beneficial use of the water applied for, the state engineer may, upon showing of such fact, grant additional time beyond the forty year period in which to make proof. (L. 19, p. 177, § 52.)

History.

As amended by L. 37, ch. 130, eff. Mar. 19; L. 39, ch. 111, eff. Mar. 20; L. 41, ch. 97, eff. May 13, making many material changes in text and adding last two sentences.

Cross-references.

See 100–3–10.

1. Right of engineer to grant extension.

State engineer may, in his discretion, extend time for completion of appropriation of waters, and such exercise of discretion will not be reviewed unless it has been abused. In re Application 7600 to Appropriate Water, 73 U. 50, 272 P. 225.

Under former statute state engineer had authority to grant extension of time for appropriation that he had fixed for completing power plant and pipe line if not beyond ultimate limit fixed by statute, although application therefor was not made until after time first fixed by engineer had elapsed. Pool v. Utah County Light & Power Co., 36 U. 508, 105 P. 289.

100–3–13. Id. Protests—Hearings and Notice.

Any other applicant or any user of water from any river system or water source may protest to the state engineer that such work is not being diligently prosecuted to completion, whereupon the state engineer shall give the applicant doing such work or his assigns sixty days' notice by registered mail to his last recorded address to appear on a date to be designated and show cause, if any he has, why his application shall not be declared forfeited in whole or in part, and on such date such applicant or his assigns shall be permitted to produce any lawful evidence tending to show compliance on his part with the law. At such hearing the state engineer may hear and consider any and all competent evidence tending to show whether or not the applicant or his assigns have complied with the law. If diligence is not shown by the applicant the state engineer may declare the application and all rights thereunder forfeited. The decision of forfeiture shall be final unless an action to review it is filed as provided by section 100–3–14.

(L. 19, p. 177, § 53.)

History.
As amended by L. 37, ch. 130, eff. Mar. 19, rewriting last sentence of text.

1. **Notice and hearing.**
No one can obtain any right to use of any water from any public stream except upon full notice and hearing before state engineer, and any rights that are granted are always subject to prior rights. United States v. Caldwell, 64 U. 490, 496, 231 P. 434 (Kimball, J., dissenting), applying Laws 1897 (R. S. 1898, § 1268) now repealed.

100–3–14. Review by Courts of Engineer's Decisions.

In any case where a decision of the state engineer is involved any person aggrieved by such decision may within sixty days after notice thereof bring a civil action in the district court for a plenary review thereof. The state engineer shall give notice of his decision by mailing a copy thereof by regular mail to the applicant and to each protestant and notice shall be deemed to have been given on the date of mailing. The place of trial, subject to the power of the court to change the same as provided by law, shall be in the county in which the stream or water source, or some part thereof, is located. The state engineer must be joined as a defendant in all suits to review his decisions, but no judgment for costs or expenses of the litigation shall be rendered against him. Parties shall be served with process as in other cases and notice of the pendency of such action shall be filed by the clerk of the district court with the state engineer within twenty days after the same is commenced which shall operate to stay all further proceedings pending the decision of the district court. (L. 19, p. 177, § 54.)

History.
As amended by L. 37, ch. 130, eff. Mar. 19, making various changes throughout text.

Comparable provisions.
Cal. Gen. Laws, Act 9091, § 1b as amended by Laws of 1939 (action for review of ruling, order or decision of

Division of Water Resources may be filed in superior court within 30 days after final action of the division).

Idaho Code, § 41–217 (appeal may be taken to district court of county in which the place of use of the water claimed is situated, within 60 days from date of license or refusal to issue license).

Cross-references.

Change of venue, 104–4–9; service of summons, 104–5–3.

1. Jurisdiction of district court.

District court had jurisdiction in action in which it determined that certain waters were not public waters and hence not subject to appropriation, and such decision was binding on state engineer, so that district court's reversal of decision of state engineer granting application for appropriation was proper. Nye v. Bacon, 81 U. 346, 18 P.2d 289.

Where, under former statute, application for appropriation of certain alleged unappropriated waters of stream was turned down by state engineer without hearing solely on ground that engineer was of opinion that there was no unappropriated water in stream, held applicant could petition district court for redress. Brady v. McGonagle, 57 U. 424, 195 P. 188.

2. Notice of engineer's decision.

Where only notice of decision of state engineer was mailed by state engineer and there was no evidence of its receipt by appellant, appellant's appeal more than sixty days after mailing of notice was properly found by district court to be taken in time. In re Application 7600 to Appropriate 30 Second Feet of Water, 63 U. 311, 225 P. 605.

3. Perfection of appeal.

Appeal should be taken as provided in cases of appeal from justice's court to district court, and it should be taken within 60 days from the time the aggrieved party receives actual or constructive notice of the order from which the appeal is taken. In re Application 7600 to Appropriate 30 Second Feet of Water, 63 U. 311, 225 P. 605.

4. Hearing and determination of appeal.

On appeal from decision of state engineer rejecting application to appropriate water, it is not for court to decree to applicant any waters he may be able to obtain by conserving and increasing flow of stream involved, but it should simply determine whether application was rightly rejected, and whether, from the evidence, there is probable cause to believe that there is unappropriated water available for use, that applicant can beneficially use it, and that water can be diverted and used without injury to or conflict with prior rights. Eardley v. Terry, 94 U. 367, 77 P.2d 362.

On appeal to district court from state engineer's order denying application to appropriate water, evidence was insufficient to support finding of district court that rights of protestants would not be injured by proposed development and diversion of water contemplated by applicant. Eardley v. Terry, 94 U. 367, 77 P.2d 362.

5. Approval of application.

Where evidence showed that there was unappropriated water which applicant could put to beneficial use, and it did not appear that protestants would be injured by diversion and use thereof, trial court, on appeal from state engineer's denial of application to appropriate water, correctly approved application permitting applicant to prove definitely that there was water available, but it was error for court to take view that applicant had already perfected his application and decree to him use of alleged increased flow of source without requiring him to comply with law of appropriation. Eardley v. Terry, 94 U. 367, 77 P.2d 362.

100–3–15. [Id.] Trial De Novo—Dismissal of Action.

The pleadings, practice and procedure in suits to review decisions of the state engineer shall be the same as in other equity cases. The hearing in the district court shall proceed as a trial de novo and shall be tried to the court as other equitable actions. Within ten days after its entry a copy of the judgment shall be transmitted by the clerk of the district court to the office of the state engineer. An action to review a decision of the state engineer shall be dismissed upon application of any party or by the court on its own motion, if the complaint was not filed or the summons was not served within sixty days after notice of the decision. An action to review a decision of the state engineer may

be dismissed upon the application of any of the parties upon the grounds provided in section 104-29-1, for the dismissal of actions generally and for failure to prosecute such action with diligence. For the purpose of this section failure to prosecute a suit to final judgment within two years after it is filed, or, if an appeal is taken to the supreme court within three years after the filing of the suit, shall constitute lack of diligence. All suits heretofore or hereafter commenced must be dismissed after ten days' notice by regular mail to the plaintiff, unless such suits are or were prosecuted to final judgment within the time specified above; *provided*, as to suits filed before the enactment hereof the court may upon a proper showing extend the time for prosecution to final judgment for a period of not to exceed two years from the date of hearing of any motion to dismiss filed pursuant to this section.

(L. 19, p. 177, § 54.)

History.

As amended by L. 37, ch. 130, eff. Mar. 19; L. 39, ch. 111, eff. Mar. 20, rewriting text of entire section.

1. Hearing and determination of appeal.

District is limited to particular question decided by state engineer. In re Application 7600 to Appropriate 30 Second Feet of Water, 63 U. 311, 225 P. 605.

When appeal is taken from decision of state engineer approving or rejecting application to appropriate water, trial court is required to determine same questions de novo, and all such court, or supreme court on appeal therefrom, is called upon to do is to determine whether application should be rejected or approved. Eardley v. Terry, 94 U. 367, 77 P.2d 362.

100-3-16. Proof of Appropriation or Permanent Change—Form—Contents.

Sixty days before the date set for the proof of appropriation or proof of permanent change to be made the state engineer shall notify the applicant by registered mail when proof of completion of works and application of the water to a beneficial use will be due. On or before the date set for completing such proof in accordance with his application the applicant shall make proof to the state engineer, on blanks to be furnished by the state engineer, by a statement descriptive of the works constructed, and of the quantity of water in acre-feet or the flow in second-feet appropriated, and of the application of the water to a beneficial use, with detailed measurements of water put to beneficial use, giving the date the measurements were made and the name of the person making the measurements. Such statement shall be sworn to by the applicant and by two disinterested witnesses and shall be accompanied by a map, profiles, and drawings made on tracing linen by a reputable, civil engineer, and shall show fully and correctly the location of the completed works with reference to a United States land survey corner or mineral monument if within a distance of six miles, the nature and extent of the completed works, the natural stream or source from which and the point where the water is diverted, the place and manner of connecting with other works or streams, the ground and grade lines, cross sections, and dimensions of the various forms of the diverting channel, the several appliances used to divert, measure and regulate the water, and the character of all structures which cross, support or constitute the diverting channel or any part of it. Such

other matter must be furnished as will fully and correctly delineate the work done and conform to the general rules and regulations of the state engineer's office. The maps, profiles and drawings shall be verified by oath of the engineer who made the same and by the applicant whose work they represent, in such form as the state engineer shall by general rule prescribe.

The state engineer may waive the filing of maps, profiles and drawings if in his opinion the written proof adequately describes the works and the nature and extent of beneficial use. (L. 19, p. 177, §§ 55, 56.)

History.

As amended by L. 37, ch. 130, eff. Mar. 19; L. 41, ch. 96, eff. May 13, making material changes in text and adding second paragraph.

Comparable provisions.

Cal. Gen. Laws, Act 9091, § 19, as amended by Laws of 1941 (immediately upon completion of project, the holder of permit for right to appropriate water must report said completion to state water commission; commission makes inspection of the works constructed and use of water therefrom; if inspection results in determination favorable to applicant, the commission issues license giving right to diversion of such an amount of water as has been found by inspection to have been applied to beneficial use).

1. Judgment on appeal.

Upon approval by district court of application to appropriate water, applicant then must proceed to perfect his appropriation as provided by law and make proof thereof under this section, and until it is perfected, applicant cannot be decreed or given present rights as under a completed appropriation. Eardley v. Terry, 94 U. 367, 77 P.2d 362.

On final proof, under this section, neither state engineer, nor any protestant, is concluded by state engineer's determination as to whether water was subject to being appropriated, and could be taken for use contemplated without injury to owners of prior rights, when he approved application to appropriate. Eardley v. Terry, 94 U. 367, 77 P.2d 362.

100–3–17. Certificate of Appropriation—Evidence.

Upon it being made to appear to the satisfaction of the state engineer that an appropriation or a permanent change of point of diversion, place or nature of use has been perfected in accordance with the application therefor, and that the water appropriated or affected by the change has been put to a beneficial use, he shall issue a certificate, in duplicate, setting forth the name and postoffice address of the person by whom the water is used, the quantity of water in acre feet or the flow in second feet appropriated, the purpose for which the water is used, the time during which the water is to be used each year, the name of the stream or source of supply from which the water is diverted, the date of the appropriation or change, and such other matter as will fully and completely define the extent and conditions of actual application of the water to a beneficial use. The certificate shall not extend the rights described in the application. Failure to make proof of appropriation or proof of change of the water on or before the date set therefor shall cause the application to lapse. One copy of such certificate shall be filed in the office of the state engineer, and the other copy shall be delivered to the appropriator or to the person making the change who shall, within thirty days, cause the same to be recorded in the office of the county recorder of the county in which the water is diverted from the natural stream or source. The certificate so issued and filed shall be prima facie evidence of the owner's right to the use of the water in the

quantity, for the purpose, at the place, and during the time specified therein, subject to prior rights. (L. 19, p. 177, § 56.)

History.

As amended by L. 37, ch. 130, eff. Mar. 19, making many material changes in text.

This section was Comp. Laws 1907, § 1288x16.

1. Issuance of certificate.

Under this section, the state engineer is not authorized to issue a certificate until it is made to appear that the water applied for has been put to a beneficial use. Tanner v. Provo Reservoir Co., 78 U. 158, 170, 2 P.2d 107.

2. Force and effect of certificate.

The certificate provided for by this section is the appropriator's deed; his evidence of title, good, at least against the state, for all it purports to be, and good as against everyone else who cannot show a superior right. Lake Shore Duck Club v. Lake View Duck Club, 50 U. 76, 166 P. 309, L. R. A. 1918 B 620.

This certificate cannot prejudice prior rights that have been acquired; state engineer's jurisdiction is limited to unappropriated waters only. Chandler v. Utah Copper Co., 43 U. 479, 135 P. 106.

Under this section, if sufficient facts are alleged in the complaint to state a cause of action, and defendants wish to question plaintiff's prima facie right to the use of the water mentioned in his certificate of appropriation, it is necessary to set up the facts upon which he relies to defeat or avoid plaintiff's claim. Plaintiff, to state a cause of action, need not allege both that he has title to the water right claimed, but also possession thereof. Tanner v. Provo Reservoir Co., 78 U. 158, 162, 2 P.2d 107.

This act does not authorize, nor purport to authorize, state engineer to entertain proceedings or to make any order respecting any water rights already acquired. His jurisdiction in such cases is limited to unappropriated waters only. Therefore a certificate to an appropriator may not prejudice rights of a prior appropriator. Chandler v. Utah Copper Co., 43 U. 479, 135 P. 106.

3. Collateral attack.

Certificate of appropriation, issued by state engineer in pursuance of former statute that appropriation had been perfected in accordance with application therefor, could not be subjected to collateral attack and its force and effect nullified. Warren Irr. Co. v. Charlton, 58 U. 113, 197 P. 1030.

A. L. R. notes.

Right of appropriator of water to recapture water which has escaped or is otherwise no longer in his immediate possession, 89 A. L. R. 210.

100–3–18. Lapse of Application—Reinstatement—Priorities—Transfers Pending Issuance of Certificates.

When an application lapses for failure of the applicant to comply with the provisions of this title or the order of the state engineer, notice of such lapsing shall forthwith be given to the applicant by regular mail. Within sixty days after such notice the state engineer may, upon a showing of reasonable cause, reinstate the application with the date of priority changed to the date of reinstatement. The original priority date of a lapsed or forfeited application shall not be reinstated, except upon a showing of fraud or mistake of the state engineer. The priority of an appropriation shall be determined by the date of receiving the written application in the state engineer's office, except as provided in section 100–3–17 and as herein provided. Where the applicant after sixty days' written notice by regular mail fails to pay the statutory fees for advertising or approval, his application shall lapse and all applications subsequent thereto shall receive the benefit of the priority thus forfeited.

Prior to issuance of certificate of appropriation, rights claimed under applications for the appropriation of water may be transferred or assigned by instruments in writing. Such instruments, when acknowl-

edged or proved and certified in the manner provided by law for the acknowledgment or proving of conveyances of real estate, may be filed in the office of the state engineer and shall from time of filing of same in said office impart notice to all persons of the contents thereof. Notices of claims to underground water filed pursuant to the provisions of section 100–5–12 may be transferred or assigned by instruments in writing in the manner herein provided. (L. 19, p. 177, § 57.)

History.
As amended by L. 37, ch. 130, eff. Mar. 19; L. 39, ch. 111, eff. Mar. 20, inserting three sentences at beginning of text.

Cross-references.
Acknowledgment of conveyances, 78–2; fees of county recorder, 28–2–3.

100–3–19. Right of Entry on Private Property—By Applicant—Bond—Priority.

Whenever any applicant for the use of water from any stream or water source must necessarily enter upon private property in order to make a survey to secure the required information for making a water filing and is refused by the owner or possessor of such property such right of entry, he may petition the district court for an order granting such right, and after notice and hearing, such court may grant such permission, on security being given to pay all damage caused thereby to the owner of such property. In such case the priority of such application shall date from the filing of such petition with the district court as aforesaid. (L. 19, p. 177, § 43.)

1. Right to go on privately owned land.
An appropriator of water of a natural stream has a right to have his water flow through a natural channel over lands in private ownership. It is an easement, and he may go upon the lands so privately owned and remove obstructions so as to permit the water to continue its flow in its original channel to the head of his ditch. Tripp v. Bagley, 74 U. 57, 75, 276 P. 912, 69 A. L. R. 1417.

Under this section, water flowing in natural streams in this state may be appropriated for power purposes, notwithstanding the point of diversion is upon privately owned land. If a landowner is compensated for damage done to his land, he is in no worse position if the water is diverted at a point on his land than he would be in if it were diverted before it reached his land. If it is diverted before it reaches his land, a right of way may be condemned across the riparian owner's land to the proposed point of diversion on his land and thence to the place of use. Whitmore v. Salt Lake City, 89 U. 387, 397, 57 P.2d 726.

2. Findings on appeal.
Supreme court will not disturb findings of trial court that applicant did not commit a trespass in making the filing. Whitmore v. Salt Lake City, 89 U. 387, 401, 57 P.2d 726.

100–3–20. Right to Convey Appropriated Waters Into Natural Streams and to Impound.

Upon application in writing and approval of the state engineer, any appropriated water may for the purpose of preventing waste and facilitating distribution be turned from the channel of any stream or any lake or other body of water, into the channel of any natural stream or natural body of water or into a reservoir constructed across the bed of any natural stream, and commingled with its waters, and a like quantity less the quantity lost by evaporation and seepage may be taken out, either above or below the point where emptied into the stream, body of water or reservoir, but in so doing the original water in such

stream, body of water, or reservoir must not be deteriorated in quality or diminished in quantity for the purpose used, and the additional water turned in shall bear its share of the expense of maintenance of such reservoir and an equitable proportion of the cost of the reservoir site and its construction. Any person having stored his appropriated water in a reservoir for a beneficial purpose shall be permitted to withdraw the same at such times and in such quantities as his necessities may require; *provided*, such withdrawal does not interfere with the rights of others. (L. 21, p. 189, § 9.)

History.

As amended by L. 37, ch. 130, eff. Mar. 19, and ch. 131, eff. Mar. 23; L. 39, ch. 111, eff. Mar. 20, making material changes in text and adding proviso.

This section has been in force in this state since 1897, Laws 1897, p. 220 (United States v. Caldwell, 64 U. 490, 497, 231 P. 434), and is Comp. Laws 1907, § 1288x25.

1. When exchange of waters allowable.

Water may be diverted by a subsequent appropriator from a stream, and water from the same stream or another stream, if equal in quantity and quality, may be returned into the stream or into the ditch or canal of the prior appropriator, if that is done at a point where the prior appropriator can make full use of the water without injury or damage to him. United States v. Caldwell, 64 U. 490, 231 P. 434. (Kimball, J., dissenting.)

2. Denial of application.

An application to exchange under this section is properly denied, where there is a finding that water proposed to be turned into creek by applicant is inferior in quality to "original" water, and that commingling of such waters would render the entire stream below point of commingling unfit for domestic and culinary uses. It is a condition of such exchange under this section that waters of original stream be not "deteriorated in quality." Little Cottonwood Water Co. v. Kimball, 76 U. 245, 252, 289 P. 116

3. Contempt.

Under the terms of the former section it was held that a person was not guilty of contempt, under the circumstances, for commingling waters in disobedience of a court decree, where he acted in good faith and under claim of right. Spanish Fork City v. Spanish Fork East Bench Irrigation & Mining Co., 46 U. 487, 151 P. 46, applying Comp. Laws 1907, § 1288x25, as amended by Laws 1911, Ch. 43, p. 60.

100-3-21. Priorities Between Appropriators.

Appropriators shall have priority among themselves according to the dates of their respective appropriations, so that each appropriator shall be entitled to receive his whole supply before any subsequent appropriator shall have any right; *provided*, in times of scarcity, while priority of appropriation shall give the better right as between those using water for the same purpose, the use for domestic purposes, without unnecessary waste, shall have preference over use for all other purposes, and use for agricultural purposes shall have preference over use for any other purpose except domestic use. (L. 19, p. 177, § 10.)

History.

This section was Comp. Laws 1907, § 1288x27, but the proviso of present section differs materially from the proviso of former section. In other respects, however, the two sections are identical.

Under former statute, first appropriator of any unused or unappropriated waters of public streams of Utah has better right than any subsequent appropriator. Brady v. McGonagle, 57 U. 424, 195 P. 188.

1. Priorities in general.

In action by mining company to quiet title to underground water flowing from its mine tunnel, where defendants appropriated water from springs and streams before mining company's lands were segregated from public domain, mining company's use of such water held subordinate rather than superior to use of prior appropriators. Silver King Consol. Min. Co. v. Sutton, 85 U. 297, 39 P.2d 682. (Moffat, J., dissenting.)

2. Extraterritorial extent.

The doctrine of prior appropriation applies to interstate stream if all states in which appropriations are involved recognize doctrine. Albion-Idaho Land Co. v. Naf Irr. Co., 97 F.2d 439.

3. Conditions precedent.

This section presupposes that there has been an actual diversion of the water from its natural channel. If claimant made no diversion for watering livestock, he acquires no priority over right of city to use the water for culinary and domestic purposes, but would be subordinate to prior appropriation by city. Bountiful City v. De Luca, 77 U. 107, 119, 292 P. 194, 72 A. L. R. 657.

Application under 100–3–2 provides exclusive method of acquiring water rights, and applicant, provided beneficial use follows, has priority over another who actually diverted water to beneficial use prior thereto but made no application under this chapter. Deseret Live Stock Co. v. Hooppiania, 66 U. 25, 239 P. 479.

Actual diversion of water and application of it to beneficial use gave appropriator superior right as against right sought to be acquired based upon an application filed in state engineer's office subsequent to application of water to beneficial use by an actual appropriation and user. Wrathall v. Johnson, 86 U. 50, 40 P.2d 755. In action to determine conflicting claims to use of certain waters, court erred in not admitting proof by defendant that he filed application in accordance with this section. Robinson v. Schoenfeld, 62 U. 233, 218 P. 1041.

In action to determine water rights, prior appropriators of water for irrigation purposes could not legally establish a prior right to use of water for such purpose by merely flooding their lands and by permitting it to gather into pools on surface or raising water level underneath surface in hope of obtaining sufficient moisture to raise crops in following summer, since such use of water was too wasteful to be tolerated, and hence, in determining amount of water to which appropriator was entitled, its claim in that regard was disallowed. Hardy v. Beaver County Irr. Co., 65 U. 28, 234 P. 524.

4. Measure and extent of priority.

The rights of prior appropriator are measured and limited by extent of his appropriation and application to beneficial use, and if he diverts more water than he is entitled to, he must return such surplus to stream for use of subsequent appropriators. Gunnison Irr. Co. v. Gunnison Highland Canal Co., 52 U. 347, 174 P. 852.

Purpose of statutes relating to water appropriation and its use is clearly to the effect that a prior appropriator may not prevent a subsequent appropriator from interfering with the prior appropriator's means and method of diverting and applying water if such interference is necessary in order to make larger and more beneficial use of waters of the state, and if it can be done without material injury to rights of prior appropriator, subsequent appropriator will be permitted to apply water to bring about largest beneficial use. United States v. Caldwell, 64 U. 490, 231 P. 434. (Kimball, J., dissenting.)

An appropriation of water is limited by time as well as by amount; an appropriator's right is limited by quantity of water which he has beneficially used and seasonal period during which he has used it. Hardy v. Beaver County Irr. Co., 65 U. 28, 234 P. 524.

At such times as a prior appropriator is not using the water under his appropriation for a beneficial purpose, such waters are considered and treated, under the doctrine of appropriation, as unappropriated public waters, and for such periods of time are subject to appropriation and use by others. Falkenberg v. Neff, 72 U. 258, 269 P. 1008.

While ordinarily prior appropriator has paramount right to divert water from stream and junior appropriator may not divert water unless waters flowing in stream are in excess of amount which prior appropriator has right to divert, if, due to seepage, evaporation, and channel absorption or other physical conditions beyond control of appropriators, the water flowing in stream will not reach diversion point of prior appropriator in sufficient quantity for him to apply it to beneficial use, then junior appropriator, whose diversion point is higher on stream, may divert the water. Albion-Idaho Land Co. v. Naf Irr. Co., 97 F.2d 439.

Where, due to seepage, evaporation, and channel absorption, water flowing in stream, when average flow was below minimums fixed by decree, would not reach users in lower division in sufficient quantities to afford practical head for irrigation, trial court properly awarded waters to upper division during times the flow at the gauging station was below such minimums, even if it be assumed that rights of users in upper division were junior in right to those in lower division. Albion-Idaho Land Co. v. Naf Irr. Co., 97 F.2d 439.

5. Title and rights of prior appropriator.

Prior appropriator of water does not acquire title thereto but merely obtains right to use of a specific quantity of

water from a certain stream upon condition that the water shall be used for a beneficial purpose. United States v. Caldwell, 64 U. 490, 231 P. 434. (Kimball, J., dissenting.)

6. Percolating waters.

Under former statute, person appropriating water on public domain by means of well sunk in ground is entitled to use same as against subsequent patentee of land, and that, too, where it is water percolating into well as contradistinguished from water flowing in well-defined channels. Stookey v. Green, 53 U. 311, 178 P. 586.

7. Developed water.

Whoever claims that he has developed water in close proximity to the source of a stream, previously appropriated by others, is charged with the burden of proving that his alleged development of water does not interfere with the waters theretofore developed. Peterson v. Wood, 71 U. 77, 262 P. 828.

8. Procedure.

The share and interest of each claimant as ascertained by the evidence should be declared and settled, in a suit over contested water rights and appropriations of water for useful purposes. Nephi Irr. Co. v. Jenkins, 8 U. 369, 31 P. 986.

In action to adjudicate rights of appropriators from stream, held prior appropriator could not be compelled to submit its reservoir to common storage of its own and subsequent appropriator's waters, and if no agreement could be reached, only other alternative was action to condemn under 104-61-1, providing that right of eminent domain may be exercised in behalf of use of reservoirs for irrigating purposes. Gunnison Irr. Co. v. Gunnison Highland Canal Co., 52 U. 347, 174 P. 852.

It is an elementary doctrine in this state that where there is more than one appropriator on any stream, measurements and apportionments of water must be under control and direction of disinterested person as state engineer who is always under continuing jurisdiction of the court. United States v. Caldwell, 64 U. 490, 503, 231 P. 434. (Kimball, J., dissenting.)

A. L. R. notes.

Appropriation of water as creating right, as against subsequent appropriator, to continue method or means of diversion, 121 A. L. R. 1044; priority as between contract holders under Carey Act project, 26 A. L. R. 296.

100-3-22. Underground Water—Report of Well and Tunnel Drillers—Failure to Comply—Penalty.

Any person, firm, copartnership, association or corporation boring or digging wells or tunnels for the purpose of appropriating or using unappropriated underground waters shall, within thirty days after the completion or abandonment of such work, report to the state engineer the data relating to each well or tunnel drilled. The report shall be made on forms furnished by the state engineer and shall contain such information as he may require, including but not limited to the following:

The name and postoffice address of the driller and the owner of well or tunnel; the number of the approved application to appropriate water under which work was prosecuted; the location of well or tunnel and the size and kind of casing used therein; the depth and log of well or tunnel; the date on which well or tunnel came into production; temperature and quantity of water issuing, drawn or pumped therefrom, and the location of water bearing strata.

Failure to comply with the provisions of this section shall constitute a misdemeanor.

History.

Added by L. 35, ch. 105, eff. Mar. 22, which contained a section 3 which made an appropriation to pay the expenses of administering such act as it applied to underground waters.

1. Percolating waters.

2. — ownership.

In absence of valid claim by either prior appropriator under federal or state law or owner of adjacent land claiming right by virtue of any common

or correlative interest, percolating waters intercepted and brought to surface by owner of freehold are property of such landowner, who may use such waters as he sees fit even to the taking of them away for use elsewhere. Silver King Consol. Min. Co. v. Sutton, 85 U. 297, 39 P.2d 682.

In action by mining company to quiet title to underground flowing from its mine tunnel, where defendants appropriated water from springs and streams before mining company's lands were segregated from public domain, mining company's use of such water held subordinate rather than superior to use of prior appropriators. Silver King Consol. Min. Co. v. Sutton, 85 U. 297, 39 P.2d 682. (Moffat, J., dissenting.)

3. —diversion of.

Where percolating waters are intercepted and collected by landowner, they may not be diverted away from land where found to be used elsewhere if by so doing sources of supply of natural springs and streams, waters of which have been appropriated by prior appropriators when lands in or through which they percolate were public lands at time of appropriation, are diminished or depleted or otherwise adversely affected by such diversion. Silver King Consol. Min. Co. v. Sutton, 85 U. 297, 39 P.2d 682.

1. Burden of proof.

Where one claims he has developed water by means of tunnels or other underground works in close proximity to source of stream or spring, waters of which have been previously appropriated by others, he is charged with burden of proving that his claimed development of water does not interfere with waters theretofore appropriated; burden is on such person to show by satisfactory proof that water so intercepted and to be diverted is in fact developed water, which would not, but for such interception, have supplied sources of such prior appropriators. Silver King Consol. Min. Co. v. Sutton, 85 U. 297, 39 P.2d 682.

A. L. R. notes.

Constitutionality of statute limiting or controlling exploitation or waste of subterranean waters, 78 A. L. R. 842; subterranean and percolating waters; springs; wells, 109 A. L. R. 395.

100-3-23. Id. Replacement of Water.

In all cases of appropriation of underground water the right of replacement is hereby granted to any junior appropriator whose appropriation may diminish the quantity or injuriously affect the quality of appropriated underground water in which the right to the use thereof has been established as provided by law. No replacement may be made until application in writing has been made to and approved by the state engineer. In all cases replacement shall be at the sole cost and expense of the applicant and subject to such rules and regulations as the state engineer may prescribe. The right of eminent domain is hereby granted to any applicant for the purpose of replacement as provided herein.

History.

Added by L. 35, ch. 105, eff. Mar. 22, which contained a section 3 which made an appropriation to pay the expenses of administering such act as it applied to underground waters.

100-3-24. Definitions.

The words and phrases of this act shall, unless inconsistent with the context, be defined as follows:

"Well" means an excavation or opening into the ground made by digging, boring, drilling, jetting or driving, or any other artificial method for obtaining underground water.

"Well drilling" means the act of constructing, repairing or deepening a well, which shall include all work incidental thereto.

"Well driller" means any person, firm, copartnership, association or corporation, who shall drill a well or wells for compensation or otherwise, upon the land of the driller, or upon other land.

History.

Added by L. 37, ch. 130, eff. Mar. 19.

100-3-25. Wells—Permit to Drill—Bond for Compliance with Law.

Every person, firm, copartnership, association or corporation drilling a well or wells in the state of Utah shall, before the first day of May, 1937, and thereafter annually, make application to the state engineer for a permit to drill such well or wells. The application shall be in a form to be prescribed by the state engineer. All permits shall expire on the thirty-first day of December following the issuance thereof and shall not be transferable. The state engineer is authorized and directed to prepare and keep on file in his office rules and regulations for well drilling.

No person, firm, copartnership, association or corporation shall drill a well or wells in this state without having first obtained an annual permit therefor as provided in this section and without having first filed with the state engineer a bond in the penal sum of $500, conditioned upon the proper compliance with the provisions of this section and the rules and regulations promulgated pursuant thereto. Such bond shall be made payable to the state of Utah and shall be approved by the state engineer. Well drillers are required to comply with the rules and regulations to be promulgated by the state engineer and if the state engineer determines, after an investigation and after a hearing upon at least 10 days' notice to the permittee, by registered mail, that such permittee has failed to comply with such rules and regulations, the state engineer may revoke the permit. The state engineer may refuse to issue a permit to a well driller if it appears that there has been a violation of the rules and regulations or a failure to comply with Section 100-3-22. The order of the state engineer revoking a permit or refusing to issue a permit shall be final unless an action to review his decision is filed within the time and in the manner provided by Section 100-3-14.

History.
Added by L. 37, ch. 130, eff. Mar. 19; amended by L. 41, ch. 96, eff. May 13, inserting clause after "section" in third line of second paragraph of text.

A. L. R. notes.
Constitutionality of statute limiting or controlling exploitation or waste of subterranean waters, 78 A. L. R. 842; subterranean and percolating waters; springs; wells, 109 A. L. R. 396.

100-3-26. Id. Violations—Penalty.

Any person, firm, copartnership, association or corporation drilling a well or wells in the state of Utah or who advertises or holds himself or itself out as a well driller, or who follows such business without first having obtained a permit as provided by this act or who drills a well or wells after revocation or expiration of his permit theretofore issued, or who drills a well or wells in violation of the rules and regulations shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than $10 or more than $299, or by imprisonment in the county jail of not less than ten days, or by fine and imprisonment. Each day that violation continues shall constitute a separate offense.

History.
Added by L. 37, ch. 130, eff. Mar. 19.

100-3-27. Requests for Segregation of Pending Applications.

Upon request in writing and approval by the state engineer, applications to appropriate or to permanently change the point of diversion,

place or purpose of use of water may be divided or segregated into two or more separate parts; *provided* such request shall be made upon blanks to be furnished by the state engineer and shall include the serial number of the application to be segregated, the name, postoffice address of the owner of the application, a statement of the nature of the proposed division or segregation, the reasons therefor, and such other information as the state engineer may require.

Action taken by the state engineer on applications for appropriation or permanent change prior to segregation, shall be applicable in all respects to the segregated parts thereof. Upon segregation the original and each segregated part shall be treated as separate applications. The approval of a request for segregation shall not confirm the validity or good standing of the segregated application or extend the time for the construction of works. Action of the state engineer upon requests for segregation taken prior to the effective date of this act is approved and confirmed.

Requests for segregation shall be rejected if the approval thereof would impair rights or would prove detrimental to the public welfare.

History.
Added by L. 39, ch. 111, eff. Mar. 20.

CHAPTER 4

DETERMINATION OF WATER RIGHTS *

100–4–1. By Engineer on Petition of Users.
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100–4–18. General Determination in Court's Discretion—State to Be Made a Party.
100–4–19. Re-determination — Bond of Applicant.
100–4–20. Assessment and Collection of Costs Determination — Use of Proceeds.

* **General comment.** There is an apparent incongruity in some of the sections of this statute. Huntsville Irr. Ass'n v. District Court of Weber County, 72 U. 431, 442, 270 P. 1090.

Procedure in general. Familiar rules of practice and procedure by which courts are guided in ordinary lawsuits do not apply to actions involving determination of water rights, since legislature has laid down other rules relative to such subject. Mammoth Canal & Irrigation Co. v. Burton, 70 U. 239, 259 P. 408.

Statutory general procedure is not intended as remedy for wrong to an individual, or to protect the individual against adverse interests; the statutory general ad-

judication is remedial for multifarious suits and conflicting interests among water users of a particular system. Spanish Fork West Field Irr. Co. v. District Court of Salt Lake County, 99 U. 558, 110 P.2d 344. (Trueman, D. J., dissenting.)

100-4-1. By Engineer on Petition of Users.

Upon a verified petition to the state engineer, signed by five or more or a majority of water users upon any stream or water source, requesting the investigation of the relative rights of the various claimants to the waters of such stream or water source, it shall be the duty of the state engineer, if upon such investigation he finds the facts and conditions are such as to justify a determination of said rights, to file in the district court an action to determine the various rights. In any suit involving water rights the court may order an investigation and survey by the state engineer of all the water rights on the source or system involved. (L. 19, p. 177, § 20; Code Report.)

1. Validity.

This legislation is constitutional. Huntsville Irr. Ass'n v. District Court of Weber County, 72 U. 431, 270 P. 1090, following Eden Irr. Co. v. District Court of Weber County, 61 U. 103, 211 P. 957.

Provisions of former act (Laws 1919, Ch. 67) were not subject to objection that act permitted unreasonable interference with vested rights in that engineer or other persons could institute action for determination of water rights and in doing so could make all those who took water from the body of water, including those with adjudicated rights, parties defendant, thus requiring them to relitigate adjudicated rights, since state in its governmental capacity has right to regulate, within reasonable bounds, the use of water, although the right to the use may have been adjudicated. Eden Irr. Co. v. District Court of Weber County, 61 U. 103, 211 P. 957.

2. Words and phrases defined.

The fact that the term "relative rights" appears nowhere in this chapter except in this section does not prevent determination under 100-4-3 et seq. of water rights among claimants and users as well as between them and the state. "Rights" of party mean his rights as against every other party to the action. Huntsville Irr. Ass'n v. District Court of Weber County, 72 U. 431, 270 P. 1090, following Smith v. District Court of Second Judicial District in and for Morgan County, 69 U. 493, 256 P. 539.

3. Nature and purpose of action.

The purposes of an action to determine rights to the use of water, and the legal principles by which it is controlled, are the same as in an action to determine title to real estate. The difference in the nature of the subject matter, and the fact that two or more persons may have the legal right to use parts of the same water source, or even identical water, need not confuse the legal aspect of the matter. The right to use a definite quantity of a particular source is just as specific a thing, in legal contemplation, as an estate in land, and the title to one is quieted in precisely the same manner as the other. Logan, Hyde Park & Smithfield Canal Co. v. Logan City, 72 U. 221, 228, 269 P. 776.

4. Exclusiveness of statutory remedy.

5. — private suits.

Statutory general procedure is not intended as remedy for wrong to an individual, or to protect the individual against adverse interests; the statutory general adjudication is remedial for multifarious suits and conflicting interests among water users of a particular system. Spanish Fork West Field Irr. Co. v. District Court of Salt Lake County, 99 U. 558, 110 P.2d 344. (Trueman, D. J., dissenting.)

Statutory general adjudication of water rights of any water system must proceed according to statute, but not all water suits must proceed as general adjudications, as statutes recognize that "private suits" do exist and may proceed without being forced through general statutory adjudication procedure. Spanish Fork West Field Irr. Co. v. District Court of Salt Lake County, 99 U. 558, 110 P.2d 344. (Trueman, D. J., dissenting.)

Action by city against more than 2,000 claimants to determine water rights of the respective parties and to secure a general adjudication thereof constituted a "private suit" under the statute, as an individual is without right to institute general statutory adjudication proceedings, and fact that there were allegations forming background for both private and general suit was immaterial.

Spanish Fork West Field Irr. Co. v. District Court of Salt Lake County, 99 U. 558, 110 P.2d 344. (Trueman, D. J., dissenting.)

6. —quieting title.

Suit to quiet title to water rights for irrigation purposes is in the nature of an action to quiet title to real estate. Hammond v. Johnson, 94 U. 20, 66 P.2d 894.

Prior appropriator may bring action to quiet title to use of all the waters of a stream, and court may determine cubic feet of water per second plaintiff is entitled to. Lawson v. McBride, 71 U. 239, 264 P. 727.

7. Jurisdiction and venue.

Action to recover proportionate share of upkeep of irrigation system under 100–1–9 is not an action involving water rights so as to defeat jurisdiction of city court. Thomas v. District Court of Box Elder County, 66 U. 300, 242 P. 348.

8. Parties.

The public, by its authorized officers, is the only party which may institute general adjudication proceedings. Spanish Fork West Field Irr. Co. v. District Court of Salt Lake County, 99 U. 558, 110 P.2d 344. (Trueman, D. J., dissenting.)

100–4–2. Interstate Streams.

For the purpose of coöperating with the state engineers of adjoining states in the determination and administration of rights to interstate waters and for such other purposes as he may deem expedient, the state engineer with the written consent of the governor is authorized to initiate and to join in suits for the adjudication of such rights in the federal courts and in the courts of other states without requiring a petition of water users as provided by section 100–4–1. The state engineer with the written consent of the governor may also commence, prosecute and defend suits to adjudicate interstate waters on behalf of this state or its citizens in the courts of other states, in federal courts, and in the supreme court of the United States. (Code Report.)

History.

As amended by L. 35, ch. 105, eff. Mar. 22, and ch. 107, eff. Mar. 21; L. 37, ch. 130, eff. Mar. 19; L. 41, 1st Spec. Sess., ch. 40, eff. July 1, making material changes in text and adding last sentence.

A. L. R. notes.

Constitutionality, construction, and application of compacts and statutes involving co-operation between states in matter of water rights, 134 A. L. R. 1412, 1418.

100–4–3. Determination by Action—Notice to Claimants—Duties of Engineer.

Upon the filing of any action for the determination of water rights the clerk of the district court shall notify the state engineer that such has been filed. Whereupon the state engineer shall, as expeditiously as possible prepare and file with the court a statement giving the names and addresses of all the claimants to the use of water from the river system or water source involved in such action, so far as the said claimants are known; and to this end the clerk of the court shall publish, once a week for two consecutive weeks in a newspaper designated by the court as most likely to give notice to such claimants, a notice setting forth that such an action has been filed, naming or describing the river system or water source involved and requiring claimants to the use of water therefrom to notify the state engineer of their names and addresses for the purposes hereinafter set forth. When such statement shall have been filed or when the clerk of the court shall have ascertained as nearly as may be the names of all claimants, he shall within fifteen days prepare a notice setting forth the date when the state engineer will begin the survey of the system or water source and the ditches, canals, wells, tunnels or other works diverting water therefrom, or the

fact that such survey has already been completed, as the case may be, and shall give notice that such claimants must within sixty days after the service of such notice file a written statement with the clerk of the court, setting forth their respective claims to the use of such water. Where such a suit shall have been filed prior to the enactment hereof, it shall be the duty of the state engineer upon receiving notice thereof to examine the records of his office with respect to the water system or water source involved, and if they are incomplete, to make such field investigations and surveys as may be necessary for the preparation of the report required by section 100-4-11, and the court shall proceed to determine the water rights involved in the manner provided by this chapter and not otherwise. (L. 19, p. 177, § 22.)

History.

As amended by L. 35, ch. 105, eff. Mar. 22; L. 39, ch. 112, eff. May 9, making no material change in text.

History of section reviewed. Spanish Fork West Field Irr. Co. v. District Court of Salt Lake County, 99 U. 527, 104 P.2d 353, rehearing denied 99 U. 558, 110 P.2d 344. (Trueman, D. J., and Wolfe, J., dissenting in part.)

1. Purpose and object of statute.

Statute was intended to prevent piecemeal litigation in determination of water rights and to provide means of determining all rights in one action, as only effectual method of preventing multiplicity of suits. Smith v. District Court of Second Judicial District in and for Morgan County, 69 U. 493, 256 P. 539.

2. Exclusiveness of remedy.

Although a purpose of statute is to prevent multiplicity of suits in determination of water rights, action involving not only rights, but asking damages and other relief as between parties, is not within terms of statute; and such action may be maintained notwithstanding prior commencement of action to determine water rights hereunder, since actions were not same, later action being broader in scope than that authorized hereunder. Smith v. District Court of Second Judicial District in and for Morgan County, 69 U. 493, 256 P. 539.

Statutory general adjudication of water rights of any water system must proceed according to statute, but not all water suits must proceed as general adjudications, as statutes recognize that "private suits" do exist and may proceed without being forced through general statutory adjudication procedure. Spanish Fork West Field Irr. Co. v. District Court of Salt Lake County, 99 U. 558, 110 P.2d 344. (Trueman, D. J., dissenting.)

Action by city against more than 2,000 claimants to determine water rights of the respective parties and to secure a general adjudication thereof constituted a "private suit" under the statute, as an individual is without right to institute general statutory adjudication proceedings, and fact that there were allegations forming background for both private and general suit was immaterial. Spanish Fork West Field Irr. Co. v. District Court of Salt Lake County, 99 U. 558, 110 P.2d 344. (Trueman, D. J., dissenting.)

3. Jurisdiction and venue.

District court had jurisdiction to proceed to determine water rights as provided by this section, and 1939 amendment altering procedure was applicable to suit commenced prior thereto, as parties had no vested right in procedure. Spanish Fork West Field Irr. Co. v. District Court of Salt Lake County, 99 U. 527, 104 P.2d 353 (Moffat, C. J., and Larson, J., dissenting), rehearing denied 99 U. 558, 110 P.2d 344. (Trueman, D. J., and Wolfe, J., dissenting in part).

1. Parties.

The public, by its authorized officers, is the only party which may institute general adjudication proceedings. Spanish Fork West Field Irr. Co. v. District Court of Salt Lake County, 99 U. 558, 110 P.2d 344. (Trueman, D. J., dissenting.)

5. Written statement.

Under this section a claimant is not limited merely to protesting against the proposed determination of the state engineer; he may file with clerk a written statement of his claim to the use of the water. Huntsville Irr. Ass'n v. District Court of Weber County, 72 U. 431, 270 P. 1090.

6. Judgment of determination.

Under this section, rights to the use of water may be determined not only as between and among the claimants and users on one side and the State of Utah on the other, but also as between and among the claimants and users thereof.

The statute clearly contemplates that the individual rights of each claimant shall be adjusted and adjudicated. Huntsville Irr. Ass'n v. District Court of Weber County, 72 U. 431, 270 P. 1090.

In action to quiet title to water rights in Virgin River water system, court did not err in also determining rights to Summit Spring, where all parties sought determination of spring rights, no useful purpose would be served in compelling retrial thereof, and variance with respect to whether spring was part of river water system was not objected to. St. George & Washington Canal Co. v. Hurricane Canal Co., 93 U. 262, 72 P.2d 642.

100–4–4. Id. Service of Notice.

Such notice requiring each claimant to file such statement shall serve as a summons in such action, and shall be served as a summons issued out of the district court, personally upon each known claimant, and shall also be published five times, once each week for five successive weeks, in a newspaper or newspapers designated by the judge of the court as most likely to give notice to the persons served. The clerk of the court shall, on or before the date of first publication, also mail, by registered letter to each of the claimants that are known, a copy of said notice, and a blank form on which the claimant shall present in writing, as provided in the next succeeding section, all the particulars relating to the appropriation of the water of said river system or water source to which he lays claim. The service of notice is complete when personal service is had, or when it is not had, on the expiration of the thirtieth day after the first publication of such notice. (L. 19, p. 177, § 23.)

Cross-references.
Summons out of district court, 104–5.

1. Validity.
Provision of former act (Laws 1919, Ch. 67, § 23) with reference to service of notice held to comply with due process clause of Constitution. Eden Irr. Co. v. District Court of Weber County, 61 U. 103, 211 P. 957.

100–4–5. Id. Statements by Claimants.

Each person claiming a right to use any water of such river system or water source shall, within sixty days after the completed service of the notice mentioned in the preceding section, file in the office of the clerk of the district court a statement in writing which shall be signed and verified by the oath of the claimant, and shall include as near as may be the following: The name and postoffice address of the person making the claim; the nature of the use on which the claim of appropriation is based; the flow of water used in cubic feet per second or the quantity of water stored in acre feet and the time during which it has been used each year; the name of the stream or other source from which the water is diverted, the point on such stream or source where the water is diverted, and the nature of the diverting works; the date when the first work for diverting the water was begun, and the nature of such work; the date when the water was first used, the flow in cubic feet per second or the quantity of water stored in acre feet, and the time during which the water was used the first year; and the place and manner of present use; and such other facts as will clearly define the extent and nature of the appropriation claimed, or as may be required by the blank form which shall be furnished by the state engineer under the direction of the court. (L. 19, p. 177, § 24.)

History.
As amended by L. 35, ch. 105, eff. Mar. 22, making no material change in text.

1. Pleadings and proof.
A claimant, by filing his petition, thereby confers jurisdiction on the court to determine the nature and extent of his rights. Garrison v. Davis, 88 U. 358, 369, 54 P.2d 439.
Claimants, in actions to determine water rights, must prove extent and amount of their appropriations with definiteness and certainty. Hardy v. Beaver County Irr. Co., 65 U. 28, 234 P. 524.

100-4-6. Id. In Case of Use for Irrigation.

If the water claimed to have been appropriated is used for irrigation, the statement shall show, in addition to the facts required by section 100-4-5, as nearly as possible the area of land irrigated the first year and each subsequent year; the total area irrigated at the time of filing and its location in each section, township and range wherein it is situated; the character and depth of the soil, the kind of crops raised and the maximum and minimum acreage irrigated during the total period of use. (L. 19, p. 177, § 25.)

1. Priorities.
In action to determine water rights, prior appropriators of water for irrigation purposes could not legally establish a prior right to use of water for such purpose by merely flooding their lands and by permitting it to gather into pools on surface or raising water level underneath surface in hope of obtaining sufficient moisture to raise crops in following summer, since such use of water was too wasteful to be tolerated, and hence, in determining amount of water to which appropriator was entitled, its claim in that regard was disallowed. Hardy v. Beaver County Irr. Co., 65 U. 28, 234 P. 524.

100-4-7. Id. In Case of Use for Power Purposes.

If the water claimed to have been appropriated is used for developing power, the statement shall show, in addition to the facts required by section 100-4-5, the number, size and kind of water wheels employed; the head under which each wheel is operated; the amount of power produced, and the purposes for which and the places where it is used; and the point where the water is returned to the natural stream or source. (L. 19, p. 177, § 26.)

100-4-8. Id. In Case of Use for Mining or Milling.

If the water claimed to have been appropriated is used for milling or mining, the statement shall show, in addition to the facts required by section 100-4-5, the name of the mill and its location, or the name of the mine and the mining district in which it is situated; the nature of the material milled or mined, and the point where the water is returned to the natural stream or source. (L. 19, p. 177, § 27.)

100-4-9. Id. Failure to File Statement—Relief.

The filing of each statement by a claimant shall be considered notice to all persons of the claim of the party making the same, and any person failing to make and deliver such statement of claim to the clerk of the court within the time prescribed by law shall be forever barred and estopped from subsequently asserting any rights, and shall be held to have forfeited all rights to the use of the water theretofore claimed by him; *provided*, that any claimant, upon whom no other service of said

notice shall have been made than by publication in a newspaper, may apply to the court for permission to file a statement of claim after the time therefor has expired, and the court may extend the time for filing such statement, not exceeding six months from the publication of said notice; but, before said time is extended, the applicant shall give notice by publication in a newspaper having general circulation on such river system or near the water source to all other persons interested in the water of such river system or water source, and shall make it appear to the satisfaction of the court that during the pendency of the proceedings he had no actual notice thereof in time to appear and file a statement and make proof of his claim; and all parties interested may be heard as to the matter of his actual notice of the pendency of such proceedings.

(L. 19, p. 177, § 29.)

100–4–10. Id. Amendment of Pleadings—Extensions of Time.

The court shall have power to allow amendments to any petition, statement or pleading; to extend as provided in this title the time for filing any statement of claim; and to extend, upon due cause shown, the time for filing any other pleading, statement, report or protest.

(L. 19, p. 177, § 31.)

1. Amendment of pleadings.

Complaint, in action by alleged prior appropriator to quiet his title to all the waters of a stream, may be amended to conform to the evidence. Lawson v. McBride, 71 U. 239, 264 P. 727.

100–4–11. Id. Report and Recommendation by Engineer to Court.

Within thirty days after the expiration of the sixty days allowed for filing statements of claims, the state engineer shall begin to tabulate the facts contained in the statements filed and to investigate, whenever he shall deem necessary, the facts set forth in said statements by reference to the surveys already made or by further surveys, and shall as expeditiously as possible make a report to the court with his recommendation of how all rights involved shall be determined.

After full consideration of the statements of claims, and of the surveys, records, and files, and after a personal examination of the river system or water source involved, if such examination is deemed necessary, the state engineer shall formulate a report and a proposed determination of all rights to the use of the water of such river system or water source, and a copy of the same shall be mailed by regular mail to each claimant, with notice that any claimant dissatisfied therewith may within ninety days from such date of mailing file with the clerk of the district court a written objection thereto duly verified on oath. The state engineer shall distribute the waters from the natural streams or other natural sources in accordance with the proposed determination or modification thereof by court order until a final decree is rendered by the court; *provided*, if the right to the use of said waters has been theretofore decreed or adjudicated said waters shall be distributed in accordance with such decree until the same is reversed, modified, vacated or otherwise legally set aside. (L. 19, p. 177, §§ 28, 32.)

History.

As amended by L. 37, ch. 130, eff. Mar. 19, making no material change in text.

1. Validity.

Provision of former act (Laws 1919, Ch. 67, § 32) held not objectionable as conferring judicial powers on state en-

gineer. Eden Irr. Co. v. District Court of Weber County, 61 U. 103, 211 P. 957.

Provision of former act (Laws 1919, Ch. 67, § 32) empowering state engineer to formulate proposed determination of rights to use of water was not subject to objection that the act permitted engineer to interfere with vested rights in view of proviso that where rights had been adjudicated, water should be distributed in accordance with the decree. Eden Irr. Co. v. District Court of Weber County, 61 U. 103, 211 P. 957.

2. Jurisdiction of state engineer.

Under former statute held that section intended to confer jurisdiction upon state engineer to distribute water formerly decreed, as well as water which had not been subject of litigation. Caldwell v. Erickson, 61 U. 205, 213 P. 182.

Holdings in action involving construction of former statute that engineer under this section had jurisdiction to distribute water formerly decreed, and that commissioner appointed by engineer under 100-5-1 superseded appointment of commissioner by court under former decree, did not render statute unconstitutional as impairing obligation of vested rights, since although provision of 100-5-1 with reference to appointment of commissioner by engineer was mandatory, such could not be done until after consultation with water users and hence, latter had opportunity to be heard. Caldwell v. Erickson, 61 U. 205, 213 P. 182.

100-4-12. Id. Judgment—In Absence of Contest.

If no contest on the part of any claimant shall have been filed, the court shall render a judgment in accordance with such proposed determination, which shall determine and establish the rights of the several claimants to the use of the water of said river system or water source; and among other things it shall set forth the name and post-office address of the person entitled to the use of the water; the quantity of water in acre feet or the flow of water in second feet; the time during which the water is to be used each year; the name of the stream or other source from which the water is diverted; the point on the stream or other source where the water is diverted; the priority date of the right; and such other matters as will fully and completely define the rights of said claimants to the use of the water. (L. 19, p. 177, § 33.)

1. Validity.

Provision of former act (Laws 1919, Ch. 67, § 33) held not objectionable as conferring judicial powers on state engineer. Eden Irr. Co. v. District Court of Weber County, 61 U. 103, 211 P. 957.

2. Compliance with statute.

Findings stating date of priority, duty of water awarded, quantity of land to be irrigated, flow in second feet, place of diversion, period of use, and name of stream or source, were sufficient to meet provisions of statute. Plain City Irr. Co. v. Hooper Irr. Co., 87 U. 545, 51 P.2d 1069.

3. Judgment.

4. — rendition and entry.

Until such questions as arise out of any contest or objection on part of any claimant or claimants to proposed determination directed to be submitted to court by state engineer are disposed of and determined, no final judgment should be rendered. Plain City Irr. Co. v. Hooper Irr. Co., 87 U. 545, 51 P.2d 1069.

5. — construction of decree.

It is proper for court, in construing decree, to refer to pleadings and issues joined in order to explain and limit language used. Salt Lake City v. Telluride Power Co., 82 U. 607, 17 P.2d 281.

Decree should be construed as a whole so as to give force to all of its terms, and if reasonable construction can be had which will give force to all wording, such construction should be made. Salt Lake City v. Telluride Power Co., 82 U. 607, 17 P.2d 281.

100-4-13. Id. In Case of Contest—Notice of Hearing.

If any contest or objection on the part of any claimant shall have been filed, as in this chapter provided, the court shall give not less than fifteen days' notice to all claimants, stating when and where the matter will be heard. (L. 19, p. 177, § 34.)

1. Notice.
This section requires notice only to all adverse claimants, or all claimants whose rights would be affected or drawn into question. Plain City Irr. Co. v. Hooper Irr. Co., 87 U. 545, 51 P.2d 1069.

2. Judgment.
Until such questions as arise out of any contest or objection on part of any claimant or claimants to proposed determination directed to be submitted to court by state engineer are disposed of and determined, no final judgment should be rendered. Plain City Irr. Co. v. Hooper Irr. Co., 87 U. 545, 51 P.2d 1069.

100–4–14. Id. Pleadings—Expert Assistance for Court.

The statements filed by the claimants shall stand in the place of pleadings, and issues may be made thereon. Whenever requested so to do the state engineer shall furnish the court with any information which he may possess, or copies of any of the records of his office which relate to the water of said river system or water source. The court may appoint referees, masters, engineers, soil specialists or other persons as necessity or emergency may require to assist in taking testimony or investigating facts, and in all proceedings for the determination of the rights of claimants to the water of a river system or water source the filed statements of claimants shall be competent evidence of the facts stated therein unless the same are put in issue. (L. 19, p. 177, § 30.)

1. Issues.
The first sentence of this section means that if one claim conflicts with another, there is an issue to be determined. One claimant by claiming too much water may be an adverse party to every other claimant in the system. He may be adverse to only a part. In any event an issue is presented which should be tried by the court by the same rules of evidence and the same orderly procedure as in other cases. Huntsville Irr. Ass'n v. District Court of Weber County, 72 U. 431, 441, 270 P. 1090.

2. Complaint.
Complaint setting forth that for 35 years plaintiff had used water from wells pumping water from basin supplied by percolating waters under premises for domestic and irrigation purposes, that such wells produced 15 gallons of water per minute, that defendants upon their land, which adjoined plaintiff's, drilled wells withdrawing water from the artesian basin, and as a result, plaintiff had been deprived of water theretofore used by him, stated cause of action, and court erred in sustaining a demurrer to it. Wrathall v. Johnson, 86 U. 50, 40 P.2d 755.

3. Evidence.
In action to adjudicate waters of a natural stream, deeds conveying lands with certain water rights and awards made by water commissioners were not evidence of original appropriation, but were evidence of claims made by earliest users of the water. Bigler v. Fryer, 82 U. 380, 25 P.2d 508.

In action against city for determination of water rights in creek, court did not err in admitting in evidence document which was record of declaration of water claims of city recorded under former statute for purpose of showing nature and extent of city's claim even though city could not divest interests of any person to such rights by execution and recordation of such document. Richfield Cottonwood Irr. Co. v. City of Richfield, 84 U. 107, 34 P.2d 945.

Minutes of city council with respect to water in certain creek were admissible in action against city involving right to use water from such creek, since 15–6–44 requires such minutes to be kept, and as public records they were competent evidence of facts therein recited. Richfield Cottonwood Irr. Co. v. City of Richfield, 84 U. 107, 34 P.2d 945.

Water record book and water commissioner's certificate may be admitted in evidence, if properly authenticated. Holman v. Christensen, 73 U. 389, 274 P. 457.

100–4–15. Id. Judgment After Hearing.

Upon the completion of the hearing, after objections filed, the court shall enter judgment which shall determine and establish the rights of

the several claimants to the use of the water of the river system or water source as provided in section 100-4-12. (L. 19, p. 177, § 35.)

1. Judgment.

2. — requisites and sufficiency.

Judgments determining conflicting claims, rights, and interests in and to use of water should be definite and certain with respect to relief granted. Hardy v. Beaver County Irr. Co., 65 U. 28, 234 P. 524.

In action to determine water rights, it was duty of court in decree to fix extent of appropriation of prior appropriator who used water for irrigation purposes, since without such determination it was impossible to determine with any degree of certainty other party's rights, who clearly had right to divert, impound and use whatever surplus water there might have been after prior appropriator's rights had been satisfied. Hardy v. Beaver County Irr. Co., 65 U. 28, 234 P. 524.

Attack upon decree, in proceeding for contempt for its violation, on ground that decree did not show any acreage of land to which water was appurtenant or quantity of water decreed to any party, was without merit, where although decree did not specify either the flow in second feet or quantity in acre feet, it did apportion and decree whole stream to parties for use for specified periods regularly rotated. Larsen v. Madsen, 87 U. 48, 48 P.2d 429.

Findings stating date of priority, duty of water awarded, quantity of land to be irrigated, flow in second feet, place of diversion, period of use, and name of stream or source, were sufficient to meet provisions of statute. Plain City Irr. Co. v. Hooper Irr. Co., 87 U. 545, 51 P.2d 1069.

3. — rendition and entry.

Until such questions as arise out of any contest or objection on part of any claimant or claimants to proposed determination directed to be submitted to court by state engineer are disposed of and determined, no final judgment should be rendered. Plain City Irr. Co. v. Hooper Irr. Co., 87 U. 545, 51 P.2d 1069.

4. — construction of decree.

It is proper for court, in construing decree, to refer to pleadings and issues joined in order to explain and limit language used. Salt Lake City v. Telluride Power Co., 82 U. 607, 17 P.2d 281.

Decree should be construed as whole so as to give force to all of its terms, and if reasonable construction can be had which will give force to all wording, such construction should be made. Salt Lake City v. Telluride Power Co., 82 U. 607, 17 P.2d 281.

In construing decree determining rights of irrigation and canal companies in pumping plant and liabilities growing out of its use, held, such companies should pay for operation and maintenance of plant in proportion to the number of acre feet of pumped water used by each. Salt Lake City v. Telluride Power Co., 82 U. 607, 17 P.2d 281.

In action to construe decree determining rights of irrigation and canal companies in pumping plant and liabilities growing out of its use, in which parties were deemed liable for operation of plant in proportion to acre feet of pumped water used, water used by upper owner and finding its way back to channel, either by run-off or seepage, was not pumped water so as to render lower user liable therefor. Salt Lake City v. Telluride Power Co., 82 U. 607, 17 P.2d 281.

Where court in its decree retains jurisdiction of the waters for a period of five years for purpose of making adjustments in duty of water, and to make "minor corrections which may be found necessary," and it is impossible to determine what is, or what is not "a minor correction," decree will be construed as though the word "minor" were expunged therefrom; therefore decree may be amended within stated period with respect to the priority of water rights. Court has inherent power to correct mere clerical errors at any time. Garrison v. Davis, 88 U. 358, 368, 54 P.2d 439, Mr. Justice Wolfe dissenting.

5. Forms.

Form of findings of fact and of the decree entered thereon is set out in Ginnulakis v. Sharp, 71 U. 528, 267 P. 1017.

6. Costs.

There is no statute in this state authorizing the assessment of costs against water users in cases adjudicated in pursuance of Laws 1919, Ch. 67. Bacon v. Harris, 71 U. 223, 263 P. 930, reviewing history of legislation leading up to repeal of laws allowing costs in such cases.

100–4–16. Id. Appeals.

From all final judgments of the district court there shall be a right of appeal to the supreme court as in other cases. The appeal shall be upon the record made in the district court, and may as in equity cases be on questions of both law and fact. All proceedings on appeal shall be conducted according to the provisions of the code of civil procedure. (L. 19, p. 177, § 36.)

Cross-references.
Appeals from district court, 104–41.

1. Appealable judgments, orders and decrees.
Judgment or decree between objectors or contestants in contest to determine water rights determining particular issues between such parties, no other rights or issues being affected or involved, is final judgment between such parties for purpose of an appeal upon such issues. Plain City Irr. Co. v. Hooper Irr. Co., 87 U. 545, 51 P.2d 1069.

Appeal taken from judgment rendered by trial court upon issues made out of contests or objections, of parties immediately concerned in those contested items, and objections arising out of them, and proposed determination submitted by state engineer, held proper, since under procedure provided for in this chapter there may be two final judgments from which separate appeals may be taken. Plain City Irr. Co. v. Hooper Irr. Co., 87 U. 545, 51 P.2d 1069.

2. Parties.
No one's rights may be determined upon appeal from judgment determining water rights except those who are parties to action and made parties to the appeal and have rights adversely affected thereby. Plain City Irr. Co. v. Hooper Irr. Co., 87 U. 545, 51 P.2d 1069.

3. Notice of appeal.
If desire is to bind all claimants on river system by judgment rendered in action for proposed determination of water rights, notice of appeal must be served upon all such claimants. Plain City Irr. Co. v. Hooper Irr. Co., 87 U. 545, 51 P.2d 1069.

4. Judgment on appeal.
The general rule as to conclusiveness of findings in equity cases applies on appeal. Thomas v. Butler, 77 U. 402, 296 P. 597.

100–4–17. Certified Copy of Final Judgment—Filing.

Within thirty days after the entry of final judgment of the district court, or if an appeal is taken to the supreme court, within thirty days after the final judgment on remittitur is entered, it shall be the duty of the clerk of the district court to deliver to the state engineer a certified copy of such judgment and to cause a certified copy thereof to be filed with the county recorder of each county in which the water adjudicated is diverted from its natural source and of each county where the water is applied. No filing fee shall be charged by either the state engineer or the county recorder. (L. 19, p. 177, § 37.)

History.
As amended by L. 37, ch. 130, eff. Mar. 19, rewriting text of entire section.

100–4–18. General Determination in Court's Discretion—State to Be Made a Party.

Whenever any civil action is commenced in the district court involving the use of water from any river system or water source, the court, in its discretion, may, if a general determination of the rights to the use of water from said river system or water source has not already been made, proceed, as in this chapter provided, to make such a general de-

termination. In any such action for the determination of water rights the state of Utah shall be joined as a necessary party.

(L. 19, p. 177, § 38.)

1. Scope and operation of section.

This section is limited in its application to suits wherein a general adjudication is sought; otherwise the state is not a necessary party, as in suit in equity to determine rights of adverse claimants to use of water flowing from spring. In any event failure to make state a party cannot be urged for first time on appeal. Morris v. Smith, 76 U. 162, 288 P. 1068.

This section is a grant of power to court to decide whether or not a general determination of water rights in the system or source involved in action involving use of water is necessary or advisable, and to proceed with such determination if necessity or advisability therefor exists. Mammoth Canal & Irrigation Co. v. Burton, 70 U. 239, 259 P. 408.

It is sufficient to bring about an exercise of judicial power under this section if party interested brings matter to attention of court in some orderly manner, such as by direct allegations in pleadings or by motion. Mammoth Canal & Irrigation Co. v. Burton, 70 U. 239, 259 P. 408.

Statutory general adjudication of water rights of any water system must proceed according to statute, but not all water suits must proceed as general adjudications, as statutes recognize that "private suits" do exist and may proceed without being forced through general statutory adjudication procedure. Spanish Fork West Field Irr. Co. v. District Court of Salt Lake County, 99 U. 558, 110 P.2d 344. (Trueman, D. J., dissenting.)

2. Words and phrases defined.

"General determination" as used in this section connotes determination of all rights within the system or other source existing at the time that the court is called upon to act or when decree is made, and which is based upon surveys and investigations made by state engineer that are provided for in this act, and made in an action conducted under and substantially in conformity with that law. Mammoth Canal & Irrigation Co. v. Burton, 70 U. 239, 259 P. 408.

3. General determination.

A determination of water rights as to certain persons, which did not settle rights of all water users in a system made prior to effective date of this act, was not a general determination so as to preclude a general determination under this section. Mammoth Canal & Irrigation Co. v. Burton, 70 U. 239, 259 P. 408.

Statutory general procedure is not intended as remedy for wrong to an individual, or to protect the individual against adverse interests; the statutory general adjudication is remedial for multifarious suits and conflicting interests among water users of a particular system. Spanish Fork West Field Irr. Co. v. District Court of Salt Lake County, 99 U. 558, 110 P.2d 344. (Trueman, D. J., dissenting.)

In action to quiet title to water rights in Virgin River water system, court did not err in also determining rights to Summit Spring, where all parties sought determination of spring rights, no useful purpose would be served in compelling retrial thereof, and variance with respect to whether spring was part of river water system was not objected to. St. George & Washington Canal Co. v. Hurricane Canal Co., 93 U. 262, 72 P.2d 642.

Action by city against more than 2,000 claimants to determine water rights of the respective parties and to secure a general adjudication thereof constituted a "private suit" under the statute, as an individual is without right to institute general statutory adjudication proceedings, and fact that there were allegations forming background for both private and general suit was immaterial. Spanish Fork West Field Irr. Co. v. District Court of Salt Lake County, 99 U. 558, 110 P.2d 344. (Trueman, D. J., dissenting.)

In action to determine and quiet rights to use of waters of river below dam, order of court in which it determined to make a general determination of rights in the river system under this section was lawful, although original action did not involve rights of plaintiffs who sought writ of prohibition against such general determination. Mammoth Canal & Irrigation Co. v. Burton, 70 U. 239, 259 P. 408.

4. Parties.

5. — in general.

The public, by its authorized officers, is the only party which may institute general adjudication proceedings. Spanish Fork West Field Irr. Co. v. District Court of Salt Lake County, 99 U. 558, 110 P.2d 344. (Trueman, D. J., dissenting.)

6. —State of Utah.

This section does not make state in its governmental capacity a necessary party. Plain City Irr. Co. v. Hooper Irr. Co., 87 U. 545, 51 P.2d 1069.

The state of Utah is not a necessary party where the proceeding to quiet title is not for a general adjudication of all of the water rights in the creek in question, but is merely to quiet right to use of water during low-water season. Clark v. North Cottonwood Irrigation & Water Co. of Farmington, 79 U. 425, 439, 11 P.2d 300.

In action between two users for determination of water rights, damages, and other relief, failure to make state a party as provided hereunder cannot be relied upon as ground for writ of prohibition where no request was made to bring in state as a party. Smith v. District Court of Second Judicial District in and for Morgan County, 69 U. 493, 256 P. 539.

Failure to make state a party cannot be urged for first time on appeal. Morris v. Smith, 76 U. 162, 288 P. 1068.

7. Costs.

Costs of "private suit" are not chargeable to state engineer's fund, but must be borne by the parties involved. Spanish Fork West Field Irr. Co. v. District Court of Salt Lake County, 99 U. 558, 110 P.2d 344.

100-4-19. Re-determination—Bond of Applicant.

Wherever a general determination of water rights upon any river system or water source has been made by the district court, any claimant to the use of water from such river system or water source seeking a redetermination of water rights upon such river system or water source shall, before commencing any action for such redetermination or for the revision of any final judgment other than as provided in section 100-4-1, furnish to the court in which such action is commenced and before the filing of any petition or complaint for such purpose, a good and sufficient bond, in a form and with sureties approved by the court, in a sum fixed by the court at least equal to twice the estimated costs which may arise in such action, conditioned that if final judgment after hearing, or after appeal should appeal be taken, is awarded against such claimant, then such claimant will pay all costs arising in such action and all damages to other parties thereto arising therefrom.

(L. 19, p. 177, § 40.)

1. Conditions precedent.

If result sought by the petition is not a re-determination within meaning of this section, but merely amendment of decree previously rendered with respect to the priority of petitioners of their water rights, the giving of a bond for costs as a condition precedent to filing of petition is not required. Garrison v. Davis, 88 U. 358, 368, 54 P.2d 439.

100-4-20. Assessment and Collection of Costs Determination—Use of Proceeds.

For the purpose of defraying the expenses incurred by the state engineer in performing the duties called for under chapter 4 of this title, there is hereby created a fund to be known as state engineer's revolving fund. Expenses incurred by the state engineer in performance of his duties under chapter 4 of this title shall be paid out of said fund, on the certificate of the state engineer approved by the state board of examiners. When the court enters a final judgment in any suit for the determination of water rights, the court shall, on petition of the state engineer, make an order assessing against the water users whose rights have been determined their pro rata share of the expenditures made by the state engineer from the state engineer's revolving fund in that determination, such costs to be pro-rated on a schedule prepared by the state engineer and approved by the court, and, until paid, said costs

shall be a lien on the property and water rights of the person against whom they are assessed. The state engineer shall collect said assessments and pay the same into the state engineer's revolving fund.

History.
Added by L. 33, ch. 79, eff. June 26.

Cross-references.
As to costs, see 100–4–15, 100–4–18.

CHAPTER 5

ADMINISTRATION AND DISTRIBUTION

100–5–1. To Appoint Water Commissioners — Procedure — To Determine Adequacy of Underground Water Supply.
100–5–2. Id. Bond.
100–5–3. Control by Engineer of Division and Distribution Under Judgments.
100–5–4. Head Gates and Measuring Devices.
100–5–5. Construction and Repair of Dams — Supervision by Engineer.
100–5–6. Examination of Dams by Engineer—Regulation of Storage—Expenses.
100–5–7. Inspection of Ditches and Diverting Works by Engineer.
100–5–8. (Repealed.)
100–5–9. Division of Waters Between Joint Owners of Ditch or Reservoir by Engineer on Petition—Fees.
100–5–10. Reports by Users to Engineer.
100–5–11. Powers of State Engineer as to Waste, Pollution, etc., of Waters.
100–5–12. Notice of Claim to Underground Waters.
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100–5–14. Owners of Reservoirs to Supply Data to State Engineer—Install Gauges.

100–5–1. To Appoint Water Commissioners—Procedure—To Determine Adequacy of Underground Water Supply.

Whenever in the judgment of the state engineer, or the district court, it is necessary to appoint one or more water commissioners for the distribution of water from any river system or water source, such commissioner or commissioners shall be appointed annually by the state engineer, after consultation with the water users. The form of such consultation and notice to be given shall be determined by the state engineer as shall best suit local conditions, full expression of majority opinion being, however, provided for. If a majority of the water users, as a result of such consultation, shall agree upon some competent person or persons to be appointed as water commissioner or commissioners, the duties he or they shall perform and the compensation he or they shall receive, and shall make recommendation to the state engineer as to such matters or either of them, the state engineer shall act in accordance with their recommendations; but if a majority of water users do not agree as to such matters, then the state engineer shall make a determination for them. The salary and expenses of such commissioner or commissioners shall be borne pro rata by the users of water from such river system or water source, upon a schedule to be fixed by the state engineer, based on the established rights of each water user, and such pro rata share shall be paid by each water user to the state engineer in

advance on or before the first day of May each year, and upon failure so to do the state engineer may create a lien upon the water right affected by filing a notice of lien in the office of the county recorder in the county where the water is diverted, may forbid the use of water by any such delinquent, his successors or assigns, while such default continues, may bring an action in the district court for such unpaid expense and salary, and may foreclose such lien, or the district court having jurisdiction of his person may issue an order to show cause upon any delinquent user why a judgment for such sum should not be entered. Any such commissioner or commissioners may be removed by the state engineer for cause. The users of water from any river system or water source may petition the district court for the removal of any such commissioner or commissioners, and after notice and hearing the court may order the removal of such commissioner or commissioners and direct the state engineer to appoint successors as necessary.

In addition to the power granted the state engineer to appoint water commissioners for the distribution of water as provided herein, the state engineer is hereby authorized upon his own motion at any time to hold a hearing, or upon a petition signed by not less than one-third of the users of underground waters in any area as shall be defined by the state engineer, he shall hold such hearing, to determine whether the underground water supply within such area is adequate for the existing claims. Notice of such hearing shall be given in a form and manner which in the judgment of the state engineer will best suit local conditions. Upon such hearing the state engineer is authorized to make full investigation and findings thereon. If it be found the water supply is inadequate for existing claims, he shall divide, or cause to be divided, by the water commissioner or water commissioners as provided in this section, the waters within such area among the several claimants entitled thereto in accordance with the rights of each respectively.

(L. 31, p. 22, § 62.)

History.

As amended by L. 35, ch. 105, eff. Mar. 22; L. 41, ch. 96, eff. May 13, making many material changes in text and adding last paragraph.

Cross-references.

Power of arrest in commissioners, 100–2–9; interference with diversion works, 100–1–15, 103–59–1.

1. Validity.

Holdings in action involving construction of former statute that engineer under 100–4–11 had jurisdiction to distribute water formerly decreed, and that commissioner appointed by engineer under this section superseded appointment of commissioner by court under former decree, did not render statute unconstitutional as impairing obligation of vested rights, since although provision of this section with reference to appointment of commissioner by engineer was mandatory, such could not be done until after consultation with water users, and hence, latter had opportunity to be heard. Caldwell v. Erickson, 61 U. 265, 213 P. 182.

2. The water commissioner.

3. — in general.

The primary purpose of a water commissioner is to assist the court in carrying out its decrees. His duties are to aid the courts and the state engineer in the distribution to the various water users of the quantity of water to which each is entitled. The commissioner is an arm of the court and the state engineer in enforcing and protecting the various water users in their rights. He is appointed by the state engineer upon recommendation of the interested water users. The state engineer may remove him for cause upon an application of a water user and a hearing had thereon. The same power inheres in the court under which he serves. Minersville Reservoir & Irrigation Co. v. Rocky Ford Irr. Co., 90 U. 283, 294, 61 P.2d 606.

1. — appointment of.

Where affidavit for writ of prohibition by state engineer to restrain defendants from jurisdiction of certain waters did not show that appointment of commissioner by engineer under former statute was made after consultation, writ was denied. Caldwell v. Erickson, 61 U. 265, 213 P. 182.

Under former statute held, that appointment of commissioner by engineer superseded appointment of commissioner by court under former decree. Caldwell v. Erickson, 61 U. 265, 213 P. 182.

5. — powers and duties.

The authority and duty of a water commissioner to distribute water to one or more users holding the right to the use thereof does not cease merely because one of them has undertaken to maintain a means of storing and conveying such water to the place of use. Nor is he relieved of this duty because of any contract that may exist between water users. Minersville Reservoir & Irrigation Co. v. Rocky Ford Irr. Co., 90 U. 283, 295, 61 P.2d 605.

6. Salary and expenses of commissioner.

7. — basis of apportionment.

That part of this section providing for the pro rata apportionment of the expenses and salary of the water commissioner among water users does not contemplate that each individual user should be required to pay an equal amount with every other individual user, but clearly contemplates some method of apportionment having reasonable relation to the services rendered for and benefits received by the respective users. And while mathematic exactness is impracticable, yet the nearest approximation to a fair and ratable division of the burden ought to be adopted. Bacon v. Gunnison Fayette Canal Co., 75 U. 278, 284 P. 1004.

Under this section the state engineer cannot adopt as a basis of apportionment of costs of distribution among water users, "whereby the amounts to be assessed and collected from the several water users were determined, not according to the quantity of water each was respectively entitled to use or which was distributed to him, but according to respective areas of land upon which the users were entitled to use water for irrigation," because such method of apportionment results in unequal and disproportionate assessment. Bacon v. Gunnison Fayette Canal Co., 75 U. 278, 280, 284 P. 1004.

It depends upon the construction of the contract between the parties fixing their water rights, whether the grantor or the grantee is liable for assessments made to defray expenses of water commissioner. Minersville Reservoir & Irrigation Co. v. Rocky Ford Irr. Co., 90 U. 283, 292, 61 P.2d 605.

With reference to assessments under this section, if measurements have been made and kept for a number of years, an assessment based upon average annual acre feet delivered to water users would meet requirments of law, and in case no measurements are available, assessments of necessity must be based upon information, such as amount of precipitation which has fallen upon watershed constituting source of supply. Bacon v. Plain City Irr. Co., 87 U. 564, 52 P.2d 427.

Where state engineer apparently based his assessments under this section upon number of second feet awarded by proposed determination without regard to whether various rights were primary or secondary, and without regard to probable amount that would be available for use of various water users, basis used in determining assessments held improper, and court in action for assessments erred in excluding evidence of amount of water delivered, since such evidence might have tended to show number of acre feet of water which was available to user. Bacon v. Plain City Irr. Co., 87 U. 564, 52 P.2d 427.

8. — collection of assessments.

Complaint in action by state engineer to recover judgment against irrigation company for assessments levied to secure funds to pay water commissioner in which no facts were alleged indicating total amount of water rights awarded by proposed determination or what part of water, if any, was distributed to company, or what basis engineer used in determining amount that should be assessed against company, held demurrable. Bacon v. Plain City Irr. Co., 87 U. 564, 52 P.2d 427.

The right of the state engineer to collect assessments from the water user cannot be defeated by an attempt of the water user to assign his or its liability for the payment thereof to another. Minersville Reservoir & Irrigation Co. v. Rocky Ford Irr. Co., 90 U. 283, 293, 61 P.2d 605.

Fact that engineer may have been derelict in consulting with irrigation company about appointment of commissioner could not be taken advantage of as defense in action against irrigation company for assessments for funds with which to pay salary of commissioner. Bacon v. Plain City Irr. Co., 87 U. 564, 52 P.2d 427.

Upon receivership of corporation possessing water rights, state engineer was not entitled to preferred claim for pro

rata share of salary and expenses of water commissioner, nor was purchaser of property of corporation liable therefor where it did not assume any obligation for payment of claim. In re White Fawn Milling Co., 100 U. 1, 110 P.2d 331.

9. —tax, lien or encumbrance.

This section does not create any tax, lien or encumbrance against water rights for unpaid pro rata share of salary and expenses of commissioner. In re White Fawn Milling Co., 100 U. 1, 110 P.2d 331.

Within the meaning of that term as used in a contract fixing water rights, an unpaid water assessment becomes an encumbrance against the water right when the state engineer refuses to deliver the water because the water assessment is not paid. Minersville Reservoir & Irrigation Co. v. Rocky Ford Irr. Co., 90 U. 283, 296, 61 P.2d 605.

10. Contempt.

Violation of water right decree is not excused by court's failure to appoint water commissioner to measure and distribute waters, or by plaintiff taking full control of water and refusing to consent to appointment of such commissioner. Gunnison Irr. Co. v. Peterson, 74 U. 460, 280 P. 715.

100–5–2. Id. Bond.

Every water commissioner before entering on his duties shall give a bond to the state for the faithful performance of his duties, in a penal sum to be fixed by the state engineer. (L. 19, p. 177, § 63.)

100–5–3. Control by Engineer of Division and Distribution Under Judgments.

The state engineer and his duly authorized assistants shall carry into effect the judgments of the courts in relation to the division, distribution or use of water under the provisions of this title. The state engineer shall divide, or cause to be divided, the water within any district created under the provisions of this title among the several appropriators entitled thereto in accordance with the right of each respectively, and shall regulate and control, or cause to be regulated and controlled, the use of such water by such closing or partial closing of the head gates, caps, valves or other controlling works of any ditch, canal, pipe, flume, well or tunnel or other means of diversion as will prevent the waste of water or its use in excess of the quantity to which any appropriator is lawfully entitled, and shall regulate, or cause to be regulated, the controlling works of reservoirs in accordance with the provisions of this title. Whenever in pursuance of his duties the state engineer regulates or causes to be regulated any head gate, cap, valve or other controlling works of any ditch, canal, pipe, flume, well or tunnel or other means of diversion or the controlling works of any reservoir, he may attach to such controlling works a written notice, properly dated and signed, setting forth that such controlling works have been properly regulated and are wholly under his control, and such notice shall be a legal notice as to the facts therein contained to all parties interested in the division and distribution of the water of such ditch, canal, pipe, flume, well or tunnel or other means of diversion or reservoir. Whenever the state engineer is required to enter upon private property in order to carry out the provisions of this title and is refused by the owner or possessor of such property such right of entry, he may petition the district court for an order granting such right, and after notice and hearing the court may grant such permission, on security being given to pay all damage caused thereby to the owner of such property.

(L. 19, p. 177, § 64.)

History.
As amended by L. 35, ch. 105, eff. Mar. 22, making material changes in text and adding last sentence.

1. Effect of appointment of commissioner.
Under former statute held, that appointment of commissioner by engineer superseded appointment of commissioner by court under former decree. Caldwell v. Erickson, 61 U. 265, 213 P. 182.

100–5–4. Head Gates and Measuring Devices.

Every person using water in this state shall construct or install and maintain a substantial head gate, cap, valve or other controlling works, weir flume and measuring device at each point where water is diverted or turned out, for the purpose of regulating and measuring the quantity of water that may be used. Such controlling works or measuring device shall be of such design as the state engineer may approve and so that the same can be locked and kept set by him or his assistants; and such owner shall construct and maintain, when required by the state engineer, flumes or other measuring devices at such points along his ditch as may be necessary for the purpose of assisting the state engineer or his assistants in determining the amount of water that is to be diverted into his ditch from the stream or water source, or taken from it by the various users. Every owner or manager of a reservoir located across or upon the bed of a natural stream shall construct and maintain, when required by the state engineer, a flume or other measuring device of a plan to be approved by the state engineer, below such reservoir at a point approved by him, and a flume or measuring device above such reservoir on each stream or source of supply discharging into such reservoir, for the purpose of assisting the state engineer in determining the amount of water to which prior appropriators are entitled, and thereafter diverting it for such prior appropriators' use. If the owner of irrigation works, canals, reservoirs, wells, pumps or tunnels shall refuse or neglect to construct or install such head gates, caps, valves, flumes or measuring devices after thirty days' notice to do so by the state engineer, the state engineer may forbid the use of water until the user thereof shall comply with his requirement, or the state engineer may proceed to construct or install or cause to be constructed or installed such controlling works or measuring devices, and the cost of the same shall be a lien against the lands and water rights served thereby, and the state engineer is authorized to bring action in the name of the state to foreclose such lien. (L. 19, p. 177, § 68.)

History.
As amended by L. 35, ch. 105, eff. Mar. 22, making many material changes in text.

Comparable provisions.
Cal. Gen. Laws, Act 9091, § 37c (owner of conduit subject to regulation by a water-master must construct and maintain a substantial and serviceable diversion dam or works in channel of stream from which the water is diverted, and also a substantial and serviceable headgate in the conduit through which the water is diverted; also water-flow measuring devices).

Idaho Code, § 41–601 (requiring appropriators or users of public waters to maintain, to satisfaction of department of reclamation, suitable headgates and controlling works at point where water is diverted).

Mont. Rev. Codes, § 7151 (persons using water, under a decree, from stream or ditch whereon water commissioner has been appointed, is required to have suitable headgates at point wherein ditch taps stream, and must also maintain proper measuring box, weir, or other water-measurement appliance at suitable place on ditch).

1. Measuring box.
The measuring box may even be located upon government land. And court may restrain anyone from interfering with or removing such box in the ditch, and from diverting the water of the stream. Willful and contemptuous violation of decree and injunctional order is a criminal contempt. Elliot v. Whitmore, 10 U. 246, 252, 37 P. 461.

100–5–5. Construction and Repair of Dams—Supervision by Engineer.

Duplicate plans, drawings and specifications for any impounding dam 10 feet or more in height, or any dam less than 10 feet in height which will impound more than 100 acre feet of water, shall be submitted to the state engineer for his approval, thirty days before construction thereof shall begin. He shall examine such plans, drawings and specifications and, if he approves the same, he shall return one copy of each of such plans, drawings and specifications with his approval, to the person submitting the same, and file the other in his office. If the state engineer disapproves such plans, drawings, or specifications, or any part thereof, he shall return the same for correction and revision. Until the approval of plans, drawings and specifications has been obtained, the construction and use of such dam is prohibited. The state engineer may keep an inspector on any such dam during the construction or repair thereof to see that the work is done in accordance with the plans, drawings and specifications, and he may require the person constructing the same to make any additions or alterations during the construction which he considers necessary for the security of the work, the safety of persons, or the protection of property. Any person beginning the construction of any such dam before the plans, drawings and specifications shall have been approved by the state engineer, or proceeding with such work without first having given the state engineer thirty days' notice thereof, or proceeding with such construction work in the absence of an inspector appointed by the state engineer, should one be required by him, or without complying with the requirements made by the state engineer in pursuance of this section, is guilty of a misdemeanor, and each day of violation of this section shall constitute a separate offense, and be separately punishable. The applicant shall pay to the state engineer all expenses incident to the necessary examination. Whenever such an inspector has been appointed by the state engineer, the applicant shall pay to the state engineer monthly in advance a sum sufficient to pay the salary and expenses of keeping such inspector on such dam during the construction thereof. This section shall apply to new construction and to repair and alteration of old structures. The provisions of this section relating to approval of plans, drawings and specifications and inspection of dams shall not apply to works constructed by the United States Bureau of Reclamation: *provided, however*, that such bureau shall file duplicate plans, drawings and specifications with the state engineer.

(L. 19, p. 177, § 73.)

History.
As amended by L. 37, ch. 130, eff. Mar. 19, making many material changes in text and adding last two sentences.

100–5–6. Examination of Dams by Engineer—Regulation of Storage—Expenses.

The state engineer may make an examination of any dam or diverting works at any time, or any person residing on or owning land in the neighborhood of any completed dam or diverting works may apply to the state engineer, in writing, requesting an examination of such dam or works, and the state engineer may order an examination thereof. Before doing so he may require the applicant for such examination to deposit a sum of money sufficient to pay the expenses of the examination, and in case the application appears to him not to have been justified, he may cause the whole or part of such expense to be paid out of such deposit. In case the request appears to the state engineer to have been justified, he may require the owner of the works to pay the whole or any part of the expenses of such examination. Whenever the state engineer finds that such dam or diverting works is in an unsatisfactory or unsafe condition, he may limit the amount of water to be stored thereby, he may order the release of all or any part of the water impounded and he may regulate future storage or forbid it entirely until the dam is repaired or reconstructed pursuant to the provisions of section 100–5–5. If any person, firm, copartnership, association or corporation refuses or neglects to comply with such orders of the state engineer he may bring action in the name of the state in the district court to enforce them. (L. 19, p. 177, § 74.)

History.
As amended by L. 37, ch. 130, eff. Mar. 19, rewriting last two sentences of text.

100–5–7. Inspection of Ditches and Diverting Works by Engineer.

The state engineer shall have authority to examine and inspect any ditch or other diverting works, and at the time of such inspection he may order the owners thereof to make any addition or alteration which he considers necessary for the security of such works, the safety of persons, or the protection of property. If any person, firm, copartnership, association or corporation refuses or neglects to comply with such requirements of the state engineer, he may bring action in the name of the state in the district court to enforce his order. (L. 19, p. 177, § 75.)

History.
As amended by L. 37, ch. 130, eff. Mar. 19, inserting clause after "person" in fifth line and deleting last sentence.

100–5–8. (Repealed by L. 35, ch. 105, § 4, eff. Mar. 22.)

100–5–9. Division of Waters Between Joint Owners of Ditch or Reservoir by Engineer on Petition—Fees.

When two or more persons, joint owners in an irrigation ditch or reservoir, are unable to agree as to the division and distribution of water received through their ditch or from their reservoir, twenty-five per cent of such owners may apply in writing to the state engineer set-

ting forth such fact and asking him to take charge of such ditch or reservoir for the purpose of making a just division or distribution of the water from the same to the parties entitled to the use thereof. The state engineer shall thereupon take exclusive charge of such ditch or reservoir for the purpose of dividing the water therefrom in accordance with rights established by existing decrees or otherwise, and shall continue the work until the necessity therefor shall cease to exist. Subject to review as provided in this title, the state engineer shall have power to determine the loss by seepage and evaporation of any water carried in a stream, in transit from a reservoir or other source, dissociated from the natural flow in the transmitting channel. In all cases where the state engineer is called upon to divide the waters of a ditch or reservoir among appropriators, when the time of such service exceeds three consecutive days, he shall be paid for his services by the interested water users in proportion to the established rights of each, and such cost shall be considered by the state engineer in fixing the schedule of pro rata cost for the salary and expenses of his assistant as by law provided. (L. 21, p. 189, § 70.)

100–5–10. Reports by Users to Engineer.

Every person using water from any river system or water source, when requested by the state engineer for any season, shall within thirty days after such request report to the state engineer in writing the nature of the use of any such water, the area on which used and the kind of crops to be grown; he shall likewise, upon such request, furnish statements of water elevations on wells or tunnels and quantity of underground water used.

Failure to comply with the provisions of this section shall constitute a misdemeanor. (L. 19, p. 177, § 69.)

History.
As amended by L. 35, ch. 105, eff. Mar. 22, making material changes in text and adding second paragraph.

100–5–11. Powers of State Engineer as to Waste, Pollution, etc., of Waters.

To prevent waste, loss, pollution or contamination of any waters whether above or below the ground, the state engineer may require the repair or construction of head gates or other devices on ditches or canals, and the repair or installation of caps, valves or casings on any well or tunnel or the plugging or filling thereof to accomplish the purposes of this section.

Any requirement made by the state engineer in accordance with this section shall be executed by and at the cost and expense of the owner, lessee or person having control of such diverting works affected. If within 10 days after notice of such requirement as provided in this section, the owner, lessee or person having control of the water affected, has not commenced to carry out such requirement, or if he has commenced to comply therewith but shall not thereafter proceed diligently to complete the work, the state engineer may forbid the use of water from such source until the user thereof shall comply with such require-

ment. Failure to comply with any requirement made by the state engineer in accordance with the provisions of this section shall constitute a misdemeanor. Each day that such violation is permitted to continue shall constitute a separate offense.

History.
Added by L. 35, ch. 105, eff. Mar. 22, which contained a section 3 which made an appropriation to pay the expenses of administering such act as it applied to underground waters.

100–5–12. Notice of Claim to Underground Waters.

Within one year after the date of the approval of this act, all claimants to rights to the use of underground waters shall file notice of such claim or claims, with the state engineer on forms furnished by him, setting forth such information as the state engineer may require, including but not limited to the following:

The name and postoffice address of the person making the claim; the location of the well or tunnel or other means of diversion with reference to a United States government survey corner; the nature and extent of use on which claim of appropriation is based; the flow of underground water used in cubic feet per second or the quantity in acre feet; the time during which underground water has been used each year and the date when underground water was first used.

Failure to file notice of claim or claims, as provided in this section, shall be prima facie evidence of intent to abandon such claimed right or rights, and in the distribution of the underground waters of this state the state engineer may disregard any claim not so filed.

History.
Added by L. 35, ch. 105, eff. Mar. 22, which contained a section 3 which made an appropriation to pay the expenses of administering such act as it applied to underground waters.

100–5–13. Time for Filing Notices of Claims Extended—Disposition of Fees Collected.

The time for filing notices of claims to underground water as provided by section 100–5–12 is extended to March 22, 1942, and all notices of claims filed with the state engineer after March 22, 1940, but prior to the enactment hereof, shall have the same force and effect as if filed in time. All fees collected for filing and recording notices of claims to underground water after March 31, 1937, shall be paid into the state treasury as provided by section 100–2–14 and may be withdrawn therefrom upon warrants of the state engineer and used by him to defray the expense of locating the well or wells described in such notices with reference to United States survey corners and to sea-level datum.

History.
Added by L. 37, ch. 130, eff. Mar. 19; amended by L. 39, ch. 111, eff. Mar. 20; L. 41, ch. 96, eff. May 13, making changes in dates in first paragraph of text.

100–5–14. Owners of Reservoirs to Supply Data to State Engineer—Install Gauges.

Within six months after the enactment hereof, every owner of existing reservoirs or dams used to impound any water whatsoever, shall notify the state engineer in writing of the name of such dam or reservoir, the general location thereof with reference to section, township

and range, city, town or highway or to a prominent and permanent natural object if located within two miles therefrom and the approximate capacity of the reservoir, and height of the dam, and shall file with the state engineer plans, drawings, and specifications; *provided*, that if the dam or reservoir is described in any application or plans and specifications on file in the state engineer's office, only the number of the application or the name of the applicant need be given.

This section shall apply to dams and reservoirs constructed prior to March 12, 1903, and those constructed thereafter for which no plans, drawings, and specifications are on file in the state engineer's office; *provided* stock-watering ponds of 10 acre-feet or less shall be exempt from the requirements of this chapter regardless of the height of the impounding dams, unless, after inspection, the state engineer shall determine that danger to life or property may be involved.

Before commencing the construction of any dam or reservoir not affected by the provisions of section 100–5–5, written notice thereof shall be given to the state engineer which shall contain the information required by the preceding paragraph.

Every owner of a dam more than 10 feet in height or which impounds more than 100 acre-feet of water shall, within six months after the effective date of this act, install a gauge of a type approved by the state engineer with reference to a permanently established bench mark located on either abutment or in the vicinity thereof where it cannot be disturbed, which will indicate the elevation of the water and the capacity of the reservoir with respect to the flow line of the outlet, the flow line of the spillway, and the top of the dam.

In case of the failure of any owner of a reservoir or dam to comply with the provisions of this section within the time specified, the state engineer may bring an action in the name of the state to enforce compliance therewith.

History.
Added by L. 39, ch. 111, eff. Mar. 20; amended by L. 41, ch. 96, eff. May 13, inserting second paragraph of text.

CHAPTER 6

WATER STORAGE COMMISSION

100–6–1 to 100–6–6. (Repealed by L. 41, ch. 75, § 23, eff. July 1. See 82C–3–23.)

Water storage commission. Although this entire chapter was repealed by L. 41, ch. 75, § 23, eff. July 1, see 82C–3–23, section 100–6–2 was purported to be amended by L. 41, ch. 96, eff. May 13, under the catchline "Water Storage Commission—Authorizations—Powers—Duties—Colorado River" to read as follows:
"The powers and duties of said commission shall be to make investigations looking to a full and proper development and utilization of the state's water supply, preliminary surveys, examinations, tests and plans, and estimates of costs; to prepare and compile all such information and data so obtained, or that may become available to it; to employ such technical assistants and other help as the funds at the disposal of the commission may permit and as may be deemed necessary or advisable; to coöperate in all such work with any county, city, state, federal or other agency interested in the development of the state's water supply;

to formulate and recommend to the governor, prior to the regular sessions of the legislature, the enactment of such legislation as may be advisable or necessary to put into effect a definite plan or program for the ultimate development and utilization of the state's water resources.

"In aid of coöperation between water users and any agency of the United States, the Utah water storage commission is authorized to make complete investigation and to prepare plans and specifications at the expense of the state for any suggested water conservation plan whenever in its opinion conditions justify such action. For the purpose of enabling the state of Utah to participate in programs of the United States or any agency or department thereof for the development and conservation of water resources and for flood control, such commission is authorized to coöperate and to assist financially in any federal project for investigation and construction of small reservoirs or other projects for the development and conservation of water resources and for flood control.

"Said commission is authorized to represent the state of Utah in all matters pertaining to the Colorado river and may designate, with the approval of the governor, a member or members to membership in any board or commission, interstate or otherwise, dealing with the Colorado river and to coöperate with the United States in the investigation of the resources of the Colorado river within the state of Utah, and particularly to make investigation of power development in the Colorado river basin in the state of Utah, and to coöperate in such investigation with any agency or agencies of the United States.

"To gather all present available data, and, based upon study thereof, make any necessary further investigations looking to the conservation and utilization of the waters of the Great Salt Lake and all other waters and streams and beds of same within the state and the mineral contents thereof; to make plans, in coöperation with other state and federal agencies, for such conservation and utilization."

CHAPTER 7

LOGAN RIVER

100-7-1. (Repealed by L. 35, ch. 105, § 4, eff. Mar. 22.)

CHAPTER 8

WITHDRAWAL OF UNAPPROPRIATED WATERS

100-8-1. Suspension of Right to Appropriate — By Proclamation of Governor.
100-8-2. Restoration by Proclamation —Priority of Applications.

100-8-1. Suspension of Right to Appropriate—By Proclamation of Governor.

For the purpose of preserving the surplus and unappropriated waters of any stream or other source of water supply for use by irrigation districts and organized agricultural water users, or for any use whatsoever, when in the judgment of the governor and the state engineer the welfare of the state demands it, the governor by proclamation may, upon the recommendation of the state engineer, suspend the right of the public to appropriate such surplus or unappropriated waters.

(C. L. 17, § 3573.)

History.
As amended by L. 37, ch. 130, eff. Mar. 19; L. 39, ch. 111, eff. Mar. 20, rewriting text of entire section.

100–8–2. Restoration by Proclamation—Priority of Applications.

Waters withdrawn from appropriation under this chapter may be restored by proclamation of the governor upon the recommendation of the state engineer. Such proclamation shall not become effective until notice thereof has been published at least once a week for three successive weeks in a newspaper of general circulation within the boundaries of the river system or water source within which the waters so to be restored are situated. Applications for appropriations shall not be filed during the time such waters are withdrawn from appropriation; *provided*, that after the first publication of notice aforesaid applications may be deposited with the state engineer and at the time such proclamation becomes effective the engineer shall hold public hearings, giving all applicants notice, to determine which applications so filed during the period of publication of such notice are most conducive to the public good, and shall file such applications in order of priority according to such determination. (L. 25, p. 205, § 3574.)

CHAPTER 9

IRRIGATION DISTRICTS

L. 1919, ch. 68; eff. Mar. 18.

100–9–1. Irrigation Districts.

100–9–2. Petition for Water Conservation District—Procedure — Expense — Duty of County Commissioners and State Engineer.

100–9–3. Land and Water Allotments — Changes — Limitations —Preparation for Election.

100–9–4. Notice of Election—Who Entitled to Vote—Directors.

100–9–5. Canvass of Returns—Organization of District.

100–9–6. Regular Election of District — Official Bond — Fiscal Agents.

100–9–7. Office Location—Pre-election Proceedings.

100–9–8. Conduct of Election.

100–9–9. Returns — Canvass — Result Declared.

100–9–10. Statement of Results—Record—Vacancies Filled.

100–9–11. Organization of Board—Powers, Duties, Proceedings—Contracts with the United States — Eminent Domain—Bonds.

100–9–12. Titles Vested—Tax Exemptions — Sales — Conveyances to United States.

100–9–13. Conveyances — Actions at Law — Judicial Notice — Presumptions as to Organization.

100–9–14. Issuance of Bonds—Contract with the United States—Special Election Payments — Additional Bonding — Validation of Previous Issues.

100–9–15. Sale of Bonds—Use of Funds.

100–9–16. Assessments Upon Real Property — Payment of Bonds.

100–9–17. Directors to Determine Amounts Required for Current Year — Certified to Commissioners.

100–9–18. Duty of County Assessors —Basis of Valuation—Uniformity — Returns — Apportionment in Case of Contracts with United States.

100–9–19. Fixing Tax Levy—Covering Delinquencies—All Taxes Special.

100–9–20. Duties of County Treasurer — Liability — Collections —Warrants and Coupons — Bond Fund — Improvement Account—Payments —Deposits.

100–9–21. General Laws Apply—Sale and Certificate—Redemption—Taxes a Lien.

100–9–22. Construction — Notice — Awarding Contracts — Contractors' Bonds.

100–9–23. Claims — Manner of Payment—Registry of Warrants—Emergency Loans.

100-9-24. Tolls, Charges, Assessments —Collection of Same.
100-9-25. Compensation of Officials—Prohibitions—Penalties.
100-9-26. Debt Limit—Interest on Warrants.
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100-9-28. Diversion of Water.
100-9-29. Inclusion and Exclusion of Lands in District.
100-9-30. Petition for Inclusion.
100-9-31. Notice of Application—Procedure—Time—Costs.
100-9-32. Hearing on Petition.
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100-9-34. Reject or Grant Petition.
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100-9-38. Exclusion of Lands—Liability Not Impaired.
100-9-39. Petition for Exclusion.
100-9-40. Notice of Application—Parties to Show Cause.
100-9-41. Hearings by Board—Assent.
100-9-42. Exclusion of Lands, When—Contracts with the United States.
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100-9-44. Division of Districts—Representation.
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100-9-47. Water District Failure to Function — Dissolution —Increase of Assessment —Lien as Tax Sale.
100-9-48. Special Proceedings for Judicial Examination.
100-9-49. Petition for Confirmation.
100-9-50. Notice — Contest — Time for Hearing.
100-9-51. Parties — Appearances — Practice and Procedure.
100-9-52. Findings and Decree—Costs.
100-9-53. Governor May Suspend Right to Appropriate Water—Limit of Time—Restoring Right — Publishing Proclamation — Applications—Hearings.
100-9-54. Transfer of Water Rights—Notice to Landowners.
100-9-55. Districts Declared Bodies Corporate—Exemptions.
100-9-56. Inclusion of State Lands—Contract with Land Board.
100-9-57. Benefit of Special Construction—Terms—Costs.
100-9-58. Local Improvement Districts.
100-9-59. Establishment—Limit as to Costs — Authorization — Construction Warrants — Orders.
100-9-60. Assessment of Damages and Benefits—Board of Equalization.
100-9-61. Costs Levied and Collected.
100-9-62. Payment of Delinquency.
100-9-63. Local Improvement Bonds.
100-9-64. Contracts with United States.
100-9-65. Validation of Act.
100-9-66. Default of District—Court Procedure.
100-9-67. Effect of Repeals Construed —Procedure Against Defaulting Members.
100-9-68. Acts Repealed — Government of Districts.
100-9-69. Effective Date.

History. The early laws relating to irrigation and irrigation companies will be found in Comp. Laws 1876, Ch. 3, p. 219 et seq.; 2 Comp. Laws 1888, Ch. 3, p. 47; R. S. 1898, Title 33, § 1287; Comp. Laws 1907, Title 40, p. 541; 1 Comp. Laws 1917, Title 65, Ch. 5.

Many of the sections of this chapter were amended by Laws 1921, Ch. 73. Argyle v. Bonneville Irr. Dist., 74 U. 480, 486, 280 P. 722.

This act came from California. State v. Green River Irr. Dist., 40 U. 83, 119 P. 1039.

Validity. This chapter was held constitutional. State v. Weber County Irr. Dist., 62 U. 200, 218 P. 732, applying Laws 1919, Ch. 68; State v. Green River Irr. Co., 40 U. 83, 119 P. 1039.

Purpose and object of act. The Irrigation Act was passed for purpose of authorizing the organization of irrigation districts with view of improving and making productive by means of irrigation large areas of arid lands which cannot be irrigated, improved, and made productive by individual effort. Stevens v. Melville, 52 U. 524, 175 P. 602.

Distinguished from Drainage Law. The law relating to irrigation districts is so unlike the law relating to drainage districts that a judicial construction of the one is of but little aid in the construction of the other. Elkins v. Millard County Drainage Dist. No. 3, 77 U. 303, 323, 294 P. 307. See Chapter 24A.

L. 1919, ch. 68; eff. Mar. 18.

AN ACT to provide for the organization and government of irrigation districts and to provide for the acquisition or construction of works for the irrigation, drainage, and local improvement of lands embraced within such districts, also to provide for the distribution of water for irrigation purposes and to repeal Chapter 5, Title 55, Compiled Laws of Utah, 1917.

Be it enacted by the Legislature of the State of Utah:

100-9-1. Irrigation Districts.

In the interest of conserving and putting to beneficial use the public waters of the state, and preventing undue waste thereof, the governor of the state of Utah, upon the recommendation of the state engineer, or fifty or a majority of owners of lands or holders of title or evidence of title to lands requiring water in any district, may propose the organization of any irrigation district under the provisions of this Act, and when so organized such district shall have the powers conferred or that may hereafter be conferred by law upon irrigation districts; provided, that where ditches, canals, or reservoirs have been constructed before the passage of this Act, such ditches, canals, reservoirs and franchises, and the lands fully watered thereby shall be exempt from the operation of this law, unless such district shall be formed to purchase, acquire, lease or rent such ditches, canals, reservoirs and their franchises, or unless such district shall be formed to make contract with the United States under any federal law; provided, further, that resident entrymen upon public lands of the United States, and purchasers of state lands, within the proposed district shall be deemed to be the owners of lands or holders of title or evidence of title to lands within the district for the purpose of becoming petitioners for the organization of such irrigation district, and shall share all the privileges and obligations of private landowners within the district, entrymen upon the public lands of the United States to be subject to the terms of the Act of Congress approved August 11, 1916, entitled, "An Act to Promote Reclamation of Arid Lands"; and provided, further, that a guardian, executor or an administrator of any estate, who is appointed as such under the laws of this state, and who as such guardian, executor or administrator, is entitled to the possession of the lands belonging to the estate which he represents may on behalf of his ward or the estate which he represents, upon being authorized by the proper court, sign and acknowledge all petitions in this Act mentioned, vote at all elections, and may show cause as in this Act mentioned, why lands should not be included in or excluded from the district. (Sec. 1.)

History.

This section is of ancient origin. Comp. Laws 1876, Ch. 3, p. 219; 2 Comp. Laws 1888, Ch. 3, p. 47.

Comparable provisions.

Cal. Gen. Laws, Act 3854, § 1, as amended by Laws of 1941 (a majority in number of holders of title or evidence of title to lands susceptible of irrigation from a common source and by the same system of works, including pumping from subsurface or other waters, such holders of title or evidence of title representing a majority in value of said lands, may propose organization of irrigation district; or organization of such an irrigation district may be proposed by

not less than 500 petitioners, said petitioners to include holders of title or evidence of title to not less than 20 per cent in value of lands included within proposed district).

Idaho Code, § 42-101 (fifty, or a majority, of holders of title or evidence of title to lands, that are susceptible of one or more modes of irrigation from the same or different sources and by the same or different systems of works, may propose organization of irrigation district).

Mont. Rev. Codes, § 7106 (sixty per centum in number of holders of title or evidence of title to lands that are sought to be included in an irrigation district and which are susceptible to irrigation, such holders of title or evidence of title also representing sixty per centum of acreage of said lands, may propose establishment and organization of irrigation district).

Cross-references.

Drainage districts, Title 24A; soil conservation and flood control districts, Title 82A; water conservancy districts, 100-11; sale or lease of water to drainage district, 100-11-18.

1. Validity.

This section is constitutional. State v. Green River Irr. Dist., 40 U. 83, 119 P. 1039.

2. Exemption of land under first proviso.

Whether land is exempt under first proviso to the section is a mixed question of law and fact. Horn v. Shaffer, 47 U. 55, 151 P. 555.

3. Limitations.

The limitation prescribed by 100-9-13 does not affect substantive rights arising under the first proviso to this section. Horn v. Shaffer, 47 U. 55, 151 P. 555.

Decisions from other jurisdictions.

— Federal.

The bill of complaint was dismissed on appeal without prejudice and with costs to defendant, inasmuch as the United States was a necessary party to suit brought to adjudicate water rights of a number of parties; and inasmuch as the United States was not made a party to the suit, the lower court was without jurisdiction to adjudicate the water rights set up in the bill of complaint, it appearing that the United States had previously entered into a contract with plaintiff, irrigation district organized under laws of Idaho, whereby the United States agreed to furnish the district the use and benefit of a proportionate part of its share of stored water available from the operation and maintenance of American Falls Reservoir, the government also agreeing to build the necessary canal, diversion works, and system to make available for use by plaintiff water from the Snake River, and plaintiff, irrigation district, agreeing to pay the government the cost of construction of the canal and distribution and drainage system, and the cost of the storage rights in the American Falls Reservoir. American Falls Reservoir Dist. No. 2 v. Crandall, 82 F.2d 973.

— California.

Irrigation districts organized pursuant to the California Irrigation District Act are political subdivisions and agencies of the state. Glenn-Colusa Irr. Dist. v. Ohrt, 31 Cal. App. 2d 619, 88 P.2d 763.

Public agencies, generally speaking, afford a proper subject for legislative classification; and this is true of irrigation districts. Powers Farms, Inc. v. Consolidated Irr. Dist., 19 Cal. 2d 123, 119 P.2d 717.

— Idaho.

An irrigation district is a public corporation having such incidental municipal powers as are necessary to its internal management and the proper conduct of its business; its primary purpose is the acquisition and operation of an irrigation system as a business enterprise for the benefit of landowners within the district, such property being held in trust for them in a proprietary capacity, while secondarily and incidentally certain municipal powers have been conferred for its government and regulation; it is not a municipal corporation within meaning of Idaho Const. Art. VII, § 4, so as to exempt its property from taxation. Lewiston Orchards Irr. Dist. v. Gilmore, 53 Idaho 377, 23 P.2d 720.

To permit a board of directors to charge tolls to each tract of land, sufficient to pay the cost of delivery of water from the source of supply to it, individually, violates the principles of coöperation on which Idaho irrigation district laws are based, and would render valueless all land intended to be benefited, except that situated near the head of the canal. Gedney v. Snake River Irr. Dist., 61 Idaho 605, 104 P.2d 909.

— Montana.

Irrigation districts are public corporations with such powers and authority as may be found in the law. State v. Stillwater County, 104 Mont. 387, 66 P.2d 788.

100-9-2. Petition for Water Conservation District—Procedure—Expense—Duty of County Commissioners and State Engineer.

For the purpose of establishing a water conservation district as provided by this Act, a petition shall be filed with the board of county commissioners of the county which embraces the largest acreage of the proposed district; said petition shall state that it is the purpose of the petitioners to organize a water conservation district under the provisions of this Act, and shall state the proposed means of water supply, the name proposed for such district and shall be accompanied by an ownership plat as shown by the county records of the lands to be included in the proposed district; the petition shall pray the board to request that a water survey and allotment of water for the lands within the proposed district be made, that the land to be included in the proposed district be determined, listed with water allotment and platted, and that the question of final organization of the same be submitted to the vote of landowners within the proposed district; the petition shall be signed by the governor, or if proposed by landowners, by fifty or a majority of such landowners or holders of title or evidence of title to land within the proposed district. If the petition is presented by landowners it must be accompanied by a good and sufficient bond to be approved by said board of county commissioners in double the amount of the probable cost of organizing such district inclusive of the cost of water survey and conditioned for the payment of all such costs incurred in said proceeding including the cost of water survey in case said organization shall not be effected; no bond need accompany the petition by the governor. The cost of the water survey, and all other costs incurred upon petition filed by the governor, shall, if organization of the district be not effected, be borne one-half by the county or counties in which the proposed district is situated, in proportion to the acreage, and one-half hy the state of Utah. In case organization of the district is effected all organizing costs and expenses, including cost of the water survey, shall be repaid by said district. Upon the filing of such petition with the board of county commissioners they shall send a certified copy of same to the state engineer of the state of Utah, with a request that the water survey and allotment be made. Thereupon it shall be the duty of the state engineer to cause to be made a water survey of all lands within the district for the purpose of determining and allotting the maximum amounts of water which could be beneficially used on such lands; each forty-acre tract or smaller tracts in separate ownership within each such legal subdivision shall be separately surveyed and the allotment made therefor. On completion of said survey and allotment, the state engineer shall file with the board of county commissioners with which the petition for the said district is filed, his return of survey and report of allotment. Upon receipt of the report and return from the state engineer, the board of county commissioners shall cause to be published, notice that petition for formation of an irrigation district has been filed, water survey and allotment made, and a date set for the hearing of applications for exclusion and inclusion of lands and revision of allotments. Such notice shall be published once a

week for three consecutive weeks, the last publication of which shall be at least one week prior to the date set for hearing, in some newspaper of general circulation published in the county, or if the district embraces lands in more than one county, then in a newspaper of general circulation published in each such county, or if there be no such paper published in any such county or counties, then in some newspaper having general circulation in such county or counties. (Sec. 2.)

History.
As amended by L. 21, ch. 73, eff. May 10, making material changes in text.

Comparable provisions.
Cal. Gen. Laws, Act 3854, § 2 (petition must be presented to board of supervisors of county in which the lands within the proposed district, or the greater portion thereof, are situated).
Idaho Code, § 42-102 (petition must be presented to board of county commissioners of county in which the greatest proportion of proposed district is situated).

1. Validity.
This section is valid. State v. Green River Irr. Dist., 40 U. 83, 119 P. 1039.

2. Compliance with section.
If the requirements of this section are not complied with, the assessment and sale for delinquent assessments is void. Bettilyon Home Builders v. Bonneville Irr. Dist., 70 U. 328, 260 P. 269.

3. The petition.
Governor's petition for organization of irrigation district stating "The proposed means of water supply is the Weber, Ogden, Bear, and Provo rivers as well as all waters that may be developed" was sufficient to confer jurisdiction on county commissioners as stating proposed means of water supply. State v. Weber County Irr. Dist., 62 U. 209, 218 P. 732.

4. Consent of landowners.
In proceeding to prohibit and restrain board of county commissioners from proceeding further in attempted organization of irrigation district, held irrigation district could not be established without initial consent of at least fifty, or a majority, of those owning land requiring water within district. Eames v. Board of Commr's of Cache County, 58 U. 495, 199 P. 970.

5. Ownership plat.
This section requires filing of a plat of lands, to be included in the proposed district, to accompany the petition, originally filed with board of county commissioners, etc. Argyle v. Bonneville Irr. Dist., 74 U. 480, 486, 280 P. 722, following Bettilyon Home Builders v. Bonneville Irr. Dist., 70 U. 328, 260 P. 269.
Where the lands to be included in the district are indicated with substantial accuracy by plat, petition, or listing in the proceedings, then jurisdiction is conferred upon the district and its officers, notwithstanding the lack of particular or metes and bounds descriptions in listings or on assessment books. After jurisdiction has been once obtained, defects in description may be aided and cured by reference to plats and other records. Argyle v. Bonneville Irr. Dist., 74 U. 480, 492, 280 P. 722.
That the plats provided for by this section were made and filed at time of formation of district must be accepted as a fact. Argyle v. Bonneville Irr. Dist., 74 U. 480, 492, 280 P. 722.

6. Notice.
The notice provided for by this section is sufficient to give board jurisdiction to allot water to land where it contains all the information required, where it informs landowner that his land below proposed canal is within proposed irrigation district, and also informs him that county commissioners will consider any proper reasons that may be urged for a revision and amendment of allotment of water, especially where no claim is made that land below canal of irrigation district is not susceptible of irrigation by system of waterworks of district, nor that land below canal is not benefited by system of waterworks of district. Furthermore, lack of familiarity with provisions of this section is no excuse. Parry v. Bonneville Irr. Dist., 71 U. 202, 207, 263 P. 751, reviewed in Argyle v. Bonneville Irr. Dist., 74 U. 480, 490, 280 P. 722.
If notice published under terms of this section gives notice, actual or constructive, that land of person to whom notice is given will be affected by formation of irrigation district, it is sufficient. Parry v. Bonneville Irr. Dist., 71 U. 202, 263 P. 751, applying section 2 of Laws 1919, Ch. 68.
Notice is sufficient if it informs person to whom given that his land is within proposed irrigation district, and will be affected by formation of district, and that county commissioners will consider any proper reasons that may be urged

for a revision and amendment of water allotment. Parry v. Bonneville Irr. Dist., 71 U. 202, 263 P. 751, applying Laws 1919, Ch. 68, § 3.

7. Location of land.

Under this section the land must be situated within the boundaries of the irrigation district; that is a prerequisite to a valid assessment. Bettilyon Home Builders v. Bonneville Irr. Dist., 70 U. 328, 260 P. 269. For other cases, see 100–9–3.

8. Water survey.

Engineer's report of survey and water allotment provided for by this section is not jurisdictional; therefore defects in survey do not affect jurisdiction of commissioners, nor invalidate organization of irrigation district. Argyle v. Bonneville Irr. Dist., 74 U. 480, 488, 280 P. 722, following State v. Weber County Irr. Dist., 62 U. 209, 218 P. 732, 734.

Imperfect and insufficient survey by state engineer did not invalidate organization of irrigation district, nor did it affect jurisdiction of county commissioners. State ex rel. Cluff v. Weber County Irr. Dist., 62 U. 209, 218 P. 732.

9. Effect of irregularities or deficiencies.

After jurisdiction is once acquired by the board of county commissioners in the formation of the district, irregularities or deficiencies thereafter may be cured by appropriate action. Argyle v. Bonneville Irr. Dist., 74 U. 480, 493, 280 P. 722.

Mere irregularities cannot affect validity of organization of irrigation district, since such districts serve useful purpose, and courts should not hold their organization invalid unless substantial provision of the statute has been omitted or disregarded. State v. Weber County Irr. Dist., 62 U. 209, 218 P. 732.

10. Presumptions.

Presumption must be indulged in favor of regularity and sufficiency of all proceedings in organization of irrigation district. Argyle v. Bonneville Irr. Dist., 74 U. 480, 486, 280 P. 722.

In absence of allegation and proof that lands are not shown on plats required by law to be made and filed, it will be presumed that they are so shown, and that listings and the plats, if read together, would indicate particular tracts with sufficient accuracy and definiteness to include such lands within district and subject them to board's jurisdiction. Argyle v. Bonneville Irr. Dist., 74 U. 480, 492, 280 P. 722.

11. Membership in district.

Where irrigation district was organized under analogous statute, parties owning land under the system of canals of such district, who had an interest in or were entitled to the water of such canals, became members of such district on organization, and tenants in common of its property, so that neither the district nor its trustees could transfer any of the interests of such landholders within or under its jurisdiction. Thompson v. McFarland, 29 U. 455, 82 P. 478, applying 2 Comp. Laws 1888, Ch. 3, p. 47.

A. L. R. notes.

Constitutionality and construction of statute which leaves to determination of private individuals boundaries of territory to be erected into water district, 70 A. L. R. 1064; "owner," scope and import of term, in statutes relating to formation of irrigation districts, 95 A. L. R. 1092.

100–9–3. Land and Water Allotments—Changes—Limitations—Preparation for Election.

When a petition has been filed, water survey and allotment made, and notice of hearing published as required by this Act, the commissioners shall upon the date set, proceed to determine and list the lands by acreage and ownership in each forty acre legal subdivision to be included in said proposed district, from the petition, and from such applications for the exclusion of lands therefrom and the inclusion of lands therein, as may be made in accordance with the intent of this Act and may revise the allotment of water made by the state engineer; provided that no increase shall be made in any such allotment without the approval of the state engineer; they may adjourn such examination from time to time not exceeding two months in all, and shall by final order duly entered determine and list the acreage and ownership in each forty acre legal subdivision together with the allotment of water made; provided,

that said board shall not so alter the included lands, shown by the plat accompanying the petition, as to change the objects of said petition, or so as to exempt from the operation of this Act any lands, requiring water, shown on the plat as included within the petition, and susceptible of irrigation by the same system of water works applicable to other lands in such proposed district; nor shall any land which will not in the judgment of the board be benefited by such proposed system be included in such district; nor shall any lands of the state of Utah not held under contract of sale and for which the state board of land commissioners has not petitioned inclusion, be included in such district; provided also that lands not included in said proposed district as shown on the ownership plat accompanying the petition, may upon application of the owner or owners be included in such district upon such hearing, and such included lands shall be listed with such allotment or water as the board, using the allotment made by the state engineer for similar lands as a basis, may make after the conclusion of such hearing; provided further that in the hearing of any such petition the board of county commissioners shall disregard any informality therein, and in case they deny the same or dismiss it for any reason on account of the provisions of this Act not having been complied with, which are the only reasons upon which they shall have a right to refuse or dismiss the same, they shall state their reasons in writing therefor in detail, which shall he entered upon their records and in case these reasons are not well founded, a writ of mandamus shall, upon proper application therefor, issue out of the district court of said county, compelling them to act in compliance with this Act, which writ shall be heard within twenty days from the date of its issuance, and which twenty days shall be excluded from the two months after return of survey by the state engineer given the commissioners herein to act upon said petition. When the lands included in the proposed district shall have been determined and listed as aforesaid, the county commissioners shall forthwith make an order determining and listing said lands as aforesaid together with the allotments of water made, and designating the name of such proposed district, and shall by further order duly entered upon the record call an election of landowners of said district to be held for the purpose of determining whether such district shall be organized under the provisions of this Act, and by such order shall submit the names of one or more persons from each of the three divisions of said district as hereinafter provided to be voted for as directors therein, and for the purpose of said election shall divide said district into three divisions as nearly equal in voting strength as may be practicable, define the boundaries thereof, designate polling places, and provided that a landowner of each of said divisions shall be elected a member of the board of directors of said district by the landowners of the whole district. Each of said divisions shall constitute an election precinct and three judges shall be appointed for each polling place therein, one of whom shall act as clerk of said election, provided, that the board of county commissioners may divide each of such divisions or election precincts into one or more voting precincts, designate polling places, and appoint judges of election therefor. (Sec. 3.)

History.

As amended by L. 21, ch. 73, eff. May 10, making many material changes and insertions in text and adding proviso.

1. Validity.

This section is valid. State v. Green River Irr. Dist., 40 U. 83, 119 P. 1030.

2. Duty of commissioners upon hearing.

Upon day set in notice, board of commissioners shall proceed to determine list, and plat the lands included within district, and by final order duly entered, determine and plat the lands included therein with the allotment of water made. Argyle v. Bonneville Irr. Dist., 74 U. 480, 487, 280 P. 722.

This section requiring board of county commissioners to determine and plat lands to be included in district means that lands to be included shall be so designated or described that they can be identified. Bettilyon Home Builders v. Bonneville Irr. Dist., 70 U. 328, 260 P. 269.

3. Designation and description of land.

This section necessarily means that the lands to be included shall be so designated or described that they may be identified. Bettilyon Home Builders v. Bonneville Irr. Dist., 70 U. 328, 260 P. 269, followed in Argyle v. Bonneville Irr. Dist., 74 U. 480, 486, 280 P. 722.

4. Allotment of water.

If amount of water allotted by board of directors of irrigation district is in excess of amount designated by state engineer, the total allotment will not be bad, but only that portion which is in excess. Argyle v. Bonneville Irr. Dist., 74 U. 480, 494, 280 P. 722.

Since this act apparently contains no provision under which directors or other officers of district have authority to correct an error in allotting water by fixing wrong acreage, court of equity has ample power to grant relief under Const. Art. I, § 11, providing for redress of injuries in courts. Madsen v. Bonneville Irr. Dist., 65 U. 571, 239 P. 781.

5. Fixing boundaries.

Fixing of boundaries of district must not be confused with allotment of water to respective tracts of land, since former is determined by board of county commissioners, while latter is later made by board of directors of district. Bettilyon Home Builders v. Bonneville Irr. Dist., 70 U. 328, 260 P. 269, followed in Argyle v. Bonneville Irr. Dist., 74 U. 480, 486, 280 P. 722.

6. Location of land.

While allotment of water to land sought to be assessed is prerequisite to valid assessment, first essential is that land be situated in district. Bettilyon Home Builders v. Bonneville Irr. Dist., 70 U. 328, 260 P. 269.

Under this section it is a prerequisite to a valid assessment that the land be situated in the irrigation district. Bettilyon Home Builders v. Bonneville Irr. Dist., 70 U. 328, 260 P. 269, followed in Argyle v. Bonneville Irr. Dist., 74 U. 480, 280 P. 722.

Section 10, Art. XIII of the Constitution is in accord with the general rule that irrigation districts cannot assess land without such district. Parry v. Bonneville Irr. Dist., 71 U. 202, 209, 263 P. 751.

Any particular tract of land shown on the plat made by board of county commissioners and referred to in the list of water allotments, where such land can be definitely identified and located by reference to either or both the plat and the list, is within the district and subject to jurisdiction of board of directors for all lawful purposes under the act. Argyle v. Bonneville Irr. Dist., 74 U. 480, 487, 280 P. 722.

The listing of the lands, even if inadequate or incorrect in description, may be aided by the plat on file. If a proper, adequate, and correct description of the tract of land can be ascertained from the plat when read in connection with the listing, then such land is within the district, and the county and district officials have jurisdiction over it for the purpose of levying and collecting taxes for water allotments actually made. This, of course, assumes that other jurisdictional requirements are met. Argyle v. Bonneville Irr. Dist., 74 U. 480, 487, 280 P. 722.

7. Effect of noncompliance with section.

In action to declare void sale of land for unpaid assessments for construction of irrigation district, where evidence failed to show that plaintiff's lands were included in plat which accompanied petition for organization of district under 100-9-2 and showed that land was so situated that only very small portion, if any, benefited by irrigation system, and description of land as contained in allotments made by state engineer, county commissioners, and directors of district was indefinite and uncertain, it was held that attempted assessment and subsequent sale were void, since it was not shown that land was in district. Bettilyon Home Builders v. Bonneville Irr. Dist., 70 U. 328, 260 P. 269.

100-9-4. Notice of Election—Who Entitled to Vote—Directors.

The board of county commissioners shall thereupon cause a notice embodying said orders in substance signed by the chairman of the board of county commissioners, and the clerk of said board, to be issued, given and published, giving public notice of said election, the time and place thereof, and the matters submitted to the vote of the landowners; said notice and substance of such order shall be so published as provided in section 2 of this Act, and if any portion of such proposed district lies within any other county, or counties, then such order and notice shall be published in a newspaper of general circulation within each of said counties. At all elections held under the provisions of this Act, all persons shall be entitled to vote who are landowners of agricultural lands, to which water has been allotted within the district as defined by this Act; provided, that corporations owning lands within the district shall be considered persons within the meaning of this section. Landowners shall be entitled to vote only in the division of such district, wherein their lands, to which water has been allotted, or a major portion thereof are located; and any individual entitled to vote as aforesaid shall also be eligible to election as a director in and for the division in such district, in which the major portion of his lands are located. The ballots to be used and cast at such election for the formation of such district, shall be substantially as follows: "Water conservation district, ... Yes, ... (Name) ..... acre-feet," or "Water conservation district, ... No. ..... (Name) ..... acre-feet," or words equivalent thereto, and shall also contain the names of the persons to be voted for as members of the board of directors of said district; each landowner may vote for three directors, one for each division, and shall indicate his vote by placing a marginal cross upon the ballot for or against any question submitted or name voted upon and opposite thereto at any election held under this Act. Provided, that at the election for the organization of the district each elector as provided herein shall be entitled to cast one vote for each acre-foot of water or fraction thereof, allotted to the land owned by such elector, as shown by the order of the board of commissioners, and shall sign the ballot and indicate along with his or her name the number of acre-feet allotted to the lands owned by the elector casting the ballot. (Sec. 4.)

History.

As amended by L. 21, ch. 73, eff. May 10, making no material change in text.

Comparable provisions.

Cal. Gen. Laws, Act 3854, § 6 (notice of election to be held in proposed district is given by board of supervisors).

Idaho Code, § 42-110 (board gives notice of election to be held in the proposed district).

1. Right to vote at election.

This section limits the right to vote on the question of the formation of a district and the issuance of bonds of the district, as well as the election of officers of the district, to the landowners of the district. Parry v. Bonneville Irr. Dist., 71 U. 202, 209, 263 P. 751.

A. L. R. notes.

"Owner," scope and import of term, in statutes relating to formation of irrigation districts, 95 A. L. R. 1092.

100–9–5. Canvass of Returns—Organization of District.

The said board of county commissioners shall meet on the first Monday next succeeding such election and proceed to canvass the returns thereof; and if, upon such canvass, it appears that a majority of the votes cast at said election are "Water conservation district .... yes," the board shall by an order entered on their minutes, declare such territory duly organized as a water conservation district, under the name and style theretofore designated, and shall declare the persons receiving respectively the highest number of votes for such several offices to be duly elected to such office. The said board shall within a reasonable time thereafter, cause a copy of such order, including a list and plat of the lands of said district, with water allotment, to be filed for record in the office of the county clerk of the county in which the petition is filed and certified copy with the county recorder of each county in which any portion of such lands are situated, and no board of county commissioners of any county including any portion of such district, shall after the date of organization of such district, allow another district to be formed including any of the land of such district, without the consent of the board of directors thereof; and from and after the date of such filing, the organization of such district shall be complete and the officers thereof shall immediately enter upon the duties of their respective offices, upon qualifying in accordance with law, and shall hold such offices, respectively, until their successors are elected and qualified. No filing or recording fees shall be charged for filing or recording any instruments required to be filed or recorded under this section. (Sec. 5.)

History.
As amended by L. 21, ch. 73, eff. May 10, making no material changes in text.

1. Filing papers in clerk's office.
Copies of plat as officially made must be filed in county clerk's office and county recorder's office. Argyle v. Bonneville Irr. Dist., 74 U. 480, 487, 280 P. 722.

100–9–6. Regular Election of District—Official Bond—Fiscal Agents.

The regular election of said district, for the purpose of electing a board of directors, shall be held on the first Tuesday after the first Monday in December of the year next succeeding the year in which the election for organization was held and annually thereafter, at which time one director shall be elected for a term of three years. Provided, that at the first election held for the organizing of district, to choose the first board of directors, three directors shall be elected and the person having the highest number of votes shall continue in office for the full term of three years from the first day of January of the year following, the next highest two years from the first day of January of the year following, and the third highest one year from the first day of January of the year following. But if two or more persons have the same number of votes then their term shall be determined by lot, under the direction of the clerk of the county wherein the organization of the district shall have been effected. The person receiving the highest number of votes for any office to be filled at such election is elected thereto. Within ten days after receiving their certificates of election, hereinafter

provided for, said officers shall take and subscribe the official oath and file the same in the office of the county clerk, of the county wherein the organization was effected, and on the 1st day of January following shall assume the duties of their respective offices. Each member of the board of directors shall execute an official bond in the sum of three thousand dollars ($3,000.00), which bond shall be approved by the clerk of the county wherein such organization was effected, and shall be recorded in the office of the said county clerk, the premium on such bonds to be paid by the district. All official bonds herein provided shall be in the form prescribed by law for official bonds for county officials, except that the obligee named in said bonds shall be the district; they shall be filed with the county clerk at the same time as the filing of the oath herein prescribed; provided, that in case any district organized under this Act is appointed fiscal agent of the United States or by the United States is authorized to make collections of money for and on behalf of the United States, in connection with any federal project, each such director shall execute a further and additional official bond in such sum as the secretary of the interior may require, conditioned for the faithful discharge of the duties of his office, and the district shall execute a further and additional bond for the faithful discharge by the district of its duties as fiscal or other agent of the United States under any such appointment or authorization. Such additional official bonds to be filed as other official bonds hereinabove provided and any such additional official bond may be sued upon by the United States or any person injured by the failure of any such director or of the district to fully, promptly and completely perform their respective duties. (Sec. 6.)

History.
As amended by L. 21, ch. 73, eff. May 10, making various material changes in text.

100-9-7. Office Location—Pre-election Proceedings.

The office of the board of directors shall be located in the county where the organization was effected. Fifteen days before any election held under this Act, subsequent to the organization of the district, the secretary, who shall be appointed by the board of directors, shall cause notice, specifying the polling places of each precinct, to be posted, in a public place in each election precinct, of the time and place of holding the election, and shall also post a general notice of the same in the office of said board, which shall be established and kept at some fixed place in said county to be determined by said board. Prior to the time for posting the notices, the board must appoint for each polling place, from each precinct, from the electors thereof, three judges, one of whom shall act as clerk, who shall constitute a board of election for each such polling place. If the board fails to appoint a board of election, or the members appointed do not attend the opening of polls on the morning of election, the electors of the precinct present at that hour may appoint the board, or supply the place of any absent member thereof. The board of directors must, in its order appointing the board of election, designate the hour and the place in the precinct where the

election must be held, provided that if there be no suitable polling places within any precinct, then said board may designate polling places outside of such precinct. Candidates for the office of director shall each within 20 days prior to the time set for the election of directors, file with the secretary of the district, a certificate of nomination containing his name and address together with the endorsement of 10 landowners qualified to vote within the precinct. It shall be the duty of the secretary to include on the official ballot, and in all notices of election, the names of all candidates whose certificate of nomination has been executed and filed in accordance with the provisions hereof. (Sec. 7.)

History.
As amended by L. 21, ch. 73, eff. May 10, making various changes in text and adding last two sentences.

100-9-8. Conduct of Election.

One of the judges shall be chairman of the election board and may: First, administer all oaths required in the progress of an election. Second, appoint judges and clerks, if during the progress of the election any judge or clerk ceases to act. Any member of the board of election, or any clerk thereof, may administer and certify oaths required to be administered during the progress of an election. Before opening the polls, each member of the board must take and subscribe an oath to faithfully perform the duties imposed upon them by law. Any elector of the precinct may administer and certify such oath. The polls must be opened at 7 o'clock in the morning of election and be kept open until 7 o'clock p. m. of the same day. It shall be the duty of the clerk of the board of election to forthwith deliver the returns duly certified to the board of directors of the district. (Sec. 8.)

History.
As amended by L. 21, ch. 73, eff. May 10, changing time that polls must be kept open.

100-9-9. Returns—Canvass—Result Declared.

No list, tally paper, or certificate returned from any election shall be set aside or rejected for want of form if it can be satisfactorily understood. The board of directors must meet at its usual place of meeting on the first Monday after election and canvass the returns. If at the time of meeting the returns from each precinct in the district in which the polls were opened have been received, the board of directors must then and there proceed to canvass the returns; but if all the returns have not been received, the canvass must be postponed from day to day until the returns have been received, or until six postponements have been had. The canvass must be made in public by canvassing the returns and declaring the results thereof. The board shall declare elected the person receiving the highest number of votes so returned for each office, and also declare the result of any question submitted. (Sec. 9.)

100-9-10. Statement of Results—Record—Vacancies Filled.

The secretary of the board of directors must, as soon as the result of any election held under the provisions of this Act is declared, enter in the records of such board and file with the county clerk of the county in which the office of said district is located, a statement of such results, which statement must show: First, a copy of the notice of said election, showing when and where posted. Second, the names of the judges of said election. Third, the whole number of votes cast in the district and in each precinct of the district. Fourth, the names of the persons voted for. Fifth, the office to fill which each person was voted for. Sixth, the number of votes given in the district for each of such persons. Seventh, the number of votes given in the district for each such persons. Eighth, the names of the persons declared elected. Ninth, the results declared on any question submitted in accordance with the majority of the votes cast for or against such question. The board of directors must declare elected the person having the highest number of votes given for each office, and also the result of any question submitted. The secretary must immediately make out and deliver to such person a certificate of election, signed by him and authenticated with the seal of the district. In case of a vacancy in the board of directors, by death, removal, resignation, or inability from any cause, to properly discharge the duties as such director, the vacancy shall be filled by appointment by the remaining members of the board. In the event that all of said directors shall resign or be removed, or from any cause be unable to discharge their duties as directors, then there may be called a special election to fill such vacancies. The secretary may call such election upon giving thirty days' notice thereof by publication in a paper having general circulation in the irrigation district. The election shall be held and returns thereof made in a manner providing for general elections in the district. Any director appointed as above provided, shall hold his office until the next general election of said district, and until his successor is elected and qualified. (Sec. 10.)

History.
As amended by L. 29, ch. 68, eff. May 14, making minor changes and inserting two sentences at end of text.

100-9-11. Organization of Board — Powers, Duties, Proceedings — Contracts with the United States—Eminent Domain —Bonds.

The directors having duly qualified, shall organize as a board, elect a president from their number and appoint a secretary. The secretary shall execute a bond, in favor of the district, in form and amount prescribed by said board. The Board shall have power, and it shall be its duty, to adopt a seal, manage and conduct the affairs and business of the district, make and execute all necessary contracts, employ such agents, attorneys, officers and employees as may be required, and prescribe their duties. The board shall establish boundaries of election precincts and may change the same, but no such change shall

be made less than thirty days prior to an election. Upon the completion of the organization of the district and before any bond issue or contract is voted on, any assessment levied, or toll or charge imposed, the board of directors having first determined the amount of water available for the use of the district, shall on such notice and hearing and under such rules and regulations as the board may determine make a final revision and allotment of the available water to each forty acre tract or smaller tract in separate ownership within each such legal subdivision; provided that no allotment shall be increased above the amount originally allotted by the state engineer without the consent of the state engineer; provided further that such final allotment may not thereafter be decreased as long as there may be any outstanding indebtedness in excess of 2 per cent of the assessed valuation of the lands within said district; such allotment may, however, be increased to an amount not exceeding the amount allotted by the state engineer should the additional amount of water become available for the use of the district. Such final allotment shall be the basis for all assessments, tolls and charges levied against the land and shall also thereafter be the basis of the vote at all elections. A copy of the order making such allotment or any increase thereof as herein provided, certified to by secretary of the district shall be immediately filed for record in the office of the county clerk of the county in which the office of the district is located and a certified copy filed with the county recorder of each county in which any lands of the district are situated. Nothing in this Act, however, shall prohibit the state engineer, upon petition by the board of directors after the organization of the district has been perfected, from increasing the maximum allotment of water for any tract or tracts of land embraced within the district when in the opinion of the state engineer said tract or tracts of land cannot be beneficially irrigated with the amount of water allotted. The board of directors shall have the power to construct or may acquire by contract, purchase, condemnation, or otherwise, canals, ditches, reservoirs, reservoir sites, irrigation systems or works and lands necessary or incidental to the use and operation of irrigation works and reservoir sites, which lands may be leased when the leasing thereof will not interfere with their use for irrigation purposes, and also water filings, water rights, rights of way, or other property or any interest therein, including power plants when acquired or developed in connection with an irrigation system with the right to sell or dispose of the surplus power therefrom. The board shall also have the right to purchase stock of irrigation, canal and reservoir companies. The board may exchange bonds of the district for any such property upon such terms and conditions as the board may deem best, subject, however, to the approval of the state board of certification. The board, its agents, and employees, shall have the right to enter upon any land in the district, to make surveys and to locate and construct any canal or canals, and the necessary laterals. Said board shall have the right by condemnation to acquire rights of way for the enlargement of any ditches, canals, or reservoirs, provided that said board shall not have the right to occupy the premises proposed to be condemned pending the determination of suit, except upon filing such

bond as is required by law in the case of suits by other corporations and individuals. The right of way is hereby given, dedicated, and set apart, to locate, construct and maintain said works, or reservoirs, over, through or upon any of the lands which are now, or may be the property of the state. The board may make such investigations and, based thereon, such representations and assurances to the secretary of the interior, as may be requisite under the act of congress, approved August 11, 1916, and may enter into any obligation or contract with the United States for the construction or operation and maintenance of the necessary works for the delivery and distribution of water therefrom or for the assumption, as principal or guarantor of indebtedness to the United States on account of district lands, or for the temporary rental of water under the provisions of the federal reclamation act, and all acts amendatory thereof, or supplementary thereto, or any other acts of congress now enacted or which may hereafter be enacted, and the rules and regulations established thereunder; or the board may contract with the United States for a water supply under any act of congress providing for or permitting such contract, and may convey to the United States as partial or full consideration therefor water rights or other property of the district, and in case contract has been or may hereafter be made with the United States as herein provided, bonds of the district may be deposited with the United States at 95 per cent of their par value to the amount to be paid by the district to United States under any such contract, the interest on said bonds to be provided for by assessment and levy as in the case of other bonds of the district, and regularly paid to the United States to be applied as provided in such contract, and if bonds of the district are not so deposited, it shall be the duty of the board of directors to include as part of any levy or assessment now provided for by law, an amount sufficient to meet each year all payments accruing under the terms of any such contract and the board may accept on behalf of the district, appointment of the district as fiscal agent of the United States, or authorization of the district by the United States to make collections of moneys for or on behalf of the United States in connection with any federal reclamation project, whereupon the district shall be authorized so as to act and to assume the duties and liabilities incident to such action, and the said board shall have full power to do any and all things required by the federal statutes now or hereafter enacted in connection therewith, and all things required by the rules and regulations now or that may hereafter be established by any department of the federal government in regard thereto. Districts cooperating with the United States may rent or lease water, to private lands, entrymen, or municipalities, in the neighborhood of the district, in pursuance of contract with the United States. If contract is proposed to be made with the United States and bonds are not to be deposited with the United States in connection therewith, the question to be submitted to the voters at a special election is whether or not contract shall be entered into with the United States. The notice of election shall state under the terms of what act or acts of congress contract is proposed to be made, and the maximum amount of money payable to the United States for construction purposes exclusive of

penalties and interest, and the water rights and other property, if any, to be conveyed to the United States as in this section provided. The ballots for such election shall contain the words "Contract with the United States—Yes" and "Contract with the United States—No," or words equivalent thereto. If a majority of the votes cast at such election are "Contract with the United States—Yes," the board of directors shall immediately enter into such contract with the United States. The board shall establish equitable rules and regulations for the distribution and use of water among the owners of lands included in this district, and may provide therein that no water shall be delivered to lands which are delinquent or in default in the payment of any toll, charge, tax or assessment. The said rules and regulations shall, as soon as adopted, be printed in convenient form for distribution in the district; provided, however, that water, the right to the use of which is acquired by the district under any contract with the United States, shall be distributed and apportioned by the district in accordance with the acts of congress and rules and regulations and the provisions of said contract in relation thereto.

The board of directors shall have power to lease or rent the use of water not needed by the landowners of said district, or contract for the delivery thereof to occupants of other lands within or without said district, at such prices and on such terms as they may deem best; provided, that no lease or rental agreement running for a period of more than five years shall be made, and no vested or prescriptive right to the use of such water shall attach to said land by virtue of such lease or such rental; and, provided, also that any landowner in said district may, where practicable, with the consent of the board of directors assign the right to the whole or any portion of the water so apportioned to his land for any one year to any other bona fide landowner, for use in the district for said year, provided such landowners shall have paid all amounts due on assessments, upon such lands. The board shall generally perform all such acts and have all such powers as shall be necessary fully to carry out the purposes of this act. The board of directors shall by resolution prescribe the dates for holding regular meetings and shall also hold such special meetings as may be required for the proper transaction of business. A special meeting may be called by a written request of ten or more of the electors of said district, addressed to the president of the board of directors, or by the president of the board, or by any two directors. All meetings of the board must be public; and two members shall constitute a quorum for the transaction of business; and on all questions requiring a vote, there shall be a concurrence of at least two members of said board. All records of the board shall be open to the inspection of any landowner during business hours. The board shall at the end of each fiscal year prepare and submit to a public meeting, of the landowners within the district, called for that purpose, a report covering all transactions and operations of the district during the year. (Sec. 11.)

History.

As amended by L. 21, ch. 73, eff. May 10, making material changes in first few sentences of text.

Comparable provisions.

Cal. Gen. Laws, Act 3854, § 13 (pertains to directors of irrigation district, and their organization as a board); § 15,

as amended by Laws of 1939 (enumerates powers and duties of the board); § 15.1 added by Laws of 1941 (conferring power upon board of directors to acquire land, or use land already acquired, for airport or aviation school or both).

Mont. Rev. Codes, § 7174 (board of commissioners of irrigation district constitutes its corporate authority; duties and powers thereof are herein enumerated).

1. Powers of board.

Irrigation Act confers power on board to determine and assess the benefits to lands of landowners within irrigation district. Stevens v. Melville, 52 U. 524, 175 P. 602.

The board of directors of an irrigation district is given power to alienate any property in the district not necessary for carrying into effect the purposes of the district. News Advocate Pub. Co. v. Carbon County, 72 U. 88, 95, 269 P. 129.

Under this section county has no authority to sell property, which has been acquired by the district, for delinquent taxes, but such authority is vested in the board of directors of such district, if such property is not needed for the uses of the district. News Advocate Pub. Co. v. Carbon County, 72 U. 88, 95, 269 P. 129.

2. Allotment and fixing boundaries.

While allotment of water to land sought to be assessed is prerequisite to valid assessment, first essential is that land be situated in district. Bettilyon Home Builders v. Bonneville Irr. Dist., 70 U. 328, 260 P. 269, followed in Argyle v. Bonneville Irr. Dist., 74 U. 480, 280 P. 722.

Fixing of boundaries of district must not be confused with allotment of water to respective tracts of land, since former is determined by board of county commissioners, while latter is later made by board of directors of district. Bettilyon Home Builders v. Bonneville Irr. Dist., 70 U. 328, 260 P. 269.

3. Final allotment as basis for assessment.

In action to declare void sale of land for unpaid assessments for construction of irrigation district where evidence failed to show that plaintiff's lands were included in plat which accompanied petition for organization of district under 100-9-2 and showed that land was so situated that only very small portion, if any, benefited by irrigation system, and description of land as contained in allotments made by state engineer, county commissioners, and directors of district was indefinite and uncertain, it was held that attempted assessment and subsequent sale were void, since it was not shown that land was in district. Bettilyon Home Builders v. Bonneville Irr. Dist., 70 U. 328, 260 P. 269.

100-9-12. Titles Vested—Tax Exemptions—Sales—Conveyances to United States.

The title to all property acquired under the provisions of this Act shall immediately and by operation of law, vest in such irrigation district, in its corporate name, and is hereby dedicated and set apart for the uses and purposes set forth in this Act, and shall be exempt from all taxation; and said board is hereby authorized and empowered to hold, use and acquire, manage, occupy and possess said property as herein provided, and may sell property no longer necessary for the use of the district; provided, that when any district contemplated in this Act shall find it necessary to procure and acquire a supply of water from outside the boundaries of this State, then in such event it shall be lawful for said district to contract and pay for the same in the same manner as other property acquired by the district is purchased and paid for; provided, further, that any property acquired by the district may be conveyed to the United States in so far as the same may be needed for the construction, operation and maintenance of works by the United States for the benefit of the district under any contract that may be entered into with the United States pursuant to this chapter. The provisions of this section as to taxation shall not apply to that portion of any property of the district not used solely for irrigation purposes.

(Sec. 12.)

Comparable provisions.

Cal. Gen. Laws, Act 3854, § 29, Idaho Code, § 42-311 (legal title to property, acquired under provisions of statute, immediately and by operation of law vests in the irrigation district).

1. Sale of district's property.

Under this and the preceding section, not only is the county not granted authority to sell property which has been acquired by an irrigation district for delinquent taxes, but such authority is vested in the board of directors of such district if such property is not needed for the uses of the district. News Advocate Pub. Co. v. Carbon County, 72 U. 88, 95, 269 P. 129, applying Laws 1919, Ch. 68, §§ 11, 12, 21, as amended by Laws 1923, Ch. 9.

2. Execution or attachment of property.

Property of irrigation district, including bank deposits, is not subject to levy of execution by judgment creditors. Upper Blue Bench Irr. Dist. v. Continental Nat. Bank & Trust Co., 93 U. 325, 72 P.2d 1048.

100-9-13. Conveyances—Actions at Law—Judicial Notice—Presumptions as to Organization.

The said board is hereby authorized and empowered to take conveyances or assurances for all property acquired by it under the provisions of this Act in the name of such irrigation district, and to institute and maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of this Act or to enforce, maintain, protect, or preserve any or all rights, privileges and immunities created by this Act or acquired in pursuance thereof. And in all courts, actions, suits, or proceedings the said board may sue, appear and defend in person or by attorneys and in the name of such irrigation district. Judicial notice shall be taken in all actions, suits and judicial proceedings in any court of this state of the organization and existence of any irrigation district of this state, now or hereafter organized, from and after the filing in the office of the county clerk of the order of the board of county commissioners mentioned in section 5 of this Act and a certified copy of said order shall be prima facie evidence in all actions, suits and proceedings in any court of this state of the regularity and legal sufficiency of all Acts, matters and proceedings therein recited and set forth; and any such irrigation district, in regard to which any such order has been heretofore or may hereafter be entered, and which has exercised or shall exercise the rights and powers of such a district, and shall have had or shall have in office a board of directors exercising the duties of their office, the legality or regularity of the formation or organization whereof shall not have been questioned by proceedings in quo warranto instituted in the district court of the county in which such district or the greater portion thereof is situated within one year from the date of such filing, shall be conclusively deemed to be a legally and regularly organized, established and existing irrigation district within the meaning of this Act, and its due and lawful formation and organization shall not thereafter be questioned in any action, suit or proceeding whether brought under the provisions of this Act or otherwise. (Sec. 13.)

1. Quo warranto.

The limitation prescribed by this section, in which the regularity of the formation or organization of an irrigation district may be assailed, is not unconstitutional as depriving a person whose rights are affected from seeking redress in the courts, a reasonable time being provided for that purpose. Horn v. Shaffer, 47 U. 55, 60, 151 P. 555.

What was intended to be set at rest by requirements of this section that quo warranto be brought within the year, were matters pertaining to the forma-

tion or organization of the district, and not substantive rights which may arise under first proviso to 100-9-1. Horn v. Shaffer, 47 U. 65, 59, 151 P. 566.

2. Judicial notice.

Under this section, judicial notice will be taken of fact that words "irrigation district" indicate a public body. Upper Blue Bench Irr. Dist. v. Continental Nat. Bank & Trust Co., 93 U. 325, 339, 72 P.2d 1048.

It is a matter of common knowledge that corporate management of irrigation systems has greatly increased in the Western states recently, but courts will not undertake to settle for the parties the better method of handling water rights. Tanner v. Provo Reservoir Co., 76 U. 336, 349, 289 P. 151.

It is matter of common knowledge that on various streams of Utah there are hundreds of farmers and others using water therefrom, many of them with rights recognized without question for more than half a century. Brady v. McGonagle, 57 U. 424, 195 P. 188.

A. L. R. notes.

Liability of irrigation district for damages, 74 A. L. R. 898.

100-9-11. Issuance of Bonds—Contract with the United States—Special Election Payments—Additional Bonding—Validation of Previous Issues.

For the purpose of constructing or purchasing or acquiring necessary reservoir sites, reservoirs, water, water filings, water rights, canals, ditches and works, stock of irrigation, canal, or reservoir companies, and other necessary property and rights, for the assumption of any indebtedness to the United States, for the purpose of paying interest upon the bonds herein authorized during the period of construction and for not more than four years thereafter, and otherwise carrying out the provisions of this Act, the board of directors of any such district shall as soon after such district has been organized as may be practicable, estimate and determine the amount of money necessary to be raised for such purposes, and shall forthwith call a special election, at which election shall be submitted to the landowners of such district, possessing the qualifications prescribed by this Act, the question of whether or not the bonds of said district shall be issued in the amount so determined. Notice of such election shall be given by posting notice in one public place in each election precinct in said district for at least twenty days, and also by publication in the manner prescribed in section 2 of this Act. Such notice shall specify the time of holding the election, the amount and purpose of bonds proposed to be issued, and said election must be held and the result thereof determined and declared in all respects as nearly as possible in conformity with the provisions of this Act governing the election of officers; provided, that no informalities in conducting such election shall invalidate the same, if the elections shall have been otherwise fairly conducted. At such election, the ballots shall contain the words "Bonds—Yes," or "Bonds—No," or words equivalent thereto. If a two-thirds majority of the votes cast at such election are "Bonds—Yes," the board of directors shall cause the bonds to be executed and payable in series as follows, to-wit:

Not later than at the expiration of eleven years, and annually, after the date of first payment of principal amount, a certain percentage, not less than 3 per cent, of the whole amount and number of said bonds; at the expiration of the final period for which the bonds have been issued, which period shall in no event exceed forty years, a percentage sufficient to pay off the remainder of said bonds; that the several enumerated

percentages be of the entire amount of the bond issue; that each bond must be payable at the given time for its entire amount, and not for a percentage. That said bonds shall bear interest at the rate of not to exceed 6 per cent per annum, payable semiannually on the 1st day of June and December of each year.

The principal and interest shall be payable at the office of the county treasurer of the county in which the organization of the district was effected as aforesaid, and at such other places as the board of directors may designate in such bonds. Said bonds shall be each of the denomination of not less than $100.00, nor more than $1,000.00, shall be negotiable in form, executed in the name of the district and signed by the president and secretary and the seal of the district shall be affixed thereto. Bonds deposited with the United States may call for the payment of such interest not exceeding 6 per cent per annum, may be of such denomination, and may call for the repayment of the principal at such times as may be agreed upon between the board and the United States, and where contract is made and bonds are not deposited with the United States, the contract may likewise call for the repayment of the principal at such time as may be agreed upon. Said bonds shall be numbered consecutively as executed and bear the date of authorization. Coupons for the interest shall be attached to each bond bearing the printed or lithographed facsimile of the signature of the president and the secretary. Said bonds shall express on their face that they are issued by the authority of this Act, stating its title and date of approval. The secretary shall keep a record of the bonds sold, their number, date of sale, the price received, the name of the purchaser and may keep a transfer register; provided, any such district may provide for the issuance of bonds that will mature in any number of years less than forty, and arrange for the payment thereof, in series as above provided; provided, further, that when the money obtained from any previous issue of bonds has become exhausted by expenditures, herein authorized therefor, and it becomes necessary to raise additional money for such purposes, additional bonds may be issued after submitting the question at a special election to the qualified voters of said district, and otherwise complying with the provisions of this section in respect to an original issue of such bonds; provided, also that the lien for taxes, for the payment of interest and principal for any bond issue, or for any indebtedness under any contract with the United States for or with which bonds have not been deposited, shall be a prior lien to that of any subsequent bond issue.

All bonds heretofore executed by any irrigation district wherein the proceedings for the organization of such district and authorizing the issuance of such bonds have been approved and confirmed by the district court of the judicial district within which such irrigation district is located, are hereby confirmed and validated. (Sec. 14.)

1. **Act as part of bond contract.** This section entered into and became constituent part of contract for payment of bonds of irrigation districts. Salter v. Nelson, 86 U. 460, 39 P.2d 1061.

100-9-15. Sale of Bonds—Use of Funds.

The board may sell bonds from time to time in such quantities as may be necessary and most advantageous to raise the money for the con-

struction or purchase of canals, reservoir sites, reservoirs, water rights and works, stock and irrigation, canal or reservoir companies, and otherwise fully to carry out the objects and purposes of this Act. Before making any sale the board shall, at a meeting, by resolution declare its intention to sell a specified amount of the bonds and the day and hour and place of such sale, and shall cause such resolution to be entered in the minutes, and notice of the sale to be given by publication thereof at least twenty days in any daily newspaper published in the city of Salt Lake, and in any other newspaper at their discretion. The notice shall state that sealed proposals will be received by the board at its office, for the purchase of the bonds, till the day and hour named in the resolution. At the time appointed the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder, or may reject all bids provided that no proposal shall be accepted which is not accompanied by a certified check for at least ten per cent (10%) of the amount of the bid to apply on the purchase price of the bonds, the amount of which check shall be forfeited if after the acceptance of the proposal the bidder shall refuse to accept said bonds and complete his purchase of the bonds on the conditions stated in his proposal. In case no bid is made and accepted as above provided the board of directors, subject to the approval of the state board of certification is hereby authorized to use said bonds for the purchase of canals, reservoir sites, reservoirs, water rights and works, stock of irrigation, canal, or reservoir companies; or for the construction of any canal, reservoir and works or otherwise fully to carry out the purposes of this Act; provided that bids for all such construction work are first called for in accordance with Section 22 hereof. The board shall make no sale of bonds either at public or private sale, or use said bonds for payment of construction work for less than the amount authorized by the state board of certification. (Sec. 15.)

History.
As amended by L. 21, ch. 73, eff. May 10, making material changes in latter part of text and adding last sentence.

100-9-16. Assessments Upon Real Property—Payment of Bonds.

Said bonds and the interest thereon, and all payments due or to become due to the United States under any contract between the district and the United States accompanying which bonds of the district have not been deposited with the United States, shall be paid by revenue derived from an annual assessment upon the real property of the district, and the real property of the district shall be and remain liable to be assessed for such payments as herein provided, except that in the case of contract obligations due by the district to the United States the same may be general obligations of the district and the lands of the district in their entirety if so provided by contract shall become and remain liable to assessment and levy annually until payment thereof is fully made. Public lands of the United States within any district shall be subject to taxation for all purposes of this Act to the extent provided by the Act of congress approved August 11, 1916, and upon full compliance therewith by the district. (Sec. 16.)

History.
As amended by L. 29, ch. 80, eff. May 14, inserting clause after "provided" in seventh line of text.

1. Extraterritorial powers.
An irrigation district has no power to assess property without the district. Parry v. Bonneville Irr. Dist., 71 U. 202, 209, 263 P. 751, applying Laws 1919, Ch. 68.

2. Section as part of bond contract.
This section enters into and becomes constituent part of contract for payment of bonds of irrigation district. Salter v. Nelson, 85 U. 460, 39 P.2d 1061.

100-9-17. Directors to Determine Amounts Required for Current Year—Certified to Commissioners.

It shall be the duty of the board of directors on or before March 1st of each year, to determine the amount of money required for the current year, to pay interest on and all maturing installments of principal of any bonds, and warrants, and all payments due or to become due to the United States under any contract between the district and the United States accompanying which bonds of the district have not been deposited with the United States as in section 11 provided and all operation and maintenance or rental payments to be made by the district to the United States under the provisions of any such contract between the United States and the district, and to meet the cost of any construction or reconstruction proposed to be covered by annual assessments, and all maintenance, operating and current expenses, including the payment of assessments upon stock of irrigation, canal, or reservoir companies owned by the district, and the amount necessary to meet the obligations of local improvement districts, and to certify to the county commissioners of the county in which the office of said district is located, said amounts together with such additional amount as may be necessary to meet any deficiencies theretofore incurred, and if so provided in case of contract with the United States a further amount to cover any deficit in payments due the United States thereunder which may have resulted from delinquent assessments for any preceding year. (Sec. 17.)

History.
As amended by L. 29, ch. 80, eff. May 14, adding last four lines of text.

1. Condition precedent to assessment.
It is a condition precedent to a valid assessment, that land to be assessed be situated within the irrigation district. Bettilyon Home Builders v. Bonneville Irr. Dist., 70 U. 328, 260 P. 269, followed in Argyle v. Bonneville Irr. Dist., 74 U. 480, 486, 280 P. 722.

100-9-18. Duty of County Assessors—Basis of Valuation—Uniformity—Returns—Apportionment in Case of Contracts with United States.

It shall be the duty of the county assessor of any county embracing the whole or a part of any irrigation district to assess and enter upon his record as assessor in its appropriate column the assessment of all real estate, to which water has been allotted, exclusive of improvements, situate, lying and being within any irrigation district in whole or in part in such county. The assessor shall assess the lands on the basis of the value per acre-foot of water allotted to the lands within the district; provided, that the board of directors of any such irrigation district may divide the district into units and fix a different value per acre-foot of water in the respective units, and in such case, the assessor

shall assess the lands within each such unit upon the same basis of value per acre-foot of water allotted to lands within such unit; and the assessor shall enter on his assessment roll the amount of special benefits assessed against each tract of land within any local improvement district situate in the irrigation district as the same is shown on the equalized benefit assessment roll of said improvement district. Immediately after said assessment shall have been extended as provided by law, the assessor shall make returns of the total amount of such assessment to the county commissioners of the county in which the office of said district is located.

In case of contract with the United States, however, under the federal laws, the assessment of real estate within the district may be otherwise apportioned in the following manner:

(1) It may be provided by contract with the United States that assessments shall conform to the requirements of the federal reclamation laws now enacted or which may hereafter be enacted;

(2) It may be provided by contract with the United States that water shall be furnished to the district, or to part of the irrigable lands thereof, upon a temporary rental basis, whereupon lands of the district for which rental charges for any given year are not required to be paid to the United States by the district shall not be taxed for such purposes;

(3) District lands shall not be taxed for purposes of payment to the United States in any year when, and to the extent, on account of exceptional difficulties of reclamation, the district shall be exempted by contract with the United States from said payment to the United States for such lands;

(4) The lands of any irrigation district may be by contract with the United States, divided into units and placed upon a basis of repayment to the United States in successive units, which shall not necessarily be composed of contiguous lands, and in such event the lands of units not yet, in any year, placed upon the repayment basis shall not during such year be subject to taxation for payment of building costs;

(5) In case lands, which shall have been irrigated by means of ditches, canals and reservoirs constructed prior to the organization of any district shall be included within such district under the terms of Section 1 of this Act, equitable credit shall be given in the making of assessments for any water and ditch rights appurtenant to such lands, such adjustment shall be made by the board of directors of such irrigation district, which adjustment shall be equitably made so that the cost of the additional rights, property, or benefits acquired by the district under contract from the United States will be fairly and equitably apportioned between the lands having rights in such old ditches, reservoirs or other works, and the lands of the district having no such rights, and due and equitable allowance made to the lands to which any such rights may be appurtenant; provided, that before making any such adjustment or allowance, the board of directors shall publish notice for a period of at least three weeks in a newspaper published in the county in which the greater portion of the irrigable lands of the district are located or if there be no such newspaper published in such county, then in some newspaper of general circulation in that county, which notice

shall state that a meeting of the board will be held for the purpose of making such adjustment and allowance, and that all parties interested therein who desire to be heard on the matter will be given an opportunity to appear and present evidence, and such notice shall state the date, the day and hour that such meeting will be held and the place of meeting, and at the date and place provided in the notice the board shall proceed to hear such evidence, if any be presented, and to make such adjustment or allowance in the manner herein prescribed. After such adjustment and allowance by the board of directors, the board shall proceed in the manner prescribed in sections 47, 48, 49, 50 and 51 of this Act to have such adjustment and allowance duly confirmed by decree of court in similar manner to that provided in said sections with reference to confirmation of the bond issue, and the court shall proceed in like manner as provided in said sections 47, 48, 49, 50 and 51 to examine into the regularity of said proceedings of the board and the equity of the adjustment or allowance made by the board, and should the court find said proceedings regular and said allowance or adjustment equitable, then the court shall file its findings and decree confirming the said allowance and adjustment, but if the court shall find that such allowance and adjustment is not equitable, then the court shall itself make an allowance and adjustment which shall be just and equitable as between the various classes of lands in the district, and shall file a decree, confirming such apportionment in like manner and with like effect as the findings and decree provided for in said section 52, provided, that in no case shall any land be taxed for irrigation purposes under this Act, which from any natural cause cannot be irrigated, or is incapable of cultivation. (Sec. 18.)

History.

As amended by L. 29, ch. 80, eff. May 14, rewriting subd. (1).

Comparable provisions.

Idaho Code, § 42-701 (secretary of board of directors acts as assessor of district; must prepare assessment book; assessment is spread upon all lands of the district, proportionate to benefits received by such lands growing out of maintenance and operation of the works of the district).

1. Applicability of section.

This section has reference to the assessments for local improvement districts within an irrigation district, authorized by 109-9-57 to 109-9-64, and has no application to assessments which do not involve special benefits to particular lands in the district. Hatch v. Edwards, 72 U. 113, 118, 269 P. 138, applying Laws 1919, Ch. 68, § 18.

2. Basis of valuation.

Assessments are to be made on the basis of value per acre foot of water allotted to the lands within the district, as required by statute; there is no propriety or necessity for any other determination of benefits to the land as the basis for assessment. Hatch v. Edwards, 72 U. 113, 118, 269 P. 138.

Where it appears that landowner is taxed for a greater acreage than he actually owns, of necessity tax for excess acreage must be held to be void, because it is not based upon any benefits received by landowner, but landowner is liable for his proportional part of cost based upon allotment of water made upon acreage actually owned by him. Madsen v. Bonneville Irr. Dist., 65 U. 571, 239 P. 781.

While it is true that land not benefited by irrigation cannot be subjected to assessments for the purpose of the district, and that assessments for improvements of this kind must correspond to the benefits resulting to the land assessed, and that an assessment of property which is not benefited is void, it is equally true that it is unnecessary that every part of the property subjected to the assessment shall be directly benefited by the improvement; accordingly, classification of the property into units for purpose of estimating benefits is proper unless classification is arbitrary or unreasonable. Hence assessment cannot be defeated by showing that some

particular part of unit is not directly benefited. Hatch v. Edwards, 72 U. 113, 126, 269 P. 138, applying Laws 1921, Ch. 73, §§ 2, 11.

An averment of an assessment on the basis of the value per acre foot of water allotted to the land assessed is sufficient, where the allegation is "that the county assessor assessed all the lands in said district and made return of the total amount of such assessment to the county commissioners of said county, all duly in the manner prescribed by § 18, c. 68, of Laws Utah 1919," where followed by an allegation that the county commissioners fixed the rate of levy necessary to provide the amount of money required by the district, and in accordance therewith levied upon the particular land described a specified sum of money as a tax thereon. Hatch v. Edwards, 72 U. 113, 119, 269 P. 138.

3. Limitations on power to assess.

Under this section it is a condition precedent to a valid assessment that the land assessed is situated within the irrigation district. Bettilyon Home Builders v. Bonneville Irr. Dist., 70 U. 328, 260 P. 269, followed in Argyle v. Bonneville Irr. Dist., 74 U. 480, 486, 280 P. 722. There can be no assessment of land which is not situated within the irrigation district (Bettilyon Home Builders v. Bonneville Irr. Dist., 70 U. 328, 260 P. 269, followed in Argyle v. Bonneville Irr. Dist., 74 U. 480, 486, 280 P. 722), so as to constitute a valid lien thereon, but it is otherwise as to land within district though notice published prior to assessment erroneously stated that no water had been allotted to such part. Parry v. Bonneville Irr. Dist., 71 U. 202, 263 P. 751, applying Laws 1919, Ch. 68, §§ 2, 3.

4. Sale under invalid assessment.

In action to declare void sale of land for unpaid assessments for construction of irrigation district, where evidence failed to show that plaintiff's lands were included in plat which accompanied petition for organization of district under 100-9-2, and showed that land was so situated that only very small portion, if any, benefited by irrigation system, and description of land as contained in allotments made by state engineer, county commissioners, and directors of district was indefinite and uncertain, it was held that attempted assessment and subsequent sale were void, since it was not shown that land was situated in district. Bettilyon Home Builders v. Bonneville Irr. Dist., 70 U. 328, 260 P. 269.

5. Presumptions.

It will be presumed that an officer, acting under this section, acted in a lawful manner, in the absence of anything to the contrary. Hatch v. Edwards, 72 U. 113, 119, 269 P. 138.

100-9-19. Fixing Tax Levy—Covering Delinquencies—All Taxes Special.

It shall be the duty of the county commissioners of the county in which is located the office of any irrigation district, immediately upon receipt of the returns of the total assessment of said district, and upon the receipt of the certificate of the board of directors certifying the total amount of money required to be raised as herein provided, to fix the rate of levy necessary to provide said amount of money, including the amount required to pay the interest and principal of the bonds of said district as the same shall become due and all payments due or to become due to the United States on contract accompanying which bonds of the district have not been deposited with the United States as in section 11 provided; and to fix the rate necessary to provide the amount of money required for any local improvement district; also to fix the rate necessary to provide the amount of money required for any other purposes as in this Act provided, and which are to be raised by the levy of assessments upon the real property of said district and to certify said respective rates to the county commissioners of each county embracing any portion of said district. In fixing the rates of levy the basis shall be the total assessment returned for the district, except that in the case of districts under contract with the United States, all amounts assessed against land held by the county on district tax sales shall be excluded.

The rates of levy as above determined shall be increased 15 per cent to cover delinquencies; except that in fixing the rate necessary to meet all payments due or to become due under any contract with the United States such further and additional increases above said 15 per cent shall be made if so provided in said contract as are sufficient to cover any deficit that may have resulted from delinquent assessments for any preceding year. For the purposes of said district it shall be the duty of the county commissioners of each county in which any irrigation district is located, in whole or in part, at the time of making levy for county purposes, to make a levy at the rates above specified, upon all real estate in said district within their respective counties. It shall furthermore be the duty of the county commissioners of each county embracing any portion of said district when sitting as a board of equalization for general county taxes to equalize district taxes. All taxes levied under this Act are special taxes. (Sec. 19.)

History.

This section, as amended by H. B. No. 154 of the Eighteenth Legislature, L. 29, ch. 80, was amended to read as above set forth by L. 29, ch. 68, eff. May 14.

1. Validity.

Irrigation Act held not invalid because it authorizes levying of assessments to provide funds to meet anticipated defaults by landowners within district. Stevens v. Melville, 52 U. 524, 175 P. 602.

In view of provisions of Laws 1919, Ch. 68, §§ 18 and 19, designating as "special" any assessments or taxes levied by irrigation districts, any such tax is invalid if levied upon lands receiving no irrigation waters, and where financial condition of district makes extension of irrigation system to such lands improbable, they may be severed from district. Whitcher v. Bonneville Irr. Dist., 69 U. 510, 256 P. 785.

2. Levy and assessment.

Taxes and assessments levied for irrigation district are special taxes, not for general support of state, city, or county government, and cannot be levied unless landowner receives special benefits for taxes he is required to pay. Whitcher v. Bonneville Irr. Dist., 69 U. 510, 256 P. 785.

An irrigation district is governed and controlled by the benefits received by each landowner, and hence a landowner should not be penalized further than is provided in the act for his pro rata share of delinquencies of other property owners in failing to pay the taxes assessed against their property. Nelson v. Board of Com'rs of Davis County, 62 U. 218, 218 P. 952.

100-9-20. Duties of County Treasurer—Liability—Collections—Warrants and Coupons—Bond Fund—Improvement Account—Payments—Deposits.

The county treasurer of the county in which is located the office of any irrigation district, shall be and is hereby constituted ex-officio district treasurer of said district, and said county treasurer shall be liable upon his official bond and to indictment and criminal prosecution for malfeasance, or failure to perform any duty herein prescribed as county treasurer or district treasurer, as is provided by law, in other cases as county treasurer. Said treasurer shall collect, receive and receipt for all moneys belonging to said district. It shall be the duty of the county treasurer of each county in which any irrigation district is located in whole or in part to furnish each landowner under said district within said county with the valuation notice for general taxes, and a separate notice of the assessed valuation for district taxes, and of the day fixed by the board of equalization for hearing complaints, and to collect and receipt for all taxes levied as herein provided, but payment of district

taxes may be received and receipted for separately from taxes upon real estate for county purposes; provided, however, that such county treasurer shall receive in payment of the general fund tax above mentioned for the year in which said taxes are levied, warrants drawn against said general fund the same as so much lawful money of the United States, if such warrant does not exceed the amount of the general fund tax which the person tendering the same owes; provided, further, that such county treasurer shall receive in payment of the district bond fund taxes above mentioned for the year in which said taxes were levied, interest coupons or bonds of said irrigation district maturing within the year the same as so much lawful money of the United States, if such interest coupons or bonds do not exceed the amount of district bond fund tax which the person tendering the same owes, and provided further that, except in case of contract obligation due to the United States as provided in section 16 of this Act, any landowner may tender and the county treasurer shall receive money or bonds and/or coupons of the district equaling such landowner's proportion of the total issue of bonds of the district, with interest to maturity, based on the proportion of the landowner's water allotment to the total final water allotment of the district, and taxes for payment of the bonds or interest on the bonds of the district shall not thereafter be levied against such landowner. The county treasurer of each county comprising a portion only of the irrigation district, excepting the county treasurer of the county in which the office of said district is located, shall on the first Monday of each month remit to the district treasurer aforesaid all moneys, warrants, coupons, or bonds theretofore collected or received by him on account of said district and said county treasurer shall keep a bond fund account, United States contract fund account, local improvement fund accounts, and a general fund account. The bond fund account shall consist of all moneys received on account of interest and principal of bonds issued by said district, said accounts for interest and principal shall be kept separate, and the United States contract fund account shall consist of all moneys received on account of any and all payments due or to become due the United States accompanying which bonds of the district have not been deposited with the United States as in section 11 provided. The local improvement fund accounts shall consist of moneys received on account of local improvements of local improvement districts or districts, respectively. The general fund shall consist of all other moneys or general fund warrants received by the collection of taxes or otherwise. The district treasurer aforesaid shall pay out of said bond fund, when due, the interest and principal of the bonds of said district, at the time and place specified in said bonds, and shall pay out of said United States contract fund when due all payments due to the United States under any contract between the district and the United States accompanying which bonds of the district have not been deposited with the United States as in Section 11 provided, and shall pay out of the local improvement fund accounts respectively, all obligations of local improvement districts as the same become due.

In cases where bonds have been deposited with the United States as provided in this Act, the moneys to be paid to the United States for

rentals or operation and maintenance charges if not secured by bonds shall be paid out of the general fund account; also all other construction, operation, and maintenance charges of the district. The district treasurer shall pay out of said general fund only upon the order of the district, signed by the president and countersigned by the secretary of said district as herein provided. The district treasurer, on the 15th day of each month, shall report to the secretary of the district the amount of money in his hands to the credit of the respective funds above provided; the amount of warrants paid during the previous month, and the amount of registered warrants if there be any. All such district taxes collected and paid to county treasurers as aforesaid shall be received by said treasurers in their official capacity, and they shall be responsible for the safe keeping and remittance thereof to the district treasurer the same as for other moneys collected by them as such treasurers; provided, that county treasurers shall receive as sole compensation for the collection of such taxes, such amount as the board of directors may allow, which compensation shall be additional to the regular salary of such county treasurers as provided by law. The district treasurer is hereby authorized to deposit the district funds with any bank or trust company at which any bonds issued by such district are made payable. (Sec. 20.)

History.

This section, as amended by H. B. No. 154 of the Eighteenth Legislature, L. 29, ch. 80, was amended to read as above set forth by L. 29, ch. 68, eff. May 14.

1. Validity.

This section held not unconstitutional as impairing obligation of contracts. Salter v. Nelson, 85 U. 460, 39 P.2d 1061.

2. Bond and interest coupons as medium of payment of bond fund taxes.

This section as amended did not enlarge rights of landowners by providing that matured interest coupons and bonds could be accepted, whereas prior to amendment it provided that interest coupons and bonds acceptable were those maturing within year, since, under section prior to amendment, matured interest coupons and bonds could also be used for payment. Salter v. Nelson, 85 U. 460, 39 P.2d 1061.

Under this section bonds and interest coupons when used in payment of tax must be received at face value. Dalton v. Redd, 85 U. 477, 39 P.2d 1068.

Landowner may relieve his lands from future bond fund taxes under this section by paying county treasurer his proportion of total bond issue with interest to date of payment, together with additional 15 per cent to cover delinquencies, and if bonds or coupons are used in payment, they should be received at par and they must either have reached maturity or will have reached maturity within year, so that where landowner did not comply with such conditions, he was not entitled to mandamus to compel release of his land from future taxes. Salter v. Nelson, 85 U. 460, 39 P.2d 1061.

Landowner having right under this section to pay district bond fund taxes with interest coupons or bonds may not be denied such right merely because no such means of securing payment of interest coupons and bonds is accorded to bondholders who are not landowners. Salter v. Nelson, 85 U. 460, 39 P.2d 1061.

A landowner who desires to avail himself of right to pay in other than money that proportion of his district bond fund tax which has been levied for paying a particular issue must pay in interest coupons or bonds of that issue. Salter v. Nelson, 85 U. 460, 39 P.2d 1061.

Taxes which are levied for payment of interest coupons or bonds due or which become due within year for which such taxes are levied may not be diverted to payment of interest coupons or bonds which have not and will not reach maturity until after the year in which taxes are levied. Salter v. Nelson, 85 U. 460, 39 P.2d 1061.

3. Mandamus.

Where bond and interest coupons tendered under this section in payment of bond fund taxes had not reached maturity, landowner was not entitled to mandamus to compel release of his land

from future levy of taxes. Dalton v. Redd, 85 U. 477, 39 P.2d 1068.

A. L. R. notes.

Failure of property owner to avail himself of remedy provided by statute or ordinance as precluding attack based on improper inclusion of property in, or exclusion of property from, assessment for irrigation, 100 A. L. R. 1298.

100-9-21. General Laws Apply—Sale and Certificate—Redemption—Taxes a Lien.

The revenue laws of this state for the assessment, levying and collecting of taxes on real estate for county purposes, except as herein modified, shall be applicable for the purposes of this Act, including the enforcement of penalties and forfeiture for delinquent taxes; provided, that lands sold for delinquent district taxes shall be sold separately for such tax, and a separate certificate of sale shall issue therefor; and provided further, that at any time after the sale shall have closed and before the time for redemption has expired, the county treasurer is authorized and required to sell and assign the interest of the county in any of the real estate sold to the county for delinquency of district taxes to the district itself, or to any person or corporation holding a recorded mortgage or other lien against such real estate, or to any holder of bonds issued by such district, or to any person who will pay the taxes, interest, penalty and costs; and provided further, that the period of redemption from sale for taxes under this Act shall be two years. In all respects, an irrigation or water conservation district shall be the beneficiary of taxes assessed and levied by it, provided, however, that the county treasurer shall retain costs and expenses provided by law for the advertisement, sale and redemption of irrigation or water conservation district taxes. All taxes levied by an irrigation district under the provisions of this Act, or any Act supplemental or amendatory thereof, shall constitute a first lien on the property assessed, which lien shall remain in force until the taxes are paid. (Sec. 21.)

History.

As amended by L. 23, ch. 9, eff. Feb. 13, inserting clause after "therefore" in sixth line of text.

1. Power to sell for delinquent taxes.

There is no statute granting specific authority to county commissioners to publish or cause to be published a notice of sale of property acquired by an irrigation district for delinquent taxes. News Advocate Pub. Co. v. Carbon County, 72 U. 88, 95, 269 P. 129.

Under this section Title 80 of the Revised Statutes must be looked to in so far as this section directs. Hatch v. Edwards, 72 U. 113, 124, 269 P. 138, applying Laws 1919, Ch. 68, § 21.

2. Notice.

Under this section a contract of the county commissioners for the publication of notice of sale of property acquired by irrigation or drainage district for delinquent taxes, the title to which the conservation district had acquired, is no part of its corporate powers or duties, is beyond their powers, and as such is not binding on the county, notwithstanding 80-10-68. News Advocate Pub. Co. v. Carbon County, 72 U. 88, 269 P. 129, applying Laws 1919, Ch. 68, § 21, as amended by Laws 1923, Ch. 9.

3. Certificate of sale.

With respect to assignments of certificates of sale, this section is to be read with 80-10-36. Hatch v. Edwards, 72 U. 113, 121, 269 P. 138.

4. Redemption.

The two-year period for redemption was prescribed by Laws of 1923. News Advocate Pub. Co. v. Carbon County, 72 U. 88, 90, 269 P. 129.

5. Effect of sale upon invalid assessment.

In action to declare void sale of land for unpaid assessments for construction of irrigation district, where evidence failed to show that plaintiff's lands were

included in plat which accompanied petition for organization of district under this section and showed that land was so situated that only very small portion, if any, benefited by irrigation system, and description of land as contained in allotments made by state engineer, county commissioners, and directors of district was indefinite and uncertain, it was held that attempted assessment and subsequent sale were void, since it was not shown that land was in district. Bettilyon Home Builders v. Bonneville Irr. Dist., 70 U. 328, 260 P. 269.

100–9–22. Construction—Notice—Awarding Contracts—Contractors' Bonds.

After adopting a plan for the construction of canals, reservoirs, and works, the board of directors shall give notice thereof as provided in section 2 of this Act, and such other notice as they may deem advisable calling for bids for the furnishing of material or construction of said work or any portion thereof. If less than the whole work is advertised, then the portion so advertised must be particularly described in such notice; said notice shall set forth that plans and specifications may be seen at the office of the board, and that the board will receive sealed proposals therefor, and that the contract will be let to the lowest responsible bidder, stating the time and the place for opening the proposals, which at said time and place shall be opened in public, and as soon as convenient thereafter the board shall let said work, either in portions or as a whole, to the lowest responsible bidder, or it may reject any or all bids, and may thereupon readvertise for proposals, or proceed to construct the work under its own superintendence. Contracts for the purchase of material shall be awarded to the lowest responsible bidder. The person or persons to whom a contract may be awarded shall enter into a bond, with good and sufficient sureties, to be approved by the board, payable to said district for not less than 25 per cent of the amount of the contract price and conditioned for the faithful performance of said contract. The work shall be done under the direction and to the satisfaction of the engineer in charge, and be approved by the board, and shall be paid for out of the general fund account; provided, that the provisions of this section shall not apply in the case of any contract between the district and the United States. Nothing herein contained shall be construed to prohibit the district from purchasing material or doing any work required by it without the letting of a contract where the estimated cost of such work does not exceed $3,000.00, or in cases of emergencies the board of directors may cause such work to be done by the district itself. (Sec. 22.)

History.
As amended by L. 21, ch. 73, eff. May 10, making no material changes in text.

100–9–23. Claims—Manner of Payment—Registry of Warrants—Emergency Loans.

No claims shall be paid by the district treasurer until the same shall have been allowed by the board, and then only upon warrants signed by the president, and countersigned by the secretary, which warrants shall state the date authorized by the board and for what purpose; and if the district treasurer has not sufficient money on hand to pay such warrant when it is presented for payment, he shall endorse thereon "Not paid

for want of funds; this warrant draws interest from date of presentation at 6 per cent per annum," and endorse thereon the date when so presented, over his signature, and from the time of such presentation until paid such warrant shall draw interest at the rate of 6 per cent per annum; provided, when there is more than the sum of $100.00 in the hands of the treasurer it shall be applied upon said warrant. All claims against the district shall he verified as required in the case of claims filed against counties in this state, and the secretary of the district is hereby authorized and empowered to administer oaths to the parties verifying said claims, as the county clerk or a notary public might do. The district treasurer shall keep a register in which he shall enter each warrant presented for payment, showing the date and amount of such warrant, to whom payable, the date of the presentation for payment, the date of payment, and the amount paid in redemption thereof, and all warrants shall be paid in the order of their presentation for payment to the district treasurer. All warrants shall be drawn payable to the claimant or bearer in the same manner as county warrants. To meet necessary expenses in anticipation of the collection of taxes, the board of directors may incur indebtedness by borrowing money or otherwise, not exceeding the taxes for the current year, and as evidence of such indebtedness may issue negotiable notes of the district, payable in not more than one year from date thereof. In case of a break in the reservoir or canal or other disaster, the board of directors is authorized to borrow money and make the necessary repairs. (Sec. 23.)

100-9-24. Tolls, Charges, Assessments—Collection of Same.

For the purpose of defraying the expenses of the organization of the district, and the construction, care, operation, management, repair and improvements of all canals, ditches, reservoirs and works, including salaries of officers and employees, or for the payment of charges to the United States for any of said purposes, or for rental of water, the board may either fix rates of tolls and charges and collect the same from all persons using said canal and water for irrigation, or other purposes, or in the case of such charges to be paid to the United States the same shall be collected from lands for which water service can be made, pursuant to contract with the United States, and in addition thereto may provide, in whole or in part, for the payment of such expenditures by levy of assessments therefor, as heretofore provided, or by both tolls and assessments, provided that if contract be made with the United States the charges for operation and maintenance or rental, as the case may be, may be fixed in accordance with the federal laws, notice and rules, and the contract with the United States; Provided, further, that in case the money raised by sale of bonds issued be insufficient, or in case bonds be unavailable for the completion of the plans by causing to be levied assessments for the completion in the same manner in which levy of assessments is made for the other purposes provided for in this Act. All tolls and charges other than regular assessments levied by the board of county commissioners of the counties in which any portion of the district is situate shall be collected by the secretary of the district

and shall be by him remitted to the district treasurer with a statement designating the funds to which such moneys shall be credited.
(Sec. 24.)

History.
As amended by L. 21, ch. 73, eff. May 10, making no material changes in text.

100-9-25. Compensation of Officials—Prohibitions—Penalties.

The board of directors shall each receive compensation at the rate of not more than $10.00 per day while attending meetings, and their actual and necessary expenses while engaged in official business. The salary of the secretary, manager, engineer and other officers and employees shall be fixed by the board of directors. No director or any officer named in this Act shall, in any manner be interested, directly or indirectly, in any contract awarded or to be awarded by the board, or in the profits to be derived therefrom; nor shall receive any bonds, gratuity, or bribe, and for any violation of this provision, such officer shall be deemed guilty of a felony, and upon conviction therefor he shall forfeit his office, and be punished by a fine not exceeding $5000.00, or by imprisonment in the penitentiary for a term of not less than one or more than five years. (Sec. 25.)

100-9-26. Debt Limit—Interest on Warrants.

The board of directors, or other officers of the district, shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this Act, and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void; provided, however, that the district shall assume the expense incurred in its organization and may incur additional indebtedness for the conduct of its business until bonds are sold or returns from first district taxes are received, which additional indebtedness, together with such expense assumed, shall not exceed $3.00 per acre of land embraced within the district; such indebtedness shall be the general obligation of the district and the board of directors may cause warrants or notes of the district to issue therefor, bearing interest not exceeding 7 per cent per annum. Said warrants or notes shall be payable not later than the 1st day of January following the receipt of the first district taxes levied and collected and the board of directors of the district shall include in their first annual budget for the ensuing year the amount necessary to liquidate all such outstanding warrants, or notes. (Sec. 26.)

History.
As amended by L. 21, ch. 73, eff. May 10, inserting "$3.00" for "$2.00" in ninth line of text.

A. L. R. notes.
Tax laws, irrigation district as municipality within, 17 A. L. R. 81.

100-9-27. Distribution of Water.

In case the volume of water in any canal, reservoir, or other works in any district shall not be sufficient to supply the continual wants of the entire district lands susceptible of irrigation therefrom, then it shall be the duty of the board of directors to distribute all available waters upon

certain or alternate days to different localities, as they may in their judgment think best for the interest of all parties concerned. All water, however, the right to the use of which is acquired by the district under any contract with the United States shall be distributed and apportioned by the district in accordance with the Acts of congress, rules and regulations established thereunder and the provisions of said contract in relation thereto. (Sec. 27.)

100-9-28. Diversion of Water.

Nothing herein contained shall be deemed to authorize any person or persons to divert the waters of any river, creek, stream, canal or reservoir to the detriment of any person or persons having a prior right to the waters of such river, creek, stream, canal, or reservoir, unless previous compensation be ascertained and paid therefor, under the laws of this State authorizing the taking of private property for public use. (Sec. 28.)

100-9-29. Inclusion and Exclusion of Lands in District.

Lands may be included in or excluded from any irrigation district, now or hereafter organized under the provisions of this Act, in the manner herein prescribed; but any such inclusion or exclusion of lands shall not impair or affect the district organization or its rights in or to property, or any of its rights or privileges of whatsoever kind or nature, nor shall it affect, impair or discharge any contract, obligation, lien or charge for or upon which it was or might become liable or chargeable had such inclusion or exclusion of lands not been made; provided that in case contract has been made between the district and the United States as provided in this Act, no lands shall be included in or excluded from the district until the United States shall assent thereto in writing and such assent be filed with the board of directors. (Sec. 29.)

Comparable provisions.

Cal. Gen. Laws, Act 3854, § 85 (similar provision as to change of boundaries to include additional land; but the proviso herein is not included).

Mont. Rev. Codes, § 7188 (includes similar provision as to change of boundaries; proviso not included).

Cross-references.

As to inclusion of land outside district, see 100-9-3.

1. Property that may be included.

Whether land is exempt under the first proviso to this section is a mixed question of law and fact; nor does 100-9-13 set at rest substantive rights which may arise under the foregoing proviso. Horn v. Shaffer, 47 U. 55, 59 151 P. 555, applying Laws 1909, Ch. 74 §§ 1-55.

Organization of irrigation district was not invalid because certain public lands of United States were originally included within boundaries of district where district court subsequently excluded those lands from district. Stevens v. Melville, 52 U. 524, 176 P. 602.

Irrigation district was not illegally organized because there were lands included therein that certain person had purchased from state, which had not been fully paid for, in view of section 1 of Irrigation Act. Stevens v. Melville 52 U. 524, 176 P. 602.

100-9-30. Petition for Inclusion.

The holder or holders of title, or evidence of title, representing a majority of the acreage of any body of land in the vicinity of the lands in any irrigation district, may file with the board of directors of said district a petition in writing, praying that such lands be included in such district. The petition shall describe the tracts, or body of land

owned by the petitioners, and the proposed method of supplying water thereto, but such description of the lands need not be more particular than is required, when such lands are entered by the county assessor in the assessment book. Such petition shall be deemed to give the assent of the petitioners to the inclusion in said district of the lands described in the petition, and such petition must be acknowledged in the same manner that conveyances of land are required to be acknowledged. (Sec. 30.)

100–9–31. Notice of Application—Procedure—Time—Costs.

The secretary of the board of directors shall cause notice of the filing of such petition to be given as in section 2 of this Act provided, which notice shall state the filing of such petition and the names of the petitioners, a description of the lands mentioned in said petition, and the prayer of said petitioners, and shall notify all persons interested to appear at the office of said board at a time named in said notice, and show cause, in writing, if any they have why the petition should not be granted. The time specified in the notice at which they shall be required to show cause shall be the regular meeting of the board next after the expiration of the time for the publication of the notice. The petitioner or petitioners, shall advance to the secretary sufficient money to pay the estimated cost of all proceedings under such petition before the secretary shall be required to give such notice. (Sec. 31.)

100–9–32. Hearing on Petition.

The board of directors, at the time and place mentioned in said notice, or at the time or times to which the hearing of said petition may have been adjourned, shall proceed to hear the petition and all objections thereto, presented in writing by any person, showing cause as aforesaid, why said petition should not be granted. The failure of any person interested to show cause, in writing, as aforesaid, shall be deemed and taken as an assent on his part to the inclusion of such lands in said district as prayed for in said petition. (Sec. 32.)

100–9–33. Conditions Precedent to Granting.

The board of directors to whom such petition is presented may require as a condition precedent to the granting of the same, that the petitioners shall severally pay to such district such respective sums, as nearly as the same can be estimated by the board, as said petitioners or their grantors would have been required to pay to such district as assessments for the payment of the pro rata share of all bonds and the interest thereon, which may have previously thereto been issued by said district, or for the payment of the pro rata share of the cost of the construction under any contract, between the district and the United States accompanying which bonds of the district have not been deposited with the United States as in this chapter provided, had such lands been included in such district at the time the same was originally formed or when said bonds were so issued, or when said contract with the United States was made; also for the payment of the pro rata share of such other cost or expense as the board of directors may deem an equitable charge on such petitioners. (Sec. 33.)

100-9-34. Reject or Grant Petition.

The board of directors, if they deem it not for the best interests of the district to include therein the lands mentioned in the petition, shall by order reject the said petition; but if they deem it for the best interests of the district that said lands be included, the board may order that the district be so changed as to include therein the lands mentioned in the said petition. The order shall list and allot water to the included lands, and require the same to be platted as district lands, provided, if within thirty days from the making of such order a majority of the landowners of the district protest in writing to said board against the inclusion of such lands in said district, said order shall be held for naught and such lands shall not be included therein. (Sec. 34.)

100-9-35. Copies of Orders and Plat Recorded—Additions Liable.

Upon the allowance of such petition and in case no protest has been filed with the board within thirty days after the entry of said order as aforesaid, a certified copy of the order of the board of directors making such change and a plat of such district showing such change, certified by the president and secretary, shall be filed for record in the office of the clerk of the county in which the office of the district is located and with the recorder of each county in which lands of the district are situated, and the district shall remain an irrigation district, as fully to every intent and purpose as if the lands which are included in the district by the change as aforesaid, had been included therein at the organization of the district; and said district as so changed and all the lands therein shall be liable for all existing obligations and indebtedness of the organized district. (Sec. 35.)

100-9-36. Minutes Admissible in Evidence.

Upon the filing of the copies of the order and the plat, as in the last preceding section mentioned, the secretary shall record in the minutes of the board the petition aforesaid; and the said minutes, or a certified copy thereof, shall be admissible in evidence with the same effect as the petition. (Sec. 36.)

100-9-37. Redivision of Districts.

At least thirty days before the next general election of such district, after the inclusion of lands, the board of directors thereof shall make an order redividing such district into three divisions as nearly equal in size as may be practicable, which shall be numbered first, second, and third, and one director shall thereafter be elected from each division. (Sec. 37.)

100-9-38. Exclusion of Lands—Liability Not Impaired.

Any tract of land included within any such district, at or after its organization, under the provisions of this Act, may be excluded therefrom, in the manner herein prescribed, but such exclusion of land from the district shall not impair or affect its organization, or its rights in or to property, or any of its rights or privileges of whatever kind or nature; nor shall such exclusion affect, impair or discharge any contract,

obligation, lien or charge for or upon which the district would or might become liable or chargeable, had such land not been excluded from the district. (Sec. 38.)

Comparable provisions.
Cal. Gen. Laws, Act 3854, § 74 (similar provision as to change of boundaries and exclusion of land).

100–9–39. Petition for Exclusion.

The owner or owners of any lands constituting a portion of any irrigation district may file with the board of directors of the district a petition praying that such lands may be excluded and taken from said district. The petition shall describe the lands which the petitioners desire to have excluded, and the description of such lands shall be with the same particularity that is required when lands are entered in the assessment book by the county assessor. Such petition must be acknowledged in the same manner and form as is required in case of a conveyance of land. (Sec. 39.)

100–9–40. Notice of Application—Parties to Show Cause.

The secretary of the board of directors shall cause a notice of the filing of such petition to be published as in section 2 of this Act provided; or if no newspaper be published as therein provided, then by posting such notice for the same time in at least three public places in said district, and in case of the posting of said notices, one of said notices must be so posted on the lands proposed to be excluded. The notice shall state the filing of such petition, the names of the petitioners, description of the lands mentioned in said petition, and the prayer of said petitioners; and it shall notify all persons interested to appear at the office of said board at a time named in said notice, and show cause in writing, if any they have, why said petition should not be granted. The time to be specified in the notice at which they shall be required to show cause shall be the regular meeting of the board next after the expiration of the time for the publication of the notice. The petitioner or petitioners shall advance to the secretary sufficient money to pay the estimated cost of all proceedings under such petition before the secretary shall give such notice. (Sec. 40.)

100–9–41. Hearings by Board—Assent.

The board of directors at the time and place mentioned in the notice, or at the time or times to which the hearing of said petition may be adjourned, shall proceed to hear the petition and all objections thereto, presented in writing by any person showing cause as aforesaid why the prayer of said petition should not be granted. The filing of such petition with such board as aforesaid, shall be deemed and taken as an assent by each and all such petitioners to the exclusion from such district of the lands mentioned in the petition, or any part of said lands. (Sec. 41.)

History.
As amended by L. 21, ch. 73, eff. May 10, making no material changes in text.

100–9–12. Exclusion of Lands, When—Contracts with the United States.

The board of directors, if they deem it not for the best interest of the district that the lands mentioned in the petition, or some portion thereof, should be excluded from said district, shall order that said petition be denied; but if they deem it for the best interest of the district that the lands mentioned in the petition, or some portion thereof, be excluded from the district, and if there are no outstanding bonds of the district, then the board may order the lands mentioned in the petition, or some defined portion thereof, excluded from the district; provided, however, that the board shall require as a condition precedent to the granting of such petition that the petitioners shall severally pay to such district their pro rata share of the outstanding obligations and indebtedness of the district provided, if within thirty days from the making of such order a majority of the landowners of the district protest in writing to said board against the exclusion of such lands from said district, said order shall be held for naught and such lands shall not be excluded therefrom; provided, further, that in case contract has been made between the district and the United States, no lands shall be excluded from said district unless the United States shall assent thereto in writing and such assent be filed with the board of directors.

(Sec. 42.)

History.
As amended by L. 21, ch. 73, eff. May 10, inserting clause after "provided" in ninth line of text.

100–9–13. Filings with County Clerk and Recorder.

Upon the allowance of such petition and in case no protest has been filed with the board within thirty days after the entry of said order as aforesaid, a certified copy of the order of the board of directors making such change and a plat of such district showing such change, certified by the president and secretary, shall be filed for record in the office of the clerk of the county in which the office of the district is located and with the recorder of each county in which lands of the district are situate, and the district shall remain an irrigation district as fully to every intent and purpose as if the lands which are excluded by the change as aforesaid had not been excluded therefrom. (Sec. 43.)

100–9–14. Division of Districts—Representation.

At least thirty days before the next general election of such district the board of directors thereof shall make an order dividing such district into three divisions as nearly equal in size as may be practicable, which shall be numbered first, second and third, and one director shall be elected from each division. (Sec. 44.)

100–9–15. Dissolution of District—Election—Procedure.

Whenever landowners representing a majority of the number of acre-feet of water allotted to the lands in any irrigation district organized, or hereafter to be organized, under this Act, shall petition the board of

directors to call a special election, for the purpose of submitting to the landowners of said irrigation district a proposition to vote on the dissolution of said irrigation district, setting forth in said petition that all bills and claims of every nature whatsoever have been fully satisfied and paid, it shall be the duty of said directors, if they shall be satisfied that all claims and bills have been fully satisfied, to call an election, setting forth the object of said election, and to cause notice to said election to be published, as in section 2 of this Act provided, setting furth the time and place for holding said election in each of the three voting precincts in said district. It shall also be the duty of the directors to prepare ballots to be used at said election on which shall be written or printed the words: "For Dissolution—Yes," and "For Dissolution—No," provided, that in case contract has been made between the district and the United States the board shall have no jurisdiction to consider any such petition for dissolution of the district, no such special election shall be held, and such district shall not be disorganized or declared disorganized until it shall have been certified to the board of directors by the United States that all payments and obligations due or to become due to the United States under such contract have been fully paid or that the United States consents to such dissolution.

(Sec. 45.)

Comparable provisions.

Idaho Code, § 42-1301 (twenty-five, or a majority, of landowners in irrigation district may petition board of directors to call special election to submit proposal on modification of district by exclusion of land within its boundaries, or proposal for dissolution of the district).

1. Operation and effect of dissolution.

Where defendants, who were landowners under the canals of a quasi-public irrigation district and members thereof, were restrained from interfering in any manner with the ditches of the district, such decree became functus officio on the dissolution of the district, whereupon defendants were remitted to their original rights as individual landowners. Thompson v. McFarland, 29 U. 455, 82 P. 478.

Where irrigation district was formed as authorized by analogous statute, decree in favor of such district, restraining defendants from interfering with the irrigation ditch of such district, did not survive a dissolution of the district by virtue of this section. Thompson v. McFarland, 29 U. 455, 82 P. 478.

100-9-16. Returns and Canvass of Election.

The board of directors shall name a day for canvassing the returns of election, and if it shall appear that a majority of the votes cast are "For Dissolution—Yes," then it shall be the duty of said board of directors to declare said district to be disorganized, and shall certify to the county clerk of the county in which the office of the district is located, stating the number of signers to said petition and the number of acre-feet of water allotted to them; that said election was called and set for the ..... day of ..... month of ..... year, that said election was held and that so many votes (stating the number) had been cast for, and that so many votes (stating the number) had been cast against said proposition; said certificates to bear the seal of the district, and the signatures of the president and secretary of said board of directors. And it shall be the duty of said clerk to have such certificate recorded with the county recorder of the respective counties embracing any lands of the district. Should it appear that a majority of the votes cast at said election were "For Dissolu-

tion—No," then the board of directors shall declare the proposition lost and shall cause the result and the vote to be made a part of the records of said irrigation district. (Sec. 46.)

100-9-47. Water District Failure to Function—Dissolution—Increase of Assessment—Lien as Tax Sale.

If after its organization a water conservation district shall fail to function as provided by this Act for a period of three years after the notice issued by the county commissioners and a majority of the owners of acre feet of water allotted to such district shall evidence a desire to dissolve the district by the filing of a petition for that purpose with the board of directors, it shall be the duty of the board of directors to file a petition with the district court requesting the dissolution of the district. Upon the filing of such petition the court shall give such notice regarding the hearing thereof as it shall deem necessary and shall proceed to hear all objections against such dissolution. If no bonds have been issued or other obligations incurred which may not be paid by a pro-rata assessment against the landowners within said district, or if no contract has been entered into with the United States or other persons which cannot be abrogated or the value of which cannot be assessed as liquidated damages, the court shall order a dissolution of the district upon the payment by each person therein of his pro rata share of the obligations of the district, provided that if it shall appear to the court that there are lands within the district the value of which will not satisfy such pro rata share, then assessment against the remaining lands shall be increased in an amount sufficient to repay the total obligations of the district. If any landowner shall fail to pay the amounts so assessed against him, such amount shall be a prior lien against his land and the same shall be sold by court order as upon a tax sale as provided in Chapter 9, Session Laws of Utah, 1923, and the proceeds of the sale shall be applied toward the payment of the amount assessed against him. In such proceeding for dissolution the court shall have power to adjust the obligations of the district, allotment of benefits, and other matters affecting the property of the landowners.

(Sec. 46x.)

History.
Added by L. 25, ch. 107, eff. Mar. 17.

1. Venue of proceedings.
The petition or application should be filed in the district court of the county where the irrigation district functions. Richards v. District Court of Weber County, 71 U. 473, 267 P. 779.

2. Adjustment of claims in dissolution proceedings.
In a proceeding for dissolution of an irrigation district, organized under Laws 1919, Ch. 68, district court could consolidate with such proceeding plaintiff's action against the irrigation district upon promissory notes, and adjust therein amount of plaintiff's claim. But a nunc pro tunc entry of formal judgment in plaintiff's favor is not an independent and conclusive determination of plaintiff's claim. Richards v. District Court of Weber County, 71 U. 473, 267 P. 779, applying Laws 1925, Ch. 68.

Under this section, the making and entering of a formal judgment in favor of claimant against the irrigation district is not necessary to establish his claim. The fact that a judgment in form was made and entered adds nothing to the legal quality of claimant's standing as a creditor. Richards v. District Court of Weber County, 71 U. 473, 477, 267 P. 779, applying Laws 1925, Ch. 107.

If claimant is dissatisfied with final order for payment of his claim without

interest he, or any other aggrieved party, has a plain appeal from the judgment. Richards v. District Court of Weber County, 71 U. 473, 478, 267 P. 779, applying Laws 1925, Ch. 107.

100–9–48. Special Proceedings for Judicial Examination.

The board of directors of a water conservation district organized under the provisions of this Act may commence special proceedings, in and by which all proceedings had in the organization of the district or in and by which its acts and the acts of the district in authorizing the issue and sale of the bonds of said district or providing for the authorization of contract with the United States and the validity of such contract, whether said bonds or any of them have or have not been sold or disposed of, or such contract or proposed contract shall or shall not have been actually signed by the United States or the district, may be judicially examined, approved and confirmed. (Sec. 47.)

History.

As amended by L. 21, ch. 73, eff. May 10, making no material changes in text.

1. Duty to institute proceedings.

There is nothing in this section which indicates that word "may" was intended to be given any other than its usual and ordinary meaning, and board of directors of irrigation district is alone authorized to institute proceedings contemplated by act. Surrage v. McKay, 60 U. 117, 206 P. 722.

If it were considered that directors of irrigation district were required by this section to institute proceedings to test legality of organization of district, directors could be compelled to perform their duty by mandamus. Surrage v. McKay, 60 U. 117, 206 P. 722.

A. L. R. notes.

Constitutionality of statutes for formation or change of irrigation districts as affected by objection that they confer nondelegable powers or impose nonjudicial functions on court, 69 A. L. R. 266; special or local legislation regulating practice in courts of justice, statutes in regard to irrigation as, 135 A. L. R. 377.

100–9–49. Petition for Confirmation.

The board of directors of a water conservation district shall file in the district court of the county in which the lands of the district, or some portion thereof, are situate, a petition praying, in effect, that the proceedings aforesaid may be examined, approved and confirmed by the court. The petition in case bonds or a contract with the United States has been authorized shall state the facts showing the proceedings had for the issue and sale of said bonds, or for the authorization of contract with the United States, as the case may be, and shall state generally that the water conservation district was duly organized, and that the first board of directors was duly elected, but the petition need not state the facts showing such organization of the district, or the election of said first board of directors. (Sec. 48.)

History.

As amended by L. 21, ch. 73, eff. May 10, making no material changes in text.

1. Collateral attack.

Proceeding to quiet title as against irrigation district's right to levy and collect taxes constitutes collateral attack on decree confirming organization of district, and if board acted within jurisdiction, errors could not be corrected, but where board sought to include and tax lands previously excluded, without notice or consent, its action was violative of due process clauses of State and Federal Constitutions. Jackson v. Bonneville Irr. Dist., 66 U. 404, 243 P. 107.

2. Conclusiveness of judgment.

Judgment confirming organization of irrigation district is not res adjudicata as to lands not properly described, and, therefore, not within district. Argyle v. Bonneville Irr. Dist., 74 U. 480, 494, 280 P. 722.

100–9–50. Notice—Contest—Time for Hearing.

The court shall fix the time for the hearing of said petition and shall order the clerk of the court to give and publish notice of the filing of said petition. The notice shall be given and published as in section 2 of this Act provided. The notice shall state the time and place fixed for the hearing of the petition and the prayer of the petitioners, and that any person interested in the organization of said district, or in the proceedings for the issue or sale of said bonds, or in the making of contract with the United States, may, on or before the day fixed for the hearing of said petition, demur to or answer said petition. The petition may be referred to and described in said notice as the petition of the board of directors of ..... water conservation district (giving its name) praying that the proceedings for the issue and sale of said bonds of said district, or that the proceedings for the authorization of contract with the United States, or the proceedings had for the organization of said district and the validity thereof, be examined, approved and confirmed by the court. (Sec. 49.)

History.
As amended by L. 21, ch. 73, eff. May 10, making no material changes in text.

100–9–51. Parties—Appearances—Practice and Procedure.

Any person interested in said district, or in the issue or sale of said bonds, or in the making of contract with the United States, may demur to or answer said petition. The provisions of the Code of Civil Procedure respecting the demurrer and answer to a verified complaint shall be applicable to a demurrer and answer to said petition. The person so demurring or answering said petition shall be the defendant to the special proceedings, and the Board of Directors shall be the plaintiff. Every material statement of the petition not specifically controverted by the answer shall, for the purpose of said special proceedings, be taken as true, and each person failing to answer the petition shall be deemed to admit as true all the material statements of the petition. The rules of pleading and practice relating to appeals and writs of error provided by the Code of Civil Procedure which are not inconsistent with the provisions of this Act are applicable to the special proceedings herein provided for. (Sec. 50.)

100–9–52. Findings and Decree—Costs.

Upon the hearing of such special proceedings the court shall find and determine whether the notice of the filing of the petition has been duly given and published for the time and in the manner in this Act prescribed, and shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm, each and all of the proceedings for the organization of said district under the provisions of said Act, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order of the sale and the sale thereof, and all of the proceedings, if any, for the authorization of contract with the United States, and the terms of said contract. The

court, in inquiring into the regularity, legality or correctness of said proceedings, must disregard any error, irregularity or omission which does not affect the substantial rights of the parties to said special proceedings; and the court may by decree approve and confirm such proceedings in part, and disapprove and declare illegal or invalid other or subsequent parts of the proceedings. A final decree as to such proceedings shall be received as readjudicated in all courts of the state of Utah in all cases whatsoever involving the validity of such bonds and the organization of the district. The costs of the special proceedings may be allowed and apportioned between the parties, in the discretion of the court. (Sec. 51.)

History.
As amended by L. 21, ch. 73, eff. May 10, adding next to last sentence of text.

100-9-53. Governor May Suspend Right to Appropriate Water—Limit of Time—Restoring Right—Publishing Proclamation—Applications—Hearings.

For the purpose of preserving the surplus and unappropriated waters of any stream or other source of water supply for use by irrigation districts, and organized agricultural water users, as provided in this Act, the governor, by proclamation, may, upon the recommendation of the state engineer, temporarily suspend the right of the public to appropriate such surplus or unappropriated water; provided that any such suspension shall in no case exceed the term of five years. Water withdrawn from appropriation under this section may be restored by proclamation of the governor upon the recommendation of the State engineer. Such proclamation shall not become effective in effecting a restoration of such waters to entry until same shall have been published once a week for at least three successive weeks in a newspaper of general circulation within the boundaries of the river system or water source within which the waters so to be restored are situated. Applications for appropriations shall not be filed during the time such waters are withdrawn from entry; provided that after the first publication of notice aforesaid such applications may be deposited with the State engineer and at the time such order becomes effective the engineer shall hold public hearings, giving all applicants notice, to determine which applications, so filed during the period of publication, are most conducive to the public good and shall file such applications in order of priority according to such determination. (Sec. 52.)

History.
As amended by L. 25, ch. 98, eff. May 12, adding all matter after "years" in seventh line of text.

100-9-54. Transfer of Water Rights—Notice to Landowners.

The board of directors of any irrigation district, with the consent of the bondholders and other creditors, shall have authority to sell, transfer, and convey the water rights and all or any other property belonging to the district to any irrigation company; provided, however, that no such sale, transfer, or conveyance shall be made until notice of the

intention of said board to make the same shall have been published, as in section 2 of this Act provided, and mailed to each landowner in the district at his last known address at least thirty days prior to the expiration of the time fixed for protest, and provided further that no such sale, transfer, or conveyance shall be made if within thirty days from the last publication of such notice the owners of one-third of the acre-feet of water allotted in said district file with said board their written protest against such sale, transfer, or conveyance. (Sec. 53.)

100-9-55. Districts Declared Bodies Corporate—Exemptions.

Irrigation districts organized under this Act and all irrigation districts heretofore organized under the laws of this state are hereby declared to be bodies corporate and politic, and the bonds and other securities of such corporations are hereby declared to be forever exempt from taxation within this state. (Sec. 54.)

1. Status of districts.

Irrigation districts organized under Laws 1919, Ch. 68, were quasi-public corporations. Bonneville Irr. Dist. v. Ririe, 57 U. 306, 195 P. 204, followed in Upper Blue Bench Irr. Dist. v. Continental Nat. Bank & Trust Co., 93 U. 325, 329, 72 P.2d 1048.

Irrigation districts being in their purpose and nature public, their rights and liabilities are to be determined, generally speaking, by same considerations which determine rights and duties inhering in what are commonly known as municipal or public bodies. Upper Blue Bench Irr. Dist. v. Continental Nat. Bank & Trust Co., 93 U. 325, 72 P.2d 1048.

A. L. R. notes.

Liability of irrigation district for damages, 74 A. L. R. 898.

100-9-56. Inclusion of State Lands—Contract with Land Board.

Lands belonging to the state of Utah not under contract of sale may be included in any irrigation district upon petition by the state board of land commissioners for the inclusion of such lands. No such state lands included within any legally organized irrigation district shall ever be assessed, nor shall any of the preceding sections relative to the levying and collection of assessments and taxes apply, but the state board of land commissioners and the state engineer shall make a thorough examination as to the benefits to accrue to such state lands by reason of the inclusion of such lands in such irrigation district, and by reason of the acquiring of water rights for said lands, and the state board of land commissioners is hereby empowered to enter into contract with the board of directors of such irrigation district, specifying by legal subdivisions the land so benefited, the amount of benefit to accrue to each tract of land, and such contracts shall provide that annual payments shall be made to said district, to be applied on the cost of constructing the irrigation works for said district, until the full amount of such benefit is paid; but the state board of land commissioners shall have the option to pay the full amount of such contract at any time, upon any or all of such legal subdivisions. (Sec. 55.)

100-9-57. Benefit of Special Construction—Terms—Costs.

Any drain, ditch, canal, or drainage system, or any other desired special construction, reconstruction, betterment, or improvement for the special benefit of particular lands lying within an irrigation district,

may be constructed and provision made to meet the cost thereof, as follows: The holders of title or evidence of title of one-quarter of the acreage proposed to be assessed for any such improvement may file with the board of directors of the irrigation district a petition in writing, setting out the nature and general plan of the desired improvement, and specifying the lands proposed to be specially assessed therefor. Such petition shall be accompanied with a bond in such sum and with such surety or sureties as may be required by said board of directors, conditioned that the petitioners will pay the cost of the investigation of the proposed improvement and of the hearing on the petition if the same be not allowed. Upon the filing of such petition the board of directors, with the assistance of a competent engineer, shall make an investigation of the feasibility, cost, and need of the proposed local improvement together with the ability of the land to pay such cost, and if same appears feasible they shall have plans and estimate of the cost thereof prepared. If the cost shall appear to the board to exceed the benefits to accrue therefrom, or if the lands proposed to be embraced within the local improvement district shall be found to be insufficient security for the return of the cost, or if a protest against the establishment of the proposed improvement signed by a majority of the holders of title to lands in the proposed local improvement district be presented at or prior to the hearing hereinafter provided for, or if in other respects the proposed local improvement district should be found not feasible, the board shall dismiss the petition at the expense of the petitioners. (Sec. 56.)

1. Applicability of section.
This section and 109–9–58 to 109–9–64 have reference to 109–9–18, and not to assessments which do not involve special benefits. Hatch v. Edwards, 72 U. 113, 118, 269 P. 138.

100–9–58. Local Improvement Districts.

In the event the said board shall find the proposed local improvement feasible, it shall approve the petition, fix a time and place for the hearing thereof, and shall publish notice thereof, as in section 2 of this Act provided, stating that the certain lands, describing them, are proposed to be organized as a local improvement district and stating generally the nature of the proposed improvement; that warrants for such local improvement are proposed to be issued as the warrants of the irrigation district; and that the lands within said local improvement district are to be assessed for such improvement. At the time and place of hearing named in said notice all persons interested may appear before the board and show cause for or against the formation of the proposed improvement district and the issuance of warrants as aforesaid. Upon the hearing the board shall determine whether or not the proposed local improvement district shall be established. Any landowner whose lands can be served or will be benefited by the proposed improvement may make application to the board at the time of hearing to include such lands, and the board of directors in such case may, at their discretion, include such lands within such district. The board of directors may exclude any land specified in said notice from said district, provided that in the judgment of the board the inclusion thereof will not be practicable. (Sec. 57.)

100-9-59. Establishment—Limit as to Costs—Authorization—Construction Warrants—Orders.

If the board shall determine in favor of the improvement it shall enter an order establishing the improvement district and shall list and plat lands included therein, and shall adopt plans for the proposed improvement, estimate the cost, and determine the number of equal annual installments, in which the cost of said improvement shall be paid; provided, however, that no local improvement, the cost of which will exceed ten thousand dollars ($10,000.00) and be less than twenty-five thousand dollars ($25,000.00), shall be undertaken unless such improvement shall first be authorized and ratified, in writing, by a majority of the landowners within the local improvement district; nor shall any improvement the cost of which will exceed twenty-five thousand dollars ($25,000.00) be undertaken unless first authorized and ratified, in writing, by a two-thirds majority of the landowners within the local improvement district, and not then if protests, in writing, signed by landowners of the irrigation district having a majority of the votes according to the number of votes cast at the last election, be submitted within thirty days after completion of publication of notice of the proposed improvement, published as in section 2 of this Act provided. The cost of such improvement shall be paid by the issuance of the warrants of the district, from time to time, therefor, either directly for the payment of the labor and material or for the securing of the funds for such purposes. Said warrants shall bear interest at a rate of not to exceed seven per cent (7%) per annum, payable semi-annually, and shall state upon their face that they are issued as warrants of the irrigation district for the benefit of the local improvement district within said irrigation district, that all lands within said local improvement district shall be primarily liable to assessment for the principal and interest of said warrants, and that such warrants are also a general obligation of said district. No warrant shall be issued in denomination exceeding five hundred dollars ($500.00) and no warrant shall be sold for less than par. A copy of the order establishing any local improvement district, together with list and plat of lands included, certified by the president and secretary, shall be filed and recorded in accordance with the provisions of section 5 of this Act relating to the filing and recording of the order declaring the organization of the irrigation district. (Sec. 58.)

A. L. R. notes.

Damages for breach of duty to furnish water for irrigation purposes, 108 A. L. R. 1181; fraud in misrepresentations to purchaser of land as to existence of irrigation plant, 27 A. L. R. 344; mechanic's lien for construction of irrigation ditch or well, area of land which may be subjected to, 84 A. L. R. 137; right of user of water to discontinue use, 112 A. L. R. 230.

100-9-60. Assessment of Damages and Benefits—Board of Equalization.

The board of directors shall, as soon as may be after the establishment of a local improvement district, view each tract of land within the district, and shall carefully consider the benefits and damages that each particular tract of land will receive from the construction and maintenance of such local improvement and assess each tract of land in

accordance with the benefits received by it, making proper allowance for damages if there be any. After such assessment is made up the secretary of the board of directors shall transmit the same to the board of county commissioners and the board of county commissioners shall cause notice to be sent by mail to each landowner in the local improvement district of the amount of benefits assessed against the land owned by him within the local improvement district, and shall state therein the time and place when the board of county commissioners shall meet as a board of equalization to hear and determine complaints made against such assessment. The board of county commissioners shall sit as a board of equalization of local improvement district benefits and shall equalize and finally determine the assessment to be made and levied upon each tract of land within the local improvement district, in the manner provided for by law for equalizing state and county taxes, and shall thereupon certify the same to the county assessor of each county within which any part of said local improvement district is located, who shall enter the same in the tax rolls. (Sec. 59.)

1. Validity.
This section is constitutional. State v. Green River Irr. Dist., 40 U. 83, 119 P. 1039.

100-9-61. Costs Levied and Collected.

The cost of local improvements shall be specially assessed against the lands within the local improvement district in proportion to the benefits accruing thereto, and shall be levied and collected in the manner herein provided. (Sec. 60.)

100-9-62. Payment of Delinquency.

In the event of the failure of the lands within the local improvement district to furnish money sufficient for the payment of principal or interest of the warrants for such local improvement work and there shall be a default in the payment of principal and interest, as aforesaid, the amount delinquent shall be paid by the general warrants of the irrigation district at large, but the lands of the local improvement district shall not thereby become released from liability for special assessment therefor. Such general district warrants, if issued, shall be redeemed as soon as there shall be available money in the local improvement district fund. (Sec. 61.)

100-9-63. Local Improvement Bonds.

Any irrigation district may issue bonds for any local improvements, as in this Act provided, and sell the same, or any part thereof, or exchange the same or any part thereof, with the holders of any previously issued warrants for the purpose of redeeming said warrants; provided, however, that all the provisions of this Act relating to the authorization and issue of bonds shall apply. (Sec. 62.)

100-9-64. Contracts with United States.

Any irrigation district may contract with the United States for local improvement work, and for such purpose may form local improvement

districts as herein provided. Authorization of bonds or of contract with the United States for local improvement work may be confirmed in the same manner as in sections 47 to 51, inclusive, of this Act provided. (Sec. 63.)

100–9–65. Validation of Act.

If any part or paragraph of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act, but shall be confined in its operation to the particular part thereof directly involved in the controversy wherein such judgment shall have been rendered. (Sec. 64.)

100–9–66. Default of District—Court Procedure.

If, after the issuance and sale of bonds, warrants, or other evidence of debt by any irrigation district, such district shall for any reason, become insolvent, and fail to maintain a board of directors, or other organization as herein provided, and shall for more than two years fail to pay its bonded indebtedness, or interest thereon, or its other indebtedness, after the same shall become due and payable, the district court of the county wherein such irrigation district, or the major portion thereof, is situate, shall, by virtue of its general equity powers, have jurisdiction to appoint a commissioner to take charge of the property of such irrigation district, sell and dispose of the same for the benefit of creditors and close the affairs of the district under the orders and directions of said district court. (Sec. 64x.)

100–9–67. Effect of Repeals Construed—Procedure Against Defaulting Members.

The repeal by the Revised Statutes of sections 2403–2427, both inclusive, of the Compiled Laws of Utah, 1888, shall not be construed to affect the existence of any district or company organized under the aforesaid sections; but any such company or district shall, notwithstanding such repeal, continue in existence with all the rights, privileges, and limitations heretofore conferred or imposed upon it by law until disincorporated or dissolved according to law. In any case in which an irrigation company or district shall have a right of action against a delinquent member of such company or district for the nonpayment of taxes voted according to law the board of directors thereof may proceed to sell the interest of such member in the canals or ditches of such company or district and his right to the use of the water flowing therein. (Sec. 65.)

100–9–68. Acts Repealed—Government of Districts.

Chapter 5, Title 55, Compiled Laws of Utah, 1917, and all other Acts in conflict herewith, are hereby repealed; provided, nothing herein contained shall invalidate or affect any district organization or rights existing under any Act or provisions so repealed, but all such districts shall hereafter be governed by the provisions of this Act. (Sec. 66.)

100-9-69. Effective Date.

This Act shall take effect upon approval.

Approved March 18, 1919. (Sec. 67.)

CHAPTER 10

METROPOLITAN WATER DISTRICTS

L. 1935, ch. 110; eff. Mar. 13.

100-10-1. Short Title.
100-10-2. Words and Phrases Defined.
100-10-3. Purpose and Corporate Existence of Districts.
100-10-4. Organization—Ordinance.
100-10-5. Id. Copies to Be Mailed.
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100-10-7. Id. Resolution Forwarded —Preliminary Expenses.
100-10-8. Call for Election.
100-10-9. Id. Election Districts.
100-10-10. Id. Concurrent and Consolidated Elections.
100-10-11. Id. Publication of Call.
100-10-12. Ballot.
100-10-13. Counting Ballots and Canvassing Returns.
100-10-14. Id. Consolidated Elections.
100-10-15. Certificate to Secretary of State — Assessed Valuation of Cities Approving.
100-10-16. Incorporation — Certificate —Date Effective.
100-10-17. Id. Validity.
100-10-18. Powers of Incorporated Districts.
100-10-19. Municipal Attorney and Engineer to Act for District—Reimbursement.
100-10-20. Directors — Representation — Voting — Organization.
100-10-21. Powers of Directors.
100-10-22. Contracts — Bonded and Other Indebtedness — Submission to Electors—Call—Precincts.
100-10-23. Elections — Publication of Call.
100-10-24. Conduct of Election—Canvass of Returns.
100-10-25. If Majority Favor.
100-10-26. Bond Issues — Payment — Deferred Maturities — Denomination — Interest—Coupons.
100-10-27. Validity of Signatures.
100-10-28. Sale of Bonds—Interim Certificates.
100-10-29. Proceeds of Sale of Bonds.
100-10-30. Action to Test Validity of Contracts, Bonds and Other Contract Obligations or Indebtedness.
100-10-31. Water Rates to Pay Operating Expenses, Repairs and Depreciation—Interest and Principal of Bonded and Other Debt to Be Paid so Far as Practicable from Water Rates—Tax Levy if Rate Inadequate.
100-10-32. Conversion of Coupon Bonds Into Registered Bonds — Reconversion — Exchanging for Higher Denomination.
100-10-33. Id. Fees.
100-10-34. Bonds as Legal Investment for Trust and Institutional Funds.
100-10-35. Taxation—Assessed Valuation.
100-10-36. Rate of Taxation.
100-10-37. Amounts and Installments for Cities.
100-10-38. Election by Cities to Pay Out of Municipal Funds.
100-10-39. Tax Rates for Cities.
100-10-40. Collection of Taxes.
100-10-41. Collection Fees.
100-10-42. Lien of Taxes.
100-10-43. Credits in Reduction of Taxes — Cash Payments —Sale by City to District of Project Taken Over by District.
100-10-44. Id. Alternative Credit—Expenses Incurred by City for Project.
100-10-45. Id. For Expenses of Incorporation.
100-10-46. Id. Such Credits Not Applicable to Taxes Levied for Interest and Principal of Bonded Indebtedness.
100-10-47. Certification and Allowance of Credits.
100-10-48. Failure of City to Carry Out Its Election to Pay in Lieu of Taxation.
100-10-49. Annexation to District—Validity of Proceedings.
100-10-50. Withdrawal from District.
100-10-51. Interest of Directors or Employees in Contracts.
100-10-52. Recall and Resignation of Directors.

100–10–53. Necessities.
100–10–54. Action by Ordinance.
100–10–55. Fiscal Year—Annual Statements.
100–10–56. Constitutionality.
100–10–57. Repeal of Inconsistent Acts.
100–10–58. Effective Date.

Constitutionality of act. This act held not unconstitutional as a special law, Lehi City v. Meiling, 87 U. 237, 48 P.2d 530; Provo City v. Evans, 87 U. 292, 48 P.2d 555.

This act held not unconstitutional as an attempt to unlawfully delegate power of taxation to a special commission, and to interfere in city and town affairs in violation of Const. Art. VI, § 29, since board of directors in whom control of district has been intrusted is not a special commission, and power of such directors is over property of districts and not over property of towns in the district, Lehi City v. Meiling, 87 U. 237, 48 P.2d 530; Provo City v. Evans, 87 U. 292, 48 P.2d 555.

This act held constitutional as against objection act was in violation of due process of law in that taxing powers conferred on district by 100–10–18 were in nature of assessments for benefits and no provision was made as to hearings with respect to such benefits, since tax imposed was general ad valorem tax and not assessment for benefits. Lehi City v. Meiling, 87 U. 237, 48 P.2d 530; Provo City v. Evans, 87 U. 292, 48 P.2d 555.

This act held not unconstitutional as violating Const. Art. VI, § 31 providing that no political subdivision should lend its credit or subscribe to stock or bonds in aid of other corporate enterprise in that 100–10–18 empowered district to join with other corporation for purpose of carrying out its powers and to obligate itself with other corporations in financing its operations and to become surety for payment of indebtedness of corporation in which district should have stock, since powers of district are for acquiring and using water for public benefit. Lehi City v. Meiling, 87 U. 237, 48 P.2d 530; Provo City v. Evans, 87 U. 292, 48 P.2d 555.

Metropolitan Water Districts Act held constitutional as agninst contention that notice of election was required by 100–10–11 to be published in each county instead of in each city included in proposed district. Lehi City v. Meiling, 87 U. 237, 48 P.2d 530; Provo City v. Evans, 87 U. 292, 48 P.2d 555.

Power to incur indebtedness not to exceed ten per cent of assessed valuation given district by 100–10–18 did not render this act unconstitutional as violation of Const. Art. XIV, § 3, requiring no debt in excess of taxes for current year to be incurred by county or subdivision thereof, since district was not subdivision of county. Lehi City v. Meiling, 87 U. 237, 48 P.2d 530; Provo City v. Evans, 87 U. 292, 48 P.2d 555. (Moffat and Hanson, JJ., dissenting.)

L. 1935, ch. 110; eff. Mar. 13.

AN ACT providing for the incorporation, government and management of metropolitan water districts, authorizing such districts to incur bonded debt and to acquire, construct, operate and manage works and property, providing for the taxation of property therein and the performance of certain functions relating thereto by officers of counties, providing for the addition of area thereto and the exclusion of area therefrom and authorizing municipal corporations to aid and participate in the incorporation of such districts.

Be it enacted by the Legislature of the State of Utah:

100–10–1. Short Title.

This act shall be known as the "Metropolitan water district act" and shall apply to the incorporation, organization, government, maintenance and operation of the water districts herein provided for and described, and to the board of directors herein referred to. (Sec. 1.)

Comparable provisions.

Cal. Gen. Laws, Act 0129, § 1 (identical).

Idaho Code, 1940 Supp., § 40–12A1 (authorizing any city or village in Idaho to establish municipal irrigation system and to establish and extend the boundaries within which it will supply and deliver irrigation water; may acquire any of the public or private waters of

the state, and may acquire, extend, enlarge, maintain and operate canals, ditches, conduits and rights-of-way for ditches, for use of such city or village); § 49–12A2 (may issue municipal coupon bonds); § 49–12A3 (may enter into contract with any irrigation district).

Cross-references.

Power of cities and towns to acquire and operate water supply and works, 15–7–4 et seq.; power of cities, 15–8–14 et seq.; power of towns, 15–12–14.

Decisions from other jurisdictions.

— California.

County ordinance entitled "An ordinance regulating the use of water from pumping wells and to prevent the waste and flow thereof and the defining of waste of such water" did no violence to any general law of the State of California, the ordinance having for its purpose the conservation of the subterranean waters, a legitimate field for the exercise of the police power. Ex parte Maas, 219 Cal. 422, 27 P.2d 373.

Because it lacks the broad legislative, executive and judicial powers of a municipal corporation, a county water district is not a municipal corporation as that term is technically used in the laws of California. Laguna Beach County Water Dist. v. Orange County, 30 Cal. App. 2d 740, 87 P.2d 46.

100–10–2. Words and Phrases Defined.

As used herein the term "municipality" or "city" shall be deemed to mean and include any incorporated city or town of the state of Utah.

The terms "board" and "board of directors" shall be deemed to refer to the directors created under section 6 hereof.

The term "public corporation" as used herein shall be deemed to mean and include the United States or any public agency thereof, this or any other state or any political district or subdivision thereof. (Sec. 2.)

Comparable provisions.

Cal. Gen. Laws, Act 9129, § 2, as amended by Laws of 1941 (enumerating the "meanings" to be ascribed to the terms used in the act).

100–10–3. Purpose and Corporate Existence of Districts.

Metropolitan water districts may be organized hereunder for the purpose of acquiring, appropriating, developing, storing, selling, leasing and distributing water for, and devoting water to, municipal and domestic purposes, irrigation, power, milling, manufacturing, mining, metallurgical and any and all other beneficial uses, and such district may be formed of the territory included within the corporate boundaries of any one or more municipalities, which need not be contiguous, and may be organized and incorporated and thereafter governed, maintained and operated as herein provided, and when so incorporated shall have and exercise such powers as are herein expressly granted, together with such powers as are reasonably implied herefrom and necessary and proper to carry out the objects and purposes of such incorporated districts. Each such district when so incorporated shall be a separate and independent political corporate entity. (Sec. 3.)

100–10–4. Organization—Ordinance.

Such metropolitan water district shall be organized and incorporated in the following manner:

The legislative body of any municipality may pass an ordinance declaring that the public convenience and necessity require the incorporation of a metropolitan water district, which ordinance shall state: (1) that it is proposed to incorporate a metropolitan water district under the provisions of this act; (2) the name or names of the city or cities

proposed to be included within the district to be incorporated; (3) the name of the proposed district; (4) if the district is to comprise more than one city an estimate of the preliminary costs and expenses of incorporating and organizing the proposed district and an apportionment of such costs and expenses among the several municipalities proposed to be included within such district. Such apportionment shall be substantially in accordance with population as shown by the most recent federal census. (Sec. 4.)

100–10–5. Id. Copies to Be Mailed.

It shall be the duty of the clerk of the legislative body, upon the taking effect of such ordinance, to forthwith transmit a certified copy thereof by registered mail to the chief executive officer of each of the other municipalities named therein. (Sec. 5.)

100–10–6. Id. Approval or Rejection.

Within sixty days after the receipt by any municipality named therein of a certified copy of such ordinance, the legislative body of such municipality shall by order either approve or reject such ordinance without alteration or amendment. In the event that the legislative body of any municipality shall fail to act upon such ordinance as herein provided within such period of sixty days after the receipt of a certified copy thereof, such municipality shall be deemed to have rejected said ordinance. (Sec. 6.)

100–10–7. Id. Resolution Forwarded—Preliminary Expenses.

Immediately upon the approval or rejection of said ordinance by the legislative body of any municipality, the clerk thereof shall forward to the clerk of the municipality initiating the proceedings a certified copy of the resolution or ordinance, either enacting or rejecting such ordinance as the case may be. Each municipality thus approving such ordinance shall promptly pay over to the municipality initiating the procedure hereunder the sum of money apportioned to it by the municipality initiating the proceedings as its share of the preliminary costs and expenses of the incorporation and organization of such district, and the money so paid shall constitute a fund for the purpose of defraying such costs and expenses herein provided for, as are not met by the respective municipalities, and such incidental expenses as may be properly incurred in connection therewith. Each municipality contributing money as herein provided shall be entitled to credit with the district for the amount contributed. (Sec. 7.)

100–10–8. Call for Election.

Within one hundred twenty days after the transmission of said original ordinance, as provided in section 5 hereof, but not until each municipality named therein shall have acted thereon or said sixty-day periods shall have expired, the legislative bodies of the cities within the proposed district including the initiating city shall call and provide for the holding of a special election in all of the municipalities, at which election the proposition of the incorporation of such metropolitan water

district shall be submitted to the electors residing within such municipalities for ratification or rejection. Such election may be held separately or may be consolidated or held concurrently with any other election or elections authorized by law at which the electors residing in all of the cities wherein such election is called to be held are entitled to vote. (Sec. 8.)

100–10–9. Id. Election Districts.

Such election shall be called by ordinance by the governing bodies of the municipalities enacting the original ordinance including the initiating city. Such ordinance shall contain: (1) the names of all cities, the governing bodies of which shall have approved the original ordinance as provided in section 6 hereof, in which cities such election shall be called to be held, (2) the day upon which such election shall be held, which day shall be the same day in all municipalities, (3) the time for opening and closing polls, and (4) the manner of voting for or against the proposition. (5) Such ordinance shall also designate the voting districts and polling places and shall appoint for each polling place, from each election district from the electors thereof, the officers of such election, which officers shall consist of three judges, one of whom shall act as clerk, who shall constitute a board of election for each polling place. The description of election districts may be made by reference to any order or orders of the board of county commissioners of the county or respective boards of county commissioners of the counties in which the proposed metropolitan water district, or any part thereof, shall be situated, or by reference to any provisions, orders or ordinances of the legislative body of any municipality proposed to be included in the incorporation of such metropolitan water district, or by detailed description of such election districts. Election districts established by the board of county commissioners of the various counties may be consolidated for special elections held hereunder. (Sec. 9.)

100–10–10. Id. Concurrent and Consolidated Elections.

Whenever any election held hereunder shall be held concurrently with or shall be consolidated with any primary or general election, the precincts, polling places and officers of election shall be those designated and appointed for such primary or general election, and the ordinance calling the election hereunder need not designate precincts or polling places or name the election officers, but shall refer to the order or orders, or act or acts, by which such other election shall have been called, and by which the precincts and polling places thereof shall have been fixed and the officers of election appointed. (Sec. 10.)

100–10–11. Id. Publication of Call.

The ordinance calling such election shall be published once at least ten days before the date of the election therein called in a newspaper of general circulation printed and published in each county within the proposed metropolitan water district, and no other or further notice of such election or publication of the names of election officers or of the precincts or polling places need be given or made. (Sec. 11.)

1. Validity.
Metropolitan Water Districts Act held constitutional as against contention that notice of election was required by this section to be published in each county instead of in each city included in proposed district. Lehi City v. Meiling, 87 U. 237, 48 P.2d 530; Provo City v. Evans, 87 U. 292, 48 P.2d 555.

100-10-12. Ballot.

The ballot used at such election shall contain the words "Shall the territory embraced within the corporate boundaries of the city of .....become a part of the..... .....metropolitan water district" (inserting the name of the city or water district as the case may be wherein such ballot shall be used and the name of the metropolitan water district as stated in the initiating ordinance) and the words "Yes" and "No" accompanied by voting squares set opposite thereto so that any elector may record his vote either for or against the propositions. (Sec. 12.)

100-10-13. Counting Ballots and Canvassing Returns.

When such election shall be held separately or shall be conducted concurrently with any other election but by the use of separate ballots, such ballots shall be counted by the respective election boards and the returns thereof shall be made to the governing board of the initiating city, which governing board, at a meeting thereof to be held within five days after such election, shall canvass the returns and declare the result thereof. (Sec. 13.)

100-10-14. Id. Consolidated Elections.

In the event that any election held hereunder shall be consolidated with any primary or general election and the proposition herein provided for shall be printed upon a ballot containing other propositions, the returns of the election held hereunder shall be made with the returns of the primary or general election to the board of commissioners or other bodies whose duty it shall be to canvass the returns thereof, and the results of the election held hereunder shall be canvassed at the time and in the manner provided by law for the canvass of the returns of such primary or general election. It shall be the duty of such canvassing body or bodies to promptly certify and transmit to the governing body of the initiating city a statement of the result of the vote upon the proposition submitted hereunder in each of the respective cities, the returns for which shall have been made to such canvassing bodies. Upon the receipt of such certificates it shall be the duty of the governing body of the initiating city to tabulate and declare the result thereof. (Sec. 14.)

100-10-15. Certificate to Secretary of State—Assessed Valuation of Cities Approving.

The governing body of the initiating city shall certify to the secretary of state the proceedings had together with the result of the election, separately stating the names of the cities in which a majority of the electors voting upon the proposition shall have voted affirmatively; *provided, however,* that the total assessed valuation in such approving municipalities as shown by county assessment records, shall be not less

than two-thirds of the total assessed valuation within the district as proposed in the original ordinance according to the records of the county or counties. (Sec. 15.)

100–10–16. Incorporation—Certificate—Date Effective.

The secretary of state shall within ten days after the receipt of such certificate of election issue a certificate of incorporation reciting that the district named in such certificate of election has been duly incorporated according to the laws of the state of Utah, and naming the municipality or municipalities of which said district shall be composed as shown by such certificate of election, which municipality or municipalities shall be those in which the majority of electors voting on the proposition of incorporation shall have voted affirmatively. The secretary of state shall transmit to each such municipality a copy of said certificate of incorporation. The incorporation of any metropolitan water district shall be and become effective from and after the date of the issuance of such certificate of incorporation, and such district shall thereupon and thereafter become vested with all of the rights, privileges, and powers in this act provided. (Sec. 16.)

100–10–17. Id. Validity.

The validity of the incorporation of any such district shall be incontestable in any suit or proceeding which shall not have been commenced within three months from the date of the issuance of the certificate of incorporation thereof; and no invalidity or irregularity in any proceeding which does not substantially and adversely affect the interests of the electors or citizens of the district, or any municipality therein, shall be held to invalidate the incorporation of any such district. (Sec. 17.)

100–10–18. Powers of Incorporated Districts.

Any district incorporated as herein provided shall have power:

(a) To have perpetual succession.

(b) To sue and be sued in all actions and proceedings and in all courts and tribunals of competent jurisdiction.

(c) To adopt a corporate seal and alter it at pleasure.

(d) To take by grant, purchase, bequest, devise or lease, and to hold, enjoy, lease, sell, encumber, alien or otherwise dispose of, water, water works, water rights and sources of water supply, and any and all real and personal property of any kind within or without the district and within and without the state necessary or convenient to the full exercise of its powers; also to acquire, construct, or operate, control and use any and all works, facilities and means necessary or convenient to the exercise of its powers, both within and without the district and within and without the state, and to do and perform any and all things necessary or convenient to the full exercise of the powers herein granted.

(e) To have and exercise the power of eminent domain and in the manner provided by law for the condemnation of private property for public use to take any property necessary to the exercise of the powers herein granted. In any proceeding relative to the exercise of such

power of eminent domain, the district shall have the same rights, powers and privileges as a municipal corporation.

(f) To construct and maintain works and establish and maintain facilities across or along any public street or highway and in, upon or over any vacant public lands which public lands are now, or may become, the property of the state of Utah, and to construct works and establish and maintain facilities across any stream of water or water course; *provided, however,* that the district shall promptly restore any such street or highway to its former state of usefulness as nearly as may be, and shall not use the same in such manner as to completely or unnecessarily impair the usefulness thereof. The grant of the right to use such vacant state lands shall be effective upon the filing by such district with the state land board of an application showing the boundaries, extent and locations of the lands, rights of way or easements desired for such purposes. If the land, rights of way or easement for which application shall be made is for the construction of any aqueduct, ditch, pipe line, conduit, tunnel or other works for the conveyance of water, or for roads, or for poles, or towers and wires for the conveyance of electrical energy or for telephonic or telegraphic communication, no compensation shall be charged the district therefor, unless, in the opinion of the state land board the construction of such works will render the remainder of the legal subdivision through which such works are to be constructed valueless or unsalable, in which event the district shall pay for the lands to be taken and for such portion of any legal subdivision which, in the opinion of said state land board, are rendered valueless or unsalable, at the rate of $2.50 per acre. If the lands for which application is made are for purposes other than the construction of roads or works for the conveyance of water, or electricity or telephonic or telegraphic communications, such district shall pay to the state for such lands at the rate of $2.50 per acre. Upon filing such application, accompanied by map or plat showing the location or proposed location of such works or facilities, the fee title to so much of such state lands as shall be necessary or convenient to enable such district efficiently and without interference to construct, maintain and operate its works and to establish, maintain and operate its facilities, shall be conveyed to such district by patent; if an easement or right of way only over such lands be sought by such district, such easement or right of way shall be evidenced by permit or grant executed by or on behalf of the state land board. The state land board may reserve in such patents, grants or permits, easements and rights of way in the public across any lands therein described for streets, roads and highways theretofore established according to law. Before any such patent, grant or permit shall be executed any compensation due to the state under the provisions hereof, must be paid. No fee shall be exacted from such district for any patent, permit or grant so issued or for any service rendered hereunder. In the use of streets the district shall be subject to the reasonable rules and regulations of the county or city wherein such streets lie, concerning excavations and the refilling of excavations, the relaying of pavements and the protection of the public during periods of construction; *provided,* that the district shall not be required to pay any license

or permit fees, or file any bonds. The district may be required to pay reasonable inspection fees.

(g) To borrow money and incur indebtedness and to issue bonds or either [other] evidence of such indebtedness; *provided, however*, that no district incorporated hereunder shall incur indebtedness which, in the aggregate, shall exceed 10 per cent of the assessed valuation, without reduction for any exemption, of all the taxable property within the district as shown by the assessment records of the county.

(h) To fix and determine the funds required for district purposes of every nature and to apportion, and charge the same against the area of each city, within the district as follows:

(1) As to the costs of all water, water rights, reservoirs, canals, conduits and other works for which the district as a whole receives the benefit, and on account of which the district is indebted or on account of which the district has made payment without any previous apportionment and charge having been made, and the charges made against the district by reason of its ownership of stock in any water users' association, in the same proportion as the water and water rights set apart or allotted to each area shall bear to the total water and water rights owned or held by the district.

(2) As to have portion of said funds required for operation, maintenance and the cost of construction of distributing systems, the same shall be equitably apportioned and shall be determined and based on the benefits and the relative cost of service rendered by the district to each respective area.

(i) To levy and collect taxes for the purposes of carrying on the operations and paying the obligations of the district; and to levy in any year a tax sufficient to cover in full any deficit that may have resulted from tax delinquencies for any preceding year; *provided, however*, that such tax levied under this section exclusive of any tax levied to meet the bonded indebtedness of such district and the interest thereon, and any indebtedness and interest thereon owing the United States by the district or for the payment of which the district shall be liable, shall not exceed twenty-five cents on each one hundred dollars of such assessed valuation.

(j) To enter into contracts, employ and retain personal services and employ laborers; to create, establish and maintain such officers and positions as shall be necessary and convenient for the transaction of the business of the district, and to elect, appoint and employ such officers, attorneys, agents and employees therefor as shall be found by the board of directors to be necessary and convenient, except as may be otherwise provided by law as to attorneys and engineers of a district which may be included within the area of only one municipality.

(k) To join with one or more other corporations public or private for the purpose of carrying out any of its powers, and for that purpose to contract with such other corporation or corporations for the purposes of financing such acquisitions, constructions and operations, and therein obligate itself severally or jointly with such other corporation or corporations; also to secure, guarantee or become surety for the payment of any indebtedness, or the performance of any contract or other obliga-

tion that may be, or shall have been, incurred or entered into by any corporation in which the district shall have acquired shares of stock by subscription or otherwise. Such contracts may provide for contributions to be made by each party thereto and for the division and apportionment of the expenses of such acquisitions and operations, and the division and apportionment of the benefits, the services and products therefrom, and may provide for an agency to effect such acquisitions and carry on such operations, and shall provide the powers and the methods of procedure for such agency the method by which such agency may contract. Such contract may contain such other and further covenants and agreements as may be necessary and convenient to accomplish the purposes hereof.

(l) To acquire water and water rights within or without the state; to develop, store and transport water; to subscribe for, purchase and acquire stock in canal companies, water companies and water user's associations; to provide, sell, lease and deliver water for municipal and domestic purposes, irrigation, power, milling, manufacturing, mining, metallurgical and any and all other beneficial uses; to fix the rates therefor, and to acquire, construct, operate and maintain any and all works, facilities, improvements and property necessary or convenient therefor, and in the doing of all said things to obligate itself jointly with other persons and corporations, public and private, and execute and perform such obligations according to the tenor thereof; *provided, however*, that in the sale, leasing and delivery of water as hereinbefore provided, preference shall always be given to the water requirements within the district; and the supplying of water to purchasers of [or] users without the district shall, in every case, be subject to the paramount right of the district to discontinue the same, in whole or in part, and to take and hold, or to provide, sell and deliver, such water for said or other beneficial uses within the district, upon one year's written notice to the purchaser or user without the district, such notice to be given by the board of directors of the district whenever it shall be determined and declared by resolution adopted by said board of directors by a two-thirds vote thereof that such water is needed or required by users within the district for beneficial use therein.

Each city, the area of which shall be a part or all of any district incorporated hereunder, shall have a preferential right to purchase from the district for distribution by such city, or any public utility therein empowered by said city for the purpose, for domestic, municipal and other beneficial uses within such city, a portion of the water served by the district which shall, from time to time, bear the same ratio to all of the water supply of the district as the total accumulation of amounts paid by such city to the district on tax assessments and otherwise, excepting purchase of water, toward the capital cost and operation expense of the district's works, shall bear to the total payments received by the district on account of tax assessments and otherwise, excepting purchase of water, toward such capital cost and operating expense.

(m) To invest any surplus money in the district treasury including such money in any sinking fund established for the purpose of provid-

ing for the payment of the principal or interest of any bonded contract or other indebtedness or for any other purpose, not required for immediate necessities of the district, in its own bonds, or in treasury notes, or bonds, of the United States, or of this state, and such investment may be made by direct purchase of any issue of such bonds or treasury notes, or part thereof, at the original sale of the same, or by the subsequent purchase of such bonds or treasury notes. Any bonds or treasury notes thus purchased and held may, from time to time be sold and the proceeds reinvested in bonds or treasury notes, as above provided. Sales of any bonds or treasury notes thus purchased and held shall, from time to time, be made in season so that the proceeds may be applied to the purposes for which the money, with which the bonds or treasury notes were originally purchased, was placed in the treasury of the district. The functions and duties authorized by this paragraph shall be performed by joint action of the controller and treasurer, with the approval of the attorney, under such rules and regulations as shall be prescribed by the board of directors of the district.

(n) To refund bonded indebtedness incurred by the district under and pursuant to the provisions of Sections 21 to 23 inclusive of the act, such refunding to be made in the following manner.

(1) The board of directors by a two-thirds vote may refund such bonded indebtedness, or any portion thereof, and issue refunding bonds of the district therefor maturing not later than fifty years from the date of the first of the refunded bonds, if said refunded bonds shall have been issued in one block, or from the date of the respective installment of such refunded bonds, if the same shall have been issued in installments, and bearing interest at a rate not exceeding the interest rate on the refunded bonds. The provisions of Sections 25, 26, 30, 31 and 33 hereof subject to the limitations and modifications imposed by this paragraph, shall apply to such refunding bonds. The provision in said Section 25 for deferring the date of the earliest maturity of the principal of the bonds shall be construed to authorize the board of directors, in its discretion, to determine and fix the date for the earliest maturity of the principal of said refunding bonds, which date shall be not later than fifteen years from the date of the first issue of the refunded bonds or from the date of the respective installment of the refunded bonds, as the case may be.

(2) Said refunding bonds may be sold by the board of directors as it shall determine, in the manner provided in Section 27 of this act for the sale of the bonds to be refunded, and the proceeds of the sale of such refunding bonds, excepting premium and accrued interest, shall be placed in the treasury of the district to the credit of the "refunding fund" and shall be applied only to the purchase, at not more than par and accrued interest, of the bonded indebtedness for which said refunding bond shall have been issued. Premium and accrued interest shall be placed in the fund to be applied to the payment of interest on, and the retirement of, the refunding bonds so sold. In lieu of selling such refunding bonds and purchasing with the proceeds thereof the bonds to be refunded, the board of directors of the district may ex-

change refunding bonds at not less than par and accrued interest for the bonds so refunded.

(3) Whenever such outstanding bonds shall be refunded, they shall be surrendered to the treasurer of the district, who shall proceed to cancel the same by indorsing on the face thereof the manner in which the refunding shall have been affected (whether by exchange or purchase, and the amount for which so purchased, if any) and by perforating through each bond and each coupon attached thereto, the word "cancelled" together with the date of cancellation. He shall keep a record of such bonds so refunded, and shall make a report to the board of directors at least once a month.

(4) All monies which shall remain in said "refunding fund" after all outstanding bonds which were proposed to be refunded therefrom have been taken up and cancelled, shall be paid into the sinking fund of such district and become a part thereof. (Sec. 18.)

History.

As amended by L. 37, ch. 133, eff. May 11; L. 41, ch. 98, eff. May 13, making no material changes in text except in subd. (g).

Comparable provisions.

Cal. Gen. Laws, Act 9129, § 5 (similar).

1. Validity.

This act held constitutional as against objection act was in violation of due process of law in that taxing powers conferred on district by this section were in nature of assessments for benefits and no provision was made as to hearings with respect to such benefits, since tax imposed was general ad valorem tax and not assessment for benefits. Lehi City v. Meiling, 87 U. 237, 48 P.2d 530; Provo City v. Evans, 87 U. 292, 48 P.2d 555.

This act held not unconstitutional as violating Const. Art. VI, § 31, providing that no political subdivision should lend its credit or subscribe to stock or bonds in aid of other corporate enterprise in that this section empowered district to join with other corporation for purpose of carrying out its powers and to obligate itself with other corporations in financing its operations and to become surety for payment of indebtedness of corporation in which district should have stock, since powers of district are for acquiring and using water for public benefit. Lehi City v. Meiling, 87 U. 237, 48 P.2d 530; Provo City v. Evans, 87 U. 292, 48 P.2d 555.

This act held not unconstitutional as an attempt to unlawfully delegate power of taxation to a special commission and to interfere in city and town affairs in violation of Const. Art. VI, § 29, since board of directors in whom control of district has been intrusted is not a special commission, and power of such directors is over property of districts and not over property of towns in the district. Lehi City v. Meiling, 87 U. 237, 48 P.2d 530; Provo City v. Evans, 87 U. 292, 48 P.2d 555.

2. Limitation on indebtedness.

Power to incur indebtedness not to exceed ten per cent of assessed valuation given district by this section did not render this act unconstitutional as violation of Const. Art. XIV, § 3, requiring no debt in excess of taxes for current year to be incurred by county or subdivision thereof, since district was not subdivision of county. Lehi City v. Meiling, 87 U. 237, 48 P.2d 530; Provo City v. Evans, 87 U. 292, 48 P.2d 555. (Moffat and Hanson, JJ., dissenting.)

Metropolitan Water District is not a municipal corporation and hence not subject to the four per cent debt limitation imposed by Const. Art. XIV, § 4. Lehi City v. Meiling, 87 U. 237, 48 P.2d 530; Provo City v. Evans, 87 U. 292, 48 P.2d 555. (Moffat and Hanson, JJ., dissenting.)

100-10-19. Municipal Attorney and Engineer to Act for District—Reimbursement.

If any district shall include the area of only one municipality, then the regularly appointed attorney and the regularly appointed engineer of such municipality shall be, ex officio, the attorney and engineer, respectively, of such district, and they shall serve as such attorney and

engineer without other compensation than that paid them by such municipality. The district shall reimburse the municipality for the actual cost to it for the services performed for the district by such attorney and engineer. (Sec. 18a.)

History.
Added by L. 41, ch. 98, eff. May 13.

100–10–20. Directors—Representation—Voting—Organization.

All powers, privileges and duties vested in or imposed upon any district incorporated hereunder shall be exercised and performed by and through a board of directors; *provided, however,* that the exercise of any and all executive, administrative and ministerial powers may be by said board of directors delegated and redelegated to any of the offices created hereby or by the board of directors acting hereunder.

In the event that the district shall be organized to comprise the area of two or more cities, the board of directors herein referred to shall consist of at least one representative from each municipality, the area of which shall lie within the metropolitan water district. Such representatives shall serve without compensation from the district and shall be designated and appointed by the chief executive officers of municipalities, respectively, with the consent and approval of the governing bodies of the municipalities, respectively. As a member of the board of directors, each representative shall be entitled to vote on all questions, orders, resolutions and ordinances coming before the board, and shall be entitled to cast one vote for each ten million dollars, or major fractional part thereof, of assessed valuation of property taxable for district purposes in the city represented by him as shown by the assessment records of the county and evidenced by the certificate of the county auditor; *provided,* that each representative shall have at least one vote and no municipality shall have votes exceeding in number the total number of votes of all the other municipalities that are members of such district. In lieu of one representative any city may at its option designate and appoint several representatives not exceeding one additional representative for each fifty million dollars of assessed valuation, but such representatives shall cast the vote to which such city would otherwise be entitled as a unit and as a majority of such representatives present shall determine. The affirmative vote of members representing more than 50 per cent of the total number of votes of all the members shall be necessary and, except as otherwise herein provided, shall be sufficient to carry any order, resolution or ordinance coming before the board of directors. For the purposes of this section, the term "major fractional part" shall be deemed to mean a fractional part larger than one-half. Members of the board of directors so constituted shall convene at the time and place fixed by the chief executive officer of the municipality initiating the proceedings hereunder, and immediately upon convening, such board of directors shall elect from its membership a chairman, a vice chairman, and a secretary, who shall serve for a period of two years, or until sooner recalled or resigning, or until his successor shall be elected and qualified.

If any district shall include the area of only one municipality then the board of directors shall consist of such number as the governing body of that municipality shall determine. All provisions of this section appropriate shall apply to such board. (Sec. 19.)

100-10-21. Powers of Directors.

The board of directors shall have power:

Meetings.

(1) To fix the time and place or places at which its regular meetings shall be held, and shall provide for the calling and holding of special meetings.

Ordinances, Resolutions and Orders—Roll Call.

(2) To make and pass ordinances, resolutions and orders not repugnant to the constitution of the United States or of the state of Utah, or to the provisions of this act, necessary for the government and management of the affairs of the district, for the execution of the powers vested in the district and for carrying into effect the provisions of this act. On all ordinances the roll shall be called and the ayes and noes recorded. Resolutions and orders may be adopted by viva voce, but on demand of any member the roll shall be called. No ordinance shall be adopted unless it shall have been introduced on a day previous to the time of such adoption except by unanimous vote of all the members of the board of directors present, provided there shall be present directors from not less than three-fourths of all cities composing said metropolitan water district and representing not less than three-fourths of the total votes of said district; *provided*, that in lieu of such previous introduction or unanimous vote any ordinance may be mailed by registered mail, postage prepaid to each member of the board of directors at least five days prior to the day upon which such ordinance shall be presented for adoption. All ordinances shall take effect upon their adoption by the board of directors.

Location of Offices.

(3) To fix the location of the principal place of business of the district and the location of all officers and departments maintained hereunder.

Business Administration, Officers and Employees.

(4) To prescribe by ordinance a system of business administration and to create any and all necessary offices which shall include the offices of controller and of treasurer and to select and employ, and establish and reëstablish the powers, duties and compensation of all officers and employees and prescribe the periods, terms and conditions of their employment, and to require and fix the amount of all official bonds necessary for the protection of the funds and property of the district.

Civil Service.

(5) To prescribe by ordinance a system of civil service.

Delegation of Authority to Officers.

(6) By ordinance to delegate and redelegate to officers of the district power to employ clerical, legal and engineering assistants and labor, and, under such conditions and restrictions as shall be fixed by the directors, power to bind the district by contract.

Claims, Method of Auditing—Construction of Works—Letting Contracts.

(7) To prescribe a method of auditing and allowing or rejecting claims and demands; also to prescribe methods for the construction of works and for the letting of contracts for the construction of works, structures or equipment, or the performance or furnishing of labor, materials or supplies, required for the carrying out of any of the purposes of this act; *provided,* that in cases where work is not be done by the district itself by force account, and the amount involved shall be $10,000, or more, the board of directors shall provide for the letting of contracts to the lowest responsible bidder, after publication of notices inviting bids, at least once and not less than ten days prior to the expiration of the period within which bids shall be received, subject always to the right of said board to reject any and all proposals. Provided, likewise, that the board of directors in advertising for bids and in letting contracts as above provided, may require all articles to be furnished to the district thereunder to be manufactured, produced or fabricated in the United States or its territories, and may prohibit the use in, or employment in connection with, the carrying out of such contracts by the contractor or any subcontractor, of all machinery or materials except such as shall have been manufactured, produced or fabricated in the United States or its territories, if such are available, the question of such availability to be determined by the board of directors. Provided, further, that contracts, in writing or otherwise, may be let without advertising for or inviting bids, when any repairs, alterations, or other work or the purchase of materials, supplies, equipment or other property, shall be deemed by the board of directors to be of urgent necessity, and shall be authorized by a two-thirds vote thereof.

Rates.

(8) To fix the rates at which water shall be sold; *provided, however,* that rates shall be equitable, although not necessarily equal or uniform, for like classes of service throughout the district. (Sec. 20.)

Comparable provisions.

Cal. Gen. Laws, Act 9129, § 6 (contains similar provisions).

I. Validity.

This act held not unconstitutional as an attempt to unlawfully delegate power of taxation to a special commission and to interfere in city and town affairs in violation of Const. Art. VI, § 29, since board of directors in whom control of district has been intrusted is not a special commission, and power of such directors is over property of districts and not over property of towns in the district. Lehi City v. Meiling, 87 U. 237, 48 P.2d 530; Provo City v. Evans, 87 U. 292, 48 P.2d 555.

100–10–22. Contracts—Bonded and Other Indebtedness—Submission to Electors—Call—Precincts.

Whenever the board of directors of any metropolitan water district incorporated under this act shall, by ordinance adopted by a vote of a majority of the aggregate number of votes of all the members of the

board of directors, determine that the interests of said district and the public interest or necessity demand the acquisition, construction or completion of any source of water supply, water, waterworks or other improvement, works or facility, or the making of any contract with the United States or other persons or corporations, or the incurring of any preliminary expense, necessary or convenient to carry out the objects or purposes of said district wherein an indebtedness or obligation shall be created to satisfy which shall require a greater expenditure than the ordinary annual income and revenue of the district shall permit, said board of directors may order the submission of the proposition of incurring such obligation or bonded or other indebtedness, for the purposes set forth in the said ordinance, to such qualified electors of such district as shall have paid a property tax in the year preceding such election, at an election held for that purpose. Any election held for the purpose of submitting any proposition or propositions of incurring such obligation or indebtedness may be held separately, or may be consolidated or held concurrently with any other election authorized by law at which such qualified electors of the district shall be entitled to vote. The declaration of public interest or necessity herein required and the provision for the holding of such election may be included within one and the same ordinance, which ordinance, in addition to such declaration of public interest or necessity, shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the public works or improvements, or the estimated amount of preliminary expenses, as the case may be, the amount of the principal of the indebtedness to be incurred therefor and the maximum rate of interest to be paid on such indebtedness, which rate shall not exceed 6 per centum per annum payable semiannually. Such ordinance shall also fix the date upon which such election shall be held and the manner of holding the same and the method of voting for or against incurring the proposed indebtedness. Such ordinance shall also fix the compensation to be paid the officers of the election and shall designate the precincts and polling places and shall appoint for each polling place, from each precinct from the electors thereof, the officers of such election, which officers shall consist of three judges, one of whom shall act as clerk, who shall constitute a board of election for each polling place. The description of precincts may be made by reference to any order or orders of the board of commissioners of the county or counties in which the district or any part thereof is situated, or by reference to any previous order or ordinance of the legislative body of the municipality, or by detailed description of such precincts. Precincts established by the boards of commissioners of the various counties, to a number not exceeding six, may be consolidated for special elections held hereunder. In the event any such election shall be called to be held concurrently with any other election or shall be consolidated therewith, the ordinance calling the election hereunder need not designate precincts or polling places or the names of officers of election, but shall contain reference to the act or order calling such other election and fixing the precincts and polling places and appointing election officers therefor. (Sec. 21.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 7, subd. a (similar).

100–10–23. Elections—Publication of Call.

The ordinance provided for in section 21 shall be published once, at least ten days before the date of the election therein called, in a newspaper of general circulation published within the district, and where no newspaper is published within the district, the ordinance shall be posted in three public places within said district at least ten days before the date of the election therein called, and no other or further notice of such election or publication of the names of election officers or of the precincts or polling places need be given or made. (Sec. 22.)

History.
As amended by L. 37, ch. 133, eff. May 11, making no material change in text.

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 7, subd. b (posting of notice is not mentioned).

100–10–24. Conduct of Election—Canvass of Returns.

The respective election boards shall conduct the election in their respective precincts in the manner prescribed by law for the holding of general elections, and shall make their returns to the secretary of the district. At any regular or special meeting of the board of directors held not earlier than five days following the date of such election, the returns thereof shall be canvassed and the results thereof declared. In the event that any election held hereunder shall be consolidated with any primary or general election and the proposition to be submitted hereunder shall be printed upon a ballot containing other propositions, the returns of the election held hereunder shall be made with the returns of the primary or general election to the board of commissioners or other bodies whose duty it shall be to canvass the returns thereof, and the results of the election held hereunder shall be canvassed at the time and in the manner provided by law for the canvass of the returns of such primary or general election. It shall be the duty of such canvassing body or bodies to promptly certify and transmit to the board of directors of the district a statement of the result of the vote upon the proposition submitted hereunder. Upon receipt of such certificates, it shall be the duty of the board of directors to tabulate and declare the results of the election held hereunder. (Sec. 23.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 7, subd. c (similar).

100–10–25. If Majority Favor.

In the event that it shall appear from said returns that a majority of said qualified electors of such district who shall have voted on any proposition submitted hereunder at such election, voted in favor of such proposition, the district shall thereupon be authorized to incur such indebtedness or obligation, enter into such contract, and issue and sell such bonds of the district, all for the purpose or purposes and object or objects provided for in the proposition submitted hereunder and in the ordinance therefor, and in the amount so provided and at a rate of interest not exceeding the rate recited in such ordinance. (Sec. 24.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 7, subd. d (similar).

100-10-26. Bond Issues—Payment—Deferred Maturities—Denomination—Interest—Coupons.

All bonds of such district, issued under the provisions of this act, shall be payable substantially in the following manner: A part to be determined by the board of directors which shall not be less than one-fiftieth part of the whole amount of such indebtedness, shall be payable each and every year on a day and date, and at a place or places to be fixed by said board of directors, together with the interest on all sums unpaid at such date; *provided*, that in case such bonds are issued in installments at different times, each installment shall be payable substantially in the following manner: A part to be determined by the board of directors which shall not be less than one-fiftieth part of the whole amount of such installment, shall be payable each and every year on a day and date, and at a place or places to be fixed by said board of directors, together with the interest on all sums unpaid at such date; *provided, however*, that said board may, in its discretion, determine and fix the date for the earliest maturity of the principal of the whole amount of such bonded indebtedness, or of each installment of such bonds, as the case may be, not more than fifteen years from the date of the first issue of such bonds, or of the respective installment of such bonds, as the case may be; in this event, the whole amount of such bonded indebtedness, or of the respective installment of such bonds, as the case may be, must be made payable in substantially equal annual parts in not to exceed fifty years from the date of the first issue of such bonds, when the bonds are issued in one block, or from the date of the respective installments of such bonds, when the bonds are issued in installments. The bonds shall be issued in such denominations as the board of directors may determine, except that no bonds shall be of less denomination than $100, nor of a greater denomination than $50,000 and shall be payable on the day and at the place or places fixed in such bonds and with interest at the rate specified therein, which rate shall not be in excess of 6 per cent per annum, and shall be payable semiannually. Such bonds shall be signed by the chairman of said board of directors, or by such other officers as said board of directors shall, by resolution adopted by a majority vote of its members, authorize and designate for that purpose, and such bonds shall also be signed by the controller, or assistant controller, and countersigned by the secretary of said board of directors. The coupons of said bonds shall be numbered consecutively, and signed by said controller, or assistant controller. All such signatures and countersignatures excepting that of the controller, or assistant controller, on said bonds, may be printed, lithographed or engraved. (Sec. 25.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 7, subd. c (similar).

100-10-27. Validity of Signatures.

In case any of such officers, whose signatures or countersignatures appear on the bonds or coupons, shall cease to be such officer before the delivery of such bonds to the purchaser, such signatures or countersignatures shall nevertheless be valid and sufficient for all purposes, the

same as if they had remained in office until the delivery of such bonds. (Sec. 26.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 7, subd. f (identical).

100–10–28. Sale of Bonds—Interim Certificates.

Such bonds shall not be sold at a price less than the par value thereof, together with accrued interest to the date of delivery, nor until notice calling for bids therefor shall have been published at least once in a newspaper of general circulation published and circulated in the county wherein the principal place of business of said district shall be located. Said notice, calling for bids, shall state the time for the receipt of such bids, which shall not be less than ten days after the first publication thereof. Such notice may offer the bonds at a fixed interest rate or with the interest rate undetermined, in which event the bids shall contain a statement of the lowest rate of interest at which the bidder will take the bonds and pay par value or more therefor, together with accrued interest. Bids for such bonds shall be opened publicly and the results thereof publicly announced. Such bonds shall be sold to the highest bidder. Temporary, or interim, bonds or certificates, of any denomination whatsoever, to be signed by the controller, may be issued until the definitive bonds are executed and available for delivery. (Sec. 27.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 7, subd. g (substantially identical).

100–10–29. Proceeds of Sale of Bonds.

Such bonds may be issued and sold by said board of directors as they shall determine, and the proceeds thereof, excepting premium and accrued interest, shall be placed in the treasury of said district to the credit of the proper improvement fund, and shall be applied exclusively to the purposes and objects mentioned in said ordinance; *provided*, that the interest on said bonds accruing during the construction period and for one year thereafter shall be deemed to be a construction cost within the meaning of the purposes and objects mentioned in said ordinance, and such interest may be paid from said proceeds of the sales of such bonds. Premium and accrued interest shall be placed in the fund to be applied to the payment of interest on, and the retirement of, the bonds so sold. For the purposes of this section, the construction period shall be deemed to end when the works, the construction of which shall have been authorized from the proceeds of any such bond issue, shall have been placed in operation to such extent as to result in the sale and delivery in the district, of water transported and provided by means of such works. (Sec. 28.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 7, subd. h (substantially identical).

100–10–30. Action to Test Validity of Contracts, Bonds and Other Contract Obligations or Indebtedness.

The board of directors may, within ninety days from the date of the election authorizing the issuance of bonds, the making of any contract, the incurring of any contract obligation or indebtedness, cause to be brought in the name of the district an action in the district court of the county in which said district, or the greater portion of the property subject to taxation by said district, according to the most recent assessment, is located, to determine the validity of any such bonds, contract, contract obligation, or indebtedness, and the sufficiency of the provision for the collection of an annual tax sufficient to pay the interest on such bonded or other indebtedness and the principal thereof as such interest and principal shall fall due and/or to constitute a sinking fund for the payment of principal on or before maturity. Such action shall be in the nature of a proceeding in rem, and jurisdiction of all parties interested may be had by publication of summons for at least once a week for three weeks in some paper of general circulation published in the county where the action is pending, such paper to be designated by the court having jurisdiction of the proceedings. Jurisdiction shall be complete within ten days after the full publication of such summons in the manner herein provided. Anyone interested may at any time before the expiration of said ten days appear and by proper proceedings contest the validity of such bonds, contract or contract obligation, or indebtedness and the sufficiency of the provisions for the collection of said annual tax. Such action shall be speedily tried and judgment rendered declaring such bonds, contract or contract obligation, or indebtedness to be valid or invalid, and declaring the provision for the collection of an annual tax for said purposes, to be sufficient or insufficient. Either party may have the right to appeal to the supreme court at any time within thirty days after the rendition of such judgment, which appeal must be heard and determined within three months from the time of taking such appeal. After the expiration of ninety days from the date of the election authorizing the making of such contract or contracts, the issuance of bonds, or the incurring of other obligation or indebtedness, no action may be brought to contest or question the validity of said bonds, contract, obligation, or indebtedness and proceedings in relation thereto or the sufficiency of the provision for the collection of an annual tax sufficient to pay the interest on such indebtedness, or the principal thereof, as it falls due and/or to constitute a sinking fund for the payment of principal on or before maturity. If there be more than one action or proceeding involving the validity of any such bonds, indebtedness or contract, or the sufficiency of the provision for the collection of an annual tax sufficient for the said purposes, they shall be consolidated and tried together. The court hearing any proceeding or action inquiring into the regularity, legality or correctness of the proceedings leading up to the making of such contract or contracts, the incurring of snid indebtedness or issunnce of bonds or the validity of such bonds or the sufficiency of such provision for the collection of an annual tax, must

disregard any error, irregularity or omission which does not affect the substantial rights of the parties to said action or proceeding. The rules of pleading and practice provided by the code of civil procedure, which are not inconsistent with the provisions of this act, are applicable to all actions or proceedings herein provided for. The motion for a new trial of any such action or proceeding must be heard and determined within ten days from the filing of the notice of intention. The costs on any proceeding or action herein provided for may be allowed and apportioned between the parties or taxed to the losing party, in the discretion of the court. (Sec. 29.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 7, subd. i (similar).

100–10–31. Water Rates to Pay Operating Expenses, Repairs and Depreciation—Interest and Principal of Bonded and Other Debt to Be Paid so Far as Practicable from Water Rates —Tax Levy if Rate Inadequate.

The board of directors shall fix such rate or rates for water furnished as will pay the operating expenses of the district, provide for repairs and depreciation of works owned or operated by such district, pay the interest on any bonded or other debt, and, so far as practicable, provide a sinking or other fund for the payment of the principal of such debt as the same may become due; it being the intention of this section to require the district to pay the interest and principal of its indebtedness from the revenues of such district, so far as practicable. If, however, from any cause, the revenues of the district shall be inadequate to pay the interest or principal of any debt as the same shall become due, the board of directors shall, at the time of fixing the tax levy and in the manner for such tax levy provided, levy and collect annually until said indebtedness shall be paid or until there shall be a sum in the treasury of the district set apart for that purpose sufficient to meet all sums coming due for principal and interest thereon, a tax sufficient to pay the annual interest on such indebtedness, or such part thereof as shall not be met from revenues of the district, and also sufficient to pay such part of the principal of such bonds and other debt as shall become due before the time when money will be available from the next general tax levy, or such portion thereof as shall not be met from revenues of the district; *provided, however*, that if the maturity of such indebtedness be made to begin more than one year after the date when the same shall be incurred, such tax shall be levied and collected at the time and in the manner aforesaid annually sufficient when added to revenues of the district available for that purpose to pay the interest on such indebtedness as it falls due and also to constitute, together with the revenues of the district available for such purpose, a sinking fund for the payment of the principal thereof on or before maturity. The taxes herein required to be levied and collected shall be in addition to all other taxes levied for district

purposes and shall be collected at the time and in the same manner as other district taxes are collected and shall be used for no purpose other than the payment of such indebtedness and accruing interest. (Sec. 30.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 7, subd. j (similar).

100-10-32. Conversion of Coupon Bonds Into Registered Bonds—Reconversion—Exchanging for Higher Denomination.

Coupon bonds issued hereunder, at the request of the holder, may be registered as to principal and interest in the holder's name on the books of the treasurer of the district, and the coupons surrendered and the principal and interest made payable only to the registered holder of the bond. For that purpose the treasurer of the district shall detach and cancel the coupons, and shall endorse a statement on the bonds that the coupon sheet issued therewith has been surrendered by the holder, and the coupons canceled by such treasurer, and that the principal and the semiannual interest are thereafter to be paid to the registered holder, or order, by draft, check or warrant drawn payable at a place of payment specified in the bond, after which no transfer shall be valid unless made on such treasurer's books by the registered holder, or by his attorney duly authorized, and similarly noted on the bond. After such registration, the principal and interest of such bond shall be payable only to the registered owner. Bonds registered under this paragraph may, with the consent of the district and the holders of the bonds, be reconverted into coupon bonds at the expense of the holder thereof, and again reconverted into registered bonds from time to time, as the board of directors of the district and the holders of the bonds may determine. In converting coupon bonds into registered bonds, coupon bonds may be exchanged for registered bonds of $100 each, or multiples thereof, but not exceeding $50,000 each, in which event new registered bonds shall be issued at the expense of the holder. Coupon bonds may be exchanged for other coupon bonds of $100 each, or multiples thereof, but not exceeding $50,000 each, in which event new coupon bonds shall be issued at the expense of the holder. (Sec. 31.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 7, subd. k (similar).

100-10-33. Id. Fees.

For each conversion or reconversion of a coupon or registered bond, the treasurer of the district shall be entitled to charge and collect such fee as the board of directors of the district may prescribe from time to time. (Sec. 32.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 7, subd. k (includes identical provision).

100–10–34. Bonds as Legal Investment for Trust and Institutional Funds.

All bonds heretofore or hereafter issued by any metropolitan water district shall be legal investments for all trust funds, and for the funds of all insurance companies, banks, both commercial and savings and trust companies, and for the state school funds, and for all sinking funds under the control of the state treasurer, and whenever any monies or funds may by law now or hereafter enacted be invested in, or loaned upon the security of, bonds of cities, cities and counties, counties, or school districts in the state of Utah, such monies or funds may be invested in, or loaned upon the security of, the bonds of such metropolitan water district; and whenever bonds of cities, cities and counties, counties, or school districts, by any law now or hereafter enacted, may be used as security for the faithful performance or execution of any court or private trust or of any other act, bonds of such metropolitan water district may be so used. (Sec. 33.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 7, subd. 1 (similar).

100–10–35. Taxation—Assessed Valuation.

Immediately after equalization and not later than the fifteenth day of August of each year, it shall be the duty of the auditor of each county wherein such district or any part thereof shall lie, to prepare and deliver to the controller of the district a certificate showing the assessed valuation of all property within the district lying in the county, and also such assessed valuation segregated according to cities, the area of which lies within the district. (Sec. 34.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 8, subd. a (identical).

100–10–36. Rate of Taxation.

On or before the twentieth day of August the board of directors of the district shall by resolution determine the amount of money necessary to be raised by taxation during the fiscal year beginning the first day of January next preceding and shall fix the rate of taxation of the areas of each separate city within the district, designating the number of cents upon each one hundred dollars assessed valuation of taxable property in each of said areas in each county and shall levy a tax accordingly.

(a) Sufficient to meet interest and sinking fund requirements on, and/or any payment to principal of, outstanding bonded and other indebtedness of said district; and sufficient to meet the payment of the principal and interest on any refunding bonds, or on any bonds the issuance of which may have been authorized as herein provided, and which bonds have not been sold but which, in the judgment of the board of directors, will be sold prior to the time when money will be available from the next subsequent tax levy, and in case such bonds are not so issued and sold or such tax for any other reason is not required for

said purpose, the tax so levied shall be applied to the payment of interest and/or principal on any refunding bonds, or on any bonds authorized as herein provided, then outstanding or subsequently issued and/or sold; or on any contract or other indebtedness and

(b) For all other district purposes. (Sec. 35.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 8, subd. b (similar).

100–10–37. Amounts and Installments for Cities.

The board of directors shall also cause to be computed and shall declare in said resolution the amount of money to be derived from the area of the district lying within each separate municipality by virtue of the tax levy in accordance with the provisions of subdivision (h) of section 18 of this act. In such resolution the board shall also fix and determine the times and proportional amounts of installments in which any city may elect to make payment in lieu of taxes as hereinafter provided. The board shall immediately cause certified copies of such resolution to be transmitted to the presiding officer of the governing body of each such city. (Sec. 36.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 8, subd. c (substantially the same).

100–10–38. Election by Cities to Pay Out of Municipal Funds.

On or before the twenty-fifth day of August of each year the governing body of each such city may elect to pay out of the municipal funds all or any portion of the amount of tax which would otherwise be levied upon property within such city. Such election shall be made by order upon motion, which order shall recite that such payment shall be made in cash concurrently with the certification of such order to the controller of the district, or that such payment shall be made in installments and the times wherein such installments shall be payable and the amounts thereof, which amounts shall be in accordance with the requirements of the board of directors of the district as approved by resolution. In the event that any city shall elect to pay in cash, or by deferred installments, money or any part thereof which would otherwise be levied upon property within the city, it shall immediately certify to the controller of the district a copy of such order and a statement showing its financial condition, the funds from which such payments shall be made and the sources of revenue to be used therefor; *provided, however,* that in the event any city shall elect to pay in cash all or any portion of the amount of tax which would otherwise be levied upon property within such city to meet interest and sinking fund requirements on, and any payment upon principal of, the outstanding bonded and or other indebtedness of said district, such amount so elected to be paid shall be deposited with the treasurer of said district on or before the twenty-seventh day of August next following such election; *and provided,* also, that unless such payment is so made in the case of interest and sinking fund requirements, and payments upon principal and unless such election, as to all other taxes, shall provide for

payments in accordance with the resolution of the board of directors as hereinbefore provided for, then such election shall be ineffective for any purpose. (Sec. 37.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 8, subd. d (similar).

100–10–39. Tax Rates for Cities.

Before the first day of September the controller of the district shall cause to be prepared and transmitted to the auditor of each county in which the district shall lie, a statement showing the tax rate to be applied to assessed property in each city, which rate shall be the rate fixed by resolution of the board of directors modified to the extent necessary to produce from each city only the amount of money apportioned thereto in said resolution, less any amount paid or undertaken to be paid by such city, or credited thereto as herein provided, but if any fraction of a cent occur, it must be taken as a full cent on each one hundred dollars. (Sec. 38.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 8, subd. e (identical).

100–10–40. Collection of Taxes.

Upon receipt by the auditor of each county wherein such district, or any part thereof, shall lie, of a certified copy of the controller's statement showing the tax rate to be applied to assessed property in each city, and showing the cities, the assessed property in which is exempt therefrom, if any, it shall be the duty of the county officers to collect taxes for the benefit of the district at the rates specified as herein provided. The taxes so levied shall be computed and collected at the time and in the manner required by law for the computation and collection of taxes for county purposes, and the property subject to such tax shall be subject to the same penalties for delinquency, and the same provisions of law relating to the sale of property for nonpayment of county taxes and redemption thereof shall apply to the tax herein authorized. When so collected, such taxes shall be paid over to the treasurer of the district, subject to the deduction herein authorized. (Sec. 39.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 8, subd. f (substantially identical).

100–10–41. Collection Fees.

In consideration of service rendered hereunder, any county shall annually be entitled to deduct and withhold an amount not exceeding one per cent on the first $25,000 collected hereunder, and one-fourth of one per cent of any amount in excess of $25,000 collected hereunder. The board of commissioners of each such county may provide such extra help as in their judgment may be necessary for the proper performance of duties hereunder. (Sec. 40.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 8, subd. f (substantially identical; "board of supervisors of each such county").

100-10-42. Lien of Taxes.

Whenever any real property situated in any district organized hereunder and upon which a tax shall have been levied, as herein provided, shall be sold for taxes and shall be redeemed, the money paid for such redemption, except advertising costs, shall be apportioned and paid in part to such district in the proportion which the tax due to such district shall bear to the total tax for which such property shall have been sold. All taxes levied under the provisions of this act shall be a lien upon the property upon which levied, and the enforcement of the collection of such tax shall be had in the same manner and by the same means as is or shall be provided by law for the enforcement of liens for state and county taxes, and all of the provisions of law relating to the enforcement of such taxes are hereby made a part of this act so far as applicable. (Sec. 41.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 8, subd. g (substantially identical).

100-10-43. Credits in Reduction of Taxes—Cash Payments—Sale by City to District of Project Taken Over by District.

Cities, the areas of which are included within metropolitan water districts incorporated hereunder, are hereby authorized to pay to such districts, out of funds derived from the sale of water or other funds not appropriated to some other use, such amounts as may be determined upon by the governing bodies, or other bodies, boards, commissioners or officers having control of such funds, thereof, respectively. Such payments may be made in avoidance of taxes as herein provided, or otherwise, and shall not be deemed gratuitous or in the nature of gifts, but shall be deemed payments for water or services in connection with the distribution of water. Any city making any such payment to any district incorporated hereunder, whether in avoidance of taxes or otherwise, shall receive credit therefor and the amount of the payment so made by any city shall be deducted from the amount of taxes which would otherwise be levied against property lying therein as herein provided. In the event that payment so made by any city shall exceed the amount of taxes which would otherwise have been levied against property within such city, the amount of such excess without interest shall be carried over and applied in reduction of taxes levied, or which would otherwise have been levied during the ensuing year or years. Any city, or body, board, commission or officer thereof having control of funds, which shall have incurred expenses (for which such funds have been, or will be, expended) in the investigation of or preliminary work upon any works or projects taken over by the district, may receive, and the district so taking over any such works or projects may make to such city, body, board, commission or officer thereof, reimbursement for all such sums so expended or to be expended, for expenses incurred in such investigation of or preliminary work upon the works or projects so taken over by the district, to the extent that the board of directors of the district shall find that such expenditures have benefited such district, it being the intention of this provision to permit the district to purchase, and the city or body, board, commission or officer thereof, to

sell, such works or projects taken over by such district, and for which such city, body, board, commission or officer thereof, has no further use or need. The sum so to be paid by such district to such city or body, board, commission or officer thereof shall be mutually agreed upon, and if the expenses, for which such reimbursement is to be made by the district, shall have been incurred by a body, board, commission or officer, of the city, having control of the funds so expended, or to be expended, for such expenses, then the district shall pay such sum to said body, board, commission or officer, or if ordered so to do by such body, board, commission or officer, the district shall pay such sum to the city. (Sec. 42.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 8, subd. h (includes substantially the same provision).

100–10–44. Id. Alternative Credit—Expenses Incurred by City for Project.

As an alternative to the purchase and sale of any works or projects taken over by the district, as hereinabove provided, any city, or body, board, commission or officer thereof having control of funds, which shall have incurred expenses for which such funds have been, or will be, expended in the investigation of or preliminary work upon any such works or projects taken over by the district, may certify the amount thereof, without interest, to the board of directors of said district at any time within four years from the date of the incorporation of such district, or the incurring of such expenses, if such district be already incorporated, and if allowed by the board of directors, such amount shall be credited to the city, which itself, or whose body, board, commission or officer, incurred the same, and such expenditures shall be considered as a payment of money made as herein provided for which deduction shall be made from the amount of taxes which would otherwise be levied against property lying within such city. (Sec. 43.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 8, subd. h (includes similar provision).

100–10–45. Id. For Expenses of Incorporation.

Any city which shall incur expenses in preliminary work in preparing for the incorporation of or in the incorporation of any district hereunder likewise may certify the amount thereof, without interest, to the board of directors of said district at any time within four years from the date of the incorporation of such district, and if allowed by the board of directors, such amount shall be credited to the city incurring the same, and shall be considered as a payment of money made as herein provided, for which deduction shall be made from the amount of taxes which would otherwise be levied against property lying within such city. (Sec. 44.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 8, subd. h (includes substantially identical provision).

100-10-16. Id. Such Credits Not Applicable to Taxes Levied for Interest and Principal of Bonded Indebtedness.

No such payments of money made in avoidance of taxes or otherwise, or such credit allowed by such board of directors, as hereinabove provided, shall apply to reduce the amount of taxes which would otherwise be levied against the property within such cities respectively, to meet interest payments on principal and/or sinking fund requirements on outstanding bonded indebtedness of such district. (Sec. 45.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 8, subd. h
(includes similar provision).

100-10-17. Certification and Allowance of Credits.

Such certification and allowance shall be made on or before the first Monday in July, and the amount of money to be raised by taxation shall be computed with reference to the credit to be allowed as herein provided, but such credit may, in the discretion of the board of directors, be considered in connection with the amount of money to be raised by the next tax levy, or may be spread over subsequent years, not to exceed five. (Sec. 46.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 8, subd. h
(includes identical provision).

100-10-18. Failure of City to Carry Out Its Election to Pay in Lieu of Taxation.

If any city shall fail to comply with the terms of the order relating to payments to be made in the district in lieu of taxation, or if any city annexed to the district shall fail to comply with the terms and conditions fixed by the board of directors and upon which such annexation occurred, the amount of the delinquency, plus a penalty of eight per cent shall be added to the taxes to be collected during the ensuing fiscal year, from the property within such delinquent city, and thereafter for a period of two years no order or ordinance shall be sufficient to exempt the property in said city from taxation hereunder unless it be accompanied by payment in cash of the amount which would otherwise be collected from owners of property within the city, together with all monies due but unpaid under any previous order, or annexation provision. (Sec. 47.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 8, subd. i
(substantially identical).

100-10-19. Annexation to District—Validity of Proceedings.

Annexation to the territory of any district organized hereunder may be effected by either of the following methods:

(a) Whenever any area shall be annexed to or consolidated with any city, the area of which city shall be a part of any district organized hereunder, such annexed or consolidated area shall by virtue of its annexation or consolidation to such city become and be a part of such district and shall be taxable in accordance with the provisions of this

act, to pay the indebtedness of the district outstanding at the time of such annexation or consolidation.

(b) The governing or legislative body of any municipality may apply to the controller of any metropolitan water district for a statement showing the amount of the bonded and other indebtedness of the district, the assessed value of the taxable property therein according to the most recent assessment, and the names of all municipalities, the areas of which are included within the district, and it shall thereupon be the duty of the controller to furnish such information to the applicant. After consideration of such statement the governing body of such municipality may apply to the board of directors of such metropolitan water district for consent to annex such municipality to the metropolitan water district. The board of directors may grant or deny such application and in granting the same may fix the terms and conditions upon which such city may be annexed to and become a part of the metropolitan water district. The action of the board of directors evidenced by order made on motion shall be promptly transmitted to the governing body of such applying city, which governing body may thereupon submit to the qualified electors of such city, at any general or special election held therein, the proposition of such annexation subject to the terms and conditions fixed as herein provided. Notice of such election shall be given by posting or publication; when given by posting such notice shall be posted at least ten days and in three public places in the city; when given by publication such notice shall be published once at least ten days before the date fixed for the election in a newspaper of general circulation in the city. Such notice shall contain the substance of the terms and conditions fixed by the board of directors, as herein provided. Such election shall be conducted and the returns thereof canvassed in the manner provided by law for municipal elections in such city. If such proposition shall receive the affirmative vote of a majority of electors of such city voting thereon at such election, the governing body of such municipality shall certify the result of such election on said proposition to the board of directors of said district and a certificate of proceedings hereunder shall be made by the secretary of the district and filed with the secretary of state. Upon the filing thereof in the office of the secretary of state, such municipality shall become, and be, an integral part of such metropolitan water district, and the taxable property therein shall be subject to taxation thereafter for the purposes of said metropolitan water district, including the payment of bonds and other obligations of such district at the time authorized or outstanding.

(c) The validity of any proceedings for the annexation of a municipality or city to any district organized hereunder, shall not be contested in any action unless such action shall have been brought within three months after the completion of such proceedings, or, in case such proceedings are completed prior to the time that this paragraph takes effect, then within three months after this paragraph shall have become effective. (Sec. 48.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 9, as amended by Laws of 1941 (similar).

100–10–50. Withdrawal from District.

Any municipality whose corporate area has become or is a part of any water district may withdraw therefrom in the following manner:

The governing body of any such municipality may submit to the electors thereof at any general or special election the proposition of withdrawing from any water district incorporated thereunder. Notice of such election shall be given in the manner provided in subdivision (b) of section 48 hereof. Such election shall be conducted and the returns thereof canvassed in the manner provided by law for the conduct of municipal elections in said city. In the event that the majority of the electors voting thereon vote in favor of such withdrawal, the result thereof shall be certified by the governing body of such municipality to the board of directors of the district. A certificate of the proceedings hereunder shall be made by the secretary of the district and filed with the secretary of state, and upon the filing of such certificate the area of the municipality so withdrawing shall be excluded from the said water district, and shall no longer be a part thereof; *provided, however,* that the property within the said municipality as it shall exist at the time of such exclusion shall continue taxable for the purpose of paying said bonded and other indebtedness outstanding or contracted for, at the time of such exclusion and until such bonded or other indebtedness shall have been satisfied. (Sec. 49.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 10, as amended by Laws of 1941 (includes similar provision).

100–10–51. Interest of Directors or Employees in Contracts.

Except as herein provided, no director or any other officer or employee of the district shall in any manner be interested, directly or indirectly, in any contract awarded or to be awarded by the board of directors, or made or to be made by such officer or employee pursuant to discretionary authority vested in him, or in the profits to be derived therefrom. Notwithstanding the fact that such director or other officer or employee of the district may be a stockholder or bondholder or director or other officer or employee of a corporation contracting with the district, contracts may be made with such corporation for its general benefit unless such director or officer or employee of the district shall own or control, directly or indirectly, stock or bonds to an amount exceeding 5 per cent of the total amount of the stock or bonds, respectively, of such contracting corporation issued and outstanding. For any violation of this section such director or other officer or employee of the district shall be deemed guilty of a misdemeanor, and such conviction shall work a forfeiture of his office, or employment, and he shall be punished by a fine not exceeding $500, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. (Sec. 50.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 11 (identical).

100–10–52. Recall and Resignation of Directors.

Every member of the board of directors of a metropolitan water district formed hereunder shall be subject to recall for or without cause by the governing body of the municipality from which such member shall be appointed, and any member may resign from said board of directors and any office held by him in said district. (Sec. 51.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 12 (every member of board of directors is subject to recall by voters of municipality, from which such member is appointed, in accordance with recall provisions of freeholders' charter, or other law applicable to such municipality).

100–10–53. Necessities.

All matters and things necessary for the proper administration of the affairs of said district which are not provided for in this act shall be provided for by the board of directors of the district by ordinance. (Sec. 52.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 13 (identical).

100–10–54. Action by Ordinance.

Any action required by this act to be done by resolution may be done, with equal validity, by ordinance. (Sec. 53.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 13½ (identical).

100–10–55. Fiscal Year—Annual Statements.

The fiscal year of any metropolitan water district incorporated hereunder shall commence on the first day of January of each year and shall continue until the close of the thirty-first day of December. As promptly as shall be possible after the close of each fiscal year, it shall be the duty of the controller of the district to prepare and transmit to the chief executive officer of each municipality, the area of which shall lie within the district, a statement of revenues and expenditures in such detail as shall be prescribed by the board of directors; also a statement of the amount of water stored by or made available to the district and the amounts used by the respective cities, the areas of which shall lie within the district. (Sec. 54.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 14 (fiscal year commences on first day of July and continues until close of 30th day of June of year following).

100–10–56. Constitutionality.

If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional. (Sec. 55.)

Comparable provisions.
Cal. Gen. Laws, Act 9129, § 15 (identical).

100–10–57. Repeal of Inconsistent Acts.

All acts or parts of acts repugnant to or inconsistent with this act, shall, to the extent of such conflict, yield to and be superseded by the provisions hereof. (Sec. 56.)

100–10–58. Effective Date.

This act shall take effect upon approval.

Approved March 13, 1935. (Sec. 57.)

CHAPTER 11

WATER CONSERVANCY ACT

L. 1941, ch. 99; eff. May 13.

100–11–1. Declaration of Policy.
100–11–2. Definition of Word and Terms.
100–11–3. District Courts Vested with Jurisdiction to Establish Water Conservancy Districts — Limitation of Powers.
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100–11–6. Id. Time and Place for Hearing — Jurisdiction of District Court—Court Not to Be Disqualified.
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100–11–38. Cases Hereunder to Be Heard at Earliest Practicable Moment.
100–11–39. To Be Liberally Construed.
100–11–40. Partial Invalidity—Savings Clause.
100–11–41. Acts in Conflict Declared Nonoperative as to This Act.

L. '1941, ch. 99; eff. May 13.

AN ACT providing for the organization of water conservancy districts and to define the purposes and powers thereof.

Be it enacted by the Legislature of the State of Utah:

100–11–1. Declaration of Policy.

It is declared that to provide for the conservation of the water resources of the state of Utah and for the greatest beneficial use of water within this state, the organization of water conservancy districts and the construction of works as herein defined by such districts are a public use and will:

(a) Be essentially for the public benefit and advantage of the people of the state of Utah.

(b) Indirectly benefit all industries of the state.

(c) Indirectly benefit the state of Utah in the increase of its taxable property valuation.

(d) Directly benefit municipalities by providing adequate supplies of water for domestic use.

(e) Directly benefit lands to be irrigated from works to be constructed.

(f) Directly benefit lands now under irrigation by stabilizing the flow of water in streams and by increasing flow and return flow of water to such streams.

(g) Promote the comfort, safety and welfare of the people of the state of Utah, and it is therefore declared to be the policy of the state of Utah:

(1) To control, make use of and apply to beneficial use all unappropriated waters in this state to a direct and supplemental use of such waters for domestic, manufacturing, irrigation, power and other beneficial uses.

(2) To obtain from water in Utah the highest duty for domestic uses and irrigation of lands in Utah within the terms of interstate compacts or otherwise.

(3) To coöperate with the United States and agencies thereof under the federal reclamation laws or other federal laws now or hereafter

enacted and to construct and finance works in the state of Utah as herein defined and to operate and maintain the same.

(4) To promote the greater prosperity and general welfare of the people of the state of Utah by encouraging the organization of water conservancy districts as provided in this act. (Sec. 1.)

Comparable provisions.

Cal. Gen. Laws, Act 0127, § 1 (creating "state irrigation board" consisting of state engineer and two executive directors; executive directors provided for by California Water Storage District Act are constituted the two executive directors of the "state irrigation board" herein created); § 3 (state irrigation board has power to unite into single "water conservation districts" irrigation districts, water storage districts, reclamation districts, drainage districts, as well as other political subdivisions organized to promote irrigation or reclamation or drainage).

Cross-references.

Irrigation and water conservancy districts, 100-9.

A. L. R. notes.

Right of owner of land within reclamation project in respect of which water right was allowed on application pursuant to Reclamation Act to perpetual right beyond control of federal government for sufficient amount beneficially to irrigate land, 115 A. L. R. 1320.

100-11-2. Definition of Word and Terms.

This act may be known and cited as "Water Conservancy Act"; the districts created hereunder may be termed "Water Conservancy Districts"; and the bonds which may be issued hereunder may be called "Water Conservancy Bonds," and such designation may be engraved or printed on their face. Wherever the term "publication" is used in this act and no manner specified therefor, it shall be taken to mean once a week for three consecutive weeks in at least one newspaper of general circulation in each county wherein such publication is to be made. It shall not be necessary that publication be made on the same day of the week in each of the three weeks, but not less than fourteen days (excluding the day of the first publication) shall intervene between the first publication and the last publication, and publication shall be complete on the date of the last publication.

Whenever the term "person" is used in this act, and not otherwise specified, it shall be taken to mean a person, firm, co-partnership, association or corporation, other than a county, town, city, city and county, or other political subdivision. Similarly, the words "public corporation" shall be taken to mean counties, city and counties, towns, cities, school districts, metropolitan water districts, irrigation districts, water districts, park districts, subdistricts, and all governmental agencies, clothed with the power of levying or providing for the levy of general or special taxes or special assessments.

Whenever the word "Board" is used in this act, and not otherwise specified, it shall be taken to mean the board of directors of the district.

Whenever the term "works" is used in this act, it shall unless otherwise specified, be held to mean dams, storage reservoirs, compensatory and replacement reservoirs, canals, conduits, pipe lines, tunnels, power plants and any and all works, facilities, improvements, and property necessary or convenient for the supplying of water for domestic, irrigation, power, milling, manufacturing, mining, metallurgical and any and all other beneficial uses.

Whenever the term "Court" is used in this act, and not otherwise specified, it shall be taken to mean the district court of that judicial district of the state of Utah wherein the petition for the organization of a water conservancy district shall be filed.

Whenever the term "property" is used in this act, it shall unless otherwise specified, be held to mean real estate and personal property.

Whenever the term "land" or "real estate" is used in this act, it shall unless otherwise specified, be held to mean real estate, as the words "real estate" are defined by the laws of the state of Utah, and shall embrace all railroads, tramroads, highways, electrical roads, street and interurban railroads, roads, streets, and street improvements, telephone, telegraph, and transmission lines, gas, sewer and water systems, water rights, pipe lines and right of ways of public service corporations and all other real property whether held for public or private use.

Whenever the term "land" or "property" is used in this act with reference to benefits, appraisals, assessments, or taxes, public corporations shall as political entities, according to benefits received, be considered as included in such reference in the same manner as "land" or "property." (Sec. 2.)

100–11–3. District Courts Vested with Jurisdiction to Establish Water Conservancy Districts—Limitation of Powers.

The district court sitting in and for any county in this state or any judge thereof in vacation, is hereby vested with jurisdiction, power and authority when the conditions stated in Section 4 of this act are found to exist, to establish water conservancy districts which may be entirely within or partly within and partly without the judicial district in which said court is located, for conserving, developing and stabilizing supplies of water for domestic, irrigation, power, manufacturing and other beneficial uses as herein provided; *provided, however*, that the terms of this act shall not be construed to confer upon such district court jurisdiction to hear, adjudicate and settle questions concerning the priority of appropriation of water between districts organized under this act and ditch companies and other owners of ditches drawing water for irrigation purposes from the same stream or its tributaries, and jurisdiction to hear and determine such questions of law and questions of right growing out of or in any way involved or connected therewith, are expressly excluded herefrom and shall be determined in the proper county as otherwise provided by the laws of the state of Utah. (Sec. 3.)

100–11–4. Petition for Establishment of District—Requirements—Contents.

Before any water conservancy district shall be established under this act, a petition shall be filed in the office of the clerk of the court vested with jurisdiction, in a county in which all or part of the lands embraced in such proposed water conservancy district are situated, signed by not fewer than twenty-five per cent of the owners of the irrigated lands to be included in the district, but not embraced within the incorporated limits of a city or town; and each tract or tracts of land shall be listed opposite the name of the signer, each such tract or tracts, together with

improvements thereon, to have an assessed value of not less than three hundred dollars; and be also signed by not fewer than five per cent of the owners of non-irrigated land or lands embraced in the incorporated limits of a city or town, all situated in the proposed district; and each tract or tracts of land shall be listed opposite the name of the signer, each such tract or tracts, together with improvements thereon, to have an assessed value of not less than three hundred dollars.

In the event a petitioner shall sign such petition both as owner of irrigated and non-irrigated land or lands situated within a municipality, his name shall be counted only as an owner of irrigated lands. A signing petitioner shall not be permitted, after the filing of the petition, to withdraw his name therefrom.

No district shall be formed under this act unless the assessed valuation of irrigated land, together with improvements thereon, within the proposed district, is not less than fifty thousand dollars and no city, or city and county, having a population of more than 25,000 as determined by the last United States census shall be included within such district unless by and with the written consent of the chief executive officer of such city, or city and county, with the approval of the legislative body of such municipality, and such consent may specify that the rate of taxation on the assessed valuation of property within said city, or city and county, under Section 16 of this act shall not exceed a maximum rate which may be less than the rates set out in said Section 16, and in such case the district shall not have power to levy an assessment on the property in said city, or city and county, at a greater rate than that specified in said consent.

The petition shall set forth:

(1) The proposed name of said district.

(2) That property within the proposed district will be benefited by the accomplishment of the purposes enumerated in Section 3 of this act.

(3) A general description of the purpose of the contemplated improvement and of the territory to be included in the proposed district. Said description need not be given by metes and bounds or by legal subdivisions, but it shall be sufficient to enable a property owner to ascertain whether his property is within the territory proposed to be organized as a district. Said territory need not be contiguous, *provided* it is so situated that the organization of a single district of the territory described is calculated to promote one or more of the purposes enumerated in Section 3 of this act.

(4) The assessed value of all irrigated land within the boundaries of the proposed district.

(5) A general designation of divisions of the district and the number of directors of the district proposed for each subdivision.

(6) Said petition shall pray for the organization of the district by the name proposed.

No petition with the requisite signatures shall be declared null and void on account of alleged defects, but the court may at any time permit the petition to be amended to conform to the facts by correcting any errors in the description of the territory, or in any other particular. However, similar petitions or duplicate copies of the same petition for

the organization of the same district may be filed and shall together be regarded as one petition. All such petitions filed prior to the hearing on the first petition filed, shall be considered by the court the same as though filed with the first petition placed on file.

In determining whether the requisite number of landowners have signed the petition, the court shall be governed by the names as they appear upon the tax roll which shall be prima facie evidence of such ownership. (Sec. 4.)

A. L. R. notes.
Constitutionality and construction of statute which leaves to determination of private individuals boundaries of territory to be erected into water district, 70 A. L. R. 1064.

100–11–5. Id. Bond to Be Filed with Petition.

At the time of filing the petition or at any time subsequent thereto, and prior to the time of hearing on said petition, a bond shall be filed, with security approved by the court, sufficient to pay all expenses connected with the proceedings in case the organization of the district be not effected. If at any time during the proceeding the court shall be satisfied that the bond first executed is insufficient in amount, it may require the execution of an additional bond within a time to be fixed to be not less than ten days distant, and upon failure of the petitioner to execute the same, the petition shall be dismissed. (Sec. 5.)

100–11–6. Id. Time and Place for Hearing—Jurisdiction of District Court—Court Not to Be Disqualified.

Immediately after the filing of such petition, the court wherein such petition is filed or a judge thereof in vacation, shall by order fix a place and time, not less than sixty days nor more than ninety days after the petition is filed, for hearing thereon, and thereupon the clerk of said court shall cause notice by publication to be made of the pendency of the petition and of the time and place of hearing thereon; the clerk of said court shall also forthwith cause a copy of said notice to be mailed by United States registered mail to the board of county commissioners of each of the several counties having territory within the proposed district.

The district court in and for the county in which the petition for the organization of a water conservancy district has been filed, shall thereafter for all purposes of this act, except as hereinafter otherwise provided, maintain and have original and exclusive jurisdiction, co-extensive with the boundaries of said water conservancy district, and of land and other property proposed to be included in said district or affected by said district without regard to the usual limits of its jurisdiction.

No judge of such court wherein such petition is filed shall be disqualified to perform any duty imposed by this act by reason of ownership of property within any water conservancy district or proposed water conservancy district, or by reason of ownership of any property that may be benefited, taxed or assessed therein. (Sec. 6.)

100-11-7. Protesting Petition—Requisites—Proceedings—Court Decree Organizing District.

At any time after the filing of a petition for the organization of a conservancy district, and not less than thirty days prior to the time fixed by the order of court for the hearing upon said petition, and not thereafter, a petition may be filed in the office of the clerk of the court wherein the proceeding for the creation of said district is pending, signed by not fewer than twenty per cent of the owners of the irrigated lands in said proposed district, but not embraced within the incorporated limits of a city or town, who have not signed the petition for creating such district, the aggregate assessed value of which, together with improvements, is not less than twenty-five thousand dollars, and also signed by not fewer than five per cent of owners of non-irrigated lands or lands embraced in the incorporated limits of a city or town, all situated in the proposed district who have not signed the petition for creating such district, the aggregate assessed value of which, together with improvements, is not less than ten thousand dollars, protesting the creation of said district. The signers of said protesting petition shall state therein the land owned by each, and shall also state the value thereof as shown by the last preceding assessment.

In the event a petitioner shall sign such petition both as owner of irrigated and non-irrigated land or lands situated within a municipality, his name shall be counted only as an owner of irrigated lands.

Upon the filing of such protesting petition, it shall be the duty of the clerk of the court forthwith to make as many certified copies thereof, including the signatures thereto, as there are counties in which any part of said proposed district extends, and forthwith to place in the hands of the county treasurer of each of such counties one of said certified copies. Thereupon it shall be the duty of each of such county treasurers to determine from the tax rolls of his county in his hands, and to certify to the said district court under his official seal, prior to the day fixed for the hearing as aforesaid, the total valuation of the several tracts of land listed in the protest, situated in said proposed district within his county. Upon the day set for the hearing upon the original petition, if it shall appear to the court from such certificate or certificates, and from such other evidence as may be adduced by any party in interest, that said protesting petition is not signed by the requisite number of owners of lands and of the requisite value as herein set forth, the court shall thereupon dismiss said protesting petition and shall proceed with the original hearing as in this section provided.

If the court shall find from the evidence that said protesting petition is signed by the requisite number of owners of lands, and of the requisite values, the court shall forthwith dismiss the original petition praying for the creation of the district. The finding of the court upon the question of such total valuation, the genuineness of the signatures, and all matters of law and fact incident to such determination shall be final and conclusive on all parties in interest whether appearing or not.

Any owner of real property in said proposed district not having individually signed a petition for the organization of a conservancy district,

and desiring to object to the organization and incorporation of said district, may on or before the date set for the cause to be heard, file objection to the organization and incorporation of the district.

Such objection shall be limited to a denial of the statements in the petition and shall be heard by the court as an advanced case without unnecessary delay.

Upon the said hearing, if it shall appear that a petition for the organization of a water conservancy district has been signed and presented, as hereinabove provided, in conformity with this act, and that the allegations of the petition are true, and that no protesting petition has been filed, or if filed has been dismissed as hereinabove provided, the court shall, by order duly entered of record, adjudicate all questions of jurisdiction, declare the district organized and give it a corporate name, by which in all proceedings it shall thereafter be known, and thereupon the district shall be a political subdivision of the state of Utah and a body corporate with all the powers of a public or municipal corporation.

In such decree the court shall designate the place where the office or principal place of the district shall be located, which shall be within the corporate limits of the district, and which may be changed by order of court from time to time. The regular meetings of the board shall be held at such office or place of business, but for cause may be adjourned to any other convenient place. The official records and files of the district shall be kept at the office so established.

If the court finds that no petition has been signed and presented in conformity with this act, or that the material facts are not as set forth in the petition filed, it shall dismiss said proceedings and adjudge the costs against the signers of the petition in such proportion as it shall deem just and equitable. No appeal or writ of error shall lie from an order dismissing said proceedings; but nothing herein shall be construed to prevent the filing of a subsequent petition or petitions for similar improvements or for a similar water conservancy district, and the right so to renew such proceeding is hereby expressly granted and authorized.

If an order be entered establishing the district, such order shall be deemed final and no appeal or writ of error shall lie therefrom, and the entry of such order shall finally and conclusively establish the regular organization of the said district against all persons except the state of Utah, in an action in the nature of a writ of quo warranto, commenced by the attorney general within three months after said decree declaring such district organized as herein provided, and not otherwise. The organization of said district shall not be directly nor collaterally questioned in any suit, action or proceeding except as herein expressly authorized. (Sec. 7.)

100–11–8. Findings and Decree to Be Filed with Secretary of State, County Recorders and County Clerks.

Within thirty days after the said district has been declared a corporation by the court, the clerk of the court shall transmit to the secretary of state and to the county clerk and recorder in each of the counties hav-

ing lands in said district, copies of the findings and the decree of the court incorporating said district. The same shall be filed in the office of the secretary of state in the same manner as articles of incorporation are now required to be filed under the general laws concerning corporations, and copies shall also be filed in the office of the county clerk and recorder of each county in which a part of the district may be, where they shall become permanent records; and the clerk and recorder in each county shall receive a fee of one dollar for filing and preserving the same, and the secretary of state shall receive for filing said copies such fees as now are or hereafter may be provided by law for like services in similar cases. (Sec. 8.)

100-11-9. Board of Directors to Be Appointed by District Courts—Number—Terms—Bonds.

Within thirty days after entering the decree incorporating said district, the court shall appoint a board of directors of the district consisting of not more than eleven persons who are residents of the county or counties in which the water conservancy district is situated, all of whom shall be owners of real property in said district.

At the expiration of their respective terms of office as fixed by the court, appointments shall be made by said court for the term of two years. The court shall fill all vacancies which may occur on the said board. Each director shall hold office during the term for which he is appointed and until his successor is duly appointed and has qualified, and shall furnish a corporate surety bond at the expense of the district, in amount and form fixed and approved by the court, conditioned for the faithful performance of his duties as such director. (Sec. 9.)

100-11-10. Id. To Take Oath—To Choose Chairman, President and Secretary—Compensation.

Each director before entering upon his official duties shall take and subscribe to an oath before an officer authorized to administer oaths, that he will support the constitution of the United States and the state of Utah and will honestly, faithfully and impartially perform the duties of his office and that he will not be interested directly or indirectly in any contract let by said district, which said oath shall be filed in the office of the clerk of said court in the original case.

Upon taking the oath, the board shall choose one of their number chairman of the board and president of the district, and shall elect some suitable person secretary of the board and of the district, who may or may not be a member of the board. Such board shall adopt a seal and shall keep in a wellbound book a record of all of its proceedings, minutes of all meetings, certificates, contracts, bonds given by employees and all corporate acts which shall be open to inspection of all owners of property in the district, as well as to all other interested parties.

Each member of the board shall receive as compensation for his service such sum as shall be ordered by the court, not in excess of the sum of five hundred dollars per annum, payable monthly, and necessary traveling expenses actually expended while engaged in the performance of his duties. (Sec. 10.)

100–11–11. Id. Quorum.

A majority of the directors shall constitute a quorum and a concurrence of a majority of those in attendance, in any matter, within their duties, shall be sufficient for its determination, except as otherwise herein provided. (Sec. 11.)

100–11–12. Duties of Secretary—Board May Employ Chief Engineer, Attorney and Other Employees.

The secretary shall be custodian of the records of the district and of its corporate seal, and shall assist the board in such particulars as it may direct in the performance of its duties. The secretary shall attest, under the corporate seal of the district, all certified copies of the official records and files of the district that may be required of him by this act, or by any person ordering the same and paying the reasonable cost of transcription, and any portion of the record so certified and attested shall prima facie import verity. The secretary shall serve also as treasurer of the district, unless a treasurer is otherwise provided for by the board. The board may also employ a chief engineer, who may be an individual, co-partnership or corporation; an attorney, and such other engineers, attorneys and other agents and assistants as may be needful; and may provide for their compensation which, with all other necessary expenditures, shall be taken as a part of the cost or maintenance of the improvement. The chief engineer shall be superintendent of all the works and improvements, and shall make a full report to the board each year, or oftener if required by the board, and may make such suggestions and recommendations to the board as he may deem proper. The secretary and treasurer and such other agents or employees of the district as the court may direct, shall furnish corporate surety bonds, at the expense of the district, in amount and form fixed and approved by the court, conditioned upon the faithful performance of their respective duties. (Sec. 12.)

100–11–13. Powers of District Boards of Directors.

The board shall have power on behalf of said district:

(a) To have perpetual succession.

(b) To take by appropriation, grant, purchase, bequest, devise or lease, and to hold and enjoy water, waterworks, water rights and sources of water supply and any and all real and personal property of any kind within or without the district necessary or convenient to the full exercise of its powers; and to sell, lease, encumber, alien or otherwise dispose of water, waterworks, water rights and sources of supply of water for use within the district; also to acquire, construct or operate, control and use any and all works, facilities and means necessary or convenient to the exercise of its power, both within and without the district for the purpose of providing for the use of such water within the district and to do and perform any and all things necessary or convenient to the full exercise of the powers herein granted.

(c) To have and to exercise the power of eminent domain and in the manner provided by law for the condemnation of private property for public use to take any property necessary to the exercise of the powers

herein granted; *provided, however,* such district shall not have or exercise the power of eminent domain over or by means thereof to acquire the title to or beneficial use of vested water rights for transmountain diversion, and in connection therewith such district shall not have the power to carry or transport water in transmountain diversion, the title to which has been acquired by any municipality by virtue of eminent domain proceedings against any such vested right or rights.

(d) To construct and maintain works and establish and maintain facilities across or along any public street or highway, and in, upon, or over any vacant public lands which public lands are now, or may become, the property of the state of Utah, and to construct works and establish and maintain facilities across any stream of water or water course; *provided, however,* that the district shall promptly restore any such street or highway to its former state of usefulness as nearly as may be, and shall not use the same in such manner as to completely or unnecessarily impair the usefulness thereof. The grant of the right to use such vacant state land shall be effective upon the filing by such district with the state land board of an application showing the boundaries, extent and locations of the lands, right of ways, or easements desired for such purposes. If the land, right of ways or easements for which application shall be made is for the construction of any aqueduct, ditch, pipe line, conduit, tunnel or other works for the conveyance of water, or for roads, or for poles or towers, and wires for the conveyance of electrical energy or for telephonic or telegraphic communication no compensation shall be charged the district therefor, unless in the opinion of the state land board the construction of such works will render the remainder of the legal subdivision through which each works are to be constructed valueless or unsalable, in which event the district shall pay for the lands to be taken and for such portion of any legal subdivision which in the opinion of the board is rendered valueless or unsalable, at the rate of $2.50 per acre. If the lands for which application is made are for purposes other than the construction of roads or works for the conveyance of water, or electricity or telephonic or telegraphic communication, such district shall pay to the state for such lands at the rate of $2.50 per acre. Upon filing such application, accompanied by map or plat showing the location or proposed location of such works and facilities, the fee title to so much of such state lands as shall be necessary or convenient to enable such district efficiently and without interference to construct, maintain and operate its works and to establish, maintain and operate its facilities, shall be conveyed to said district by patent. If an easement or right of way only over such lands be sought by the district, such easement or right of way shall be evidenced by permit or grant executed by or on behalf of the state land board. The state land board may reserve easements and right of ways, in the public across any lands in such patents, grants or permits described for streets, roads and highways theretofore established according to law. Before any such patent, grant or permit shall be executed, any compensation due to the state under the provisions hereof, must be paid. No fee shall be exacted from the district for any patent, permit or grant so issued or for any service rendered hereunder. In

the use of streets, the district shall be subject to the reasonable rules and regulations of the county, city or town where such streets lie, concerning excavation and the refilling of excavation, the relaying of pavements and the protection of the public during periods of construction; *provided*, that the district shall not be required to pay any license or permit fees, or file any bonds. The district may be required to pay reasonable inspection fees.

(e) To contract with the government of the United States or any agency thereof for the construction, preservation, operation and maintenance of tunnels, reservoirs, regulating basins, diversion canals and works, dams, power plants and all necessary works incident thereto, and to acquire perpetual rights to the use of water from such works; to sell and dispose of perpetual rights to the use of water from such works to persons and corporations, public and private.

(f) To list in separate ownership the lands within the district which are susceptible of irrigation from district sources and to make an allotment of water to all such lands, which allotment of water shall not exceed the maximum amount of water that the board determines could be beneficially used on such lands; to levy assessments as hereinafter provided, against the lands within the district to which water is allotted on the basis of the value per acre-foot of water allotted to said lands within the district; *provided*, that the board may divide the district into units and fix a different value per acre-foot of water in the respective units, and in such case, shall assess the lands within each unit upon the same basis of value per acre-foot of water allotted to lands within such unit.

(g) To fix rates at which water not allotted to lands as hereinbefore provided, shall be sold, leased, or otherwise disposed of; *provided, however*, that rates shall be equitable although not necessarily equal or uniform, for like classes of service throughout the district.

(h) To enter into contracts, employ and retain personal services and employ laborers; to create, establish and maintain such offices and positions as shall be necessary and convenient for the transaction of the business of the district; and to elect, appoint and employ such officers, attorneys, agents and employees therefor as shall be found by the board to be necessary and convenient.

(i) To adopt plans and specifications for the works for which the district was organized, which plans and specifications may at any time be changed or modified by the board. Such plans shall include maps, profiles, and such other data and descriptions as may be necessary to set forth the location and character of the works, and a copy thereof shall be kept in the office of the district and open to public inspection.

(j) To appropriate and otherwise acquire water and water rights within or without the state; to develop, store and transport water; to subscribe for, purchase and acquire stock in canal companies, water companies, and water users' associations; to provide, sell, lease, and deliver water for municipal and domestic purposes, irrigation, power, milling, manufacturing, mining, metallurgical and any and all other beneficial uses and to derive revenue and benefits therefrom; to fix the terms and rates therefor; and to make and adopt plans for and to

acquire, construct, operate and maintain dams, reservoirs, canals, conduits, pipe lines, tunnels, power plants and a ıy and all works, facilities, improvements and property necessary or convenient therefor, and in the doing of all said things to obligate itself and execute and perform such obligations according to the tenor thereof; *provided, however,* the sale, leasing and delivery of water for irrigation, and domestic purposes as hereinbefore provided shall only be made for use within the district.

Nothing in this act provided shall be construed to grant to the district or board the power to generate, distribute or sell electric energy except for the operation of the works and facilities of the district.

(k) To invest any surplus money in the district treasury, including such money as may he in any sinking fund established for the purpose of providing for the payment of the principal or interest of any contract, or bonded, or other indebtedness or for any other purpose, not required for the immediate necessities of the district, in its own bonds, or in treasury notes or bonds of the United States, or of this state, and such investment may be made by direct purchase of any issue of such bonds or treasury notes, or part thereof, at the original sale of the same, or by the subsequent purchase of such bonds or treasury notes. Any bonds or treasury notes thus purchased and held may, from time to time, be sold and the proceeds reinvested in bonds or treasury notes as above provided. Sales of any bonds or treasury notes thus purchased and held shall, from time to time, he made in season so that the proceeds may be applied to the purposes for which the money with which the bonds or treasury notes were originally purchased were placed in the treasury of the district.

The functions and duties authorized by this paragraph shall be performed under such rules and regulations as shall be prescribed by the board.

(l) To refund bonded indebtedness incurred by the district under and pursuant to such rules and regulations as shall be prescribed by the board.

(m) To borrow money and incur indebtedness and to issue bonds or other evidence of such indebtedness.

(n) To adopt by-laws not in conflict with the constitution and laws of the state for carrying on the business, objects and affairs of the board and of the district. (Sec. 13.)

100-11-14. Petition to Organize Subdistricts—Same as District Petitions—Additional Contents.

Subdistricts may be organized upon the petition of the owners of real property, within or partly within and partly without the district, which petition shall fulfill the same requirements concerning the subdistricts as the petition outlined in Section 4 of this act is required to fulfill, concerning the organization of the main district and shall be filed with the clerk of the court, and shall be accompanied by a bond as provided for in Section 5 of this act. All proceedings relating to the organization of such subdistricts shall conform in all things to the provision of this act relating to the organization of districts; *provided,*

that not more than a majority of the owners of lands, having one-half or more of the aggregate assessed value of the lands in the proposed subdistrict, shall be required to sign the petition for the erection of a subdistrict and not more than twenty-five per cent of the owners of lands in the proposed subdistrict shall be required to sign the protesting petition against the creation of such subdistrict. Whenever the court shall by its order duly entered of record, declare and decree such subdistricts to be organized, the clerk of said court shall thereupon give notice of such order to the directors of the district who shall thereupon act also as directors of the subdistrict. Thereafter, the proceedings in reference to the subdistrict shall in all matters conform to the provision of this act except that in the appraisal of benefits for the purpose of such subdistricts, in the issuance of bonds, in levying of assessments and in all other matters affecting only the subdistricts, the provisions of this act shall apply to the subdistrict as though it were an independent district, and it shall not in these things be amalgamated with the main district. The said petition for organization of a subdistrict shall also contain a statement of the amount or quantity of water for which said subdistrict desires to acquire the perpetual use and the amount of money that said subdistrict is willing to pay therefor, and the court shall, prior to the entry of its decree organizing any territory into a subdistrict obtain the verified consent of the board to furnish such perpetual use of water for the purposes therein specified to such subdistricts at a price and upon the term mentioned in the petition, then the court shall be authorized to enter its decree of organization of such subdistrict. (Sec. 14.)

100–11–15. District Board May Levy and Collect Taxes and Special Assessments—Classification of Methods.

In addition to the other means of providing revenue for such districts as herein provided, the board shall have power and authority to levy and collect taxes and special assessments for maintaining and operating such works and paying the obligations and indebtedness of the district by any one or more of the methods or combinations thereof, classified as follows:

Class A. To levy and collect taxes upon all property within the district as hereinafter provided.

Class B. To levy and collect assessments for special benefits accruing to property within municipalities for which use of water is allotted as hereinafter provided.

Class C. To levy and collect assessments for special benefits accruing to lands within irrigation districts for which use of water is allotted as hereinafter provided.

Class D. To levy and collect assessments for special benefits accruing to lands for which use of water is allotted as hereinafter provided. (Sec. 15.)

100–11–16. Id. Board to Fix Rate of Levy Under "Class A"—Maximum Rate—Certify to County Commissioners.

To levy and collect taxes under class A as herein provided, the board shall, in each year, determine the amount of money necessary to be

raised by taxation, taking into consideration other sources of revenue of the district, and shall fix a rate of levy which when levied upon every dollar of assessed valuation of property within the district, and with other revenues will raise the amount required by the district, to supply funds for paying expenses of organization, for surveys and plans, paying the costs of construction, operating and maintaining the works of the district; *provided, however*, that said rate shall not exceed one-half mill on the dollar, prior to the delivery of water from the works, and thereafter not to exceed one mill on the dollar, of assessed valuation of the property within the district, except in the event of accruing defaults or deficiencies where an additional levy may be made as provided in Section 20 hereof. The board shall, on or before the first day of July of each year, certify to the board of county commissioners of each county within the district or having a portion of its territory within the district, the rate so fixed with directions that at the time and in the manner required by law for levying of taxes for county purposes, such board of county commissioners shall levy such tax upon the assessed valuation of all property within the district, in addition to such other taxes as may be levied by such board of county commissioners, at the rate so fixed and determined. (Sec. 16.)

100-11-17. Id. Board May Sell or Lease Water to Municipalities Upon Petition—Fix Rates—Levy and Collection of Special Assessments Under Class B.

To levy and collect special assessments under class B as herein provided, the board shall make an allotment of water to each petitioning municipality in the district in the manner as hereinafter provided, in such quantity as will in the judgment of the board, when added to the then present supply of water of such municipality, make an adequate supply for such municipality, and shall fix and determine the rate or rates per acre-foot, and terms at and upon which such water shall be sold, leased or otherwise disposed of, for use by such municipalities; *provided, however*, that such rates shall be equitable although not necessarily equal or uniform for like classes of services throughout the district. In the event any city, city and county, or town shall desire to purchase, lease or otherwise obtain the beneficial use of waters of the district for domestic or irrigation purposes, the legislative body of such municipality shall by ordinance authorize and direct its mayor and clerk to petition the board for an allotment of water, upon terms prescribed by the board, which petition shall contain inter alia, the following:

(1) Name of municipality.

(2) Quantity of water to be purchased or otherwise acquired.

(3) Price per acre-foot to be paid.

(4) Whether payments are to be in cash or annual installments.

(5) Agreement by the municipality to make payments for the beneficial use of such water together with annual maintenance and operating charges and to be bound by the provisions of this act and the rules and regulations of the board.

The secretary of the board shall cause notice of the filing of such petition to be given and published once each week for two successive

weeks, in a newspaper published in the county in which said municipality is situated, which notice shall state the filing of such petition and giving notice to all persons interested to appear at the office of the board, at a time named in said notice, and show cause, in writing, if any they have, why the petition should not be granted. The board at the time and place mentioned in said notice or at such time or times at which the hearing of said petition may adjourn, shall proceed to hear the petition and objections thereto, presented, in writing, by any person showing cause as aforesaid why said petition should not be granted. The failure of any person interested to show cause in writing, as aforesaid, shall be deemed and taken as an assent on his part to the granting of said petition. The board may at its discretion, accept or reject the said petition, but if it deems it for the best interest of the district that said petition be granted, shall enter an order granting the said petition and from and after such order the said municipality shall be deemed to have purchased, leased, or otherwise acquired the beneficial use of water as set forth in said order. If said petition is granted, the board shall, in each year, determine the amount of money necessary to be raised by taxation from property within such municipality to pay the annual installments and a fair proportionate amount of estimated operating and maintenance charges for the next succeeding year, as provided in the order granting said petition, and prepare a statement showing the tax rate to be applied to all property in such municipality, which rate shall be the rate fixed by resolution of the board modified to the extent necessary to produce from each such municipality only the amount of money apportioned thereto in said resolution, less any amount paid or undertaken to be paid by such municipality in cash or as credited thereto by payments from the general funds of such municipality. Upon receipt by the board of county commissioners of each county, wherein such municipality is located, of a certified copy of such resolution showing the tax rate to be applied to all property in each municipality and showing the municipalities and the property which is exempt therefrom, if any, it shall be the duty of the county officers to levy and collect such tax in addition to such other tax as may be levied by such board of county commissioners at the rate so fixed and determined. (Sec. 17.)

Cross-references.
Water supply in municipalities, 15–7–4 et seq., 15–8–14, 15–12–14.

100–11–18. Id. Board May Sell or Lease Water to Irrigation Districts —Levy and Collection of Special Assessments Under Class C.

To levy and collect special assessments upon lands under class C as herein provided, the board shall make an allotment of water to each of the petitioning irrigation districts within the district in the manner as hereinafter provided in such quantity as will in the judgment of the board, when added to the present supply of water of such irrigation district, make an adequate supply of water for such irrigation district, and shall fix and determine the rate or rates per acre-foot and terms at and upon which water shall be sold, leased or otherwise disposed of to

such irrigation district; *provided, however,* that such rates shall be equitable although not necessarily equal or uniform for like classes of services throughout the district. In the event any irrigation district shall desire to purchase, lease, or otherwise obtain the beneficial use of waters of the district, the board of such irrigation district shall by resolution authorize and direct its president and secretary to petition the board for an allotment of water, upon terms prescribed by the board, which petition shall contain, inter alia, the following:

(1) Name of irrigation district.

(2) Quantity of water to be purchased or otherwise acquired.

(3) Price per acre-foot to be paid.

(4) Whether payments are to be made in cash or annual installments.

(5) Agreement by such irrigation district to make payments for the beneficial use of such water, together with annual maintenance and operating charges, and to be bound by the provision of this act and the rules and regulations of the board.

The secretary of the board shall cause notice of the filing of such petition to be given and published, which notice shall state the filing of such petition and giving notice to all persons interested to appear at the office of the board at a time named in said notice and show cause in writing, if any they have, why the petition should not be granted. The board at the time and place mentioned in said notice, or at such time or times at which the hearing of said petition may be adjourned, shall proceed to hear the petition and objections thereto, presented, in writing, by any person showing cause as aforesaid why said petition should not be granted. The failure of any person interested to show cause, in writing, as aforesaid, shall be deemed and taken as an assent on his part to the granting of said petition. The board may, at its discretion, accept or reject the said petition, but if it deems it for the best interest of the district that said petition shall be granted, shall enter an order to that effect granting the said petition, and from and after such order, the irrigation district and/or persons therein shall be deemed to have purchased, leased, or otherwise acquired the beneficial use of water as set forth in said order. If said petition is granted, the board shall, in each year, determine the amount of money necessary to be raised by special assessment on lands within such irrigation district and shall certify to the county assessor of the county in which the lands of such irrigation district are located the amount of the assessment, plus a fair proportionate amount of the estimated operating and maintenance charges for the next succeeding year on each tract of land on or before the first day of July of each year, and such county assessor shall extend the amount of such special assessment, plus said operating and maintenance charges, on the tax roll as a special assessment against the lands upon which said special assessment is made. If subdistrict or subdistricts are organized as herein provided, assessments of special benefits shall be made, spread on the tax rolls and collected in the same manner as herein provided in the case of irrigation districts.

(Sec. 18.)

Cross-references.
Irrigation districts, 100-9.

100-11-19. Id. Board May Sell or Lease Water to Persons and Private Corporations on Petition—Levy and Collection of Taxes Under Class D.

To levy and collect special assessments upon lands under class D as herein provided, the board shall make an allotment of water to petitioning owners of lands in the district, upon which water can be beneficially used in the manner as hereinafter provided, in such amount as will, in the judgment of the board, together with the present supply of water for irrigation purposes on such lands, make an adequate water supply for irrigation of such lands, and shall fix and determine the rate or rates per acre-foot and the terms at and upon which water shall be held, leased or otherwise disposed of, for use on said lands. In the event that any person or private corporation shall elect to purchase, lease or otherwise obtain the beneficial use of waters of the district for irrigation of lands, such person or corporation shall petition the board for an allotment of water upon terms prescribed by the board, which petition shall contain inter alia, the following:

(1) Name of applicant.

(2) Quantity of water to be purchased or otherwise acquired.

(3) Description of lands upon which the water will be used and attached.

(4) Price per acre-foot to be paid.

(5) Whether payments will be made in cash or annual installments.

(6) Agreement that the annual installments and the charges for maintenance and operating shall become a tax lien upon the lands for which such water is petitioned and allotted and to be bound by the provision of this act and the rules and regulations of the board.

The board may, in its discretion, accept or reject the said petition, but if it deems it for the best interests of the district that said petition be granted, shall enter an order granting the said petition and from and after such order, the said petitioner shall have deemed to have agreed to the purchase, lease or other means of acquiring the beneficial use of water under the terms set forth in said petition and order. Such order shall provide for payment on the basis of rate per acre-foot of water allotted to said lands within the district, providing that the board may divide the district into units and fix a different rate per acre-foot of water in the respective units and *provided, further*, that such rates shall be equitable although not necessarily equal or uniform for like classes of services throughout the district.

The secretary of the board shall cause notice of the filing of such petition to be given and published, which notice shall state the filing of such petition and giving notice to all persons interested to appear at the office of the board at a time named in said notice and show cause in writing, if any they have, why the petition should not be granted. The board at the time and place mentioned in said notice, or at such time or times at which the hearing on said petition may be adjourned, shall proceed to hear the petition and objections thereto, presented, in writing, by any person showing cause as aforesaid, why said petition should not be granted. The failure of any person interested to show cause, in writing, as aforesaid, shall be deemed and taken as an assent

on his part to the granting of said petition. The board may, at its discretion, accept or reject the said petition, but if it deems it for the best interest of the district that said petition shall be granted, shall enter an order to that effect granting said petition, and from and after such order the petitioner or persons interested therein, shall be deemed to have purchased, leased or otherwise acquired the beneficial use of water as set forth in said order. If such petition is granted, the board shall cause a certified copy of the order granting said petition to be recorded in the county in which said lands are located, and thereafter the annual installments and annual operating and maintenance charges shall be a perpetual tax lien upon said lands. The board shall on or before the first day of July of each year, certify to the county assessor of the county within the district in which such lands are located the amount of the annual installments, plus a fair proportionate amount of the estimated operating and maintenance charges apportioned to said lands for the next succeeding year, and such county assessor shall extend the amount so certified on the tax roll as a flat special assessment against the lands for which such water is petitioned and allotted.

(Sec. 19.)

A. L. R. notes.

Damages for breach of duty to furnish water for irrigation purposes, 108 A. L. R. 1181; right of owner of land within reclamation project in respect of which water right was allowed on application pursuant to Reclamation Act to perpetual right beyond control of federal government for sufficient amount beneficially to irrigate land, 115 A. L. R. 1320.

100-11-20. Id. May Levy Additional Taxes and Assessments to Pay Deficiencies.

The board in making the annual assessments and levies as herein provided, shall take into account the maturing indebtedness for the ensuing year as provided in its contracts and the maturing of bonds and interest on all bonds, and deficiencies and defaults of prior years, and shall make ample provision for the payment thereof. In case the proceeds of such levies and assessments made under the provisions of this act, together with other revenues of the district, are not sufficient to punctually pay the annual installments on its contracts or bonds, and interest thereon, and to pay defaults and deficiencies, then the board shall make such additional levies of taxes and assessments as may be necessary for such purposes and notwithstanding any limitations by contract, order, tax lien, or otherwise, such taxes and assessments shall be made and continue until the indebtedness of the district shall be fully paid; *provided, however,* that the amount of such additional levies of taxes under class A as herein provided, shall not in any one year exceed an amount that would be raised by a levy of one-half mill against the assessed value of such property as fixed for general tax purposes; *provided,* that such levies for defaults and deficiencies shall not at any time be so made as to impose upon class A as herein provided, payments in excess of twenty-five per cent of the anticipated revenue from all sources to be raised for the specific purpose of payment of existing defaults and deficiencies; and *provided further,* that in making such additional levies or assessments, the board shall take into account

all sources of revenue and equitably distribute the burden of such defaults and deficiencies according to the uses and benefits as provided in this act. (Sec. 20.)

100–11–21. Id. To Hear Objections to Assessments—Procedure—Appeal to District Court.

Prior to the first day of July of each year in which assessments are made, the board shall appoint a time and place or places where it will meet within the district for the purpose of hearing objections to assessments, and prior notice of such hearing shall be given by publication in two issues, a week apart, in some newspaper of general circulation published in each county; *provided*, that if there is any county in the district in which there is no newspaper published, then such notice shall be published in an adjoining county. Said notice shall notify the owners of property in the district that in the secretary's office may be found and examined a description of the property so assessed, the amount of the assessment thereon fixed by the board, and the time and place or places fixed by the board for the hearing of objections to such assessments. It shall not be necessary for said notice to contain separate descriptions of the lots or tracts of real estate, but it shall be sufficient if the notice shall contain such descriptions as will inform the owner whether or not his real estate is covered by such descriptions, and to inform the owner where can be found of record the amount of assessments. If in the opinion of any person whose property is assessed, his property has been assessed too high, or has been erroneously or illegally assessed, he may at any time before the date of such hearing, file written objections to such assessments, stating the grounds of such objections, which statement shall be verified by the affidavit of said person or his agent. In such hearing the board shall hear such evidence and arguments as may be offered concerning the correctness or legality of such assessment and may modify or amend the same. Any owner of property desiring to appeal from the findings of the board as to assessment shall, within thirty days from the finding of the board, file with the clerk of the court a written notice making demand for trial by the court. The appellant at the same time shall file a bond with good and sufficient security to be approved by the clerk of said court in a sum not exceeding two hundred dollars to the effect that if the finding of the court be not more favorable to the appellant than the finding of the board, the appellant will pay the cost of the appeal. The appellant shall state definitely from what part of the order the appeal is taken. In case more than one appeal is taken, the court may upon its showing that the same may be consolidated without injury to the interests of any one, consolidate and try the same together.

The court shall not disturb the findings of the board unless the findings of the board in any case is manifestly disproportionate to the assessments imposed upon other property in the district created under this act. The trial shall be to the court and the matter shall take precedence before the court and shall be taken up as promptly as may be after the appeal is filed. If no appeal is taken from the findings of the board within the time prescribed in this section, or after the findings of

the court in case an appeal is taken from the findings of the board, then the assessment shall be final and conclusive evidence that said assessments have been made in proportion to the benefits conferred upon the property in said district by reason of the improvements to be constructed under the provisions of this act and such assessments shall constitute a perpetual lien upon such property so assessed until paid. (Sec. 21.)

100-11-22. Officials Charged with Duty to Collect Taxes—Taxes Levied Create Equal Lien.

It shall be the duty of the officer or body having authority to levy taxes within each county, city and county, or town, to levy the taxes and special assessments as provided in this act, and it shall be the duty of all county, or city and county officials, charged with the duty of collecting taxes, to collect such taxes and special assessments in the time, form and manner and with like interest and penalties as county or city and county taxes are collected and when collected to pay the same to the district ordering its levy and collection, and the payment of such collections shall be made through the secretary of the district and paid into the depository thereof to the credit of the district. All taxes and assessments made under this act, together with all interest thereon and penalties for default in payment thereof, and all costs in collecting the same, shall, until paid, constitute a perpetual lien on a parity with the tax lien of general, state, county, city, town or school taxes and no sale of such property to enforce any general, state, county, city, town or school tax or other liens shall extinguish the perpetual lien of such taxes and assessments. (Sec. 22.)

100-11-23. Tax Sales.

If the taxes and assessments levied are not paid as herein provided, then the real property shall be sold at the regular tax sale for the payment of said taxes and assessments, interest and penalties, in the manner provided by the statutes of the state of Utah for selling property for payment of general taxes. If there are no bids at said tax sale for the property so offered under class A and class B, said property shall be struck off to the county, and the county shall account to the district in the same manner as provided by law for accounting for school, town and city taxes. And if there are no bids for the property so offered under class C and class D, said property shall be struck off to the district and the tax certificate shall be issued in the name of the district and the board shall have the same power with reference to sale of said tax certificate, as now vested in county commissioners and county treasurers when property is struck off to the counties. (Sec. 23.)

100-11-24. Property Exempt from Assessments.

All property of whatever kind and nature owned by the state and by towns, cities, school districts, drainage districts, metropolitan water districts, irrigation districts, park districts, water districts, or any other governmental agency or agencies within the said district, shall be exempt from assessment and levy by the board as provided by this act for the purposes herein contained. (Sec. 24.)

100-11-25. Board May Dispose of Water Under Term Contracts.

The board may sell, lease or otherwise dispose of the use of water by term contracts or by contracts for the perpetual use of such water to persons, mutual ditch companies, water users' associations and other private corporations for irrigation or commercial use as shall be provided by contracts, in writing, authorized and entered into by the board; and the board shall require that security be given to secure the payments to be made under such contract or contracts. (Sec. 25.)

100-11-26. Liens to Secure Payment of Annual Installments.

To meet the annual installments as provided in contracts for the use of water;

(a) A water users' association may bind itself to levy an annual assessment on the use of water and to secure same by liens on land and water rights or in such manner as may be provided by law.

(b) A mutual ditch or irrigation company may bind itself by mortgage upon its irrigation works and system and levy annual assessments upon its stockholders; and

(c) Any person or corporation landowner may create a mortgage lien upon lands or give other security satisfactory to the board; and all such contracts shall provide for forfeiture of the use of water for non-payment of assessments or installments in the same manner and procedure as provided by statute for forfeiture of stock in a mutual ditch company. (Sec. 26.)

100-11-27. Board May Create Sinking Fund.

Whenever a contract of indebtedness has been created by the district, it shall be lawful for the board to make the annual levy of taxes and special assessments in such amount as will create a surplus of funds to meet the annual installments of indebtedness or the payment of bonds and interest, and the necessary maintenance and operating charges, and the board shall cause such surplus funds to be placed in a sinking fund which may be used for the payments of contingencies, defaults and delinquencies, and to pay the future annual installments of indebtedness on contract or bonds and interest. (Sec. 27.)

100-11-28. Powers of Board in Distribution of Water.

The board shall have the following powers concerning the management, control, delivery, use and distribution of water by the district, to wit:

(1) To make and enforce all reasonable rules and regulations for the management, control, delivery, use and distribution of water.

(2) To withhold the delivery of water upon which there are any defaults or delinquencies of payment.

(3) To provide for and declare forfeitures of rights to the use of water upon default or failure to comply with any order, contract or agreement for the purchase, lease or use of water and to resell, lease or otherwise dispose of water upon which forfeiture has been declared.

(4) To allocate and reallocate the use of water to lands within the district.

(5) To provide for and grant the right, upon terms, to transfer water from lands to which water has been allocated to other lands within the district and to discharge liens from lands to which same was theretofore attached and to create liens, as provided in this act, upon lands to which the use of such water is transferred. (Sec. 28.)

100-11-29. Change of Boundaries — Petition for Inclusion of Other Lands—Procedure.

The boundaries of any district organized under the provision of this act may be changed in the manner herein prescribed, but the change of boundaries of the district shall not impair or affect its organization or its rights in or to property, or any of its rights or privileges whatsoever; nor shall it affect or impair or discharge any contract, obligation, lien or charge for or upon which it might be liable or chargeable had such change of boundaries not been made. The owners of lands may file with the board a petition, in writing, praying that such lands be included in the district. The petition shall describe the tracts or body of land owned by the petitioners, and such petition shall be deemed to give assent of the petitioners to the inclusion in said district of the lands described in the petition, and such petition must be acknowledged in the same manner that conveyances of land are required to be acknowledged. The secretary of the board shall cause notice of filing of such petition to be given and published in the county in which the lands are situated, which notice shall state the filing of such petition, names of petitioners, descriptions of lands mentioned and the prayer of said petitioners; giving notice to all persons interested to appear at the office of the board at the time named in said notice and show cause in writing, if any they have, why the petition should not be granted. The board shall at the time and place mentioned or at such time or times at which the hearing may be adjourned, proceed to hear the petition and all objections thereto, presented, in writing, by any person showing cause why said petition should not be granted. The failure of any person interested to show cause, in writing, shall be deemed and held and taken as an assent on his part to the inclusion of such lands in the district as prayed for in the petition. If the petition is granted, the board shall make an order to that effect and file same with the clerk of the court and upon order of the court said lands shall be included in the district. (Sec. 29.)

100-11-30. Petition for Exclusion of Lands in District—Procedure—Court Order.

The owner or owners in fee of any lands constituting a portion of the district may file with the board a petition praying that such lands be excluded and taken from said district. Petitions shall describe the lands which the petitioners desire to have excluded. Such petition must be acknowledged in the same manner and form as required in case of a conveyance of land and be accompanied by a deposit of money sufficient to pay all costs of the exclusion proceedings. The secretary of the board shall cause a notice of filing of such petition to be published in the county in which said lands, or the major portion thereof, are

located. The notice shall state the filing of such petition, the names of petitioners, descriptions of lands mentioned in said petition, and the prayer of said petitioners; and it shall notify all persons interested to appear at the office of said board at the time named in said notice, showing cause in writing, if any they have, why said petition should not be granted. The board at the time and place mentioned in the notice, or at the time or times at which the hearing of said petition may be adjourned, shall proceed to hear the petition and all objections thereto, presented, in writing, by any person showing cause as aforesaid, why the prayer of the petition should not be granted. The filing of such petition shall be deemed and taken as an assent by each and all such petitioners to the exclusion from the district of the lands mentioned in the petition, or any part thereof. The board, if they deem it not for the best interests of the district that the lands mentioned in the petition, or portion thereof, shall be excluded from the district, shall order that said petition be denied; but if they deem it for the best interest of the district that the lands mentioned in the district, or some portion thereof, be excluded from the district, and if there are no outstanding bonds of the district, then the board may order the lands mentioned in the petition or some portion thereof, to be excluded from the district. *Provided, further*, that in case contract has been made between the district and the United States or any agency thereof, no change shall be made in the boundaries of the district unless the Secretary of the Interior shall assent thereto in writing and such assent be filed with the board. Upon such assent, any lands excluded from the district shall upon order of the court be discharged from all liens in favor of the United States under the contract with the United States or under bonds deposited with its agents. Upon allowance of such petition, the board shall file a certified copy of the order of the board making such change with the clerk of the court and upon order of the court said lands shall be excluded from the district. (Sec. 30.)

100–11–31. Issuance of Bonds—Form—Maximum Interest Rate—Exempt from Taxation.

To pay for construction, operation and maintenance of said works and expenses preliminary and incidental thereto, the board is hereby authorized to enter into contract with the United States or any agency thereof, providing for payment in installments or to issue negotiable bonds of the district. If bonds are authorized, the same shall bear interest at a rate not exceeding six per centum per annum, payable semiannually, and shall be due and payable not less than ten or more than fifty years from their dates. The form, terms and provisions of said bonds, provisions for their payment and conditions for their retirement and calling, not inconsistent with law, shall be vested and determined by the board and they shall be issued as hereinafter provided in payment of the works, equipment, expenses and interest during the period of construction. Said bonds shall be executed in the name of and on behalf of the district and signed by the president of the board with the seal of the district affixed thereto and attested by the secretary of the board. Said bonds shall be in such denominations as the board

shall determine and shall be payable to bearer and may be registered in the office of the county treasurer of the county wherein the organization of the district has been effected, with the interest coupons payable to bearer, which shall bear the facsimile signature of the president of the board. Such bonds shall be exempt from all state, county, municipal, school and other taxes imposed by any taxing authority of the state of Utah and shall not be sold at less than par and accrued interest. (Sec. 31.)

100-11-32. Id. To Be Submitted to Qualified Taxpaying Electors—Election.

Whenever the board incorporated under this act shall by resolution adopted by a majority of the said board, determine that the interests of said district and the public interest or necessity demand the acquisition, construction or completion of any source of water supply, waterworks, or other improvements, or facility, or the making of any contract with the United States or other persons or corporations, to carry out the objects or purposes of said district, wherein the indebtedness or obligations shall be created, to satisfy which shall require a greater expenditure than the ordinary annual income and revenue of the district shall permit, said board shall order the submission of the proposition of issuing such obligation or bonded or other indebtedness for the purposes set forth in said resolution, to such qualified electors of the district as shall have paid a tax on property in the district in the year preceding such election, at an election held for that purpose. Any election held for the purpose of submitting any proposition or propositions of incurring such obligation or indebtedness may be held separately, or may be consolidated or held concurrently with any other election authorized by law at which such qualified electors of the district shall be entitled to vote. The declaration of public interest or necessity herein required and the provision for the holding of such election may be included within one and same resolution, which resolution, in addition to such declaration of public interest or necessity, shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the works or improvements as the case may be, the amount of principal of the indebtedness to be incurred therefor, and the maximum rate of interest to be paid on such indebtedness. Such resolution shall also fix the date upon which such election shall be held and the manner of holding the same and the method of voting for or against the incurring of the proposed indebtedness. Such resolution shall also fix the compensation to be paid the officers of the election and shall designate the precincts and polling places and shall appoint for each polling place, from each precinct from the electors thereof, the officers of such election, which officers shall consist of three judges, one of whom shall act as clerk, who shall constitute a board of election for each polling place. The description of precincts may be made by reference to any order or orders of the board of county commissioners of the county or counties in which the district or any part thereof is situated, or by reference to any previous order, or resolution of the board or by detailed description of such precincts. Precincts

established by the boards of the various counties may be consolidated for special elections held hereunder. In the event any such election shall be called to be held concurrently with any other election or shall be consolidated therewith, the resolution calling the election hereunder need not designate precincts or polling places or the names of officers of election, but shall contain reference to the act or order calling such other election and fixing the precincts and polling places and appointing election officers therefrom. (Sec. 32.)

100–11–33. Resolution to Issue Bonds to Be Published—Manner.

The resolution provided in Section 32 shall be published once a week for two consecutive weeks, the last publication of which shall be at least ten days prior to the date set for said election, in a newspaper of general circulation printed and published within the district, and no other or further notice of such election or publication of the names of election officers or of the precincts or polling places need be given or made. (Sec. 33.)

100–11–34. Conducting of Election—Canvass of Returns.

The respective election boards shall conduct the election in their respective precincts in the manner prescribed by law for the holding of general elections, and shall make their returns to the secretary of the district. At any regular or special meeting of the board held not earlier than five days following the date of such election, the returns thereof shall be canvassed and the results thereof declared. In the event that any election held hereunder shall be consolidated with any primary or general election, the returns thereof shall be made and canvassed at the time and in the manner provided by law for the canvass of the returns of such primary or general election. It shall be the duty of such canvassing body or bodies to promptly certify and transmit to the board a statement of the result of the vote upon the proposition submitted hereunder. Upon receipt of such certificate, it shall be the duty of the board to tabulate and declare the results of the election held hereunder. (Sec. 34.)

100–11–35. Majority Authorizes Issuance of Bonds—Resubmission of Proposition.

In the event that it shall appear from said returns that a majority of said qualified electors of the district who shall have voted on any proposition submitted hereunder at such election voted in favor of such proposition, the district shall thereupon be authorized to incur such indebtedness or obligations, enter into such contract or issue and sell such bonds of the district, all for the purpose or purposes and object or objects provided for in the proposition submitted hereunder and in the resolution therefor, and in the amount so provided and at a rate of interest not exceeding the rate of interest recited in such resolution. Submission of the proposition of incurring such obligation or bonded or other indebtedness at such an election shall not prevent or prohibit submission of the same or other propositions at subsequent election or elections called for such purpose. (Sec. 35.)

100-11-36. Board May Petition District Court for Judicial Determination of Its Acts—Powers—Taxes—Contracts.

The board may, in its discretion, at any time file a petition in the court, praying a judicial examination and determination of any power conferred hereby or by any amendment hereto or of any tax or assessment levied or of any act, proceeding or contract of the district, whether or not said contract shall have been executed, including proposed contracts for the acquisition, construction, maintenance or operation of works for the district. Such petition shall set forth the facts whereon the validity of such power, assessment, act, proceeding or contract is founded and shall be verified by the president of the board. Notice of the filing of said petition shall be given by the clerk of the court, under the seal thereof, stating in brief outline the contents of the petition and showing where a full copy of any contract or contracts, therein mentioned, may be examined. Said notice shall be served by publication at least once a week for five consecutive weeks (five issues) in a newspaper of general circulation in the county in which the principal office of the district is located, and by posting the same in the office of the district at least thirty days prior to the date fixed in said notice for the hearing on said petition. Any owner of property in the district or person interested in the contract or proposed contract may appear and demur to or answer said petition at any time prior to the date fixed for said hearing or within such further time as may be allowed by the court; and the petition shall be taken as confessed by all persons who fail so to appear. The said petition and notice shall be sufficient to give the court jurisdiction and, upon hearing, the court shall examine into and determine all matters and things affecting the question submitted, shall make such findings with reference thereto and render such judgment and decree thereon as the case warrants. Costs may be divided or apportioned among the contesting parties in the discretion of the trial court. Review of the judgment of the court may be had as in other similar cases, except that such review must be applied for within thirty days after the time of the rendition of such judgment, or within such additional time as may be allowed by the court within thirty days. The code of civil procedure shall govern in matters of pleading and practice where not otherwise specified herein. The court shall disregard any error, irregularity or omission which does not affect the substantial rights of the parties. (Sec. 36.)

100-11-37. Due Notice—Jurisdiction of District Court Not Lost for Failure to Give.

In any and every case where a notice is provided for in this act, if the court finds for any reason that due notice was not given, the court shall not thereby lose jurisdiction, and the proceeding in question shall not thereby be void or be abated, but the court shall in that case order due notice to be given, and shall continue the hearing until such time as notice shall be properly given, and thereupon shall proceed as though notice had been properly given in the first instance. (Sec. 37.)

100–11–38. Cases Hereunder to Be Heard at Earliest Practicable Moment.

All cases in which there may arise a question of the validity of the organization of a water conservancy district, or a question of the validity of any proceeding under this act shall be advanced as a matter of immediate public interest and concern, and heard at the earliest practicable moment. The courts shall be open at all times for the purposes of this act. (Sec. 38.)

100–11–39. To Be Liberally Construed.

This act being necessary to secure and preserve the public health, safety, convenience and welfare, and for the security of public and private property, it shall be liberally construed to effect the purposes of this act. (Sec. 39.)

100–11–40. Partial Invalidity—Savings Clause.

Should the courts of the state or of the United States declare any section, provision, paragraph, clause, sentence, phrase, or part thereof, of this act invalid or unconstitutional, or in conflict with any other section, provision, paragraph, clause, sentence, phrase, or part thereof, of this act then such decision shall affect only the section, provision, paragraph, clause, sentence, phrase, or part thereof, declared to be unconstitutional or unauthorized, and shall not affect any other part whatsoever of this act. The legislature of the state of Utah hereby declares that it would have passed this act and each section, provision, paragraph, clause, sentence, or phrase thereof, irrespective of the fact that any one or more of the other sections, provisions, paragraphs, clauses, sentences, or phrases, or parts thereof, be declared invalid or unconstitutional. (Sec. 40.)

100–11–41. Acts in Conflict Declared Nonoperative as to This Act.

All acts or parts of acts conflicting in any way with any of the provisions of this act in regard to the improvements or improvement districts, or regulating or limiting the power of taxation or assessments, or otherwise interfering with the accomplishment of the purposes of this act according to its terms, are hereby declared nonoperative and noneffective as to this act as completely as if they did not exist. But all such acts and parts of acts shall not in any other way be affected by this act. (Sec. 41.)

CHAPTER 12

CONSOLIDATING CERTAIN WATER COMPANIES AND CONSERVATION DISTRICTS

L. 1933, ch. 80; eff. June 26.

100–12–1. Powers and Duties of Land Board — Consolidation — Purpose.
100–12–2. Id. To Reserve Stock for Irrigating State Lands—Sell or Lease Excess Stock.
100–12–3. Disposition of Proceeds.
100–12–4. State Land Board to Vote Stock of Consolidated District.
100–12–5. Effective Date.

L. 1933, ch. 80; eff. June 26.

AN ACT authorizing the state land board to merge and consolidate the properties, rights, privileges, and franchises acquired by the state through foreclosure of the mortgage of the Carbon Water Company to the state of Utah with the properties, rights, privileges, and franchises of the Price River Water Conservation District and other corporations, associations and individuals owning storage rights in the reservoir of the Price River Water Conservation District; to exchange such properties for the capital stock of the consolidated corporation; to reserve a portion of such stock for the irrigation of state lands; to sell or lease the excess stock; to vote the stock of the consolidated corporation, and defining the manner in which the proceeds from the sale or lease of said stock shall be applied.

Be it enacted by the Legislature of the State of Utah:

100-12-1. Powers and Duties of Land Board—Consolidation—Purpose. The state land board of the state of Utah is hereby authorized to merge and consolidate the properties, rights, privileges and franchises acquired by the state of Utah through foreclosures of the mortgage of the Carbon Water Company to the state of Utah with the properties, right, privileges and franchises of the Price River Water Conservation District, the Wellington Canal Company, Bryner Plantz Ditch, Bryner Hansen Ditch, Lyn Ditch, Spring Glen Canal, Oberto Ditch, Marchello Ditch, Stowell Canal, Cook Ditch, Price Water Company, Pioneer Ditch Number Two, Allred Ditch, Pioneer Ditch Number One, Carbon Water Company, Tidwell Canal, Snyder Ditch, being all corporations of a similar nature, and others having or owning storage rights in the reservoir of the Price River Water Conservation District, situated in Carbon and Emery counties, Utah, pursuant to the provisions of chapter 5, title 18, Revised Statutes of Utah, 1933, to the end that greater efficiency in the preservation and distribution of water and greater economy of management may be accomplished, and in order to effect such merger and consolidation the state land board is hereby authorized to join in the execution of proper articles of merger and consolidation providing all of the other constituent parties are duly and regularly authorized to join therein; and the state land board is hereby further authorized to take and accept stock of the consolidated corporation of sufficient amount and of proper class in full payment for the properties, rights, privileges and franchises transferred and conveyed to such consolidated corporation. (Sec. 1.)

100-12-2. Id. To Reserve Stock for Irrigating State Lands—Sell or Lease Excess Stock. The state land board shall have power, and it shall be its duty, in the event such merger and consolidation is effected, to reserve and hold such amount of the capital stock of the consolidated corporation as will supply a water right for all lands owned by the state and capable of irrigation from the canals, ditches or distribution system of the consolidated corporation, and shall have power, and it shall be its duty, to sell or lease all excess stock upon such terms as it may deem best to persons

owning land capable of being irrigated from the canals, ditches or distributing system of the consolidated corporation. (Sec. 2.)

100–12–3. Disposition of Proceeds.

The money derived from the sale or lease of such excess stock shall go to the reservoir land grant fund until the principal of the loan or loans made to the Carbon Water Company, or its predecessors, the interest thereon, and advances made by the state in connection therewith, are fully paid, and thereafter the money derived from the sale or lease of said stock go to the state school fund. (Sec. 3.)

100–12–4. State Land Board to Vote Stock of Consolidated District.

In the event it is necessary for the consolidated corporation to borrow money for consolidation expenses, repairs, improvements and operation, and to pay the indebtedness of the Price River Water Conservation District or any of the constituent companies, and to pledge or mortgage all or any part of the assets and properties of the consolidated corporation as security therefor, the state land board is hereby authorized to vote the stock of the state of Utah in favor thereof providing it deems the best interests of all the constituent parties will be subserved thereby. (Sec. 4.)

100–12–5. Effective Date.

This act shall take effect when the Revised Statutes of Utah, 1933, become effective. (Sec. 5.)

CHAPTER 13

UTAH LAKE DIKING PROJECT

L. 1935, ch. 109; eff. Mar. 11.

100–13–1. Governor Authorized to Convey to the United States Lands or Interests in Said Lands in Bed of or on Margin of Utah Lake.
100–13–2. Manner of Executing and Attesting Deeds, etc.
100–13–3. Description of Land.
100–13–4. Purposes for Which Land Is to Be Used.
100–13–5. Effective Date.

L. 1935, ch. 109; eff. Mar. 11.

AN ACT authorizing the governor of the state of Utah to convey or grant to the United States of America certain lands or interests in said lands in the bed of or on the margin of Utah Lake.

Be it enacted by the Legislature of the State of Utah:

100–13–1. Governor Authorized to Convey to the United States Lands or Interests in Said Lands in Bed of or on Margin of Utah Lake.

For the purpose of coöperating with and assisting the United States of America in developing the water resources of this state, the governor of the state of Utah is hereby authorized to grant and convey to

the United States of America by deed or deeds or other appropriate instrument or instruments such right, title and interest which the state of Utah now has or which it may acquire in and to the lands herein described, or of any part of the same, and or to grant and convey any easement or right of way in, upon or across any such state lands as may be necessary or desirable in connection with the construction by the United States of America of any storage reservoir, dike or dikes, and or other works for the development and use of water for irrigation and other purposes; *provided*, that the governor shall not make any such grants or conveyances until an agreement has been made by the United States of America with a water users' association, and or other entity or entities for the construction of any of such works in connection with which is desired any grant or conveyance provided for in this act.

(Sec. 1.)

100-13-2. Manner of Executing and Attesting Deeds, etc.

All deeds or other instruments herein authorized to be executed shall be executed and attested in the manner in which patents to state lands are executed and attested. (Sec. 2.)

100-13-3. Description of Land.

The lands subject to this act are located in Utah county, state of Utah, and are described as follows, to wit:

All lands in the bed or on the margin of Utah Lake below elevation 4491.0′ (U. S. Coast and Geodetic Survey Adjusted Datum 1922) within the following described boundary:

Beginning at the west quarter corner of sec. 19, T. 5 S., R. 1 E., S. L. B. & M., and running thence three miles east to the east quarter corner sec. 21, T. 5 S., R. 1 E.; thence one-half mile south to southeast corner sec. 21, T. 5 S., R. 1 E.; thence one and one-half miles east to south quarter corner sec. 23, T. 5 S., R. 1 E.; thence one mile south to south quarter corner sec. 26, T. 5 S., R. 1 E.; thence two and one-half miles east to northeast corner sec. 31, T. 5 S., R. 2 E.; thence four miles south to southeast corner sec. 18, T. 6 S., R. 2 E.; thence one mile east to northeast corner sec. 20, T. 6 S., R. 2 E.; thence one mile south to southeast corner sec. 20, T. 6 S., R. 2 E.; thence one mile east to northeast corner sec. 28, T. 6 S., R. 2 E.; thence three miles south to northeast corner sec. 9, T. 7 S., R. 2 E.; thence one mile east to northeast corner sec. 10, T. 7 S., R. 2 E.; thence one mile south to southeast corner sec. 10, T. 7 S., R. 2 E.; thence three miles east to northeast corner sec. 18, T. 7 S., R. 3 E.; thence four miles south to southeast corner sec. 31, T. 7 S., R. 3 E.; thence three and one-half miles west to south quarter corner sec. 34, T. 7 S., R. 2 E.; thence one-half mile south to center of sec. 3, T. 8 S., R. 2 E.; thence one and one-half miles west to east quarter corner sec. 5, T. 8 S., R. 2 E.; thence one mile south to east quarter corner sec. 8, T. 8 S., R. 2 E.; thence one and one-half miles west to center of sec. 7, T. 8 S., R. 2 E.; thence one and one-half miles south to south quarter corner sec. 18, T. 8 S., R. 2 E.; thence four and one-half miles west to northeast corner sec. 20, T. 8 S., R. 1 E.; thence four miles south to southeast corner sec. 5, T. 9 S., R. 1 E.; thence one mile

west to southwest corner sec. 5, T. 9 S., R. 1 E.; thence three miles south to southeast corner sec. 19, T. 9 S., R. 1 E.; thence four and one-half miles west to south quarter corner sec. 21, T. 9 S., R. 1 W.; thence eleven miles north to north quarter corner sec. 33, T. 7 S., R. 1 W.; thence one and one-half miles east to northeast corner sec. 34, T. 7 S., R. 1 W.; thence one mile north to northwest corner sec. 26, T. 7 S., R. 1 W.; thence one-half mile, more or less, east to southwest corner sec. 24, T. 7 S., R. 1 W.; thence one mile north to northwest corner sec. 24, T. 7 S., R. 1 W.; thence one mile, more or less, east to northeast corner sec. 24, T. 7 S., R. 1 W.; thence seven miles north to northwest corner sec. 18, T. 6 S., R. 1 E.; thence one mile west to southwest corner sec. 12, T. 6 S., R. 1 W.; thence two miles north to northwest corner sec. 1, T. 6 S., R. 1 W.; thence one-half mile west to south quarter corner sec. 35, T. 5 S., R. 1 W.; thence two and one-half miles north to center sec. 23, T. 5 S., R. 1 W.; thence one and one-half miles east to west quarter corner sec. 19, T. 5 S., R. 1 E. to the point of beginning. (Sec. 3.)

100–13–4. Purposes for Which Land Is to Be Used.

Said lands to be used by the United States of America as aforesaid in connection with the development and use of water for irrigation and other purposes in this state under the provisions of the act of congress known as the Reclamation act, approved June 17, 1902 (32 Stat. 388) and/or of the act of congress known as the National Industrial Recovery act, approved June 16, 1933, (48 Stat. 195) and acts amendatory thereof or supplementary thereto. (Sec. 4.)

100–13–5. Effective Date.

This act shall take effect upon approval.

Approved March 11, 1935. (Sec. 5.)

TITLE 101

WILLS AND SUCCESSION

Chapter 1. EXECUTION AND REVOCATION OF WILLS.
Chapter 2. INTERPRETATION OF WILLS.
Chapter 3. GENERAL PROVISIONS.
Chapter 4. SUCCESSION.

CHAPTER 1

EXECUTION AND REVOCATION OF WILLS

101-1-1. Who Competent to Make a Will—Married Men Restricted.
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101-1-3. Married Women Competent to Make.
101-1-4. Who May Take Under Will.
101-1-5. Manner of Execution and Attestation.
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101-1-33. Id. Share of Estate—How Assigned to Them.
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101-1-36. Devise Conveys All of Testator's Interest.
101-1-37. After-Acquired Property Passes by Will.

101-1-1. Who Competent to Make a Will—Married Men Restricted.

Every person over the age of eighteen years of sound mind may by last will dispose of all his estate, real and personal, and such estate not

disposed of by will is succeeded to as provided in chapter 4 of this title, being chargeable in both cases with the payment of all the decedent's debts as provided by law; *provided*, that a married man shall not devise away from his wife more than two-thirds in value of his legal or equitable estates in real property without her consent in writing.

(C. L. 17, § 6311.)

History.

This section down to the proviso is practically identical with 2 Comp. Laws 1888, § 2647; the proviso was added later. R. S. 1898, § 2731; Comp. Laws 1907, § 2731. The section is also more or less identical with Comp. Laws 1876, § 685. It is also much like California Probate Code (1941) § 20.

Comparable provisions.

Cal. Probate Code, § 20 ("Every person of sound mind, over the age of eighteen years, may dispose of his or her separate property, real and personal, by will.")

Idaho Code, § 14-301, Mont. Rev. Codes, § 6974 (substantially identical, except as to the proviso).

Iowa Code 1939, § 11846 (any person of full age and sound mind may dispose by will of all his property, subject to rights of homestead and exemption created by law, and the distributive share in his estate given by law to surviving spouse, except sufficient to pay his debts and expenses of administration).

Cross-references.

Married women may make will and take by will, Const. Art. XXII, § 2, 40-2-1, 101-1-3; wife's inchoate interest, 101-4-3; relinquishment of inchoate interest, when insane, 102-14-22 et seq.; property subject to payment of debts, 101-3-2, 101-3-3, 101-4-2, 101-4-5; property not subject to payment of general debts, 101-4-6, 102-8-2; statute of frauds as not applicable, 33-5-2; dower and curtesy abolished, 101-4-9; will as including codicil, 88-2-12, subd. (12).

1. Constitutionality.

Privilege to dispose of one's property by will depends upon positive law, and is within legislative control. In re Mower's Estate, 93 U. 390, 73 P.2d 967. The privilege is not a natural right but depends on positive law, and is within control of law-making power. In re Little, 22 U. 204, 61 P. 899. (Bartch, C. J., dissenting.)

This right to make a will must not be invaded or abrogated by the courts; only the legislature may do that. Anderson v. Anderson, 43 U. 26, 39, 134 P. 553.

2. Testamentary capacity.

3. —origin.

Right to dispose of property by will is governed and controlled entirely by statute, and such statutes are mandatory, and unless strictly complied with, instrument, as will, is void. In re Wolcott's Estate, 54 U. 165, 180 P. 169, 4 A. L. R. 727, cited with approval in In re Love's Estate, 75 U. 342, 347, 285 P. 299.

4. —in general.

Any person not only has legal right to make will, but he has likewise the right to make as many different ones as he chooses, and to make them in accordance with dictates of his own conscience and judgment. In re Young's Estate, 33 U. 382, 94 P. 731, 17 L. R. A. (N. S.) 108, 126 Am. St. Rep. 843, 14 Ann. Cas. 590.

Eccentricities and idiosyncrasies, however gross, do not constitute insanity, and cannot incapacitate one otherwise sound from making a valid will. Accordingly, protestant must do more than show that testator was untidy in his personal habits and dress at home, and that he had a miserly disposition and an entire lack of affection for his offspring, to establish that testator was of unsound mind. In re Hanson's Will, 50 U. 207, 167 P. 256.

That testator, of foreign birth, inured to hardship and scant means of living, did not measure up to ideals of American life, should not mitigate against his right to dispose of his property by will. In re Hansen's Will, 52 U. 554, 177 P. 982.

In will contest on ground of lack of testamentary capacity, the test is whether testator had testamentary capacity at time the alleged will was made, and the inquiry should be limited to a period of time not too remote from that event. In re Hanson's Will, 50 U. 207, 167 P. 256.

5. Insane persons.

Of course, an insane person is incompetent to make a will. In re Frandsen's Will, 50 U. 156, 164, 167 P. 362.

6. Old age.

No general rule can be laid down as to whether the infirmities of old age incapacitate the testator. In re Swan's Estate, 51 U. 410, 170 P. 452, and authorities cited.

7. Disherison.

Testator, if of sound and disposing mind and memory, had right to dispose of property as he saw fit and could disinherit his sister if he so desired. In re

Bryan's Estate, 82 U. 390, 25 P.2d 602. He may cut off his children with a $1.00 bequest. In re Ford's Estate, 70 U. 456, 261 P. 15.

8. Limitations on testamentary capacity of married men.

Husband has absolute power to dispose of his real and personal property by will, except that he cannot legally devise away from his wife more than two-thirds of his legal and equitable estate in real property. In re Little, 22 U. 204, 61 P. 899. (Bartch, C.J., dissenting.)

9. Issues, proof and variance.

Objections to admission of will to probate, including allegation that at time will was made mind of testatrix was benumbed by narcotics and sedatives and she could only follow suggestions of others, was sufficient to raise issue of mental competency of testatrix. In re McCoy's Estate, 91 U. 212, 63 P.2d 620.

10. Evidence.

11. — presumptions.

The law of this state is not satisfied with mere presumption of sanity, but requires affirmative proof of fact. In re Swan's Estate, 51 U. 410, 170 P. 452.

12. — burden of proof.

Burden of proof is on contestant to show mental incapacity and undue influence, and the proponent of will can meet this by proof of a negative; that is, that he did not procure the execution of the will by undue influence, and that testator was not mentally incapable. In re Bryan's Estate, 82 U. 390, 25 P.2d 602.

13. — expert and opinion evidence.

The opinions of witnesses as to mental incompetency of testator, of necessity, must be founded on and be deducible from facts which, in law, if true, would in some manner justify conclusion of witness as to incompetency. In re Hansen's Will, 52 U. 554, 177 P. 982.

Opinions of lay witnesses concerning the testamentary capacity of the testator, and upon the issue of undue influence, while admissible, should be based upon facts relevant to the issue, and upon occurrences reasonably contemporaneous, and not too remote in point of time, for issue is whether testator had capacity when will was made. In re Hanson's Will, 50 U. 207, 167 P. 256. And see In re Swan's Estate, 51 U. 410, 170 P. 452.

Opinions of lay witnesses upon questions of insanity and undue influence should not be permitted unless such witnesses possess personal knowledge respecting the facts upon which their opinions are based. In re Hanson's Will, 50 U. 207, 167 P. 256.

In will contest opinions of lay witnesses as to mental condition cannot be given unless one offering opinion has had personal acquaintanceship with testator and unless witness details underlying facts upon which his opinion is based. In re Hanson's Estate, 87 U. 580, 52 P.2d 1103.

Trial court, in will contest, had duty to weigh and give effect to opinions of witnesses as to whether testatrix was mentally competent to make will at time will was made. In re McCoy's Estate, 91 U. 212, 63 P.2d 620.

In will contest, admission of opinion of stepgranddaughter relative to testatrix' mental capacity was not error, where she had observed testatrix' condition on four occasions, before and shortly after will's execution, on day will was made. In re McCoy's Estate, 91 U. 212, 63 P.2d 620.

Where contract to make testamentary disposition of property is clear, definite, and free from doubt, such contract will be enforced. Van Natta v. Heywood, 57 U. 376, 195 P. 192.

As respects whether senile dementia had deprived 83-year-old testator of testamentary capacity, testimony of nonexperts, such as subscribing witnesses, was entitled to same weight as that of medical experts. In re Swan's Estate, 51 U. 410, 170 P. 452. (McCarty, J., dissenting.)

14. — weight and sufficiency.

Personal habits, general behavior, eccentricities, age, physical infirmities, attitude of testator towards children, and fact that he failed substantially to recognize them by way of bequests under will, held proper subjects for investigation in testing mental capacity of testator. In re Hansen's Will, 52 U. 554, 177 P. 982.

Evidence that testator was 83 years of age, had for a number of years suffered with hardening of arteries and with some disease of kidneys, and by reason of that fact his physical health had for long time been failing and his mind was more or less affected, and at times he had spells of unconsciousness lasting several hours at a time, was insufficient to support finding against testamentary capacity where subscribing witnesses testified that testator was in sound mind and in his normal state of mental condition when will was executed. In re Swan's Estate, 51 U. 410, 170 P. 452. (McCarty, J., dissenting.)

In will contest wherein proponent was deceased's second wife and contestants were an adopted child and son by deceased with his first wife from whom he had been divorced, evidence of sexual relations of a perverted nature with

proponent before and after marriage was insufficient on issues of undue influence and lack of testamentary capacity to sustain verdict of jury that will was not that of deceased. In re Ford's Estate, 70 U. 450, 261 P. 15.

While undue influence may be established by inferences and circumstances, it cannot rest upon mere suspicion. In re Hanson's Will, 50 U. 207, 167 P. 256.

Evidence held insufficient to support finding that testator, who failed substantially to recognize children by way of bequests under will, did not have testamentary capacity. In re Hansen's Will, 52 U. 554, 177 P. 982.

In will contest, testimony as to inherent brain weakness is admissible although observed years before making of will, but infirmities coming from old age must be observed in fair proximity to date of execution of will. In re Hanson's Estate, 87 U. 580, 52 P.2d 1103.

13. Appeal and review.

Where a finding as to insanity of testator, and the exercise of undue influence, are not supported by the evidence, the supreme court will reverse. In re Hanson's Will, 50 U. 207, 167 P. 256.

Where finding by trial court that testator had testamentary capacity was sustained by substantial evidence, it would not be disturbed by reviewing court. In re Swan's Estate, 51 U. 410, 170 P. 452.

Decisions from other jurisdictions.

— California.

On appeal from an order admitting will to probate, the mental condition of the testatrix at the time the will was executed was the question to be determined, and evidence as to her mental condition before or after that date was important only as it threw light upon her mental condition at that time. In re De Graaf's Estate, 34 Cal. App. 2d 120, 93 P.2d 199.

A will is a solemn instrument and is recognized as such by those desiring to make testamentary disposition of their property; and it was unreasonable to suppose, in case at bar, that testatrix permitted a bank's trust officer to make interlineations, changes, and cancellations upon her will, holographic in form, and at the same time expected the document to retain its character as a valid testamentary disposition of her property. In re Towle's Estate, 14 Cal. 2d 261, 93 P.2d 555, 124 A. L. R. 624.

The language of section 20 of the Probate Code should be borne in mind, to the effect that every person of sound mind over the age of 18 years may dispose of his separate property by will; the property of the testator is his to dispose of as he wills, and he is not called upon to consult or satisfy the wishes or views of juries or courts. In re Garvey's Estate, 38 Cal. App. 2d 449, 101 P.2d 551.

A testator may incorporate an extrinsic document into his will, provided the document is in existence at the time and provided, further, that the reference to it in the will clearly identifies it, or renders it capable of identification by extrinsic proof; an attempt to incorporate a future document is ineffectual, because a testator cannot be permitted to create for himself the power to dispose of his property without complying with the formalities required in making a will. Simon v. Grayson, 16 Cal. 2d 531, 102 P.2d 1081.

— Idaho.

In deciding whether a letter, in case at bar, was written by deceased with testamentary intent, the court cited, inter alia, as being helpful and instructive in determining the intent of the deceased in writing the letter, the case of Nichols v. Emery, 109 Cal. 323, 41 P. 1089, 50 Am. St. Rep. 43, wherein the supreme court of California said: "It is undoubtedly the general rule enunciated by the leading case of Habergham v. Vincent, 2 Ves. Jr. 231, and oft repeated, that the true test of the character of an instrument is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property, to accrue and take effect only upon his death, and passing no present interest. The essential characteristic of an instrument testamentary in its nature is that it operates only upon, and by reason of, the death of the maker. Up to that time it is ambulatory. By its execution the maker has parted with no rights, and divested himself of no modicum of his estate; and, per contra, no rights have accrued to, and no estate has vested in, any other person. The death of the maker establishes for the first time the character of the instrument. It at once ceases to be ambulatory. It acquires a fixed status, and operates as a conveyance of title. Its admission to probate is merely a judicial declaration of that status." In re Hengy's Estate, 53 Idaho 515, 26 P.2d 178.

— Iowa.

The law of the place where the property is situated governs as to the validity of a devise of real property. Lynch v. Miller, 54 Iowa 516, 6 N. W. 740; Ware v. Wisner, 4 McCrary (U. S.) 66.

It is competent for a testator to make a bequest to a person or institution to

be chosen or named by a trustee or executor. Quinn v. Shields, 62 Iowa 129, 17 N. W. 437, 49 Am. Rep. 141.

The characteristic distinction between a will and a trust is that while the former becomes operative only at the death of the testator, a trust passes an interest to the trustee and beneficiary instantly upon the execution and delivery of the writing by which it is created. Lewis v. Curnutt, 130 Iowa 423, 106 N. W. 914.

For the purpose of carrying out the testator's intent, a will is to be construed more liberally than a deed. Westcott v. Meeker, 144 Iowa 311, 122 N. W. 964, 29 L. R. A. (N. S.) 947.

Although a will is not a contract, yet the terms and benefits of a will may be the subject of contract. Baker v. Syfritt, 147 Iowa 49, 125 N. W. 998.

Notwithstanding the general rule that a will is ambulatory in character and speaks only from the testator's death, he may make it speak from some other period or date. Baker v. Hibbs, 167 Iowa 174, 149 N. W. 85.

Equity will not undertake to make a new will for the testator by reformation. Pring v. Swarm, 176 Iowa 153, 157 N. W. 734.

If a will be unconditional upon its face, it cannot be adjudged to be conditional nor contingent upon the strength of parol testimony. In re Will of Tinsley, 187 Iowa 23, 174 N. W. 4, 11 A. L. R. 826.

The essence of a testamentary disposition of property is that it be merely a declaration of the testator's intention as to what shall take place after his death. Eaton v. Blood, 201 Iowa 834, 208 N. W. 508, 44 A. L. R. 1516.

The test of whether an instrument is a will is the intention of the maker at the time of its execution; whether the intention was to pass property only after death or to pass it by the particular instrument. In re Estate of White, 209 Iowa 1210, 229 N. W. 705.

A will may by reference incorporate another paper into it, if such paper is in existence at time will is executed. In re Estate of Cameron, 215 Iowa 63, 241 N. W. 458.

Under proper limitations, a testator has a right to dispose of his property in the manner deemed best to him, and, as trustor, can determine the management of the estate. In re Will of Lawson, 215 Iowa 752, 244 N. W. 739, 88 A. L. R. 316.

Advanced age is not, in itself, evidence of unsoundness of mind, nor do old age and failure of memory necessarily deprive one of testamentary capacity, for to constitute senile dementia in such legal sense as to deprive one of testamentary capacity there must be such failure of mind as to deprive one of intelligent action. Boyles v. Cora, 230 Iowa 1057, 300 N. W. 281.

General rule is that testator has right to dispose of his estate as he desires. Roorda v. Roorda, 230 Iowa 1103, 300 N. W. 294.

Ability to transact some business is not essential to testamentary capacity In re Estate of Grange, — Iowa —, 2 N. W. 2d 635.

— Montana.

All that is required by section 6974 is that a person have testamentary capacity at the time of the execution of the will; it is a question, not whether a testator is sane or insane, but rather whether or not he is mentally competent. In re Cissel's Estate, 104 Mont 306, 66 P.2d 779.

A person may make a valid contract to dispose of his property by will. Erwin v. Mark, 105 Mont. 361, 73 P.2d 537, 113 A. L. R. 1064.

A. L. R. notes.

Admissibility and credibility of testimony of subscribing witness tending to impeach execution of will or testamentary capacity of testator, 79 A. L. R. 394.

Admissibility and weight on issue of mental capacity or undue influence in respect of will or conveyance, of instruments previously executed by person in queation, 82 A. L. R. 963.

Admissibility of evidence of reputation on issue of mental condition, or testamentary or contractual incapacity or capacity, 105 A. L. R. 1443.

Admissibility of evidence on question of testamentary capacity or undue influence in a will contest as affected by remoteness, relative to the time when the will was executed, of the facts or events to which the evidence relates, 124 A. L. R. 433.

Admissibility of evidence other than testimony of subscribing witnesses to prove due execution of will, or testamentary capacity, 63 A. L. R. 1195.

Blind persons, wills of, 37 A. L. R. 603.

Codicil as affecting application of statutory provision to will, or previous codicil not otherwise subject, or as obviating objections to lack of testamentary capacity, undue influence or defective execution otherwise fatal to will, 87 A. L. R. 836.

Decedent's agreement to devise, bequeath, or leave property as compensation for services, 106 A. L. R. 742.

Devise or bequest for upkeep of cemetery lot as violation of rule against perpetuities, 14 A. L. R. 118.

Devise or bequest to country or political division without specification of particular purpose as a charitable devise or bequest, 82 A. L. R. 476.

Divorce as affecting will previously executed by husband or wife, 42 A. L. R. 1289.
Effect of reference in will to conveyance, 110 A. L. R. 261.
Epilepsy as affecting testamentary capacity, 16 A. L. R. 1418.
May parts of will be upheld notwithstanding failure of other parts for lack of testamentary capacity or undue influence, 69 A. L. R. 1129.
Necessity of affirmative evidence of testamentary capacity to make prima facie case in will contest, 110 A. L. R. 675.
Opinion of attesting witness as to mental condition of testator, necessity of laying foundation for, 93 A. L. R. 1049.
Relative weight of testimony of attesting witnesses in support of mental competency of testator, 123 A. L. R. 88.
Remedies for breach of decedent's agreement to devise, bequeath, or leave property as compensation for services, 69 A. L. R. 14.
Right to accept one devise or bequest under will and renounce another, 91 A. L. R. 657.
Testamentary capacity as affected by use of intoxicating liquor or drugs, 67 A. L. R. 857.
Validity, construction and effect of provisions of will to effect that legacy or devise is made in consideration of, or in contemplation of services to be rendered after testator's death, in carrying on testator's business or in administering or caring for estate, 116 A. L. R. 361.
Validity of bequest or trust for care of specified animal, 31 A. L. R. 430.
Validity of devise or bequest for purchase or care of burial lot or monument as affected by objection that amount is excessive, 55 A. L. R. 1303.
Validity of provision in will vesting discretion in executor or third person as to objects of testator's bounty, 45 A. L. R. 1440.
Validity of testamentary trust to promote women's rights, 28 A. L. R. 720.
Validity of will as affected by fact that testatrix and beneficiaries are inmates of house of prostitution, 16 A. L. R. 457.
Variance between pleading and proof in suit for specific performance of oral agreement of decedent to leave property at death, 130 A. L. R. 231.
Will of blind person, 37 A. L. R. 603.

101-1-2. Effect of Fraud, Duress or Undue Influence.

A will, or part of a will, procured to be made by duress, menace, fraud or undue influence may be denied probate; and a revocation procured by the same means may be declared void. (C. L. 17, § 6312.)

History.

This section is identical with 2 Comp. Laws 1888, § 2648; R. S. 1898, § 2732; Comp. Laws 1907, § 2732. This section is also identical with California Probate Code (1941) § 22.

Comparable provisions.

Cal. Probate Code, § 22 (identical).
Mont. Rev. Codes, § 6976 (substantially identical).

1. Undue influence.

The California rule as to what constitutes undue influence sufficient to avoid a will has been adopted in this state. It should always be remembered, however, that no hard and fast rule can be laid down which will control every case. Each case must, to a very large extent, be determined upon its own facts and circumstances. Anderson v. Anderson, 43 U. 26, 134 P. 553, and cases cited.

Undue influence, in order to avoid will, must be such as to destroy free agency of testator at time instrument is made (Miller v. Livingstone, 31 U. 415, 88 P. 338, followed in Anderson v. Anderson, 43 U. 26, 37, 134 P. 553) and impel him to do what he would not have done had he been free from the control of such influence (In re Bryan's Estate, 82 U. 390, 25 P.2d 602), but physical coercion and restraint are unnecessary to constitute undue influence. Anderson v. Anderson, 43 U. 26, 37, 134 P. 553.

In action by testator's children by first wife to revoke will on ground of undue influence exercised by second wife to persuade testator to disinherit them, instruction that undue influence is that degree of importunity which deprives testator of his free agency, so that instrument executed under its operation is not his free and unconstrained act, held proper. Miller v. Livingston, 36 U. 228, 102 P. 996.

In action by testator's children by first wife to revoke will on ground of undue influence exercised by second wife to persuade testator to disinherit them, court properly refused to instruct jury that any degree of influence over another ac-

quired by kindness and affection can never constitute undue influence within meaning of law. Miller v. Livingston, 36 U. 228, 102 P. 996.

2. Evidence.

3. — competency, admissibility and relevancy.

Since it is not usually possible in will contests to produce direct evidence of statements and conduct which one accused of undue influence has used on decedent, usual way is to give surrounding circumstances from which deductions can be made. In re Hanson's Estate, 87 U. 580, 52 P.2d 1103.

In action by testator's children by first wife to revoke will on ground of undue influence exercised by second wife to persuade testator to disinherit them, evidence that testator always manifested the greatest affection for his children, and that his demeanor toward them was affectionate, held admissible. Miller v. Livingston, 36 U. 228, 102 P. 996.

4. — presumptions.

Undue influence must be proved; it will not be presumed from mere interest or opportunity. In re Bryan's Estate, 82 U. 390, 25 P.2d 602.

Opportunity to exercise influence, unless combined with circumstances tending to show its exercise, affords no presumption that it was in fact exercised. In re Bryan's Estate, 82 U. 390, 25 P.2d 602.

If there is evidence that beneficiary of will was in confidential relationship with testator, and was active in preparation of will, there arises from proof of such acts and relationship a suspicion which amounts to a presumption, but it may be overcome by evidence that will was free act of testator. In re Bryan's Estate, 82 U. 390, 25 P.2d 602.

5. — burden of proof.

Burden of proof is on contestant to show mental incapacity and undue influence, and the proponent of will can meet this by proof of a negative; that is, that he did not procure the execution of the will by undue influence, and that testator was not mentally incapable. In re Bryan's Estate, 82 U. 390, 25 P.2d 602.

6. — weight and sufficiency.

The general rules of evidence apply to the quantum of proof to show undue influence. Anderson v. Anderson, 43 U. 26, 134 P. 553.

In action to revoke will on ground of undue influence, evidence which tended to show continuous effort on part of testator's second wife to create in his mind a feeling of disregard for his children by former wife, and that she procured making of will in first instance against his wishes, and thereafter, by same means, prevented revocation of it, held not open to objection on ground of remoteness. Miller v. Livingstone, 31 U. 415, 88 P. 338.

Will drawn at request and direction of sole beneficiary, who was active in procuring and superintending its execution, is not looked on with favor, and court will cautiously and carefully examine into circumstances which were attendant upon their execution, and will scan with scrutinizing eye evidence offered to procure their probate, and such circumstances may, in some instances, be sufficient to exclude proposed will, unless court is satisfied that paper propounded is true will of deceased. Miller v. Livingstone, 31 U. 415, 88 P. 338.

In will contest wherein proponent was deceased's second wife and contestants were an adopted child and son by deceased with his first wife from whom he had been divorced, evidence of sexual relations of a perverted nature with proponent before and after marriage was insufficient on issues of undue influence and lack of testamentary capacity to sustain verdict of jury that will was not that of deceased. In re Ford's Estate, 70 U. 456, 261 P. 15.

Where contestant proved that priest visited testator in hospital and called attorney who drew will in which priest was made executor and property was given to Catholic school, there was insufficient evidence of undue influence so that trial court properly granted motion for nonsuit. In re Bryan's Estate, 82 U. 390, 25 P.2d 602.

Evidence in will contest held to support findings of undue influence. In re Hanson's Estate, 87 U. 580, 52 P.2d 1103.

A. L. R. notes.

Admissibility and weight on issue of mental capacity or undue influence, in respect of will or conveyance, of instruments previously executed by person in question, 82 A. L. R. 963.

Admissibility of declarations of testator on issue of undue influence, 79 A. L. R. 1447.

Admissibility of evidence on question of testamentary capacity or undue influence in a will contest as affected by remoteness, relative to the time when the will was executed, of the facts or events to which the evidence relates, 124 A. L. R. 433.

Codicil as affecting application of statutory provision to will, or previous codicil not otherwise subject, or as obviating objections to lack of testa-

mentary capacity, undue influence, or defective execution otherwise fatal to will, 87 A. L. R. 836.
Executor or trustee named in will as beneficiary within rule that activity of beneficiary in preparation of will raises presumption of undue influence, 63 A. L. R. 948.
Fraud as distinguished from undue influence as ground for contesting will, 92 A. L. R. 790.
May parts of will be upheld notwithstanding failure of other parts for lack of testamentary capacity or undue influence, 69 A. L. R. 1129.
Presumption and burden of proof as to undue influence on testator, 60 A. L. R. 228.
Undue influence by third person in which immediate beneficiary did not participate, 96 A. L. R. 613.

101-1-3. Married Women Competent to Make.

A married woman may dispose of all her estate by will without the consent of her husband, and may alter or revoke her will in the same manner as if she were single. Her will must be executed and proved in the same manner as other wills. (C. L. 17, § 6313.)

History.

This section is identical with 2 Comp. Laws 1888, § 2649; R. S. 1898, § 2733; Comp. Laws 1907, § 2733, except for omission of "separate" before "estate" which occurred in former sections. This section is also substantially identical with Comp. Laws 1876, § 689. It is almost identical with California Probate Code (1941) § 50.

Formerly a married woman's testamentary capacity was confined to her separate property. 2 Comp. Laws 1888, p. 109, § 2649.

Comparable provisions.

Idaho Code, § 14-302 (word "separate" is inserted, so as to be worded in part, "* * * may dispose of all her separate estate by will, without the consent of her husband * * *"; her will must be attested, witnessed and proved in like manner as all other wills).

Mont. Rev. Codes, § 6975 (married woman may make will in same manner and with same effect as if she were sole, except that such will shall not, without written consent of her husband, operate to deprive him of more than two-thirds of her real estate, or of more than two-thirds of her personal estate).

Cross-references.

Right of married woman to take by will and make a will, Const. Art. XXII, § 2, 40-2-1.

101-1-4. Who May Take Under Will.

A testamentary disposition may be made to any person or corporation capable by law of taking the property so disposed of by deed or assignment or other transaction between living persons. (L. 31, p. 78, § 6314).

History.

This section is more or less similar to 2 Comp. Laws 1888, § 2650; R. S. 1898, § 2734; Comp. Laws 1907, § 2734.

Comparable provisions.

Mont. Rev. Codes, § 6977 ("A testamentary disposition may be made to any person capable of taking the property so disposed of, except corporations other than those formed for scientific, literary, or solely educational purposes, cannot take under a will, unless expressly authorized by statute.")

Cross-references.

Art institute may take by will, 85-2-18; school for deaf and blind, 85-3-2, 85-3-14; fair association, 85-4-1; state hospital, 85-7-4; university, 75-4-3; agricultural college, 75-5-4; corporations not for profit may take by devise, 18-6-8; succession on death of trustee, 29-2-1; when gift to witness void, 101-1-12.

Decisions from other jurisdictions.

— Montana.

The right to take testamentary disposition of property depends entirely upon the will of the legislature; it may withhold the right altogether, or impose any limitations or conditions upon it which it chooses; and a necessary postulate of this proposition is that the legislature has the exclusive power to designate those whom the testator may make the objects of his bounty. In re Hauge's Estate, 92 Mont. 36, 9 P.2d 1065.

A. L. R. notes.

Discontinuance of active functions of religious or other society or merger or association with other organiza-

tion as affecting legacy or devise to it, 91 A. L. R. 840.

Nature of estate created by, and enforceability of, provision in devise or bequest to charitable, religious, or educational corporation as to particular purpose of the corporation for which it shall be used, 130 A. L. R. 1101.

Right of alien enemy to take by inheritance or by will, 137 A. L. R. 1328.

Validity of will as affected by fact that testatrix and beneficiaries are inmates of house of prostitution, 16 A. L. R. 457.

What institutions or gifts are within statutes declaring invalid bequests for charitable, benevolent, religious, or similar purposes, if made within a specified period before testator's death, or limiting the amount of, such bequests, 111 A. L. R. 525.

101-1-5. Manner of Execution and Attestation.

Every will, other than a nuncupative will, must be in writing, and every will, other than an olographic or a nuncupative will, must be executed and attested as follows:

(1) It must be subscribed at the end thereof by the testator himself;

(2) The subscription must be made in the presence of the attesting witnesses;

(3) The testator must at the time of subscribing the same declare to the attesting witnesses that the instrument is his will; and,

(4) There must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will, at the testator's request, in his presence, and in the presence of the other. (C. L. 17, § 6315.)

History.

This section is substantially identical with 2 Comp. Laws 1888, § 2651; R. S. 1898, § 2735; Comp. Laws 1907, § 2735.

Comparable provisions.

Cal. Probate Code, § 50 (variances herein are similar to those noted hereunder as to the Idaho and Montana provisions; further, there is added to subd. 1 the following: "A person who subscribes the testator's name, by his direction, should write his own name as a witness to the will, but a failure to do so will not affect the validity of the will"; to subd. 2 are also added the following concluding words: "present at the same time"; in subdivision 3 are also inserted the words "or acknowledging"; subd. 4, "* * * at least two attesting witnesses * * *," and the following concluding sentence is also added thereto: "The witnesses should give their places of residence, but a failure to do so will not affect the validity of the will").

Idaho Code, § 14-303, Mont. Rev. Codes, § 6980 (to subd. 1 is added the following: "or some person in his presence and by his direction must subscribe his name thereto"; to subd. 2 is added the following: "or be acknowledged by the testator to them, to have been made by him or by his authority"; from subd. 4 is omitted the following: "and in the presence of the other").

Iowa Code 1939, § 11850 (personal property to value of $300 may be bequeathed by verbal will witnessed by two competent persons); § 11851 (soldier in actual service, or mariner at sea, may dispose of all his personal estate by a will so made and witnessed); § 11852 (all other wills must be in writing, signed by testator, or by some person in his presence and by his express direction writing his name thereto, and witnessed by two competent persons).

Cross-references.

Nuncupative wills, 101-1-16 to 101-1-18; when gift to witness void, 101-1-12, 101-1-13; will invalid unless properly executed, 104-48-13; proof of will, 104-48-13, 102-3-8; writings, how proved, 104-48-8.

1. Subscription of will.

Witnesses have no right to subscribe their names as witnesses to will unless they first satisfy themselves of testator's mental capacity. In re Swan's Estate, 51 U. 410, 170 P. 452.

2. Testator's knowledge of contents of will.

The signature of testator is not conclusive of his assent to the will. And even though it is not shown affirmatively that he was ignorant of its contents, this is sufficiently shown by evidence that no one read it to him, that he was illiterate and did not read will himself and could not do so, and no declaration or statement is shown to have been made to or by him from which it might be inferred that he knew the contents of the will. In re Dong Ling Hing's Estate, 78 U. 324, 340, 2 P.2d 902.

3. Testator's act of publication.

The act of publication is not complete until the attesting witnesses understand from the testator that the instrument they attest is his will. In re Dong Ling Hing's Estate, 78 U. 324, 341, 2 P.2d 902.

4. Testator's request.

Where finding of trial court that witnesses did not sign will at testatrix' request was sustained by testimony to effect that testatrix seemed oblivious to all that was going on, will was invalid and was not entitled to probate. In re McCoy's Estate, 91 U. 212, 63 P.2d 620.

5. Proof of execution of will.

If subscribing witnesses are unavailable, court may receive other evidence regarding statutory requirements for execution and attestation. For example, handwriting of testator and subscribing witness may be identified, and this will be similar in effect to testimony of subscribing witnesses. Such evidence may, however, be impeached or discredited to same effect as if subscribing witnesses had been present in court and had given their testimony, and such evidence is of inferior character to that of subscribing witnesses. In re Dong Ling Hing's Estate, 78 U. 324, 339, 2 P.2d 902.

A beneficiary is, under 101-1-12, incompetent as a subscribing witness, but competent to testify in will contest, subject to determination of credibility as in case of other witnesses. In re Dong Ling Hing's Estate, 78 U. 324, 2 P.2d 902.

In will contest it has been held that testimony of sole beneficiary, who was a subscribing witness, was insufficient to sustain due execution of will. In re Dong Ling Hing' Estate, 78 U. 324, 340, 2 P.2d 902.

Decisions from other jurisdictions.

— California.

The law requires the subscription or acknowledgment to be made before the two witnesses present at the same time, and where this requirement is not met, the instrument must be denied probate. In re Krause's Estate, 18 Cal. 2d 623, 117 P.2d 1.

Although the code provision is that a testator at the time of subscribing the instrument must declare to the attesting witnesses that it is his will, such a declaration need not be expressed in words, but may be sufficiently indicated by the conduct and acts of the testator; it is essential, however, that each of the witnesses shall understand that the testator was promulgating the document as his will. In re Norswing's Estate, 47 Cal. App. 2d 730, 118 P.2d 858.

— Idaho.

Although the statute requires that, at the time of subscribing or acknowledging the instrument, the testator must declare to the attesting witnesses that the instrument is his will, and although this requirement must be complied with, no particular formula of words or actions is prescribed to constitute the required declaration; it may be done by word of mouth, and it may also be inferred from the acts and conduct of the testator. In re Gordon's Estate, 48 Idaho 171, 279 P. 625.

— Iowa.

The signing and executing of a will creates no rights and vests no title, not even an inchoate one, in the devisee. His rights, if any, first accrue upon the death of the testator. Lorieux v. Keller, 5 Iowa 196.

Where undisputed evidence was that testator touched top of pen while another made mark with it for him, and that he was in the habit of signing by mark and knew it was his will that he was signing, court properly held as matter of law that testator signed the instrument. In re Estate of Burcham, 211 Iowa 1395, 235 N. W. 764.

— Montana.

The acknowledgment of a testator to a will may be made in any manner that conveys to the mind of a witness of reasonable intelligence the testator's intention to acknowledge its execution. In re Bragg's Estate, 106 Mont. 132, 76 P.2d 57.

A. L. R. notes.

Admissibility and credibility of testimony of subscribing witness tending to impeach execution of will or testamentary capacity of testator, 79 A. L. R. 394.

Admissibility of evidence other than testimony of subscribing witnesses to prove due execution of will, or testamentary capacity, 63 A. L. R. 1195.

Admissibility of testator's declarations upon issue of genuineness or due execution of purported will, 119 A. L. R. 1366.

Character as witness of one who signed will for another purpose, 8 A. L. R. 1075.

Codicil as affecting application of statutory provision to will, or previous codicil not otherwise subject, or as obviating objections to lack of testamentary capacity, undue influence, or defective execution otherwise fatal to will, 87 A. L. R. 836.

Duty of attesting witness with respect to testator's capacity, 35 A. L. R. 79.

Effect of illegibility of signature of testator or witness to will, 64 A. L. R. 208.
Effect of use of figures to express date of will, 6 A. L. R. 1455.
Effect of witness signing before testator signs, 57 A. L. R. 833.
Imputation to attesting witness of notice of contents of instrument, 4 A. L. R. 716.
Instrument inter vivos as will or part of will, 45 A. L. R. 843.
Interlineations or changes appearing on face of will, 67 A. L. R. 1138.
Letter as will or codicil, 54 A. L. R. 917.
Manner of signing as affecting sufficiency of signature of testator, 114 A. L. R. 1110.
Necessity of, and what amounts to, request on part of testator to the witnesses to attest or subscribe will, 125 A. L. R. 414.
Necessity that attesting witness to will not signed by testator in his presence shall have seen latter's signature on paper, 127 A. L. R. 384.
Notation on note or securities as a will or codicil, 62 A. L. R. 292.
Place of signature of attesting witnesses to will, 10 A. L. R. 429.
Presumption as to due execution of will from attestation, with or without attestation clause, 76 A. L. R. 617.
Retrospective application of statute concerning execution of wills, 111 A. L. R. 910.
Signature with lead pencil, 8 A. L. R. 1339.
Signing by witnesses to will in presence of each other, necessity of, 99 A. L. R. 554.
Testamentary character of memorandum or other informal writing not testamentary on its face regarding ownership or disposition of specific personal property, 117 A. L. R. 1327.
Testator's name in body of instrument as sufficient signature where statute does not require will to be signed at end, 29 A. L. R. 891.
Validity, construction, and application of codicil or other testamentary instrument authorizing certain person to change will or to make disposition of testator's property contrary to provisions of will, 108 A. L. R. 1098.
Validity of will written on disconnected sheets, 71 A. L. R. 530.

101-1-6. Olographic Wills—Defined—Execution—Proof.

An olographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state and need not be witnessed. Such wills may be proved in the same manner as other private writings.

(C. L. 17, § 6316.)

History.

This section is practically identical with 2 Comp. Laws 1888, § 2652; R. S. 1898, § 2736; Comp. Laws 1907, § 2736. This section is also much like California Probate Code (1941) § 53.

Comparable provisions.

Cal. Probate Code, § 53 (holographic will is one entirely written, dated and signed by hand of testator himself; subject to no other form and need not be witnessed; no address, date or other matter written, printed or stamped thereon, which is not incorporated in provisions which are in handwriting of decedent, shall be considered as any part of the will).

Idaho Code, § 14-304 (reading in part as follows: "* * * dated and signed by the hand of the testator or testatrix [who may be either married or unmarried]. It is subject * * *"; omitted is the concluding sentence herein).

Mont. Rev. Codes, § 6981 (substantially identical, except that concluding sentence herein is omitted).

1. Compliance with section.

The requirement of this section that will be "entirely written" is mandatory, and, unless strictly complied with, instrument, as a will, is void. In re Love's Estate, 75 U. 342, 347, 285 P. 299.

Under this section, "an instrument partly written and partly printed may not be admitted to probate as an olographic will if the written provisions are not complete within themselves." In re Yowell's Estate, 75 U. 312, 331, 285 P. 285.

But a strict adherence to this section does not demand that the paper upon which an olographic will is written shall be free from all writing and printing not in the handwriting of testator. The test is: If testator intended that any word or figure, not in his handwriting, should be a part of his will, then the instrument is not a valid olographic will, but on the other hand, if words and figures not in handwriting of testator appear on will which were not intended to be part of will, then will may be admitted to probate as olographic will, provided will

meets other statutory requirements. In re Yowell's Estate, 75 U. 312, 333, 285 P. 285.

A legal olographic will may be written, signed, and dated by testator on a sheet of paper upon which appears other written or printed matter, where it appears that such other matters were not intended by the testator to form any part of the will. In re Love's Estate, 75 U. 342, 348, 285 P. 299, following In re Yowell's Estate, 75 U. 312, 285 P. 285.

2. Separate sheets of paper.

While an olographic will may be written on more than one sheet of paper without dating and signing each sheet, nor is it always essential to have the sheets fastened together by some mechanical device, still there must be an obvious connection in their provisions or a coherence running through the separate papers. Accordingly, if two documents offered as a will are so completely inconsistent or antagonistic in their provisions that they cannot be construed together as a part of a harmonious whole will, the court will decline to do so. In re Love's Estate, 75 U. 342, 348, 285 P. 299.

3. Dating.

Writer of olographic will must designate the year, month and day in order to comply with requirement of this section that will be "dated." In re Love's Estate, 75 U. 342, 347, 285 P. 299.

4. Illustrative cases.

Olographic will written on stationer's will form by filling in blanks held invalid within statute, although matter written by decedent in her own hand, standing alone, might have constituted complete testamentary disposition of her property, since printed words could not be treated as surplusage and disregarded. In re Wolcott's Estate, 54 U. 165, 180 P. 169, 4 A. L. R. 727.

A will written on merchant's billheads, which bills contained much printed matter usually found on such bills, and other written matter, but portions containing bequests and devises were complete in themselves and contained no reference to printed portions, was upheld. In re Yowell's Estate, 75 U. 312, 285 P. 285.

Letter written by decedent to lady friend planning for their future marriage, and stating that he would make her his sole heir, and if he should die before they were married, he would make her his legal heir, but that he did not expect to die, was not intended as present disposition of his property, but merely an expressed intention to dispose of it at some future time, and hence instrument was properly denied probate as will. In re Jensen's Estate, 37 U 428, 108 P. 927.

Decisions from other jurisdictions.

— California.

Instrument was not entitled to probate, wherein were contained cancellations, interlineations and additions in the handwriting of a person other than testatrix, the evidence being undisputed that same were made by bank's trust officer in presence of testatrix and with her knowledge and consent; no amount of argument could offer escape from the simple, basic fact that the document was not entirely written, dated and signed by the hand of the testatrix herself. In re Towle's Estate, 14 Cal. 2d 261, 93 P.2d 555, 124 A. L. R. 624.

Question of validity of holographic will did not depend upon determination of sequence of time in which changes therein were made by testatrix or by bank's trust officer; and, regardless of whether or not a change made by testatrix was made prior to changes made by the trust officer, or was made in the order in which the paragraph was reached during the course of a discussion, or after marks upon the document had been completed by the trust officer, the changes so made were part and parcel of the same transaction; if, therefore, there was a reëxecution by testatrix by virtue of the change made in her own handwriting, it was a reëxecution of the instrument in its entirety, including the interlineations, changes and additions made by the trust officer; the slightest change by a stranger with the knowledge and consent of the testator, at any time during its existence, completely vitiates any instrument as an holographic will. In re Towle's Estate, 14 Cal. 2d 261, 93 P.2d 555, 124 A. L. R. 624.

— Idaho.

The statute makes but three requirements of an olographic will: first, that it be entirely written by the hand of the testator; second, that it be dated by the hand of the testator; and, third, that it be signed by the hand of the testator; and a letter written by deceased, in case at bar, satisfied every requirement of the statute applicable to the proper execution and proof of an olographic will. In re Hengy's Estate, 53 Idaho 515, 26 P.2d 178.

A. L. R. notes.

Holographic will as affected by printed or written matter on paper or form used, 61 A. L. R. 398.

101-1-7. Witnesses to Add Place of Residence.

A witness to a written will must write, with his name, his place of residence. But a violation of this section does not affect the validity of the will. (C. L. 17, § 6317.)

Comparable provisions.
Idaho Code, § 14-305, Mont. Rev. Codes, § 6982 (reading in part as follows: "* * * with his name, his place of residence; and a person who subscribes the testator's name, by his direction, must write his own name as a witness to the will. But a violation of this section does not affect the validity of the will").

101-1-8. Conjoint or Mutual Wills—Valid—Revocation.

A conjoint or mutual will is valid, but it may be revoked by any of the testators in the same manner as any other will. (C. L. 17, § 6318.)

Comparable provisions.
Cal. Probate Code, § 23, Mont. Rev. Codes, § 6983 (substantially identical).

A. L. R. notes.
Joint and mutual wills, 102 A. L. R. 491; right of party to joint or mutual will, made pursuant to agreement as to disposition of property at death, to dispose of such property during life, 108 A. L. R. 867.

101-1-9. Subsequent Incompetency of Witness—Effect.

If the subscribing witnesses to a will are competent at the time of attesting its execution, their subsequent incompetency, from whatever cause it may arise, does not prevent the probate and the allowance of the will, if it is otherwise satisfactorily proved. (C. L. 17, § 6319.)

Comparable provisions.
Idaho Code, § 14-306, Mont. Rev. Codes, § 6984 (substantially identical).

A. L. R. notes.
Right of party to joint or mutual will, made pursuant to agreement as to disposition of property at death, to dispose of such property during life, 108 A. L. R. 867.

101-1-10. Deposit of Will with County Clerk.

Wills sealed up and indorsed may be deposited with the county clerk, who shall file and safely preserve the same until the death of the testators, unless such testators shall themselves sooner demand the same. (C. L. 17, § 6320.)

History.
This section is practically identical with R. S. 1898, § 2740; Comp. Laws 1907, § 2740. See In re Frandsen's Will, 50 U. 156, 160, 167 P. 362.

Comparable provisions.
Iowa Code, 1939, § 11856 (substantially the same; deposited with court clerk).

Cross-references.
Clerk's records, 19-17-2; fees, 28-2-2.

101-1-11. Conditional Wills—Denied Probate According to Event.

A will, the validity of which is made by its own terms conditional, may be denied probate, according to the event with reference to the condition. (C. L. 17, § 6321.)

Comparable provisions.
Cal. Probate Code, § 24 ("A will, the validity of which is made conditional by its own terms, shall be granted or denied probate, or denied effect after probate, in conformity with the condition").
Mont. Rev. Codes, § 6985 (identical).

Cross-references.
Conditional wills, 101-2-29 to 101-2-33.

A. L. R. notes.
Condition that devisee or legatee shall renounce, embrace, or adhere to specified religious faith, 25 A. L. R. 1523.

101-1-12. Gifts to Witness—When Void.

All beneficial devises, legacies and gifts whatever, made or given in any will to a subscribing witness thereto are void, unless there are two other competent subscribing witnesses to the same; but a mere charge on the estate of the testator for the payment of debts does not prevent his creditors from being competent witnesses to his will.

(C. L. 17, § 6322.)

History.
This section is practically identical with R. S. 1898, § 2742; Comp. Laws 1907, § 2742.

Comparable provisions.
Cal. Probate Code, § 51 (pertains, subject to exception, to beneficial devises, bequests and legacies to subscribing witnesses); § 52 (identical with latter portion of this section following the semicolon).
Iowa Code 1939, § 11854 (no subscribing witness can derive benefit from will unless signed by two competent and disinterested persons as witnesses, besides himself; if, without will, he would be entitled to portion of testator's estate, he may receive such portion to extent in value of amount devised).
Mont. Rev. Codes, § 6986 (identical).

1. Subscribing witness as beneficiary.
While a beneficiary is competent to testify in will contest as to execution of will, he is incompetent as a subscribing witness. Of course, his credibility may be tested. In re Dong Ling Hing's Estate, 78 U. 324, 339, 2 P.2d 902.

A. L. R. notes.
Competency of attesting witness who is not benefited by will except as it revokes an earlier will, 64 A. L. R. 1306; competency of husband or wife of beneficiary as attesting witness to will, 25 A. L. R. 308; membership in, or other connection with, club, society, association or corporation as disqualifying one as witness to will in which it is beneficiary, 53 A. L. R. 211; statute avoiding devise or bequest to subscribing witness as affecting latter's duty to elect where will disposes of property belonging to him, 29 A. L. R. 230.

101-1-13. Id. When Witness Entitled in Event of Intestacy.

If a witness to whom any beneficial devise, legacy or gift, void by the preceding section, is made would have been entitled to any share of the estate of the testator in case the will should not be established, he succeeds to so much of the share as would be distributed to him, not exceeding the devise or bequest made to him in the will, and he may recover the same from the other devisees or legatees named in the will, in proportion to and out of the parts devised or bequeathed to them.

(C. L. 17, § 6323.)

Comparable provisions.
Mont. Rev. Codes, § 6987 (substantially identical).

101-1-14. Foreign Wills Valid.

A will of real or personal property, or both, or a revocation thereof, made out of this state by a person not having his domicile in this state is as valid, when executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, as if it were made in this state according to the provisions of this chapter.

(C. L. 17, § 6324.)

Comparable provisions.

According to the 1941 Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings, Utah is mentioned as having adopted, with modifications, in 1907, "An Act Relating to the Execution of Wills," which had been approved in 1892 and again in 1895; this act was superseded in 1910 by the "Uniform Foreign Executed Wills Act." This latter act was in turn superseded in 1940 by the "Model Execution of Wills Act"; the "Uniform Foreign Executed Wills Act" was worded as follows: "A last will and testament, executed without this state in the mode prescribed by the law, either of the place where executed or of the testator's domicile, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state, provided, said last will and testament is in writing and subscribed by the testator." (See, infra, as to Iowa.) The pertinent provision of the "Uniform Model Execution of Wills Act" is worded as follows: "§ 7. Foreign Execution. A will executed outside this state in a manner prescribed by this Act, or a written will executed outside this state in a manner prescribed by the law of the place of its execution or by the law of the testator's domicile at the time of its execution, shall have the same force and effect in this state as if executed in this state in compliance with the provisions of this Act."

Cal. Probate Code, § 26 ("No will made out of this state is valid as a will in this state unless executed according to the provisions of this act, except that a will valid under the laws of a state or country in which the testator is domiciled at the time of his death is valid in this state so far as the same relates to personal property").

Iowa Code 1939, § 11893 (identical with Uniform Foreign Executed Wills Act, text stated supra, in this note).

Mont. Rev. Codes, § 6988 (substantially identical).

Cross-references.

Proof of foreign wills, 102-3-22; aliens may take by descent, 101-4-24; what law governs construction, 101-3-21.

Decisions from other jurisdictions.

— Iowa.

The order of probate of a foreign will may be set aside by original action on the ground that the will, although valid in the state where executed, is not in compliance with the requirements of our law and therefore not valid as a disposition of real property here situated. Lynch v. Miller, 54 Iowa 516, 6 N. W. 740.

The proceedings of the court of another state in the probate of a will will be presumed to be regular. Otto v. Doty, 61 Iowa 23, 15 N. W. 578.

There being nothing in the record of the probate of the will in the foreign state to show when, or in what court in such state, the will was probated, or that any court or judge ever passed upon the sufficiency of the proof offered and adjudged it sufficient, or that any order was ever made by anyone duly authorized admitting the will to probate, held that the action of the lower court in admitting such will to probate was erroneous. In re Capper's Will, 85 Iowa 82, 52 N. W. 6.

The giving of notice of the probate of a foreign will is unnecessary. In re Capper's Will, 85 Iowa 82, 52 N. W. 6.

Mental incapacity or undue influence do not go directly to the question of jurisdiction of a foreign court to probate a will but do bear upon the testator's power to acquire a new domicile upon which jurisdiction may depend. Sullivan v. Kenney, 148 Iowa 361, 126 N. W. 349.

In order for a foreign will to constitute a muniment of title to real estate in this state, it must have been admitted to probate here. The certification of a copy of the will, and of the record of its admission to probate in the foreign state, is not sufficient. Goldsmith v. Petersen, 159 Iowa 692, 141 N. W. 60.

101-1-15. Republication by Codicil.

The execution of a codicil referring to a previous will has the effect to republish the will as modified by the codicil. (C. L. 17, § 6325.)

History.

This section is identical with R. S. 1898, § 2745; Comp. Laws 1907, § 2745.

Comparable provisions.

Cal. Probate Code, § 25, Mont. Rev. Codes, § 6990 (identical).

Iowa Code 1939, § 11853 (if codicil is duly executed to will defectively executed and clearly identified in such codicil, will and codicil are considered one instrument and execution of both sufficient).

1. Codicil defined.

A codicil is some modification or qualification of, or addition or supplement to, an existing will and instrument.

A statement which makes no reference whatever to any will is not a codicil. In re Yowell's Estate, 75 U. 312, 330, 285 P. 285.

Decisions from other jurisdictions.

— Iowa.

A change in a will, although in the handwriting of the testator, cannot operate as a codicil when not witnessed and not executed with the formalities required by law. McAllister v. McAllister, 191 Iowa 906, 183 N. W. 596.

Codicil, in its ordinary and also in its legal application, is an addition to or modification of some existing testamentary paper. Blackford v. Anderson, 226 Iowa 1138, 286 N. W. 735.

A. L. R. notes.

Ademption or failure of substituted gift made by codicil or later will as preventing revocation, or effecting revival, of original gift to the same legatee or devisee, 59 A. L. R. 1106.

101–1–16. Nuncupative Wills—Defined.

A nuncupative will is not required to be in writing nor to be declared or attested with any formalities. (C. L. 17, § 6326.)

Comparable provisions.

Mont. Rev. Codes, § 6991 (substantially identical).

Cross-references.

Admission to probate, 102–3–6.

101–1–17. Id. Requisites to Validity.

To make a nuncupative will valid and to entitle it to be admitted to probate, the following conditions are requisite:

(1) The estate bequeathed must not exceed in value the sum of $1,000.

(2) It must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator at the time to bear witness that such was his will, or to that effect.

(3) The decedent must have been at that time in expectation of immediate death from an injury or casualty happening or occurring within twenty-four hours previous to the making of such nuncupative will. (C. L. 17, § 6327.)

Comparable provisions.

Mont. Rev. Codes, § 6992 (substantially identical, except that subd. 3 reads as follows: "The decedent must, at the time, have been in actual military service in the field, or doing duty on shipboard at sea, and in either case in actual contemplation, fear, or peril of death; or the decedent must have been, at the time, in expectation of immediate death from injury received the same day").

101–1–18. Id. Proof.

No proof must be received of any nuncupative will unless it is offered within six months after the speaking of the testamentary words, nor unless the words, or the substance thereof, were reduced to writing within thirty days after they were spoken. (C. L. 17, § 6328.)

Comparable provisions.

Mont. Rev. Codes, § 6993 (substantially identical).

101–1–19. Revocation and Alteration of Written Wills.

Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than:

(1) By a written will, or other writing of the testator declaring such revocation or alteration executed with the same formalities with which a will should be executed by such testator; or,

(2) By being burned, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself or by some person in his presence and by his direction.

(C. L. 17, § 6329.)

History.
This section is practically identical with R. S. 1898, § 2749; Comp. Laws 1907, § 2749.

Comparable provisions.
Idaho Code, § 14-307, Mont. Rev. Codes, § 6995 (substantially identical).

1. Capacity to revoke.
It requires the same capacity to revoke a will as to make one. If, therefore, testator was insane and thus incompetent to make a will, he is likewise incompetent to revoke one. In re Frandsen's Will, 50 U. 156, 164, 167 P. 362.

A. L. R. notes.
Admissibility of declaration by testator on issue of revocation of will, 79 A. L. R. 1493.
Effect of testator's attempted physical alteration of will after execution, 115 A. L. R. 710.
Option given by testator before or after execution of will as ademption of specific legacy or devise, 79 A. L. R. 268.
Revocation by revoking clause in lost will or other lost instrument, 94 A. L. R. 1024.
Revocation of codicil as affecting will, 38 A. L. R. 244.
Revocation of will by writing not testamentary in character, 14 A. L. R. 1018.
Right to revoke will executed pursuant to contract, 3 A. L. R. 172.
Rule of ademption as applied to legacies of proceeds of life insurance, 119 A. L. R. 1387.
Validity, construction, and effect of provisions of will relating to its modification or revocation, 72 A. L. R. 871.
What amounts to ademption of legacy of corporate stock or other corporate securities, 117 A. L. R. 811.
What amounts to an ademption or abatement of a legacy of a business or professional practice, 13 A. L. R. 173.

101-1-20. Cancellation or Destruction at Direction of Testator.

When a will is canceled or destroyed by any other person than the testator, the direction of the testator and the fact of such cancellation or destruction must be proved by two witnesses. (C. L. 17, § 6330.)

Comparable provisions.
Idaho Code, § 14-308, Mont. Rev. Codes, § 6996 (identical except that word "injury" is used in lieu of "cancellation").

A. L. R. notes.
Revocation by ratification or adoption of physical destruction or mutilation of will without testator's knowledge or consent in first instance, 99 A. L. R. 524.

101-1-21. Revocation of Will Executed in Duplicate.

The revocation of a will executed in duplicate may be made by revoking one of the duplicates. (C. L. 17, § 6331.)

Comparable provisions.
Cal. Probate Code, § 76 (will executed in duplicate is revoked if one of duplicates is burnt, torn, canceled, defaced, obliterated or destroyed under circumstances mentioned in subd. 2 of section 74 of the Code).
Idaho Code, § 14-309, Mont. Rev. Codes, § 6997 (identical).

A. L. R. notes.
Destruction or cancellation, actual or presumed, of one copy of will executed in duplicate, as revocation of other copy, 48 A. L. R. 297.

101-1-22. Effect of Subsequent Will on Prior Will.

A prior will is not revoked by a subsequent will, unless the latter contains an express revocation or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will.

(C. L. 17, § 6332.)

History.
This section is identical with R. S. 1898, § 2752; Comp. Laws 1907, § 2752.

Comparable provisions.
Cal. Probate Code, § 72 (includes substantially identical provision, coupled with provision to the effect that mere naming of executor in prior will need not be given effect by court when subsequent will is otherwise wholly inconsistent with terms of prior will, intention of testator being left to determination of the court).
Mont. Rev. Codes, § 6998 (identical).

1. Operation and application of section.
A will which is completely inconsistent or antagonistic with an earlier one revokes such prior will, even though there be no express revocation of the former will. This applies to olographic wills as well as to others. In re Love's Estate, 75 U. 342, 348, 285 P. 299.

A. L. R. notes.
Implied revocation of will by later will, 123 A. L. R. 1395; necessity that later will refer to earlier will in order to effect a revocation under statutes providing that a will may be revoked by a subsequent will declaring the revocation, 28 A. L. R. 691; possibility of avoiding or limiting effect of clause in later will purporting to revoke all former wills, 125 A. L. R. 936.

101–1–23. Revocation of Second Does Not Revive First.

If after making a will the testator duly makes and executes a second will, the revocation of such second will does not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless after such revocation the first will is duly republished. (C. L. 17, § 6333.)

Comparable provisions.
Cal. Probate Code, § 75 (substantially the same; "* * * destruction or other revocation of the second will * * *").
Idaho Code, § 14–310, Mont. Rev. Codes, § 6999 (identical except that words "destruction, cancellation" are inserted so as to be worded in part, "* * * the destruction, cancellation, or revocation of such second will * * * or unless, after such destruction, cancellation, or revocation, the first will is duly republished"; Montana uses word "was," "* * * was duly republished").

A. L. R. notes.
Ademption or failure of substituted gift made by codicil or later will as preventing revocation, or effecting revival, of original gift to same legatee or devisee, 59 A. L. R. 1106; revocation of later will as reviving earlier will, 53 A. L. R. 521.

101–1–24. Effect of Marriage and Issue After Making Will.

If after making a will the testator marries and has issue of such marriage born either in his lifetime or after his death, and the wife or issue survives him, the will is conclusively presumed to be revoked, unless provision is made for such issue by some settlement, or unless such issue is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no evidence of other facts to rebut the presumption of such revocation can be received.
(C. L. 17, § 6334.)

Comparable provisions.
Idaho Code, § 14–311, Mont. Rev. Codes, § 7000 (similar; words "conclusively presumed" are omitted, thus reading in part: "* * * the will is revoked, unless provision has been made for such issue * * * and no other evidence to rebut the presumption of such revocation can be received").

A. L. R. notes.
Illegitimacy of child as affecting revocation of will by subsequent birth of child, 38 A. L. R. 1344; statute as to effect of subsequent birth of a child as applicable where will provides for child, in the absence of an express exception, 30 A. L. R. 1236; when will deemed to have provided for, or contemplated, contingency of future birth or adoption of children, marriage, or other event which by statute wholly or partially revokes or otherwise renders such will inoperative, 127 A. L. R. 750.

101-1-25. Effect of Marriage, if Wife Survives.

If after making a will the testator marries and the wife survives him, the will is conclusively presumed to be revoked, unless provision has been made for her either by marriage contract, or by some written settlement showing on its face the testator's intention to substitute such contract or settlement for a provision in her favor in his will, or unless she is provided for in the will or in such way mentioned therein as to show an intention not to make such provision; and no evidence of other facts to rebut the presumption of revocation can be received.

(C. L. 17, § 6334.)

History.
This section was R. S. 1898, § 2754, drastically amended by Comp. Laws 1907, § 2754.

Comparable provisions.
Idaho Code, § 14-312, Mont. Rev. Codes, § 7001 (omitted are the following bracketed words: "* * * the will is [conclusively presumed to be] revoked, unless provision has been made for her by marriage contract [or by some written settlement showing on its face the testator's intention to substitute such contract or settlement for a provision in her favor in his will] or unless she is provided for in the will * * *").

1. Validity of marriage.
Special administrator was not authorized to pay money out of the estate of her husband for her support and maintenance and costs to establish her right as surviving wife of deceased, since deceased made will prior to marriage which did not provide for her, where woman was 27-year-old chronic epileptic and was afflicted with syphilis, so that marriage was void. Sharp v. Seventh Judicial District Court of Utah, 81 U. 236, 17 P.2d 261.

A. L. R. notes.
Antenuptial agreement or settlement as affecting rule regarding revocation of will by marriage, 92 A. L. R. 1010.

101-1-26. Contract to Sell Property Theretofore Disposed of by Will.

An agreement made by a testator for the sale or transfer of property disposed of by a will previously made does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement for specific performance or otherwise against the devisees or legatees as might be had against the testator's successors, if the same had passed by succession. (C. L. 17, § 6335.)

Comparable provisions.
Cal. Probate Code, § 77, Idaho Code, § 14-314, Mont. Rev. Codes, § 7003 (substantially identical).

101-1-27. Charge or Encumbrance on Property Theretofore Disposed of by Will.

A charge or encumbrance upon any estate for the purpose of securing the payment of money or the performance of any covenant or agreement is not a revocation of any will relating to the same estate which was previously executed; but the devises and the legacies therein contained must pass subject to such charge or encumbrance. (C. L. 17, § 6336.)

Comparable provisions.
Idaho Code, § 14-315 (substantially identical).
Mont. Rev. Codes, § 7004 (identical).

A. L. R. notes.
Change from absolute ownership of real property to mortgage interest by way of security, or vice versa, as ademption on revocation of legacy or devise, 65 A. L. R. 632; rights and remedies in respect of legacy charged upon land devised, 116 A. L. R. 7.

101-1-28. Change of Interest in Property Theretofore Disposed of by Will.

A conveyance, settlement or other act of a testator by which his interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation; but the will passes the property which would otherwise devolve by succession. (C. L. 17, § 6337.)

Comparable provisions.
Idaho Code, § 14-316, Mont. Rev. Codes, § 7005 (identical).

A. L. R. notes.
Interest or estate remaining in testator after conveyance or transfer of less than his entire estate or interest in property as passing under previously executed will covering property in question, 117 A. L. R. 1380; lease of property as ademption or revocation of devise, 8 A. L. R. 1638; property purchased with proceeds of sale of subject of devise or bequest as passing thereunder, 3 A. L. R. 1497.

101-1-29. Id. When a Revocation.

If the instrument by which an alteration is made in the testator's interest in a thing previously disposed of by his will expresses his intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency by reason of which they do not take effect. (C. L. 17, § 6338.)

Comparable provisions.
Idaho Code, § 14-317 (identical).
Mont. Rev. Codes, § 7006 (substantially identical).

101-1-30. Revocation Revokes Codicils.

The revocation of a will revokes all its codicils. (C. L. 17, § 6339.)

Comparable provisions.
Cal. Probate Code, § 70, Idaho Code, § 14-318, Mont. Rev. Codes, § 7007 (identical).

101-1-31. Child Born After the Making of a Will.

Whenever a testator has a child born either in his lifetime or after his death, or adopted, after the making of his will, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate. (C. L. 17, § 6340.)

History.
This section is practically identical with R. S. 1898, § 2760; Comp. Laws 1907, § 2760.

Comparable provisions.
Idaho Code, § 14-319, Mont. Rev. Codes, § 7008 (substantially identical except that words "or adopted" are omitted).
Iowa Code 1939, § 11858 (substantially the same as to "legitimate child" born after making of last will, either in lifetime or after death of testator; and the said interest shall be taken ratably from interests of heirs, devisees and legatees).

Cross-references.
Adoption, 14-4; posthumous child taking as one of class, 101-2-23; considered living at death of parent, 101-4-23.

1. Proceedings before industrial commission.
In application by widow, in her own right and as guardian of her minor children, held minor heirs, including unborn child of deceased employee, were bound by proceedings before industrial commission, notwithstanding that if award was permitted to stand it might expose defendant company to double liability, and would result in taking prop-

erty without due process of law, and deny to employer equal protection of law, in violation of both Federal and State Constitutions. Utah Copper Co. v. Industrial Commission, 57 U. 118, 193 P. 24, 13 A. L. R. 1367.

A. L. R. notes.

Adopted child, right to inherit from kindred of adoptive parents, 120 A. L. R. 837.

Adopted child as within contemplation of statute regarding rights of children pretermitted by will, or statute preventing disinheritance of child, 105 A. L. R. 1176.

Adopted child as within term "issue" in statute relating to decedent's estates, 98 A. L. R. 190.

Adopted child's children, right to inherit from the adopting parent, 16 A. L. R. 1265.

Child adopted after testator's death, right to take under will, 5 A. L. R. 1280.

101-1-32. Failure to Provide for Child or Child's Issue.

When any testator omits to provide in his will for any of his children, natural or adopted, or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child has the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section. (C. L. 17, § 6341.)

History.

This section is identical with 2 Comp. Laws 1888, § 2677; R. S. 1898, § 2761; Comp. Laws 1907, § 2761, except for use of words "natural or adopted" in the present section. See In re Frandsen's Will, 50 U. 156, 167 P. 362. This section was copied from the Massachusetts statute, as it formerly read. See 6 Mass. Laws Annotated, Ch. 191, § 20, and Mansfield v. Neff, 43 U. 258, 269, 134 P. 1160. In other words, Massachusetts was the original source from which our statute was derived and adopted. 6 Mass. Laws Annotated, Ch. 191, § 20. But the statutes of California and of Iowa are in substance, meaning and purpose precisely the same as ours (Cal. Civ. Code, § 1307). Coulam v. Doull, 4 U. 267, 275, 9 P. 568, aff'd 133 U. S. 216, 33 L. Ed. 596, 10 S. Ct. 253, in which supreme court of Utah reviewed and discussed both statutes and cases in California, Iowa, and Massachusetts.

Comparable provisions.

Idaho Code, § 14-320, Mont. Rev. Codes, § 7009 (substantially identical, except that words "natural or adopted" are omitted).

1. Operation and effect of section.

Statute raises prima facie presumption that failure of testator to provide for child not named in will was not intentional, where contrary fact does not appear. In re Atwood's Estate, 14 U. 1, 45 P. 1036, 60 Am. St. Rep. 878, overruled as to another point in In re Miller's Estate, 31 U. 415, 88 P. 338.

2. Operation, effect and applicability of section.

This section is, in a sense, a restriction on the disposition of property by will, and its terms should not be extended by implication. Mansfield v. Neff, 43 U. 258, 134 P. 1160.

This section does not apply to testator's illegitimate grandchild, as there is no obligation to provide for an illegitimate grandchild. Mansfield v. Neff, 43 U. 258, 134 P. 1160.

That will made no provision for protestant, granddaughter of testator, is not ground for contest, but a matter which can be presented upon final distribution as provided for by this section and 101-1-33. In re Frandsen's Will, 50 U. 156, 167 P. 362, applying Comp. Laws 1907, § 2762.

3. Evidence.

4. — in general.

Under this section, whether the testator intentionally or unintentionally omitted to provide for or mention any child or issue of a deceased child is to be determined, not alone from the language of the will, but also by extrinsic evidence and proof of collateral facts, including testator's declarations. In re Newell's Estate, 78 U. 463, 481, 5 P.2d 230.

The words "unless it appears that such omission was intentional," open the door wide for the admission of any competent evidence, and it need not appear from the face of the will itself that testator intended to exclude his children, but if it appears from extrinsic evidence that testator has children, who are not mentioned in the will, the statute raises a presumption that testator omitted them through inadvertence or mistake, which presumption, however, may be rebutted. Coulam v. Doull, 4 U. 267, 9 P. 568, aff'd 133 U. S. 216, 33 L. Ed. 596, 10 S. Ct. 253.

5. — presumptions.

The language of the will and the bequests and devises may be of such a character as to lead to but one conclusion, that all others except those mentioned in the will were intended to be excluded. But mere inferences do not generally lead to a conclusive presumption of intentional omission. In re Newell's Estate, 78 U. 463, 481, 5 P.2d 230.

Where a child of testator or issue of deceased child was omitted from the will and no provision made for him, a presumption arises that he was omitted unintentionally or through mistake or by accident, though such presumption was rebuttable, and omitted heir does not share in estate if it appears, either by the will, or by evidence dehors the will, that the omission was intentional. The nature and effect of this presumption of unintentional omission is discussed at length by Mr. Justice Straup. In re Newell's Estate, 78 U. 463, 481, 5 P.2d 230.

If evidence is adduced and is sufficient to support a finding that the omission was intentional, then the presumption that such omission was unintentional ceases, and question of intention of testator, independently of the presumption, had to be considered and determined on all the evidence adduced on the subject or question, including all reasonable and proper inferences to be adduced therefrom. In re Newell's Estate, 78 U. 463, 483, 5 P.2d 230.

6. — rebuttal of presumption.

A preponderance of the evidence is sufficient to overcome the presumption of unintentional omission. The presumption ceases to exist when sufficient evidence is adduced to justify or warrant a finding that the omission was intentional. In re Newell's Estate, 78 U. 463, 486, 5 P.2d 230.

7. Instructions.

An instruction should not be so worded as to convey to the jury the thought that the presumption of unintentional omission is itself evidence; such a charge is prejudicial and erroneous. Mr. Justice Straup suggests the character of instruction that should be given. In re Newell's Estate, 78 U. 463, 490, 5 P.2d 230.

A. L. R. notes.

Adopted child, right to inherit from kindred of adoptive parents, 120 A. L. R. 837.

Adopted child as within contemplation of statute regarding rights of children pretermitted by will, or statute preventing disinheritance of child, 105 A. L. R. 1176.

Adopted child as within term "issue" in statute relating to decedent's estates, 98 A. L. R. 190.

Adopted child's children, right to inherit from the adopting parent, 15 A. L. R. 1265.

Intention of testator as regards child not provided for by will as affecting applicability of statutes to prevent disinheritance of children, 65 A. L. R. 472.

101–1–33. Id. Share of Estate—How Assigned to Them.

When any share of the estate of a testator is assigned to a child born after the making of a will, or to a child or the issue of a child omitted in the will as hereinbefore mentioned, the same must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from all the devisees or legatees in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest or other provision in the will would thereby be defeated; in such case, such specific devise, legacy or provision may be exempted from such apportionment, and a different apportionment consistent with the intention of the testator may be adopted.

(C. L. 17, § 6342.)

History.

This section is substantially identical with R. S. 1898, § 2762; Comp. Laws 1907, § 2762. See In re Frandsen's Will, 50 U. 156, 167 P. 302.

Comparable provisions.

Idaho Code, § 14–321 (identical).

Mont. Rev. Codes, § 7010 (substantially identical).

A. L. R. notes.
Nature of, and remedies for enforcement of, the interest which a pretermitted child takes by virtue of statute where parent leaves will, 123 A. L. R. 1073.

101-1-34. Id. Effect of Advancements Made.

If such children or their descendants so unprovided for had an equal proportion of the testator's estate bestowed on them in the testator's lifetime by way of advancement, they take nothing by virtue of the three preceding sections. (C. L. 17, § 6343.)

Comparable provisions.
Idaho Code, § 14-322, Mont. Rev. Codes, § 7011 (substantially identical).

Cross-references.
Effect of advancements, 101-2-35, 101-4-18 to 101-4-22, 102-12-9.

A. L. R. notes.
Applicability of doctrine of advancements to testate succession, 32 A. L. R. 730.

101-1-35. Death of Beneficiary Before Testator—If a Relative, Descendants Take.

When any estate is bequeathed or devised to any child or other relative of the testator, and the legatee or devisee dies before the testator leaving lineal descendants, or when any such child or other relative is named in a will as a legatee or devisee and is dead at the time the will is executed, but leaves lineal descendants surviving the testator, such descendants take the estate so given by the will in the same manner as the legatee or devisee would have done had he survived the testator. (C. L. 17, § 6344.)

Comparable provisions.
Idaho Code, § 14-323 (substantially the same, except that omitted is the language commencing "or when any such child or other relative" and terminating "but leaves lineal descendants surviving the testator," so as to read in part: "* * * and the devisee or legatee dies before the testator, leaving lineal descendants, such descendants take the estate so given * * *").
Iowa Code 1939, § 11861 (if a devisee die before testator, his heirs shall inherit the property devised to him, unless from terms of will a contrary intent is manifest).
Mont. Rev. Codes, § 7012 (same as Idaho language, hereunder noted, except that only devise and devisee are mentioned).

Cross-references.
When death of beneficiary causes failure of gift, 101-2-27, 101-2-28.

Decisions from other jurisdictions.
— Iowa.
If a devisee dies before the testator, the devise lapses in the absence of a statutory provision to the contrary, and the property passes under the residuary clause, if there be one; otherwise, to the testator's heirs. In re Freeman's Estate, 146 Iowa 38, 124 N. W. 804.

A. L. R. notes.
Applicability of statute to prevent lapses, in case of person dead at time will was made, 3 A. L. R. 1682; devise or bequest to one "or his heirs" or to one "and his heirs" as affected by death of person named before death of testator, 78 A. L. R. 992.

101-1-36. Devise Conveys All of Testator's Interest.

Every devise of land in any will conveys all the estate of the devisor therein which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate. (C. L. 17, § 6345.)

Comparable provisions.
Idaho Code, § 14-324, Mont. Rev. Codes, § 7013 (identical).

101-1-37. After-Acquired Property Passes by Will.

Any estate, right or interest in lands acquired by the testator after the making of his will passes thereby and in the same manner as if title thereto were vested in him at the time of making the will, unless the contrary manifestly appears by the will to have been the intention of the testator. (C. L. 17, § 6346.)

Comparable provisions.

Idaho Code, § 14-325, Mont. Rev. Codes, § 7014 (contain substantially identical provision, coupled with the following sentence: "Every will made in express terms devising, or in any other terms denoting the intent of the testator to devise, all the real estate of such testator, passes all the real estate which such testator was entitled to devise at the time of his decease").

Iowa Code 1939, § 11849 (property to be subsequently acquired may be devised, when the intention is clear and explicit).

Cross-references.

Devise or bequest of "all" property, 101-2-15; after-acquired property as passing by deed, 78-1-9.

Decisions from other jurisdictions. — Iowa.

The bequest in a will of "the remainder of all my personal property and the whole of my real estate," held to cover subsequently acquired property, whether real or personal. Briggs v. Briggs, 69 Iowa 617, 29 N. W. 632.

After-acquired realty will pass under a devise of "all my real estate," specifically described, "also including all other real estate now owned by me." Luers v. Luers, 145 Iowa 600, 124 N. W. 603, 139 Am. St. Rep. 453.

Property acquired after the will is made may be devised when the intention of the testator is clear and specific. Wilts v. Wilts, 151 Iowa 149, 130 N. W. 906.

A. L. R. notes.

Real property disposed of and reacquired by testator after execution of will covering it as passing thereunder, 103 A. L. R. 1217; when will deemed to cover after-acquired property, 75 A. L. R. 474.

CHAPTER 2

INTERPRETATION OF WILLS

101-2-1. Testator's Intention Governs.
101-2-2. Intention to Be Ascertained from Words of Will.
101-2-3. Interpretation Governed by Following Rules.
101-2-4. Several Wills to Be Construed Together as One.
101-2-5. All Parts to Be Harmonized, if Possible.
101-2-6. Clear and Distinct Gift Prevails Over Inference from Other Parts of Will.
101-2-7. When Meaning Doubtful or Ambiguous.
101-2-8. Words to Be Taken in Ordinary Sense.
101-2-9. All Provisions to Be Given Effect, if Possible.
101-2-10. Intestacy to Be Avoided.
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101-2-14. Property Embraced in a Power Passes by Will.
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101-2-16. Effect of Devise of Residue of Real Property.
101-2-17. Effect of Bequest of Residue of Personal Property.
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101-2-19. Id. When Used as Words of Donation, Not of Limitation.
101-2-20. Effect of Words Referring to Death or Survivorship.
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101–2–24. Imperfect Descriptions to Be Corrected—Evidence Admissible.
101–2–25. Disposition to One on Attaining Majority — Presumption.
101–2–26. When Vested Disposition Is Divested.
101–2–27. Death of Beneficiary During Lifetime of Testator.
101–2–28. Id. Interests in Remainder Not Affected.
101–2–29. Conditional Disposition Defined.
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101–2–35. When Advancements Are to Be Taken as Ademptions.

101–2–1. Testator's Intention Governs.

A will is to be construed according to the intention of the testator. Where his intention can not have effect to its full extent, it must have effect as far as possible. (C. L. 17, § 6347.)

History.

This section is identical with R. S. 1898, § 2767; Comp. Laws 1907, § 2767.

Comparable provisions.

Cal. Probate Code, § 101 (includes identical provision, coupled with the following sentence: "Several testamentary instruments executed by the same testator are to be taken and construed together as one instrument").

Mont. Rev. Codes, § 7016 (identical).

1. Operation and effect of section.

This section controls all other sections in which rules of construction are given, in that no rule provided for is to be given force and effect except for purpose of ascertaining real intention of testator as expressed by him; rules of construction are to be resorted to as mere aids or guides for purpose of attaining real intention of testator. In re Poppleton's Estate, 34 U. 285, 97 P. 138, 131 Am. St. Rep. 842.

The section has been applied to ascertainment of testator's intention with respect to annuities. In re Estate of Sears, 18 U. 193, 55 P. 83.

2. Intention of testator and how ascertained.

Intention of testator controls in construction of provisions of will. Runiel v. Solomon, 54 U. 25, 180 P. 419. Intention of testator is ultimate object to be kept in mind and to which all rules must yield. In re Johnson's Estate, 64 U. 114, 228 P. 748. These are cardinal principles, and such intention must prevail provided it is not contrary to law and testator has complied with the forms of law in the execution of the will. In re Dewey's Estate, 45 U. 98, 101, 143 P. 124, Ann. Cas. 1918 A 475.

In construction of will to ascertain intention of testator there is greater latitude of construction than in the case of a deed. In re Johnson's Estate, 64 U. 114, 228 P. 748.

The intention of testator is to be ascertained from language used by testator in will, and if meaning is clear from words used, resort to rules of construction is neither necessary nor permissible; "where, however, meaning of a word or phrase employed by the testator is not clear, and may be given either one of two or more meanings when read in the light of the whole instrument, the courts not only may, but are required to, look to the condition and circumstances surrounding the testator at the time the will was made, and in the light of these determine his true intention." In re Poppleton's Estate, 34 U. 285, 293, 97 P. 138, 131 Am. St. Rep. 842.

Decisions from other jurisdictions. — California.

The fact that decedent, on the day following a conference in which her holographic will had been marked up by bank's trust officer, made a declaration of trust in which she disposed of all her Illinois property in the same manner in which she had disposed of her estate in her holographic will as modified, indicated that she had intentionally abandoned and discarded her holographic will; and this conclusion was further strengthened by the fact that she had prepared, by an attorney, a draft of a formal will embracing all the terms and conditions of the holographic will as modified by interlineations, alterations and changes made by herself, and by bank's trust officer in her presence and with her knowledge and consent. In re Towle's Estate, 14

Cal.2d 261, 93 P.2d 555, 124 A. L. R. 624.

One of the governing rules with respect to construction of a will is that the words are not to be construed by any one section or paragraph but that the instrument must be read as a whole, and that all parts of a will are to be construed together and in relation to each other so as to form, if possible, a consistent whole. In re Northcutt's Estate, 16 Cal.2d 683, 107 P.2d 607.

— Montana.

The law favors equality among children in the distribution of estates, and in case of a doubtful construction it selects that which leads to such a result. In re Murphy's Estate, 99 Mont. 114, 43 P.2d 233.

The principles declared in sections 7016 to 7024 of the Montana Revised Codes, relating to the interpretation of wills, must be given full application in any construction made of a will. In re Yergy's Estate, 106 Mont. 505, 79 P.2d 555.

Where it was apparent from the language of the will that the testator was so anxious to give full power and authority to his widow that he stated the matter in every conceivable way possible, not only emphasizing her right to the use of the income in the way of rents and profits but also specifically stating that she had full power and privilege to use any part of the principal that she might from time to time desire, the widow was clearly acting within her right when she employed a bookkeeper and manager and paid him from the assets of the life estate. In re Yergy's Estate, 106 Mont. 505, 79 P.2d 555.

A. L. R. notes.

Agreement, before death of third person, between his prospective heirs, devisees, or legatees as to their respective shares in estate, 74 A. L. R. 441.

Automobile as within description of property covered by bequest, 75 A. L. R. 113.

Construction of provision creating trust that losses or depreciation of corpus shall be made good out of principal, 90 A. L. R. 718.

"Devise" or "devisee" in statute as including "legacy" or "legatee," or vice versa, 4 A. L. R. 240.

Law in effect at time of execution of will or at time of death of testator as controlling, 129 A. L. R. 859.

Practical construction placed on will by parties interested, 67 A. L. R. 1272.

Term "goods" employed in will as covering real property, 54 A. L. R. 97.

Validity, construction, and effect of express provisions in will for severance of good from bad in event of partial invalidity, 80 A. L. R. 1210.

What included in devise of "house," "dwelling house," or the like, 12 A. L. R. 1179.

What included in term "money" as used in will, 93 A. L. R. 514.

What included in terms "notes," "securities," etc., in a bequest, 52 A. L. R. 1097.

What passes under term "belongings" or "effects" in will, 80 A. L. R. 941.

What passes under term "contents" in will, 120 A. L. R. 1210.

Word "now" or other word of time in will as relating to date of execution of will or date of death of testator, 125 A. L. R. 790.

101-2-2. Intention to Be Ascertained from Words of Will.

In case of uncertainty arising upon the face of a will as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations.

(C. L. 17, § 6348.)

Comparable provisions.

Mont. Rev. Codes, § 7017 (substantially identical).

A. L. R. notes.

Admissibility of extrinsic evidence to aid in construction, 94 A. L. R. 26.

Cross-references.

Correction of imperfect descriptions, 101-2-24.

101-2-3. Interpretation Governed by Following Rules.

In interpreting a will subject to the laws of this state, the rules prescribed in this chapter are to be observed, unless an intention to the contrary clearly appears. (C. L. 17, § 6349.)

History.
This section is substantially identical with R. S. 1898, § 2769; Comp. Laws 1907, § 2769.

Comparable provisions.
Mont. Rev. Codes, § 7018 (substantially identical).

1. Water rights.
Where land devised was of little value without water rights, water rights passed to devisees as appurtenant to, and part of, the land. In re Johnson's Estate, 64 U. 114, 228 P. 748.

101-2-4. Several Wills to Be Construed Together as One.

Several testamentary instruments executed by the same testator are to be taken and construed together as one instrument.

(C. L. 17, § 6350.)

History.
This section is identical with R. S. 1898, § 2770; Comp. Laws 1907, § 2770.

Comparable provisions.
Mont. Rev. Codes, § 7019 (identical).

1. Illustrative cases.
Two documents offered as one will, but completely inconsistent or antagonistic, cannot be construed together as a part of a harmonious whole will. In re Love's Estate, 75 U. 342, 348, 285 P. 299.

A. L. R. notes.
Incorporation into will of provisions of will of another person by reference thereto, 37 A. L. R. 1476.

101-2-5. All Parts to Be Harmonized, if Possible.

All the parts of a will are to be construed in relation to each other, and, if possible, so as to form one consistent whole; but where several parts are absolutely irreconcilable, the later must prevail.

(C. L. 17, § 6351.)

Comparable provisions.
Mont. Rev. Codes, § 7020 (substantially identical; "the latter must prevail").

A. L. R. notes.
Acknowledgment of signature by testator or witness to will as satisfying statutory requirement that testator or witness sign in presence of each other, 115 A. L. R. 689.

101-2-6. Clear and Distinct Gift Prevails Over Inference from Other Parts of Will.

A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of, or reference to, its contents in another part of the will. (C. L. 17, § 6352.)

Comparable provisions.
Mont. Rev. Codes, § 7021 (identical).

101-2-7. When Meaning Doubtful or Ambiguous.

Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto or recital thereof in another part of the will. (C. L. 17, § 6353.)

Comparable provisions.
Mont. Rev. Codes, § 7022 (identical).

101-2-8. Words to Be Taken in Ordinary Sense.

The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained. (C. L. 17, § 6354.)

Cal.2d 261, 93 P.2d 555, 124 A. L. R. 624.

One of the governing rules with respect to construction of a will is that the words are not to be construed by any one section or paragraph but that the instrument must be read as a whole, and that all parts of a will are to be construed together and in relation to each other so as to form, if possible, a consistent whole. In re Northcutt's Estate, 16 Cal.2d 683, 107 P.2d 607.

— Montana.

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The principles declared in sections 7016 to 7024 of the Montana Revised Codes, relating to the interpretation of wills, must be given full application in any construction made of a will. In re Yergy's Estate, 106 Mont. 505, 79 P.2d 555.

Where it was apparent from the language of the will that the testator was so anxious to give full power and authority to his widow that he stated the matter in every conceivable way possible, not only emphasizing her right to the use of the income in the way of rents and profits but also specifically stating that she had full power and privilege to use any part of the principal that she might from time to time desire, the widow was clearly acting within her right when she employed a bookkeeper and manager and paid him from the assets of the life estate. In re Yergy's Estate, 106 Mont. 505, 79 P.2d 555.

A. L. R. notes.

Agreement, before death of third person, between his prospective heirs, devisees, or legatees as to their respective shares in estate, 74 A. L. R. 441.

Automobile as within description of property covered by bequest, 75 A. L. R. 113.

Construction of provision creating trust that losses or depreciation of corpus shall be made good out of principal, 99 A. L. R. 718.

"Devise" or "devisee" in statute as including "legacy" or "legatee," or vice versa, 4 A. L. R. 246.

Law in effect at time of execution of will or at time of death of testator as controlling, 129 A. L. R. 859.

Practical construction placed on will by parties interested, 67 A. L. R. 1272.

Term "goods" employed in will as covering real property, 54 A. L. R. 97.

Validity, construction, and effect of express provisions in will for severance of good from bad in event of partial invalidity, 80 A. L. R. 1210.

What included in devise of "house," "dwelling house," or the like, 12 A. L. R. 1179.

What included in term "money" as used in will, 93 A. L. R. 514.

What included in terms "notes," "securities," etc., in a bequest, 52 A. L. R. 1097.

What passes under term "belongings" or "effects" in will, 80 A. L. R. 941.

What passes under term "contents" in will, 120 A. L. R. 1210.

Word "now" or other word of time in will as relating to date of execution of will or date of death of testator, 125 A. L. R. 790.

101-2-2. Intention to Be Ascertained from Words of Will.

In case of uncertainty arising upon the face of a will as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations.

(C. L. 17, § 6348.)

Comparable provisions.

Mont. Rev. Codes, § 7017 (substantially identical).

Cross-references.

Correction of imperfect descriptions, 101-2-24.

A. L. R. notes.

Admissibility of extrinsic evidence to aid in construction, 94 A. L. R. 26.

101-2-3. Interpretation Governed by Following Rules.

In interpreting a will subject to the laws of this state, the rules prescribed in this chapter are to be observed, unless an intention to the contrary clearly appears. (C. L. 17, § 6349.)

History.
This section is substantially identical with R. S. 1898, § 2769; Comp. Laws 1907, § 2769.

Comparable provisions.
Mont. Rev. Codes, § 7018 (substantially identical).

1. Water rights.
Where land devised was of little value without water rights, water rights passed to devisees as appurtenant to, and part of, the land. In re Johnson's Estate, 64 U. 114, 228 P. 748.

101-2-4. Several Wills to Be Construed Together as One.

Several testamentary instruments executed by the same testator are to be taken and construed together as one instrument. (C. L. 17, § 6350.)

History.
This section is identical with R. S. 1898, § 2770; Comp. Laws 1907, § 2770.

Comparable provisions.
Mont. Rev. Codes, § 7019 (identical).

1. Illustrative cases.
Two documents offered as one will, but completely inconsistent or antagonistic, cannot be construed together as a part of a harmonious whole will. In re Love's Estate, 75 U. 342, 348, 285 P. 299.

A. L. R. notes.
Incorporation into will of provisions of will of another person by reference thereto, 37 A. L. R. 1476.

101-2-5. All Parts to Be Harmonized, if Possible.

All the parts of a will are to be construed in relation to each other, and, if possible, so as to form one consistent whole; but where several parts are absolutely irreconcilable, the later must prevail. (C. L. 17, § 6351.)

Comparable provisions.
Mont. Rev. Codes, § 7020 (substantially identical; "the latter must prevail").

A. L. R. notes.
Acknowledgment of signature by testator or witness to will as satisfying statutory requirement that testator or witness sign in presence of each other, 115 A. L. R. 689.

101-2-6. Clear and Distinct Gift Prevails Over Inference from Other Parts of Will.

A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of, or reference to, its contents in another part of the will. (C. L. 17, § 6352.)

Comparable provisions.
Mont. Rev. Codes, § 7021 (identical).

101-2-7. When Meaning Doubtful or Ambiguous.

Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto or recital thereof in another part of the will. (C. L. 17, § 6353.)

Comparable provisions.
Mont. Rev. Codes, § 7022 (identical).

101-2-8. Words to Be Taken in Ordinary Sense.

The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained. (C. L. 17, § 6354.)

Comparable provisions.
Cal. Probate Code, § 106 (includes identical provision).
Mont. Rev. Codes, § 7023 (identical).

Decisions from other jurisdictions.
— Montana.
Words occurring more than once in a will are presumed to have been used always in the same sense when the context does not show a contrary intention, or when the words are not applied to different subjects, and this rule applies with double force where the word in question is found in two sentences in immediate succession. In re Murphy's Estate, 99 Mont. 114, 43 P.2d 233.

When the term "children" is used in a will, it is ordinarily given its primary meaning of all legitimate offspring of the first degree, unless the context of the will indicates a different intention. In re Murphy's Estate, 99 Mont. 114, 43 P.2d 233.

A. L. R. notes.
Construction of words "lend" or "loan" in deed or will, 34 A. L. R. 956; "devise" or "devisee" in statute as including "legacy" or "legatee," or vice versa, 4 A. L. R. 246.

101-2-9. All Provisions to Be Given Effect, if Possible.

The words of a will are to receive an interpretation which will give to every expression some effect rather than one which will render any of the expressions inoperative. (C. L. 17, § 6355.)

Comparable provisions.
Mont. Rev. Codes, § 7024 (identical).

101-2-10. Intestacy to Be Avoided.

Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy. (C. L. 17, § 6356.)

Comparable provisions.
Mont. Rev. Codes, § 7025 (identical).

101-2-11. Technical Words—Taken in Technical Sense.

Technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention.

(C. L. 17, § 6357.)

History.
This section is identical with R. S. 1898, § 2777; Comp. Laws 1907, § 2777.

Comparable provisions.
Cal. Probate Code, § 106 (includes the following sentence: "Technical words are not necessary to give effect to any species of disposition by a will; but technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense").
Mont. Rev. Codes, § 7026 (identical).

1. Operation and effect of section.
This section is but declaratory of rule prevailing at common law, and is rule of construction only. In re Poppleton's Estate, 34 U. 285, 97 P. 138, 131 Am. St. Rep. 842.

2. Application of rule.
Where it appeared from different provisions of will that words "devise" and "bequeath" were used interchangeably, such words would not be given usual technical construction. Rumel v. Solomon, 54 U. 25, 180 P. 419.

Decisions from other jurisdictions.
— California.
Where it appeared that the will was not prepared by the testatrix herself but was drafted by her attorney, it could be assumed that the legal terms embodied in the will were used in their technical sense. In re Northcutt's Estate, 16 Cal. 2d 683, 107 P.2d 607.

101-2-12. Id. Not Necessary to Give Effect to a Disposition.

Technical words are not necessary to give effect to any species of disposition by will. (C. L. 17, § 6358.)

Comparable provisions.
Mont. Rev. Codes, § 7027 (substantially identical).

101-2-13. Words of Inheritance Not Necessary to Pass Fee.

The term "heirs," or other words of inheritance, are not requisite to devise a fee, and a devise of real property passes all the estate of the testator, unless otherwise limited. (C. L. 17, § 6359.)

Comparable provisions.
Cal. Probate Code, § 107 (substantially identical).
Mont. Rev. Codes, § 7028 (identical).

101-2-14. Property Embraced in a Power Passes by Will.

Real or personal property embraced in a power to devise or to bequeath passes by a will purporting to devise or bequeath all the real or personal property of the testator. (C. L. 17, § 6360.)

Comparable provisions.
Mont. Rev. Codes, § 7029 (identical except that only power to devise is mentioned).

101-2-15. Effect of Disposition of "All" Testator's Property.

A devise or bequest of all the testator's real or personal property in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death. (C. L. 17, § 6361.)

Comparable provisions.
Cal. Probate Code, § 125 (identical, except that the following concluding words are added thereto: "including property embraced in a power to devise").
Mont. Rev. Codes, § 7030 (identical).

A. L. R. notes.
Bequest or devise of all testator's personal property or real property as general or specific, 88 A. L. R. 553.

101-2-16. Effect of Devise of Residue of Real Property.

A devise of the residue of the testator's real property passes all the real property which he was entitled to devise at the time of his death, not otherwise effectually devised by his will. (C. L. 17, § 6362.)

Comparable provisions.
Cal. Probate Code, § 126 (substantially identical, in its merged form, with 101-2-16 and 101-2-17).
Mont. Rev. Codes, § 7031 (identical).

A. L. R. notes.
Devolution of lapsed portion of residuary clause, 74 A. L. R. 547.
Effect of designation of particular property in residuary clause of a will, 128 A. L. R. 822.
Effect of restrictive words or reference to specific property in residuary clause to limit scope of clause as regards lapsed or ineffectual legacies and devises, 10 A. L. R. 1522.
Fund remaining at termination of testamentary trust or annuity as applicable to make up deficiencies in particular bequests in preference to claims of residuary beneficiaries, 118 A. L. R. 352.
Gift by will of mixed residue of real and personal property as subjecting residuary realty to payment of pecuniary legacies, 42 A. L. R. 664.
Property over which the testator had power of appointment which is exercised by residuary clause, as available for payment of pecuniary legacies after exhaustion of testator's property, 129 A. L. R. 826.
Reversion upon failure of contingency upon which future estate is limited as within residuary clause of will, 108 A. L. R. 464.

101–2–17. Effect of Bequest of Residue of Personal Property.

A bequest of the residue of the testator's personal property passes all the personal property which he was entitled to bequeath at the time of his death, not otherwise effectually bequeathed by his will.

(C. L. 17, § 6363.)

Comparable provisions.

Cal. Probate Code, § 126 (substantially identical, in its combined form, with 101–2–16 and 101–2–17).

Mont. Rev. Codes, § 7032 (identical).

A. L. R. notes.

Devolution of lapsed portion of residuary clause, 74 A. L. R. 547.

Effect of designation of particular property in residuary clause of a will, 128 A. L. R. 822.

Effect of restrictive words or reference to specific property in residuary clause to limit scope of clause as regards lapsed or ineffectual legacies and devises, 10 A. L. R. 1522.

Fund remaining at termination of testamentary trust or annuity as applicable to make up deficiencies in particular bequests in preference to claims of residuary beneficiaries, 118 A. L. R. 352.

Gift by will of mixed residue of real and personal property as subjecting residuary realty to payment of pecuniary legacies, 42 A. L. R. 654.

Property over which the testator had power of appointment which is exercised by residuary clause, as available for payment of pecuniary legacies after exhaustion of testator's property, 129 A. L. R. 826.

Reversion upon failure of contingency upon which future estate is limited as within residuary clause of will, 108 A. L. R. 464.

101–2–18. Effect of Disposition to "Heirs," "Relatives," "Family," "Descendants," etc.

A testamentary disposition to "heirs," "relatives," "nearest relatives," "representatives," "legal representatives," or "personal representatives," or "family," "issue," "descendants," "nearest-" or "next of kin," of any person, without other words of qualification, when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person according to the provisions of the chapter on succession in this title.

(C. L. 17, § 6364.)

Comparable provisions.

Cal. Probate Code, § 108 (includes substantially identical provision; word "relations" used in lieu of "relatives"; words "issue" and "descendants" not specifically mentioned).

Mont. Rev. Codes, § 7033 (substantially identical; term "relations" used in lieu of "relatives").

A. L. R. notes.

Adopted child as within term "issue" in statute relating to decedent's estates, 98 A. L. R. 190.

Devise or bequest to "cousins" as including others than first cousins, 19 A. L. R. 1410.

Disposition of bequest or devise to one's estate, or, in alternative, to one or his estate, 69 A. L. R. 1243.

"Heirs" in will as including legatees or devisees, 70 A. L. R. 581.

Husband or wife as next of kin within provision of will, 59 A. L. R. 1407.

Meaning of term "relatives" or "relations" employed in will, 57 A. L. R. 1180.

"Nearest," meaning in testamentary gift to "nearest heir" or the like, 11 A. L. R. 329.

Time as of which members of class described as testator's "heirs," "next of kin," "relations," etc., to whom a future gift is made are to be ascertained, 127 A. L. R. 602.

Who are within descriptive terms "relation," "child," "brother," "sister," etc., describing legatee or devisee in statute providing against lapse upon death of legatee or devisee before testator, 115 A. L. R. 444.

Word "child" or "children" in will as including grandchild or grandchildren, 104 A. L. R. 282.

101–2–19. Id. When Used as Words of Donation, Not of Limitation.

The terms mentioned in the next preceding section are used as words of donation and not of limitation, when the property is given to the

person so designated directly, and not as a qualification of an estate given to the ancestor of such person. (C. L. 17, § 6365.)

Comparable provisions.
Cal. Probate Code, § 108 (includes substantially identical provision).
Mont. Rev. Codes, § 7034 (substantially identical).

101–2–20. Effect of Words Referring to Death or Survivorship.

Words in a will referring to death or survivorship simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession.

(C. L. 17, § 6366.)

Comparable provisions.
Mont. Rev. Codes, § 7035 (identical).

101–2–21. Effect of Disposition to a Class.

A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a further period, it includes also all persons coming within the description before the time to which possession is postponed.

(C. L. 17, § 6367.)

Comparable provisions.
Cal. Probate Code, § 123 (includes identical provision).
Mont. Rev. Codes, § 7036 (identical).

Decisions from other jurisdictions.
— Montana.
Provision directing trustees to pay one-sixth of the remaining net income of the trust estate "to the children of my said son" constituted a gift to a class, the shares of each of whom were to be determined by the number of the class. In re Murphy's Estate, 99 Mont. 114, 43 P.2d 233.

A. L. R. notes.
Adopted child as within class in testamentary gift, 70 A. L. R. 621.
Adopted child as within class named in deed or trust instrument, 133 A. L. R. 597.
Child adopted after testator's death, right to take under will, 5 A. L. R. 1280.
Devise or bequest to one "or his heirs" or one "and his heirs" as affected by death of person named before death of testator, 128 A. L. R. 94.
Language of will excluding or restricting one as beneficiary, as excluding him from class to whom gift is made in another part of will, 80 A. L. R. 140.
Living members of class as excluding their children from the class, 83 A. L. R. 164.
Taking per stirpes or per capita under will, 126 A. L. R. 157.
Vested or contingent character of remainder under devise of a remainder to a certain person or persons "or" his or their heirs or other class, 128 A. L. R. 306.
When may gift by will or deed of trust be considered as one to a class, 105 A. L. R. 1304.

101–2–22. When Realty Deemed Personalty.

When a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death. (C. L. 17, § 6368.)

History.
This section is identical with R. S. 1898, § 2788; Comp. Laws 1907, § 2788.

Comparable provisions.
Cal. Probate Code, § 124, Mont. Rev. Codes, § 7037 (identical).

1. Money received as royalties.
Where testator left mining property in California, Nevada and Utah, and administration in California was domiciliary, and those in Utah and Nevada were ancillary, Utah court had jurisdiction, especially, in view of this sec-

tion, of an attempt by legatee to obtain partial distribution of assets in Utah which consisted of money received as royalties, which under will were to be sold. In re Campbell's Estate, 53 U. 487, 173 P. 688.

101–2–23. Unborn Child Takes if Answering Description of Class.

A child conceived before, but not born until after, a testator's death, or any other period when a disposition to a class vests in right or in possession, takes, if answering to the description of the class.

(C. L. 17, § 6369.)

Comparable provisions.
Cal. Probate Code, § 123 (includes substantially identical provision).
Mont. Rev. Codes, § 7038 (identical).

A. L. R. notes.
Adoption of child as satisfying condition of devise or bequest when or if beneficiary has a child, 30 A. L. R. 1412; right of child en ventre sa mere to take under a conveyance or devise of present interest to parent and children, 50 A. L. R. 619; statute as to effect of subsequent birth of a child as applicable where will provides for child, in the absence of an express exception, 30 A. L. R. 1236.

101–2–24. Imperfect Descriptions to Be Corrected—Evidence Admissible.

When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intentions cannot be received.

(C. L. 17, § 6370.)

History.
This section is identical with R. S. 1898, § 2790; Comp. Laws 1907, § 2790.

Comparable provisions.
Mont. Rev. Codes, § 7039 (identical).

Cross-references.
Intention to be ascertained from words of will, 101–2–2.

1. Description of land.
Where misdescription of testator's land was made to appear by extrinsic evidence, such error was corrected under authority of this section. In re Johnson's Estate, 64 U. 114, 228 P. 748.

False or repugnant words contained in description of land may be rejected if there remains a sufficient description, aided by circumstances surrounding testator when he made the will, to identify the land intended to be devised, and the land so identified will pass to the devisee. In re Johnson's Estate, 64 U. 114, 228 P. 748.

101–2–25. Disposition to One on Attaining Majority—Presumption.

Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death.

(C. L. 17, § 6371.)

History.
This section is identical with R. S. 1898, § 2791; Comp. Laws 1907, § 2791.

Comparable provisions.
Mont. Rev. Codes, § 7040 (identical).

Cross-references.
When legacies and annuities due, 101–3–14.

1. Trusts.
In view of this provision, vesting property upon testator's death, beneficiary of trust, empowered by will to change trustee, may compel named trustee, under order of court, to convey property to new trustee even before conclusion of probate proceedings and distribution of property therein. In re Lowe's Estate, 68 U. 49, 249 P. 128.

Decisions from other jurisdictions.
— Montana.
Where the direction is to pay when the legatee attains a certain age, and the interest or income from the fund is given to him in the meantime, a pres-

ent gift is shown to have been intended, and the legacy vests in interest at the date of the testator's death. In re Murphy's Estate, 99 Mont. 114, 43 P.2d 233.

On death of testator, in case at bar, the members of the class under consideration in being at that time were vested in right at that time, and the after-born child was vested in right at the time of birth, but no one of the class was vested in possession or in title, or could be so vested until some one of the class attained the age of 21 years. In re Murphy's Estate, 99 Mont. 114, 43 P.2d 233.

A. L. R. notes.

Gift to one "provided" or "providing" he attains a certain age as vested or contingent, 71 A. L. R. 1051.

101-2-26. When Vested Disposition Is Divested.

A testamentary disposition, when vested, can not be divested, unless upon the occurrence of the precise contingency prescribed by the testator for that purpose. (C. L. 17, § 6372.)

Comparable provisions.

Cal. Probate Code, § 143 (includes identical provision).

Mont. Rev. Codes, § 7041 (identical).

101-2-27. Death of Beneficiary During Lifetime of Testator.

If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place, except as provided in section 101-1-35. (C. L. 17, § 6373.)

Comparable provisions.

Mont. Rev. Codes, § 7042 (identical; reference is to section 7012; see note under 101-1-35).

Decisions from other jurisdictions.

— Montana.

In absence of statute to contrary, where legacy or devise is left to a person who is already dead at the time the will in question is executed, the gift lapses even though the fact of such death is known to the testator. In re Doyle's Estate, 107 Mont. 64, 80 P.2d 371.

A. L. R. notes.

Applicability of statute to prevent lapses in case of person dead at time will was made, 3 A. L. R. 1682; devise or bequest to one "or his heirs" or to one "and his heirs" as affected by death of person named before death of testator, 78 A. L. R. 992.

101-2-28. Id. Interests in Remainder Not Affected.

The death of a devisee or legatee of a limited interest before the testator's death does not defeat the interest of persons in remainder who survive the testator. (C. L. 17, § 6374.)

Comparable provisions.

Cal. Probate Code, § 140 (identical).

Mont. Rev. Codes, § 7043 (substantially identical).

101-2-29. Conditional Disposition Defined.

A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or to be defeated. (C. L. 17, § 6375.)

History.

This section is practically identical with R. 3. 1898, § 2795; Comp. Laws 1907, § 2795.

Comparable provisions.

Cal. Probate Code, § 141, Mont. Rev. Codes, § 7044 (substantially identical).

Cross-references.

When conditional will denied probate, 101-1-11.

1. Applicability of section.

Where testator who was member of Mormon Church and believed in its doctrines, including doctrine of polygamy,

devised real estate to wife, and gave another woman other property, but in event of her "marrying again," provided that such devise should terminate, it was held that the use of term "marry again" by testator included polygamous marriages, and devise came within this section. In re Poppleton's Estate, 34 U. 285, 97 P. 138, 131 Am. St. Rep. 842.

A. L. R. notes.

Condition that devisee or legatee shall renounce, embrace, or adhere to specified religious faith, 25 A. L. R. 1523.

Distinction between contingent estates and estates vested, subject to defeasance, 131 A. L. R. 712.

Effect of prevention, by co-legatee or co-devisee or a third person, of legatee or devisee from performing the condition upon which the gift rests, 76 A. L. R. 1342.

Excuse for delay in complying with condition of bequest or devise, beyond time allowed by will, 26 A. L. R. 929.

Gift to one "provided" or "providing" he attains a certain age as vested or contingent, 71 A. L. R. 1051.

Nature of estate created by, and enforceability of, provision in devise or bequest to charitable, religious, or educational corporation as to particular purpose of the corporation for which it shall be used, 130 A. L. R. 1101.

Right of legatee or devisee and duty of executor in respect of legacy or devise payment of which is by the terms of will conditional upon performance of some act or course of conduct by legatee or upon some future event, 110 A. L. R. 1354.

Validity, interpretation, and application of provisions of will making devise or bequest to or in trust for religious or educational body dependent upon adherence to particular body of principles or dogmas, or ecclesiastical connection, 120 A. L. R. 971.

Validity of bequest or devise in trust terms of which are subject to testator's future directions, 24 A. L. R. 177.

Validity of condition of gift or benefit by will depending on divorce or separation, 68 A. L. R. 757.

When will deemed contingent, 79 A. L. R. 1168.

101–2–30. Condition Precedent Defined.

A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect. (C. L. 17, § 6376.)

Comparable provisions.

Cal. Probate Code, § 142 (includes identical definition).

Mont. Rev. Codes, § 7045 (identical).

A. L. R. notes.

Condition that devisee or legatee shall renounce, embrace, or adhere to specified religious faith, 25 A. L. R. 1523.

Distinction between contingent estates and estates vested, subject to defeasance, 131 A. L. R. 712.

Effect of prevention, by co-legatee or co-devisee or a third person, of legatee or devisee from performing the condition upon which the gift rests, 76 A. L. R. 1342.

Excuse for delay in complying with condition of bequest or devise, beyond time allowed by will, 26 A. L. R. 929.

Gift to one "provided" or "providing" he attains a certain age as vested or contingent, 71 A. L. R. 1051.

Nature of estate created by, and enforceability of, provision in devise or bequest to charitable, religious, or educational corporation as to particular purpose of the corporation for which it shall be used, 130 A. L. R. 1101.

Right of legatee or devisee and duty of executor in respect of legacy or devise payment of which is by the terms of will conditional upon performance of some act or course of conduct by legatee or upon some future event, 110 A. L. R. 1354.

Validity of condition of gift or benefit by will depending on divorce or separation, 68 A. L. R. 757.

When will deemed contingent, 79 A. L. R. 1168.

101–2–31. Id. When Disposition Vests.

Where a testamentary disposition is made upon a condition precedent, nothing vests until the condition is fulfilled, except where such fulfillment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof, and the impossibility was unknown to

the testator, or arose from an unavoidable event subsequent to the execution of the will. (C. L. 17, § 6377.)

Comparable provisions.
Cal. Probate Code, § 142 (includes substantially identical provision).
Mont. Rev. Codes, § 7046 (identical).

A. L. R. notes.
Provision suspending vesting for fixed period upon condition or with qualification that period shall not be longer than lifetime of person or persons in being at death of testator as violation of rule against perpetuities, 91 A. L. R. 771.

101-2-32. Id. When Deemed Performed.

A condition precedent in a will is to be deemed performed when the testator's intention has been substantially, though not literally, complied with. (C. L. 17, § 6378.)

Comparable provisions.
Cal. Probate Code, § 142 (includes substantially identical provision).
Mont. Rev. Codes, § 7047 (identical).

101-2-33. Condition Subsequent Defined.

A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event. (C. L. 17, § 6379.)

Comparable provisions.
Cal. Probate Code, § 143 (includes identical definition).
Mont. Rev. Codes, § 7048 (identical).

A. L. R. notes.
Condition that devisee or legatee shall renounce, embrace, or adhere to specified religious faith, 25 A. L. R. 1523.
Distinction between contingent estates and estates vested, subject to defeasance, 131 A. L. R. 712.
Effect of prevention, by co-legatee or co-devisee or a third person, of legatee or devisee from performing the condition upon which the gift rests, 76 A. L. R. 1342.
Excuse for delay in complying with condition of bequest or devise, beyond time allowed by will, 26 A. L. R. 929.
Validity, interpretation, and application of provisions of will making devise or bequest to or in trust for religious or educational body dependent upon adherence to particular body of principles or dogmas, or ecclesiastical connection, 120 A. L. R. 971.
Validity of condition of gift or benefit by will depending on divorce or separation, 68 A. L. R. 757.
When will deemed contingent, 79 A. L. R. 1168.

101-2-34. Disposition to Several Vests in Them as Owners in Common.

A devise or legacy given to more than one person vests in them as owners in common. (C. L. 17, § 6380.)

Comparable provisions.
Mont. Rev. Codes, § 7049 (identical).

Cross-references.
Similar section relating to conveyances, 78-1-5.

101-2-35. When Advancements Are to Be Taken as Ademptions.

Advancements or gifts are not to be taken as ademptions of general legacies, unless such intention is expressed by the testator in writing. (C. L. 17, § 6381.)

History.
This section is identical with R. S. 1898, § 2801; Comp. Laws 1907, § 2801.

Comparable provisions.
Mont. Rev. Codes, § 7050 (identical).

Cross-references.

Advancements generally, 101–1 34, 101–4–18 to 101–4–22, 102–12 9.

1. Determination of question.

Whether an ademption has taken place by an advancement, depends upon the express or implied terms of will, and not upon the provisions of the statute of descents, to-wit, 101–4–18 to 101–4–20. In re Pickard's Estate, 42 U. 105, 129 P. 353.

A. L. R. notes.

Applicability of doctrine of advancements to testate succession, 32 A. L. R. 730.

CHAPTER 3

GENERAL PROVISIONS

101–3–1. Classification of Legacies.
101–3–2. Payment of Debts—All Intestate's Property Chargeable.
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101–3–4. Id. Contribution by Devisees and Legatees.
101–3–5. Effect of Discharge or Bequest of Debts in a Will.
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101–3–14. When Legacies and Annuities Due.
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101–3–20. Wills Made Prior to May 31, 1884, Not Affected.
101–3–21. When Law of Locus and Law of Domicile Governs.
101–3–22. Murderer May Not Inherit from Victim.

101–3–1. Classification of Legacies.

Legacies are distinguished and designated, according to their nature, as follows:

(1) A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort cannot be had to the other property of the testator.

(2) A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid; if such fund or property fails, in whole or in part, resort may be had to the general assets as in case of a general legacy.

(3) An annuity is a bequest of certain specified sums periodically; if the fund or property out of which they are payable fails, resort may be had to the general assets as in case of a general legacy.

(4) A residuary legacy embraces only that which remains after all the bequests of the will are discharged.

(5) All other legacies are general legacies. (C. L. 17, § 6382.)

History.
This section is practically identical with R. S. 1898, § 2802; Comp. Laws 1907, § 2802.

Comparable provisions.
Cal. Probate Code, § 161 (substantially identical; from subd. 2 is omitted the portion following the semicolon herein, but the concluding language of subd. 3 is worded as follows: "if the fund or property out of which a demonstrative legacy or an annuity is payable fails, in whole or in part, resort may be had to the general assets, as in case of a general legacy").
Mont. Rev. Codes, § 7051 (identical).

1. Specific legacy.
A specific legacy is something distinguished from the rest of the testator's estate, and it is sufficient if it can be specified and distinguished from the rest of the testator's estate at the time of his decease. In re Campbell's Estate, 27 U. 361, 76 P. 851.

2. Marshaling decedents' estates.
Where there was nothing in provision of will which either expressly or by necessary implication onerated real estate specifically devised with burden of paying general legacies mentioned in subsequent provision, held real estate passed free from any claim on part of beneficiaries mentioned in subsequent paragraph. Rumel v. Solomon, 54 U. 25, 30, 180 P. 419.

A. L. R. notes.
Agreement that one's share in estate shall be equal to share of certain other person as affected by gift to latter during lifetime of decedent, 5 A. L. R. 1436.
Bequest or devise of all testator's personal property or real property as general or specific, 88 A. L. R. 553.
Direction in will that legacies be paid out of the personal estate as affecting right to charge real estate therewith, 26 A. L. R. 648.
Duty and liability of executor (or administrator with will annexed) in respect of personal property specifically bequeathed, and not needed for payment of debts, 127 A. L. R. 1071.
Fund remaining at termination of testamentary trust or annuity as applicable to make up deficiencies in particular bequests in preference to claims of residuary beneficiaries, 118 A. L. R. 352.
Rights and remedies in respect of legacy charged upon land devised, 134 A. L. R. 361.
Specific devises and specific legacies as subject to ratable contribution for the payment of debts, 42 A. L. R. 1519.
When legacy is regarded as demonstrative, 73 A. L. R. 1250.

101–3–2. Payment of Debts—All Intestate's Property Chargeable.

When a person dies intestate, all his property, real and personal, without any distinction between them, is chargeable with the payment of his debts, except as otherwise provided by law. (C. L. 17, § 6383.)

History.
This section is identical with R. S. 1898, § 2803; Comp. Laws 1907, § 2803.

Comparable provisions.
Idaho Code, § 15–1201 (substantially identical).
Mont. Rev. Codes, § 7052 (substantially identical).

Cross-references.
Property subject to payment of debts, 101–4–2, 101–4–5, 101–4–1; property not subject to payment of general debts, 101–4–6, 102–8–2.

1. Presentation of claims.
A judgment claim must be presented like any other claim, and await the acquisition of funds with which to pay it. Wasatch Livestock Loan Co. v. Nielson, 90 U. 307, 321, 56 P.2d 613, rehearing denied 90 U. 331, 61 P.2d 616.

101–3–3. Id. Order of Recourse to Testator's Property.

The property of a testator, except as otherwise provided by law, must be resorted to for the payment of debts, expenses and family allowance in the following order:

(1) The property which is expressly appropriated by the will for the payment of the same.

(2) Property not disposed of by the will.

(3) Property which is devised or bequeathed to a residuary legatee.

(4) Property which is not specifically devised or bequeathed.

(5) All other property ratably.

Before any debts are paid, the expenses of the administration and the allowance to the family must be paid or provided for.

(C. L. 17, § 6384.)

Comparable provisions.
Mont. Rev. Codes, § 7053 (substantially identical as to "payment of debts").

101–3–4. Id. Contribution by Devisees and Legatees.

When an estate given by will has been sold for the payment of debts, expenses or family allowance all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been taken therefor, and the court, when distribution is made, must by decree for that purpose settle the amount of the several liabilities, and decree the amount each person shall contribute, and reserve the same from their distributive shares, respectively, for the purpose of paying such contribution.

(C. L. 17, § 6385.)

A. L. R. notes.
Specific devises and specific legacies as subject to ratable contribution for the payment of debts, 42 A. L. R. 1519.

101–3–5. Effect of Discharge or Bequest of Debts in a Will.

The discharge or bequest in a will of any debt or demand of the testator against the executor named, or any other person, is not valid against the creditors of the decedent, but is a specific bequest of the debt or demand. It must be included in the inventory, and, if necessary, applied in the payment of the debts. If not necessary for that purpose, it must be paid in the same manner and proportion as other specific legacies. (C. L. 17, § 6386.)

A. L. R. notes.
Legacy or devise to creditor of testator as satisfaction in whole or part of debt, 86 A. L. R. 6.

101–3–6. Order of Recourse to Property for Payment of Legacies.

The property of a testator, except as otherwise provided by law, must be resorted to for the payment of legacies in the following order:

(1) The property which is expressly appropriated by the will for the payment of the legacies.

(2) Property not disposed of by the will.

(3) Property which is devised or bequeathed to a residuary legatee.

(4) Property which is not specifically devised or bequeathed.

(C. L. 17, § 6387.)

Comparable provisions.
Idaho Code, § 15–1203, Mont. Rev. Codes, § 7054 (substantially identical).

101–3–7. Id. Of Legacies to Spouse or Kindred.

Legacies to husband, wife or kindred of any class are chargeable only after legacies to persons not related to the testator.

(C. L. 17, § 6388.)

Comparable provisions.
Mont. Rev. Codes, § 7055 (identical, except that word "widow" is used in lieu of "wife").

101–3–8. Abatement by Classes.

Abatement takes place in any class only as between legacies of that class, unless a different intention is expressed in the will.

(C. L. 17, § 6389.)

Comparable provisions.
Mont. Rev. Codes, § 7056 (identical).

A. L. R. notes.
Construction and effect of provisions of will regarding abatement of legacies or devises in event of insufficiency of assets to pay all in full, 101 A. L. R. 704; preference among general legacies as regards abatement, 34 A. L. R. 1247.

101–3–9. Title Passes by Will Subject to Probate Proceedings.

In a specific devise or legacy the title passes by the will, but possession can only be obtained from the personal representative; and he may be authorized by the court to sell the property devised and bequeathed in the cases herein provided. (C. L. 17, § 6390.)

Comparable provisions.
Idaho Code, § 15–1205, Mont. Rev. Codes, § 7057 (substantially identical; "* * * may be authorized by the judge of the probate court * * *" [Idaho], "* * * by the district court * * *" [Mont.]).

101–3–10. When Conveyance by Heir Good Notwithstanding Devise.

The rights of a purchaser or encumbrancer of real property, in good faith and for value, derived from any person claiming the same by succession, are not impaired by any devise made by the decedent from whom succession is claimed, unless within four years after the devisor's death the instrument containing such devise is duly proved as a will, and recorded in the office of the clerk of the district court having jurisdiction thereof, or written notice of such devise is filed with the recorder of the county where the real property is situated.

(C. L. 17, § 6391.)

Comparable provisions.
Mont. Rev. Codes, § 7058 (although the language is substantially identical, the arrangement thereof varies; clause "within four years after the devisor's death" constitutes the concluding portion of the section, thus reading, in part, "* * * from whom succession is claimed, unless the instrument * * * or unless written notice of such devise is filed with the clerk of the county where the real property is situated, within four years after the devisor's death").

101–3–11. Duty of Legatees for Life Only.

Where specific legacies are for life only, the first legatee must sign and deliver to the second legatee, or, if there is none, to the personal representative, an inventory of the property, expressing that the same

is in his custody for life only, and that, on his decease, it is to be delivered and to remain to the use and for the benefit of the second legatee, or to the personal representative, as the case may be. (C. L. 17, § 6392.)

Comparable provisions.
Mont. Rev. Codes, § 7059 (identical).

Cross-references.
Principal and income, Title 73A; termination of life estate, 104–59.

101–3–12. When Bequest of Income Accrues.

In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death. (C. L. 17, § 6393.)

Comparable provisions.
Mont. Rev. Codes, § 7060 (identical).

101–3–13. Gifts in Contemplation of Death May Be Satisfied Before Death.

A legacy or gift in contemplation, fear or peril of death may be satisfied before death. (C. L. 17, § 6394.)

Comparable provisions.
Mont. Rev. Codes, § 7061 (substantially identical).

101–3–14. When Legacies and Annuities Due.

Legacies are due and deliverable at the expiration of one year after the testator's decease. Annuities commence at the testator's decease. (C. L. 17, § 6395.)

History.
This section is identical with R. S. 1898, § 2815; Comp. Laws 1907, § 2815.

Comparable provisions.
Cal. Probate Code, § 162 ("Legacies are due and deliverable one year after the testator's death, and bear interest from that time on and after the effective date of this act at the rate of 4 per cent per annum, except that legacies for maintenance, or to the testator's widow, bear like interest from the testator's death. Annuities commence at the testator's death").
Idaho Code, § 15–1206 (identical, except that "eight months" specified in lieu of "one year").
Mont. Rev. Codes, § 7062 (identical).

Cross-references.
When testamentary dispositions vest, 101 2-25.

1. Applicability of section.
This section has been applied to annuities. In re Estate of Sears, 18 U. 193, 55 P. 83, applying R. S. 1898, § 2815.

A. L. R. notes.
Annuity or stated sum directed to be paid during life as charge upon principal in event of insufficient income, where will or other trust instrument neither expressly specifies income as the source of payment, nor expressly authorizes use of principal for that purpose, 109 A. L. R. 717; right of estate of named beneficiary to payments of annuity or income during period between his death and the death of third person or other event by reference to which the period of payments is limited by the terms of will or other instrument, 112 A. L. R. 581; right of specific or demonstrative legatee or devisee (or general legatee for payment of whose legacy there is direction to set aside or a setting aside of property) to earnings, dividends and accretions between time of testator's death and payment of legacy, 116 A. L. R. 1129.

101–3–15. Interest on Legacies.

Legacies bear interest from the time when they are due and payable, except that legacies for maintenance, or to the testator's widow, bear interest from the testator's decease. (C. L. 17, § 6396.)

Comparable provisions.
Cal. Probate Code, § 162 (see note under 101–3–14).
Mont. Rev. Codes, § 7063 (identical).

101–3–16. Intent Governs Four Preceding Sections.

The four preceding sections are in all cases to be controlled by a testator's express intention. (C. L. 17, § 6397.)

History.
This section is identical with R. S. 1898, § 2817; Comp. Laws 1907, § 2817.

Comparable provisions.
Cal. Probate Code, § 163 (testator's express intention controls).
Mont. Rev. Codes, § 7064 (identical).

1. Trusts.
Beneficiary of trust, empowered by will to change trustee, and whose consent is necessary to all acts of trustee relating to investment of trust fund, may remove trustee without cause and procure appointment of another, subject to qualification that latter is competent and other beneficiaries' interests will not be jeopardized; and in view of 101–2–25, vesting property upon death of testator, trustee may be compelled to convey property to new trustee even before conclusion of probate proceedings and distribution of property therein. In re Lowe's Estate, 68 U. 49, 249 P. 128.

101–3–17. Although Not Named Executor, One Intended Entitled to Letters.

Where it appears by the terms of a will that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named executor, is entitled to letters testamentary in the same manner as if he had been named executor. (C. L. 17, § 6398.)

Comparable provisions.
Mont. Rev. Codes, § 7065 (substantially identical).

101–3–18. Executor Cannot Appoint Executor.

An authority to an executor to appoint an executor is void. (C. L. 17, § 6399.)

Comparable provisions.
Mont. Rev. Codes, § 7066 (identical).

Cross-references.
Executor of executor, 102–3–18.

101–3–19. Executor Must Qualify—Limited Power Before Letters Issue.

No person has any power as an executor until he qualifies, except that before letters have been issued he may pay funeral charges and take necessary measures for the preservation of the estate. (C. L. 17, § 6400.)

Comparable provisions.
Mont. Rev. Codes, § 7067 (identical).

101–3–20. Wills Made Prior to May 31, 1884, Not Affected.

The provisions of this title do not impair the validity of the execution of any will made prior to the 31st day of May, 1884, nor affect the construction of any such will. (C. L. 17, § 6401.)

Comparable provisions.
Mont. Rev. Codes, § 7068 (similar in purport).

101–3–21. When Law of Locus and Law of Domicile Governs.

Except as otherwise provided, the validity and interpretation of wills are governed, when relating to real property within this state, by the law of this state; when relating to personal property, by the law of the testator's domicile. (C. L. 17, § 6402.)

History.
This section is identical with R. S. 1898, § 2822; Comp. Laws 1907, § 2822.

Comparable provisions.
Mont. Rev. Codes, § 7069 (identical).

Cross-references.
Validity of foreign wills, 101–1–14; proof of foreign wills, 102–3–22.

1. Wills of personalty.
Under this section interpretation of wills shall be governed, when relating to personal property, by law of testator's domicile, and not by interpretation given wills by courts of sister state where domiciliary administration is had. In re Campbell's Estate, 53 U. 487, 173 P. 688.

Generally, law of testator's domicile governs in construction of his will disposing of personalty, and courts exercising ancillary powers should be governed by this rule in construing wills, unless construction by law of testator's domicile contravenes law of state where will is offered for probate. In re Campbell's Estate, 53 U. 487, 173 P. 688.

A. L. R. notes.
Accountability of domiciliary executor or administrator, to court of domicile, in respect of personal assets subject, or susceptible, to ancillary administration, 132 A. L. R. 1369.
Conflict of laws as to construction and effect of will devising real property, 79 A. L. R. 91.
Decree of court of domicile respecting validity or construction of will, or admitting or denying its admission to probate, as conclusive as regards real estate in another state devised by will, 131 A. L. R. 1023.
Governing law of will as affected by change of domicile after its execution, 57 A. L. R. 220.
Law of domicile or of place of ancillary administration as governing rights and priorities of creditors of decedent in respect of assets in ancillary jurisdiction, 124 A. L. R. 1281.

101–3–22. Murderer May Not Inherit from Victim.

No person finally convicted of feloniously causing the death of another shall take or receive any property or benefit by succession, will, or otherwise, directly or indirectly, by reason of the death of such person; but all property of the deceased and all rights conditioned upon his death shall vest and be determined the same as if the person convicted were dead. (C. L. 17, § 6403.)

Comparable provisions.
Cal. Probate Code, § 258 ("No person convicted of the murder of the decedent shall be entitled to succeed to any portion of the estate; but the portion thereof to which he would otherwise be entitled to succeed goes to the other persons entitled thereto under the provisions of this chapter").
Iowa Code 1939, § 12032 ("No person who feloniously takes or causes or procures another so to take the life of another shall inherit from such person, or receive any interest in the estate of the decedent as surviving spouse, or take by devise or legacy from him, any portion of his estate").

A. L. R. notes.
Murder of ancestor by heir as affecting intestate succession, 51 A. L. R. 1096; murderer, right to take as beneficiary under will of victim, 51 A. L. R. 1113.

CHAPTER 4

SUCCESSION *

101-4-1. Defined.
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101-4-3. Wife's Interest in Husband's Real Property.
101-4-4. Election by Widow to Take Under Will or Distributive Share.
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101-4-12. Degrees of Kindred—How Computed.
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101-4-17. Half Blood Inherits Equally with Whole Blood.
101-4-18. Advancements—To Be Taken Towards Share.
101-4-19. Id. If Exceeding or Less than Share.
101-4-20. Id. Defined.
101-4-21. Id. Value, How Determined.
101-4-22. Id. Charged Against Issue of Deceased Heir.
101-4-23. Inheritance "By Right of Representation" — Posthumous Child Deemed Alive at Parents' Death.
101-4-24. Aliens May Take by Succession.

* **History of act.** This chapter was Comp. Laws 1876, §§ 700-732; 2 Comp. Laws 1888, §§ 2739-2760; R. S. 1898, §§ 2824-2850; Comp. Laws 1907, §§ 2824-2850.

101-4-1. Defined.

Succession is the coming in of another to take the property of one who dies without disposing of it by will. (C. L. 17, § 6404.)

History.

This section is practically identical with Comp. Laws 1876, § 700; 2 Comp. Laws 1888, § 2739; R. S. 1898, § 2824; Comp. Laws of 1907, § 2824. In re Bullen's Estate, 47 U. 96, 151 P. 533, L. R. A. 1916 C 670, construing word "heirs" in 101-4-2, and holding that wife is not an heir.

Comparable provisions.

Idaho Code, § 14-101, Mont. Rev. Codes, § 7071 (identical).

1. Operation and effect of section.

This section implies that property acquired by succession may be disposed of by will. In re Bullen's Estate, 47 U. 96, 151 P. 533, L. R. A. 1916 C 670.

A. L. R. notes.

Consideration for compromise of family dispute over estate, 118 A. L. R. 1357.

Constitutionality of statute repealing, modifying, or changing course of descent and distribution of property, 103 A. L. R. 223.

Effect on joint estate, community estate, or estate by entireties, of death of both tenants in same disaster, 18 A. L. R. 105.

Inheritable quality of possibility of reverter, 77 A. L. R. 344.

Mistake as to one's interest in land under law of descent a subject of relief, 39 A. L. R. 194.

Release to ancestor by heir expectant, 28 A. L. R. 427.

Right of heir, next of kin, or other person interested in decedent's estate to attack his marriage on ground of his mental incompetency, 57 A. L. R. 131.

Succession to property as affected by death in common disaster in absence of presumption or proof of survivorship, 43 A. L. R. 1348.

Validity and effect of transfer of expectancy by prospective heir, 121 A. L. R. 450.

101–4–2. Property of Intestate Passes to Heirs Subject to Probate Proceedings.

The property, both real and personal, of one who dies without disposing of it by will passes to the heirs of the intestate, subject to the control of the court, and to the possession of any administrator appointed by the court for the purposes of administration. (C. L. 17, § 6405.)

History.

This section is practically identical with first sentence of Comp. Laws 1876, p. 273, § 701, with 2 Comp. Laws 1888, § 2741, with R. S. 1898, § 2825, and with Comp. Laws 1907, § 2825. In re Bullen's Estate, 47 U. 96, 151 P. 533, L. R. A. 1916 C 670, construing words "heirs of the intestate," and holding that widow is not husband's heir as to her share of his estate.

Comparable provisions.

Idaho Code, § 14–102, Mont. Rev. Codes, § 7072 (substantially identical; "* * * subject to the control of the probate court * * *" [Idaho], "* * * of the district court * * *" [Montana]).

Cross-references.

Payment of debts, 101–1–1, 101–3–2, 101–4–5; property not subject to payment of debts, 101–4–6; 102–8–2; upon death of trustee, trust estate vests in successor, 29–2–1.

1. General construction of section.

This section is to be read in connection with 102–8–2. Rands v. Brain, 5 U. 197, 14 P. 129.

2. Title and rights of heirs.

3. — in general.

Upon death, title to property of which deceased died possessed immediately passes to and vests in heirs, subject to administration and payment of debts. Chamberlain v. Larsen, 83 U. 420, 29 P.2d 355; In re Smithfield City, 70 U. 564, 262 P. 105. Under this section title to property of intestate passes to his heirs upon his death subject to divestment for debts and expenses. Jones v. State Tax Commission, 99 U. 373, 104 P.2d 210. (Larson, J., dissenting.)

An heir under our statutes takes subject only to the legal claims against the estate. Dunn v. Wallingford, 47 U. 491, 155 P. 347.

Under this section the homestead passes to the heirs subject to widow's rights, where estate is solvent and there are no creditors. Knudsen v. Hannberg, 8 U. 203, 30 P. 749.

4. — nature of right.

Right to take by succession is not absolute but may be qualified or made conditional by statute, and where unknown heirs fail to claim within five years, rights are terminated and estate escheats, under 102–12–28. In re Apostolopoulos' Estate, 68 U. 344, 250 P. 469, 253 P. 1117, 48 A. L. R. 1322.

5. — assignment of interest by heir.

Heir may assign or dispose of his interest in the estate at any time and to any person without consent of administrator, provided he does so for a good and legal consideration. It will be implied, however, that assignment relates only to what the heir may have after debts and legal expenses of administration are paid. Dunn v. Wallingford, 47 U. 491, 155 P. 347. And see Stuart v. Pederson, 41 U. 308, 125 P. 395.

6. Debts of decedents.

Property of intestate passes to his heirs, subject to debts, allowances, and expenses of administration. Snyder v. Murdock, 20 U. 407, 59 P. 88. And see citations supra, this section.

A. L. R. notes.

Adopted child, right to inherit from kindred of adoptive parents, 38 A. L. R. 8.

Adopted child as within term "issue" in statute relating to decedent's estates, 98 A. L. R. 190.

Agreement, before death of third person, between his prospective heirs, devisees, or legatees as to their respective shares in estate, 74 A. L. R. 441.

Children of adopted child, right of, to inherit from the adopting parent, 15 A. L. R. 1265.

Family settlement of intestate estate, 54 A. L. R. 976.

Form and sufficiency of allegations of heirship, 110 A. L. R. 1329.

Right of children of an adopted child to take the share which the parent would have taken under a will if he had survived the testator, 8 A. L. R. 1012.

Succession to property as affected by death in common disaster in absence of presumption or proof of survivorship, 43 A. L. R. 1348.

101-4-3. Wife's Interest in Husband's Real Property.

One-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, to which the wife has made no relinquishment of her rights, shall be set apart as her property in fee simple, if she survives him; *provided*, that the wife shall not be entitled to any interest under the provisions of this section in any such estate of which the husband has made a conveyance when the wife, at the time of the conveyance, was not and never had been a resident of the territory or state of Utah. Property distributed under the provisions of this section shall be free from all debts of the decedent except those secured by liens for work or labor done or material furnished exclusively for the improvement of the same, and except those created for the purchase thereof, and for taxes levied thereon. The value of such part of the homestead as may be set aside to the widow shall be deducted from the distributive share provided for her in this section. In cases wherein only the heirs, devisees and legatees of the decedent are interested, the property secured to the widow by this section may be set off by the court in due process of administration.

(C. L. 17, § 6406.)

History.

This section does not differ materially from R. S. 1898, § 2826; Comp. Laws 1907, § 2826. It was originally taken in part from McClain's Ann. Stats. of Iowa, 1888, § 3644, and incorporated in the Utah statutes in the year 1898. The second sentence, however, immediately following the proviso came from the Indiana statute (Burns' Ann. St. 1933, § 6-2313), so it is said. In re Reynolds' Estate, 90 U. 415, 421, 62 P.2d 270.

For a brief outline of the history of dower-right legislation of Utah, see Hilton v. Thatcher, 31 U. 360, 88 P. 20, referred to approvingly in In re Park's Estate, 31 U. 255, 258, 87 P. 900.

Cross-references.

Limited right of married man to devise away from his wife, 101-1-1; relinquishment by insane wife, 102-13-22 et seq.; homesteads, Title 38.

1. Legislative power over estate.

Dower is subject that is entirely within control of legislative power until it becomes vested by death of husband, and, until vested, legislature may modify, abrogate, increase, or diminish it at pleasure, at least as it affects wife. Hilton v. Thatcher, 31 U. 360, 88 P. 20.

2. What law governs.

The right of dower is governed by law in force at death of husband while measure of right is determined by law in force at time of husband's conveyance where wife did not relinquish her right. Hilton v. Thatcher, 31 U. 360, 88 P. 20.

3. Nature of widow's estate.

Under this section the widow takes one-third in fee simple in her own right, and not as her deceased husband's heir. In re Bullen's Estate, 47 U. 96, 151 P. 533, L. R. A. 1916 C 670; Staats v. Staats, 63 U. 470, 226 P. 677. The one-third that passes to the wife by virtue of this section is not received by her as heir within the meaning of this section or by 80-12-2 et seq., but belongs to her absolutely in her own right, and was not subject to inheritance tax, at least prior to the amendment of the Inheritance Tax Act. In re Bullen's Estate, 47 U. 96, 151 P. 533, L. R. A. 1916 C 670.

Dower is merely inchoate right which may or may not ripen into vested interest. Hilton v. Sloan, 37 U. 359, 108 P. 689.

The former rule is stated in Hilton v. Stewart, 31 U. 255, 87 P. 900, 8 L. R. A. (N. S.) 1101.

Under this section, where estate is solvent and there are no creditors, widow takes her part of homestead. And prior to abolition of dower, it was held that widow could take her one-third of intestate's real and personal property, as well as her dower interest, and she was not put to her election. Knudsen v. Hannberg, 8 U. 203, 30 P. 749.

4. Renunciation of will.

Where widow renounces her deceased husband's will, she is entitled only to her distributive share of such husband's real estate by succession under this section. In re Little, 22 U. 204, 61 P. 899. (Bartch, C. J., dissenting.)

5. Conditions precedent.

6. —lawful marriage.

In action by woman who claimed to be legal wife of decedent to recover one-third interest in certain real property, wherein it appeared that she had become plural wife of decedent at time when such marriages were prevalent, and she also claimed common-law marriage had been entered into in foreign state, evidence held sufficient to sustain finding that plaintiff and decedent were not legally married. Beck v. Utah-Idaho Sugar Co., 59 U. 314, 203 P. 647.

Judgment, in action against estate, declaring one claiming dower to be widow of deceased, held, not binding on grantees of decedent in action by widow to establish dower in land conveyed to grantees, and judgment was not admissible to prove her marriage. Hilton v. Snyder, 37 U. 384, 108 P. 698, Ann. Cas. 1912 C 241.

A plural wife does not acquire the status of a lawful wife, and is without the pale of the law of inheritance as to any property which her husband has acquired previous to her marriage or which he may thereafter acquire. Raleigh v. Wells, 29 U. 217, 81 P. 908, 110 Am. St. Rep. 689.

7. —survival of wife.

The interest of wife, although in fee, is, nevertheless, a mere inchoate interest, and depends entirely upon condition that she survive her husband. Gee v. Baum, 58 U. 445, 199 P. 680.

8. Priorities.

9. —liens and encumbrances.

Dower right is subject to every lien or encumbrance at law or in equity existing before it attaches. Wilson v. Wilson, 32 U. 169, 89 P. 643.

Before a wife will be entitled to a dower interest in the equitable estate of her husband under a purely executory estate, such as contract for purchase of land at price payable in instalments, the equitable estate in the lands must be of such character that court of equity would have compelled a conveyance of legal title to husband during his lifetime; there must be performance of conditions of the contract before alienation of husband's rights, and wife must survive husband. McNeil v. McNeil, 61 U. 141, 211 P. 988.

Where defendant, in action for specific performance of contract to convey land, after he had paid two instalments under contract, entered into with state for purchase of land, which obligated him to pay purchase price in ten annual instalments and provided that, upon failure to pay instalment, lands should revert to state, entered into contract with plaintiff whereby latter promised to pay remaining instalments in consideration for conveyance of undivided one-half of such lands, plaintiff was entitled to specific performance of such contract after making payments free of defendant's claim that his wife had dower in such lands, since wife's dower did not attach until all payments were made to state, at which time defendant had already made contract with plaintiff. McNeil v. McNeil, 61 U. 141, 211 P. 988.

Where husband had contracted to sell certain parcel of his property without wife's consent, and on his death wife received her one-third share out of other portions of her husband's land, it was held in action by purchaser for specific performance that children who had inherited other two-thirds of land were subrogated to legal rights of wife and could set up defense that specific performance could not be enforced against wife. Free v. Little, 31 U. 449, 88 P. 407.

10. —claims for purchase money.

Under this section, a widow's dower or other inchoate right is expressly excluded as against a claim for purchase money. Wherritt v. Dennis, 48 U. 309, 159 P. 534, applying Comp. Laws 1907, § 2826.

11. —mechanics' liens.

Under this section, wife's interest in husband's property, other than homestead, is subject to mechanic's lien. Langton Lime & Cement Co. v. Peery, 48 U. 112, 159 P. 49.

12. —taxes.

Wife could not claim dower in property which husband and his parents fraudulently permitted to be sold to county for taxes and on which they obtained quitclaim deed back from county. Gigliotto v. Albergo, 100 U. 392, 115 P.2d 791.

13. —antenuptial conveyances.

Voluntary conveyance by either party to marriage contract of his or her real property made without knowledge of other, and on eve of marriage, is fraud upon marital rights of such other, and such conveyance will be treated as fraudulent and void as against party surprised, and his or her marital rights in land so conveyed will not be affected thereby. Wilson v. Wilson, 32 U. 169, 89 P. 643.

Where father held certain land in trust for sons, and on eve of his second marriage conveyed such land to sons by former marriage, wife could not complain because such conveyance was made without her knowledge. Wilson v. Wilson, 32 U. 169, 89 P. 643.

14. — mortgages.

The wife's inchoate interest in husband's realty by virtue of this section is not superior to mortgage lien, which mortgage was executed by husband in renewal of mortgage joined in by wife, though action on note secured by renewal mortgage was barred by 104-2-22. And fact that original obligation was kept alive by written acknowledgments and the execution and delivery of renewal notes and mortgages, rather than by payment upon the original obligation, cannot change the result. Tracy Loan & Trust Co. v. Luke, 72 U. 231, 269 P. 780.

Under this section, widow gets one-third in value of any and all pieces of real estate, but her interest will be subjected to the payment of any deficiency in a mortgage debt on any such piece of real estate which came to the coverture or in which mortgage she joined, not met by the other two-thirds of the property. If there is cash or personal property, or unencumbered real estate, or a surplus between the mortgage debt on other real estate and her third interest in that other real estate, the cash or the proceeds of such personal property, unencumbered real estate, or such surplus, should be applied to relieve her share in the property subjected to the deficiency, except that if the lien is for work and labor done or material furnished exclusively for improvement or for the purchase price, her share must bear it pro rata. In re Reynolds' Estate, 90 U. 415, 422, 62 P.2d 270.

The widow's right to have set aside for her one-third of the real estate does not depend on whether the general assets are sufficient to pay the husband's mortgage or whether they are so used. And as to mortgages which were executed before marriage by the husband, and which came into coverture and remained until his death in that status, the same rule applies. In re Reynolds' Estate, 90 U. 415, 420, 62 P.2d 270.

15. Relinquishment of rights by widow.

A wife by joining in husband's mortgage as accommodation maker of notes secured thereby, and by signing the mortgage, relinquishes her rights in that property only in reference to the mortgagee, and not for the benefit of the other heirs, the general creditors or tax creditors. The wife's interest has some of the aspects of joint tenancy in one-third of the real estate. In re Reynolds' Estate, 90 U. 415, 419, 62 P.2d 270.

Where husband, anticipating death, conveyed all his property to his wife and other members of his family, it was presumed that the conveyances were made with the consent of his wife in absence of evidence to the contrary, and hence, her dower was relinquished. In re Kjar's Estate, 62 U. 427, 220 P. 501.

Where deed of husband in which wife joins as wife merely is held inoperative as against him, it also becomes inoperative as against her, and grantee in such deed obtains no rights whatever as against wife. Gee v. Baum, 58 U. 445, 199 P. 680.

Where a wife did not know what property her husband had, and did not know the value of such property, a relinquishment by her of her one-third interest in his realty, given her under this section, in consideration of $225, where the actual value of his realty was $7,000, was so inequitable as to render the transaction unenforceable. In re Bell's Estate, 29 U. 1, 80 P. 615.

Instrument whereby wife released her one-third interest for a sum of money on an understanding that the husband should apply for a divorce, and that the wife should make no defense thereto, was void as against public policy. In re Bell's Estate, 29 U. 1, 80 P. 615.

16. Liability of wife on covenants of warranty.

Where deed with warranties is signed by wife of grantor merely as such, she having no title to, or interest in, the land conveyed, except the contingent interest given her by this section, she is not liable to one other than her immediate grantee, since this is a personal covenant, and does not pass to a subsequent grantee, except by assignment. H. T. & C. Co. v. Whitehouse, 47 U. 323, 154 P. 950, L. R. A. 1916 D 611.

17. Bona fide or innocent purchasers.

Mere claim of bona fide or innocent purchasers for value is not ordinarily available as against widow's claim for dower. Hilton v. Sloan, 37 U. 359, 108 P. 689.

18. Deduction of homestead.

Deceased husband's estate being solvent and out of debt, value of such part of homestead as may be set aside to widow should be deducted from distributive share, provided for her by this section, unless it clearly appears from will of husband that he intended it otherwise. In re Little, 22 U. 204, 61 P. 899. (Bartch, C. J., dissenting.)

19. Remedies.

20. — setting apart to widow.

Interest of wife in husband's estate is in nature of encumbrance, existing against each specific parcel, and widow cannot have her interest in land in lump sum set apart out of husband's estate. In re Park's Estate, 31 U. 255, 87 P. 900.

21. —action to recover widow's one-third.

In view of this section and Const. Art. VIII, § 19, which provides there may be but one form of action in which both law and equity may be administered, equitable estoppel may be interposed as defense in action at law for dower. Hilton v. Sloan, 37 U. 359, 108 P. 689.

Wife's right to dower is not affected by husband's representations on selling land that he is unmarried, unless she knowingly, or under peculiar circumstances amounting to knowledge, permits innocent persons to deal with him while in good faith believing that he is what he represents himself to be. Hilton v. Sloan, 37 U. 359, 108 P. 689.

Where widow claiming dower had obtained church divorce which was in fact invalid, and subsequently she had remarried and raised large family by her second husband, her first husband had conveyed property in question as unmarried man, and claimant had continued to live with second husband, although six months before first husband's death she was informed that church divorces were invalid, held, widow was estopped to claim dower in land of first husband. Hilton v. Sloan, 37 U. 359, 108 P. 689.

Burden was on widow claiming dower to establish valid marriage. Hilton v. Snyder, 37 U. 384, 108 P. 698, Ann. Cas. 1912 C 241.

22. Inheritance tax.

Where widow elected to take under husband's will which provided for widow in lieu of distributive share in real estate given her by this section, she took as heir, and whole estate was subject to inheritance tax, 80–12–3, as against contention that one-third interest of widow in her husband's real property was exempt from such tax. In re Osgood's Estate, 52 U. 185, 173 P. 152, L. R. A. 1918 E 697; In re Kohn's Estate, 56 U. 17, 189 P. 409. (Gideon, J., dissenting.)

If, however, widow elects to take under this section, her one-third is not subject to inheritance tax. In re Bullen's Estate, 47 U. 96, 151 P. 533, L. R. A. 1916 C 670.

A. L. R. notes.

Computation of the value of an inchoate dower right, 64 A. L. R. 1053.

Constitutionality of statutes in relation to dower, 20 A. L. R. 1330.

Dower as affected by adverse possession, 41 A. L. R. 1115.

Dower in permanent leaseholds, 39 A. L. R. 340.

Dower in reversion or remainder interest of husband, 21 A. L. R. 1073.

Dower of alien widow in estate of deceased husband, 110 A. L. R. 520.

Dower rights in respect of land conveyed by husband prior to the marriage in fraud of creditors, 110 A. L. R. 986.

Dower rights of wife in real property which was subject to executory agreement for sale by husband at time of marriage, 63 A. L. R. 136.

Dower rights of wife in respect of improvements made by spouse's alienee or his successor after death of spouse, 74 A. L. R. 1168.

Dower rights of wife of purchaser under executory contract, 66 A. L. R. 65.

Dower rights of wife who unites with husband in mortgage, 65 A. L. R. 963.

Estate tax as element in computation of widow's share in estate, 10 A. L. R. 518.

Governing law as to rights of spouse in estate of deceased spouse, 88 A. L. R. 861.

Misconduct of surviving spouse as affecting marital rights in other's estate, 71 A. L. R. 277.

Protection of inchoate dower against exploitation of mineral resources or other act in nature of waste or which impairs value of land, 53 A. L. R. 309.

Remarriage as affecting one's status as a "widow" or "widower" for purposes of statute of descent and distribution or other statute employing such term, 72 A. L. R. 1324.

Rights as between surviving wife and holder of leasehold interest under lease from deceased husband in respect of improvements made pursuant to provisions of lease, 92 A. L. R. 1382.

Sale of property by widow as executrix or administratrix as barring her right to dower, 30 A. L. R. 944.

Separation agreement between husband and wife as affecting right of inheritance, 81 A. L. R. 693.

Widow's statutory distributive share as affected by advancements to others, or by provisions of will that legatees shall take certain indebtedness owing to testator as part of their share, 76 A. L. R. 1420.

101–4–4. Election by Widow to Take Under Will or Distributive Share.

If the husband shall make any provision by will for the widow, such provision shall be deemed to be in lieu of the distributive share secured by the next preceding section, unless it shall appear from the will that the decedent designed the testamentary provisions to be additional to

such distributive share, in which case the widow shall be presumed to have accepted both such testamentary provisions and such distributive share. If, however, it does not appear from the will that its provision for the widow is additional, then the widow shall be conclusively presumed to have renounced such provision and to have accepted her distributive share, unless within four months after the admission of the will to probate, or within such additional time before distribution as the court may allow, she shall, by written instrument filed with the clerk of the court, accept the testamentary provision, which acceptance shall be construed to be a renunciation of her distributive share. In the event that the wife shall be insane or incompetent, or absent from the state, an election shall be made for her by a general guardian, if she has one, or by a special guardian for the purpose appointed by the court.

(C. L. 17, § 6407.)

History.

This section is practically identical with R. S. 1898, § 2827; Comp. Laws 1907, § 2827.

1. Nature of widow's title or right.

Widow takes her one-third interest in her husband's real estate not as an heir, but in her own right. Staats v. Staats, 63 U. 470, 226 P. 677.

Right given widow by this section to elect to take under will, or to take distributive share of one-third of realty provided under 101-4-3, is a property right. In re Hansen's Guardianship, 67 U. 256, 247 P. 481.

2. Widow's election.

Provision of will placing entire estate, after payment of debts and necessary expenses, in trust for widow, with income to her for life, is not an "additional" bequest to "distributive share" of one-third of realty provided under 101-4-3, but is in lieu thereof, within meaning of this section and, therefore, widow is required hereunder to elect within four-month period to take under will or she is conclusively presumed to have renounced will and accepted statutory "distributive share." In re Hansen's Guardianship, 67 U. 256, 247 P. 481.

In making election for incompetent widow, guardian and court must consider that distributive share provided under 101-4-3 amounts to only one-third of realty and no personal property. In re Hansen's Guardianship, 67 U. 256, 247 P. 481. Widow, under guardianship because of senility, cannot be deprived of benefits of will by failure of guardian to elect to take thereunder within four-month period provided herein, or by failure of court to order guardian to make election within that period, in view of Const. Art. VIII, § 7, 102-1-6, 102-13-29, 102-13-32 and 102-13-33, since affirmative order of court is necessary where disposal of ward's property rights is involved. In re Hansen's Guardianship, 67 U. 256, 247 P. 481. In view of continuing jurisdiction of courts in guardianship cases, and provisions of Const. Art. VIII, § 7, 102-1-6, 102-13-29, 102-13-32 and 102-13-33, court may authorize or order guardian of incompetent widow, more than three years after filing of will for probate, to elect to take under will, notwithstanding guardian was appointed within two months of filing of will leaving entire estate in trust, with income to widow for life, and notwithstanding provision of this section that failure to elect to take under will within four-month period shall be deemed conclusive of an election to take distributive share provided in lieu thereof under 101-4-3. In re Hansen's Guardianship, 67 U. 256, 247 P. 481.

3. Effect of renunciation of will.

Renunciation by widow of her rights under her deceased husband's will does not nullify will as to other legacies nor take from other legatees their rights under will. In re Little, 22 U. 204, 61 P. 899. (Bartch, C. J., dissenting.)

4. The rule in Schenk's case.

In re Schenk's Estate, 53 U. 381, 178 P. 344, which held that widow, after having renounced provisions of will in her favor and thereby elected to accept her distributive share under law of succession, could not thereafter claim as against will, all property which amounted to $1,100, as homestead under 101-4-6, or by way of summary distribution under 102-8-2, was discussed in In re Mower's Estate, 93 U. 390, 73 P.2d 967, which stated that when the legislature, in 1933, eliminated 1898 amendment to 101-4-6 and 102-8-2, which read, "This section shall not be construed to prevent the disposition by will of homestead and exempt personal property," the basis of the Schenk decision had been repealed

and that now husband may dispose of all his estate by will subject to homestead rights of widow and minor children, if wife's one-third interest is not in excess of homestead allowance, but if one-third exceeds the homestead, he may only devise from his widow two-thirds of his realty.

A. L. R. notes.

Construction, application, and effect of statutes which deny or qualify right of widow or surviving husband to elect against will of other spouse, 87 A. L. R. 228.

Direction in will that provision for wife shall be in lieu of other rights as requiring election, 93 A. L. R. 1384.

Effect of election to take under will on right of widow to fixed statutory allowance, or allowance for support, 4 A. L. R. 391.

Estate tax as element in computation of widow's share in estate, 10 A. L. R. 518.

Governing law as to rights of spouse in estate of deceased spouse, 88 A. L. R. 861.

Provision in will directing conversion as affecting rights of surviving spouse taking for or against will, 91 A. L. R. 867.

Renunciation of will by spouse and election to take under statute as affecting provisions imposing upon spouse personal duty as trustee, executor, guardian, or the like, 71 A. L. R. 665.

Revocation of election to take under or contrary to will, 81 A. L. R. 740.

Treatment of widow's allowance and exemptions in computing share to which she is entitled in case of death of husband intestate or of her election to take against will, 98 A. L. R. 1325.

What amounts to election by widow to take under or against will, 82 A. L. R. 1509.

What amounts to widow's election as between antenuptial or postnuptial settlement and husband's will or her rights under statute of descent and distribution, or attack by her upon such settlement, 117 A. L. R. 1001.

When is widow put to her election between provision made for her by her husband's will, and her dower, homestead, or community right, 68 A. L. R. 507.

Widow's allowance and exemptions, treatment of in computing share to which she is entitled under statute of distribution in case of death of husband intestate or of her election to take against will, 98 A. L. R. 1325.

Widow's statutory distributive share as affected by advancements to others, or by provisions of will that legatees shall take certain indebtedness owing to testator as part of their share, 76 A. L. R. 1420.

101–4–5. Succession in Absence of Will or Marriage Contract.

When any person having title to any estate, not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this title or in the probate code, subject to the payment of his debts, in the following manner:

(1) If the decedent leaves a surviving husband or wife, and only one child or the issue of one child, in equal shares to the surviving husband or wife, and child or issue of such child; if the decedent leaves a surviving husband or wife, and more than one child living or one child living and the issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children, and to the issue of any deceased child by right of representation; but if there is no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all of the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take by right of representation. The share in the legal and equitable estates in real property of which an intestate husband dies possessed, secured by this section to his widow, shall not be additional to the interest in such estate provided for her in section 101–4–3.

(2) If the decedent leaves no surviving husband or wife, but leaves issue, the whole estate goes to such issue, and if such issue consists of more than one child living, or one child living and the issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living and the issue of the deceased child or children by right of representation.

(3) If the decedent leaves no issue, all of the estate, real and personal, of which the decedent died seised or possessed, of not over $25,000 in value exclusive of debts and expenses, goes to the surviving husband or wife; and if over that value, $25,000 in value thereof goes to the surviving husband or wife, and the excess goes one-half to the surviving husband or wife and the other half to the decedent's father and mother, in equal shares, and if either is dead, the whole of said half goes to the other; if there is no father or mother, then one-half of such excess goes in equal shares to the brothers and sisters of the decedent, and to the children or grandchildren of any deceased brother or sister by right of representation; if the decedent leaves no issue or husband or wife, the estate must go to his father and mother in equal shares, and if either is dead, then to the other.

(4) If there is neither issue, husband, wife, father nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children or grandchildren of any deceased brother or sister by right of representation.

(5) If the decedent leaves a surviving husband or wife, and neither issue, father, mother, brother nor sister, nor the children or grandchildren of any deceased brother or sister, the whole estate goes to the surviving husband or wife.

(6) If the decedent leaves neither issue, husband, wife, father, mother, brother nor sister, nor children or grandchildren of any deceased brother or sister, the estate must go to the next kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote.

(7) If the decedent leaves several children, or one child and the issue of one or more children, and any such surviving child dies under age, not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation.

(8) If at the death of such child who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parents descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take by right of representation.

(9) If the decedent leaves no husband, wife or kindred, and there are no heirs to take the estate or any portion thereof, the same shall escheat to the state for the benefit of the school fund.

(L. 25, p. 195, § 6408.)

History.

This section originally was contained in sections 703 to 713 of Comp. Laws 1876. It was more or less identical with Comp. Laws 1888, § 2741, except for the last sentence of subdivision (1), and subdivision (3). In R. S. 1898, § 2828 the last sentence of subdivision (1) was added as a proviso, and subdivision (3) assumed its present form except that $25,000 formerly read "five thousand dollars." And both the Revised Statutes of 1898, supra, and Comp. Laws 1907, § 2828, are practically identical with the present section.

Formerly under subdivision (3), if intestate died without issue leaving a widow and brother, each took one-half of the estate. Benson v. Anderson, 10 U. 135, 138, 37 P. 256, applying 2 Comp. Laws 1888, § 2741, subd. 2, from which present subdivision is derived.

Cross-references.

Succession by a witness to a will, 101–1–13; property subject to payment of debts, 101–1–1, 101–3–2, 101–3–3, 101–4–2; property not subject to payment of debts, 102–8–2; one feloniously causing death may not inherit from victim, 101–3–22.

1. Validity.

A subdivision of the statute of descents in the Territorial Act, similar to subdivision (1), whereby the widow took a child's part during her life or widowhood, which became the property of her children at her death, was held valid. Cain's Heirs v. Young, 1 U. 361, rev'd on another point 99 U. S. 610, 25 L. Ed. 421.

2. Words and phrases defined.

The words "limited by marriage contract" refer to antenuptial contract for conveying property or creating an encumbrance thereon; not to any contract inhering in the relation of husband and wife. In re Schenk's Estate, 53 U. 381, 178 P. 344. This case is reviewed supra, 101–4–4.

3. Surviving husband or wife with children or issue.

Under former legislation, if widow agreed to receive property in lieu of her statutory interest, and, after approval by commissioner appointed to make partition, his report is confirmed by decree of distribution, the widow takes such property in fee, and, therefore, her grantee would take the same title free from claims of heirs. Shaw v. Hays, 47 U. 14, 151 P. 337, applying Comp. Laws 1876, § 703, which is considerably like present section.

Under subdivision (1) of this section, the widow takes as heir of her husband, and not in her own right. That is, what goes to her under that subdivision, over and above her one-third interest granted under 101–4–3, she takes as her husband's heir, for the reason that he may dispose of it by will to her or to another. In re Bullen's Estate, 47 U. 96, 151 P. 533, L. R. A. 1916 C 670.

Under territorial law of descent, "her estate" went one-fourth to her surviving husband for life, and the remainder, with the other three-fourths, to her surviving children. Hatch v. Hatch, 46 U. 116, 129, 148 P. 1096.

4. Issue, but no surviving husband or wife.

"Issue" as used in subdivision (2) of this section does not include adopted children so as to allow them to inherit through their adoptive parents. In re Harrington's Estate, 96 U. 252, 85 P.2d 630, 120 A. L. R. 830.

5. Surviving husband or wife, but no issue.

Under subdivision (3) unpaid monthly instalments on war-risk policy, unpaid at death of beneficiary, are to be distributed to heirs of insured, who were such at time of insured's death. In re Hogan's Estate, 77 U. 486, 491, 297 P. 1007.

6. Inheritance by brothers and sisters.

Statutory provisions, under which brothers and sisters may inherit, are to be construed with reference to statutory provision precluding kindred of half blood from inheriting property descending from ancestor of decedent. Matter of Estate of Amy, 12 U. 278, 42 P. 1121, aff'd 171 U. S. 179, 43 L. Ed. 127, 18 S. Ct. 802.

7. Escheat to school fund.

Right to take by succession is not absolute and unknown heirs not appearing within five years may lose rights under 102–12–28, providing for escheat after expiration of such period if no claimants appear. In re Apostolopoulos' Estate, 68 U. 344, 250 P. 469, 253 P. 1117, 48 A. L. R. 1322.

In view of this provision and 102–12–28, unclaimed estate escheats after five years notwithstanding existence of heirs unaware of their rights, where notice by publication is given under 102–12–7. (But this may be modified by provisions of treaty between United States and country of an alien intestate, requiring actual notice to consular authorities respecting death of any such person without apparent heirs.) In re Apostolopoulos' Estate, 68 U. 344, 250 P. 469, 253 P. 1117, 48 A. L. R. 1322.

Further as to escheat, see 102–12–28 to 102–12–30.

8. Renunciation of will.

Where widow renounces will whereby her deceased husband disposed of his personal property, she cannot claim interest in such property as distributee under this section. In re Little, 22 U. 204, 61 P. 899. (Bartch, C. J., dissenting.)

9. Inheritance tax.

Even prior to the amendment of the Inheritance Tax Act, property which passed to the wife by virtue of subdivision (1) of this section was subject to the tax, because the wife takes as heir thereunder. In re Bullen's Estate, 47 U. 96, 151 P. 533, L. R. A. 1916 C 670.

A. L. R. notes.

Estate tax as element in computation of widow's share in estate, 10 A. L. R. 518.

Estoppel to claim rights in estate of deceased spouse by assent or failure to object to unlawful marriage with third person, 28 A. L. R. 1126.

Governing law as to rights of spouse in estate of deceased spouse, 88 A. L. R. 861.

Misconduct of surviving spouse as affecting marital rights in other's estate, 71 A. L. R. 277.

Real property in other state, or its value, as a factor in computation of the interest of husband or wife in other's estate, 66 A. L. R. 733.

Remarriage as affecting one's status as a "widow" or "widower" for purposes of statute of descent and distribution or other statute employing such term, 72 A. L. R. 1324.

Right of surviving spouse to exoneration out of the decedent's estate in respect of liens on estate by entirety, 67 A. L. R. 1181.

Separation agreement between husband and wife as affecting right of inheritance, 81 A. L. R. 693.

Treatment of widow's allowance and exemptions in computing share to which she is entitled in case of death of husband intestate or of her election to take against will, 98 A. L. R. 1325.

Validity of postnuptial agreement releasing or waiving rights of surviving spouse on death of other spouse, 49 A. L. R. 116.

Widow's allowance and exemptions, treatment of in computing share to which she is entitled under statute of distribution in case of death of husband intestate or of her election to take against will, 98 A. L. R. 1325.

101–4–6. Homestead—Exempt Property.

A homestead as provided by section 1, title Homesteads, together with all personal property exempt from execution, shall be wholly exempt from the payment of the debts of the decedent, and shall be the absolute property of the surviving husband or wife and minor children, or of the minor children in case there is no surviving husband or wife, or of the surviving husband or wife in case there are no minor children, to be set apart on petition and notice, at any time after the return of the inventory. (C. L. 17, § 6409.)

History.

This section was formerly section 676 of Comp. Laws of 1876. Down to a former proviso contained therein it is practically identical with R. S. 1898, § 2829 and with Comp. Laws 1907, § 2829. That proviso is now contained in 38–0–1 and in Title 52.

For a discussion of the last sentence of R. S. 1898 and of Comp. Laws 1907, which was eliminated from this section, see post, this note, regarding rule in Schenk's case.

Cross-references.

Homesteads, Title 38; use and distribution of, 102–8; exemptions from execution generally, 104–37–13.

1. Validity.

Constitutional provision setting up equality of rights of ownership of separate property by married woman, and eliminating the common-law incapacity, does not confer rights upon wives different from those of husbands, and does not invalidate statute giving husband homestead in property of deceased wife. In re Petersen's Estate, 97 U. 324, 93 P.2d 445.

2. General construction.

This section and 102–8–1, 102–8–2 and 102–9–21 must be construed together. In re Mower's Estate, 93 U. 390, 73 P.2d 967. It is not in conflict with 102–8–2, and was not repealed thereby. In re Syndergaard's Estate, 31 U. 490, 88 P. 616. Accordingly, funeral and administrative expenses are prior to exemptions provided in 104–37–13. In re Petersen's Estate, 69 U. 484, 256 P. 409.

Homestead being constitutional creation, all laws relating thereto must be liberally construed to protect it and make it effective for dependent and helpless, to insure them shelter and support. In re Mower's Estate, 93 U. 390, 73 P.2d 967; In re Petersen's Estate, 97 U. 324, 93 P.2d 445.

3. Exemption from payment of debts.

Reasonable expenses of decedent's last illness and funeral expenses, as well as administration expenses, are preferred claims against estate, and when necessary, homestead property is subject to their payment. In re Mower's Estate, 93 U. 390, 405, 73 P.2d 967, following matter of Estate of Thorn, 24 U. 209, 67 P. 22, and In re Petersen's Estate, 60 U. 484, 256 P. 409.

Therefore, realty, worth less than $1500 and constituting, for all practical purposes, intestate's entire estate, should be sold by administrator to pay expenses of intestate's last sickness and his funeral charges and expenses of administration (see 102-8-2), and not, before such expenses are paid, be set off by court to intestate's widow and to others entitled to it. Matter of Estate of Thorn, 24 U. 209, 67 P. 22.

4. Setting apart of homestead.

It is not a valid objection to a claim of homestead in this state that the parties have not resided on the property, or that the property is held in cotenancy with a stranger. In re Petersen's Estate, 97 U. 324, 93 P.2d 445.

The amount of property owned by the person claiming homestead is not material to a determination of whether homestead shall be allowed. In re Petersen's Estate, 97 U. 324, 93 P.2d 445.

Where value of hotel property was not less than $2500, contention of widow that since there were no debts, and since value of property would not exceed exemptions to which she was entitled, legal right of administrator could not be enforced, was without merit. Columbia Trust Co. v. Anglum, 63 U. 353, 225 P. 1089.

5. Title and rights of survivor.

Under Compiled Laws of Utah territory, intestate's widow took a life estate in the homestead, with remainder over to children of deceased. Doely v. Stringham, 4 U. 107, 7 P. 405.

Where real estate is set apart as homestead to surviving wife or husband and minor children, it becomes theirs absolutely, subject only to valid liens or mortgages, if any, with which it may be encumbered, and fact that subsequently value of property should exceed limit of statutory homestead exemption, would not authorize reopening of estate. In re Bedford's Estate, 34 U. 24, 95 P. 518, 16 L. R. A. (N. S.) 728, 16 Ann. Cas. 118.

Under former statute, homestead belonged to heirs to whom it was set apart, and heirs who were of age at time of death of intestate or at time homestead was set apart had no interest therein. Christiansen v. Robinson, 35 U. 67, 99 P. 458.

6. Right to dispose of homestead.

7. —in general.

This section, after 1933 amendment, permits husband to dispose of all his estate by will subject to homestead rights of widow and children if wife's one-third interest does not exceed homestead, but if the one-third exceeds the homestead, he may devise two-thirds of his estate away from wife and children. In re Mower's Estate, 93 U. 390, 73 P.2d 967.

Under a former statute, right to dispose of homestead property by will held limited to such estates as exceeded homestead limit in value. In re Little, 22 U. 204, 61 P. 899.

8. —the rule in Schenk's case.

In re Schenk's Estate, 53 U. 381, 178 P. 344, which held that widow, after having renounced provisions of will in her favor and thereby elected to accept her distributive share under law of succession, could not thereafter claim as against will, all property which amounted to $1,100, as homestead under 101-4-6, 102-8-2, was discussed in In re Mower's Estate, 93 U. 390, 73 P.2d 967, which stated that when the legislature, in 1933, eliminated 1898 amendment to sections above mentioned which read, "This section shall not be construed to prevent the disposition by will of homestead and exempt personal property," the basis of the Schenk decision had been repealed and that now husband may dispose of all his estate by will subject to homestead rights of widow and minor children, if wife's one-third interest is not in excess of homestead allowance, but if one-third exceeds the homestead, he may only devise from his widow two-thirds of his realty.

A. L. R. notes.

Direction in will for payment of debts and expenses as subjecting exempt homestead to their payment, 103 A. L. R. 257.

101-4-7. Id. Ownership—Partition.

If the surviving husband or wife again marries, or when all minor children arrive at the age of majority, the homestead may be partitioned, one-half to the surviving husband or wife and the other half to the children. The interest of the surviving husband or wife or of any child in the homestead may be disposed of by will, or shall pass by succession in the proportions aforesaid as other real property, but partition shall not be made except at such times as in this section provided.

(C. L. 17, § 6410.)

101-4-8. Id. Value Deducted from Share of Survivor.

The value of such part of the homestead and exempt personal property as may be set aside to the surviving wife or husband or minor children shall be deducted from the distributive share provided for such survivors. (C. L. 17, § 6411.)

History.

This section is identical with R. S. 1898, § 2831; Comp. Laws 1907, § 2831.

101-4-9. Dower and Curtesy Abolished.

There shall be neither dower nor curtesy in this state.

(C. L. 17, § 6412.)

History.

Dower was abolished at an early date in this state. 2 Comp. Laws 1888, p. 81, § 2530.

The present section is practically identical with R. S. 1898, § 2832; Comp. Laws 1907, § 2832.

Comparable provisions.

Cal. Civil Code, § 173, Idaho Code, § 31-915 (no estate is allowed husband as tenant by curtesy upon death of his wife, nor is any estate in dower allotted to wife upon death of her husband).

Mont. Rev. Codes, § 5812 (no estate is allowed husband as "tenant by curtesy" upon the death of his wife); § 5813 (widow is endowed of the third part of all lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless same shall have been relinquished in legal form).

101-4-10. Illegitimate Children—Inheritance by.

Every illegitimate child is an heir of the person who acknowledges himself to be the father of such child, and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock. The issue of all marriages null in law, or dissolved by divorce, are legitimate. (C. L. 17, § 6413.)

History.

This section was Comp. Laws 1876, § 714. It is identical with R. S. 1898, § 2833; Comp. Laws 1907, § 2833. This section is also identical with 2 Comp. Laws 1888, §§ 2742, 2743, enacted in 1884 by the territorial legislature. It was, however, repealed by Congress when Utah was a territory, in pursuance of the policy of the federal government to put down polygamy. See Chapman v. Handley, 7 U. 49, 24 P. 673. But see Pratt's Estate, 7 U. 278, 26 P. 576, decided on authority of Cope v. Cope, 137 U. S. 682, 34 L. Ed. 832, 11 S. Ct. 222, rev'g 7 U. 63, 24 P. 677.

This identical provision was a part of the territorial laws, and was in force until modified by Congress by the Edmunds Law. It does not apply to issue of so-called Mormon or plural marriages. Rohwer v. District Court of First Judicial District, 41 U. 279, 286, 125 P. 671.

It was held that territorial legislation providing for the inheritance of

illegitimate children was not repealed by Act of Congress to suppress practice of polygamy. Cope v. Cope, 137 U. S. 682, 34 L. Ed. 832, 11 S. Ct. 222, rev'g 7 U. 63, 24 P. 677. Followed in Pratt's Estate, 7 U. 278, 26 P. 576.

Comparable provisions.

Cal. Probate Code, § 255 ("Every illegitimate child is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of the parent's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession"); Idaho Code, § 14-104, Mont. Rev. Codes, § 7074 (these provisions follow closely the wording of the California provision hereunder noted, concluding, however, as follows: "* * * after such marriage, acknowledges him as his child, or adopts him into his family, in which case such child and all the legitimate children are considered brothers and sisters, and on the death of either of them, intestate and without issue, the others inherit his estate and are heirs as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father and mother, respectively, their rights in the estates of all the children in like manner as if all had been legitimate. The issue of all marriages null in law, or dissolved by divorce are legitimate."

Iowa Code 1939, § 12030 (illegitimate children inherit from their mother, and she from them); § 12031 (inherit from the father when paternity is proven during his life, or recognized by him as his children; such recognition must be general and notorious, or in writing; if such recognition has been mutual, the father may inherit from his illegitimate children).

Cross-references.

Legitimation by acknowledgment, 14-4-12; marriage in belief that former spouse was dead or divorced, issue legitimate, 40-1-3.

1. Right of bastards to inherit.

The right of illegitimate children to inherit is purely statutory; the common law conferred no such right. Mansfield v. Neff, 43 U. 258, 134 P. 1160.

2. Acknowledgment by father.

What acts amount to the acknowledgment contemplated by this section depends upon facts and circumstances of each particular case. Harrison v. Harker, 44 U. 541, 142 P. 716; Rohwer v. District Court of First Judicial District, 41 U. 270, 125 P. 671.

3. Issue of illegitimate.

Where bachelor received his illegitimate child into his family and acknowledged such child to be his own, it was held that children of the illegitimate child who predeceased bachelor were entitled to inherit from latter. In re Garr's Estate, 31 U. 57, 86 P. 757.

4. Fruit of void marriages.

By this section it was intention of legislature to declare all children that are fruit of marriages that are void under statute as legitimate. Utah Fuel Co. v. Industrial Commission, 65 U. 100, 234 P. 697.

Posthumous child of deceased employee held entitled to compensation although marriage of deceased was void, since it was contracted before divorce became final in view of this section. Utah Fuel Co. v. Industrial Commission, 65 U. 100, 234 P. 697.

5. Burden of proof.

Illegitimate child claiming as heir under this section has burden of proving natural parentage and unambiguous acknowledgment by deceased. In re Roberts' Estate, 69 U. 548, 256 P. 1068. In re Roberts' Estate was followed in In re Newell's Estate, 78 U. 463, 471, 5 P.2d 230.

A. L. R. notes.

Conflict of laws as to legitimacy or legitimation, or as to rights of illegitimates, as affecting descent and distribution of decedents' estates, 73 A. L. R. 941.

Denial of, or expression of douht as to paternity or other relationship as estoppel to assert right of inheritance by virtue of such relationship, 33 A. L. R. 579.

Illegitimate child as "child" within statute limiting right or amount of disposition by will by one survived by a child, 23 A. L. R. 400.

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of gestation after access by husband, 7 A. L. R. 329.
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Separation agreement as affecting right of inheritance, 35 A. L. R. 1505.
Who may dispute presumption of legitimacy of child born in wedlock, 1 A. L. R. 1632.

101-4-11. Id. Inheritance from.

If an illegitimate child dies intestate, without leaving husband or wife or lawful issue, his estate goes to his mother, or, in case of her decease, to her heirs at law. (C. L. 17, § 6414.)

History.
This section came from Comp. Laws 1876, § 715, but was repealed by Congress when Utah was a territory as a part of the policy of the federal government to put down the practice of polygamy. It was re-enacted after statehood in practically the same identical terms. See Chapman v. Handley, 7 U. 49, 24 P. 673. But see Pratt's Estate, 7 U. 278, 26 P. 576, decided on authority of Cope v. Cope, 137 U. S. 682, 34 L. Ed. 832, 11 S. Ct. 222, rev'g 7 U. 63, 24 p. 677.
This section is identical with R. S. 1898, § 2834; Comp. Laws 1907, § 2834, except for words "husband or wife."

Comparable provisions.
Idaho Code, § 14-105, Mont. Rev. Codes, § 7075 ("If an illegitimate child who has not been acknowledged or adopted by his father, dies intestate without lawful issue, his estate goes to his mother, or in case of her decease, to her heirs at law").

A. L. R. notes.
Inheritance by, from, or through illegitimate, 83 A. L. R. 1330.

101-4-12. Degrees of Kindred—How Computed.

The degree of kindred is established by the number of generations, and each generation is called a degree. (C. L. 17, § 6415.)

Comparable provisions.
Cal. Probate Code, § 251, Mont. Rev. Codes, § 7076 (identical).
Idaho Code, § 14-106 (degrees of kindred are computed according to rules of civil law; as to "kindred of the half blood," see note under 101-4-17).

101-4-13. Id. Lineal and Collateral.

The series of degrees forms the line; the series of degrees between persons who descend from one another is called direct or lineal consanguinity, and the series of degrees between persons who do not descend from one another, but spring from a common ancestor, is called the collateral line or collateral consanguinity. (C. L. 17, § 6416.)

Comparable provisions.
Mont. Rev. Codes, § 7077 (identical).

101-4-14. Id. Ascending and Descending.

The direct line is divided into a direct line descending and a direct line ascending. The first is that which connects the ancestor with those who descend from him. The second is that which connects a person with those from whom he descends. (C. L. 17, § 6417.)

Comparable provisions.
Mont. Rev. Codes, § 7078 (substantially identical).

101-4-15. Id. In Direct Line.

In the direct line there are as many degrees as there are generations. Thus, the son is, with regard to the father, in the first degree; the

grandson, in the second; and vice versa with regard to the father and grandfather toward the sons and grandsons. (C. L. 17, § 6418.)

Comparable provisions.
Cal. Probate Code, § 252 (amplifying upon "lineal consanguinity, or the direct line of consanguinity").
Mont. Rev. Codes, § 7079 (identical).

101–4–16. Id. In Collateral Line.

In the collateral line the degrees are counted by generations from one of the relatives up to the common ancestor, and from the common ancestor to the other relatives. In such computation the decedent is excluded, the relative included, and the ancestor counted but once. Thus, brothers are related in the second degree; uncle and nephew in the third degree; cousins-german in the fourth, and so on. (C. L. 17, § 6419.)

Comparable provisions.
Cal. Probate Code, § 253 (amplifying upon "collateral consanguinity").
Mont. Rev. Codes, § 7080 (substantially identical).

101–4–17. Half Blood Inherits Equally with Whole Blood.

Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance. (C. L. 17, § 6420.)

History.
This section has been in force in this state at least since February, 1876 (Comp. Laws 1876, p. 276). It was carried into the compilation of 1888 (2 Comp. Laws 1888, § 2749, p. 125). From thence it was carried into the Revised Statutes of 1898, of which revision it was section 2840, the same number as in the compilation of 1907.

Comparable provisions.
Cal. Probate Code, § 254 (substantially the same; words "in favor of those who are" are added thereto).
Idaho Code, § 14–106 (includes substantially identical provision).
Mont. Rev. Codes, § 7081 (substantially identical).

1. Words and phrases defined.
The phrase "of the blood" includes the half blood as well as the whole blood, and excludes only those who have none of the blood of the ancestor from whom the estate came. Accordingly, where a mother died leaving children as the issue of two marriages, and had taken by inheritance property belonging to a deceased son, such property was properly distributed among his half brothers and sisters and their descendants, as well as brothers and sisters of the whole blood. Gardner's Estate v. Gardner, 42 U. 40, 129 P. 360, explaining Amy v. Amy, 12 U. 278, 333, 42 P. 1121, and applying Comp. Laws 1907, § 2840, which is identical with present section.

2. Kindred of half blood.
Kindred of half blood are excluded from inheriting property which descended from line in which they are not related. Matter of Estate of Amy, 12 U. 278, 42 P. 1121, aff'd 171 U. S. 179, 43 L. Ed. 127, 18 S. Ct. 802.

Statutory provisions, under which brothers and sisters may inherit, are to be construed with reference to statutory provision precluding kindred of half blood from inheriting property descending from ancestor of decedent. Matter of Estate of Amy, 12 U. 278, 42 P. 1121, aff'd 171 U. S. 179, 43 L. Ed. 127, 18 S. Ct. 802.

A. L. R. notes.
Deceased spouse as ancestor of surviving spouse within statute providing that kindred of the half blood inherit equally with those of the whole blood, unless the inheritance come to the intestate by descent, devise, or gift of some one of his ancestors, 110 A. L. R. 1014.

101–4–18. Advancements—To Be Taken Towards Share.

Any estate, real or personal given by the decedent in his lifetime as an advancement to any child, or other lineal descendant, is a part of the

estate of the decedent for the purposes of division and distribution thereof among his issue, and must be taken by such child or other lineal descendant toward his share of the estate of the decedent.

(C. L. 17, § 6421.)

History.
This section is identical with R. S. 1898, § 2841; Comp. Laws 1907, § 2841. It is also practically identical with Comp. Laws 1876, § 722.

Comparable provisions.
Idaho Code, § 14-107 (substantially identical).
Mont. Rev. Codes, § 7082 (identical).

Cross-references.
Effect of advancements, 101-1-34; advancements not taken as ademptions, 101-2-35; advancements to be specified in decree of distribution, 102-12-9.

1. Determination of question.
Whether an advancement by a testator in his lifetime operated as an ademption under 101-2-35, depends upon interpretation and construction to be given to will itself. In re Pickard's Estate, 42 U. 105, 129 P. 353.

A. L. R. notes.
Applicability of doctrine of advancements in case of pretermitted child or grandchild entitled by statute to the share which he would have received if testator had died intestate, 88 A. L. R. 375; applicability of doctrine of advancements to testate succession, 32 A. L. R. 730; presumption and burden of proof with respect to advancement to children, 72 A. L. R. 327; release by, or advancement to, child as affecting grandchild's interest in grandparent's estate, 68 A. L. R. 410.

101-4-19. Id. If Exceeding or Less than Share.

If the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from any further portion in the division and distribution of the estate, but he must not be required to refund any part of such advancement; and, if the amount so received is less than his share, he is entitled to so much more as will give him his full share of the estate of the decedent. (C. L. 17, § 6422.)

History.
This section is almost identical with section 723 of Comp. Laws 1876, and it is absolutely identical with R. S. 1898, § 2842; Comp. Laws 1907, § 2842.

Comparable provisions.
Idaho Code, § 14-108, Mont. Rev. Codes, § 7083 (identical).

1. Ademption.
The provisions of the will and not this section govern the question of whether or not there has been an ademption as provided for in 101-2-35. In re Pickard's Estate, 42 U. 105, 129 P. 353.

A. L. R. notes.
Recovery of excess of advancement over distributable share in estate, 46 A. L. R. 1428.

101-4-20. Id. Defined.

All gifts and grants are made as advancements, if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement, or acknowledged in writing as such by the child or other successor or heir. (C. L. 17, § 6423.)

History.
Except for the provision of love and affection as a consideration, this section is practically identical with Comp. Laws 1876, § 724. It is absolutely identical with R. S. 1898, § 2843; Comp. Laws 1907, § 2843.

Comparable provisions.
Idaho Code, § 14-109, Mont. Rev. Codes, § 7084 (identical).

1. Advancement as an ademption.
An interpretation and construction of the language of the will and not the provisions of this section govern in determination of question whether or not an advancement has worked an ademption of a legacy or devise. Parol evidence is admissible in case of an ambiguity. In re Pickard's Estate, 42 U. 105, 129 P. 353.

A. L. R. notes.
Items in form of account as advancements, 49 A. L. R. 574.

101–4–21. Id. Value, How Determined.

If the value of the estate so advanced is expressed in the conveyance, or in the charge thereof made by the decedent, or in the acknowledgment of the party receiving it, it must be held as of that value in the division and distribution of the estate; otherwise, it must be estimated according to its value when given, as nearly as the same can be ascertained. (C. L. 17, § 6424.)

Comparable provisions.
Idaho Code, § 14–110, Mont. Rev. Codes, § 7085 (identical).

A. L. R. notes.
Intent as a factor in determining whether there is an advancement, 26 A. L. R. 1089; valuation of property for purposes of advancement, 26 A. L. R. 1178.

101–4–22. Id. Charged Against Issue of Deceased Heir.

If any child, or other lineal descendant, receiving an advancement dies before the decedent, leaving issue, the advancement must be taken into consideration in the division and distribution of the estate, and the amount thereof must be allowed accordingly by the representatives of the heirs receiving the advancement in the same manner as if the advancement had been made directly to them. (C. L. 17, § 6425.)

Comparable provisions.
Idaho Code, § 14–111, Mont. Rev. Codes, § 7086 (substantially identical).

A. L. R. notes.
Release by, or advancement to, child as affecting grandchild's interest in grandparent's estate, 68 A. L. R. 410.

101–4–23. Inheritance "By Right of Representation"—Posthumous Child Deemed Alive at Parents' Death.

Inheritance or succession "by right of representation" takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living. Posthumous children are considered as living at the death of their parents. (C. L. 17, § 6426.)

History.
This section is identical with Comp. Laws 1876, § 728; 2 Comp. Laws 1888, § 2757; R. S. 1898, § 2846; Comp. Laws 1907, § 2846.

Comparable provisions.
Cal. Probate Code, § 250 ("* * * takes place when the descendants of a deceased person take the same share or right in the estate of another that such deceased person would have taken as an heir if living. A posthumous child is considered as living at the death of the parent.").
Idaho Code, § 14–115, Mont. Rev. Codes, § 7087 (identical).

1. Posthumous children.
In view of this section, unborn child could maintain action for wrongful death of parent under 104–3–11. Parmley v. Pleasant Valley Coal Co., 64 U. 125, 228 P. 557.

2. Unborn children.
In application by widow, in her own right and as guardian of her minor children, held minor heirs, including unborn child of deceased employee, were bound by proceedings before industrial commission, notwithstanding that if award was permitted to stand it might expose defendant company to double liability, and would result in taking property without due process of law, and deny to employer equal protection of law, in violation of both Federal and State Constitutions. Utah Copper Co. v. Industrial Commission, 57 U. 118, 193 P. 24, 13 A. L. R. 1367.

Decisions from other jurisdictions.
— California.
Appellant, who was born after execution of the will, took by right of representation the specific devise to his father who predeceased testator, notwithstanding clause omitting all other

heirs not mentioned in the will. In re Sullivan's Estate, 31 Cal. App. 2d 527, 88 P.2d 225.

A. L. R. notes.

Right of child en ventre sa mere to take under a conveyance or devise of present interest to parent and children, 50 A. L. R. 619; statute as to effect of subsequent birth of a child as applicable where will provides for child, in the absence of an express exception, 30 A. L. R. 1236; taking per stirpes or per capita under will, 126 A. L. R. 157.

101–4–24. Aliens May Take by Succession.

Aliens as well as citizens may in all cases take by succession; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relatives. (C. L. 17, § 6427.)

History.

This section was Comp. Laws 1876, § 729. It is practically identical with R. S. 1898, § 2847; Comp. Laws 1907, § 2847.

Comparable provisions.

Cal. Probate Code, § 259, added by Laws of 1941 (pertains to rights of aliens not residing within United States or its territories to take either real or personal property or proceeds thereof in California by succession or testamentary disposition upon same terms and conditions as residents and citizens of United States; such rights are dependent upon existence of "reciprocal rights"); § 259.1 (burden of establishing existence of such reciprocal rights is upon such nonresident aliens); § 259.2 (if such reciprocal rights are not found to exist, and if no heirs other than such aliens are found eligible to take such property, the property is disposed of as escheated property).

Idaho Code, § 14–116, Mont. Rev. Codes, § 7088 ("Resident aliens may take in all cases by succession as citizens, and no person capable of succeeding under the provisions of this title [Idaho] chapter [Mont.] is precluded from such succession by reason of the alienage of any relative, but no nonresident foreigner can take by succession, unless he appears and claims such succession within two years [Idaho] within five years [Mont.] after the death of the decedent to whom he claims succession").

Iowa Const. Art. I, § 22 ("Foreigners who are, or may hereafter become residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and descent of property, as native born citizens").

Cross-references.

Validity of foreign wills, 101–1–14.

1. Validity.

Of course this section is constitutional. See In re Apostolopoulos' Estate, 68 U. 344, 353, 250 P. 469, 253 P. 1117, 48 A. L. R. 1322.

2. Operation and effect of section.

This section gives an alien inheritable blood. In re French's Estate, 64 U. 66, 76, 228 P. 194.

3. Judicial determination of existence of heirs.

Under this section it may be that the presumption that a decedent left a surviving heir applies in all cases; and that, therefore, some appropriate proceedings to judicially determine the fact that no heirs survive the decedent must be had. In re French's Estate, 64 U. 66, 76, 228 P. 194.

Decisions from other jurisdictions.

— Idaho.

Idaho statute is not a recognition or extension of any previously existing right a nonresident alien had, but it is rather the fresh grant of a right or a statute of grace which the state confers on aliens; the state might as well declare all such estates escheated rather than allow them to go to a nonresident alien who is otherwise within the recognized line of succession; in this condition of the law, the question of time becomes an essential prerequisite to the right of a nonresident alien to succeed to an estate left by a decedent within this state. Connolly v. Reed, 22 Idaho 29, 125 P. 213.

A. L. R. notes.

Disabilities and property rights of aliens as subject of treaty regulations, 4 A. L. R. 1391.

Nonresidence of decedent owning real property in the state as affecting application of local statute relating to descent of real property, 119 A. L. R. 523.

Right of alien enemy to take by inheritance or by will, 137 A. L. R. 1328.

Right of nonresident alien subject of enemy nation to institute suit after commencement of war, 137 A. L. R. 1355.

Right of resident alien who is a subject of an enemy country to prosecute suit during war, 137 A. L. R. 1347.

Suits and remedies against alien enemies, 137 A. L. R. 1361.

TITLE 102

PROBATE CODE

Chapter 1. TITLE AND JURISDICTION.
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CHAPTER 1

TITLE AND JURISDICTION *

102-1-1. Title Designated "Probate Code."
102-1-2. Where Wills Proved, and Letters Granted.
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102-1-4. Disqualification of Judge.
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102-1-8. Id. No Collateral Attack.

* **History of act.** This title was contained in Comp. Laws 1876, Ch. III, pp. 279–344; 2 Comp. Laws 1888, Part Eleventh, pp. 456–555; R. S. 1898, Title 74, pp. 827–874; Comp. Laws 1907, Title 89, pp. 1207–1265.

Force and effect of Code. "The source of the administrator's power and that of the probate court must be found in the Probate Code." In re Harris' Estate, 99 U. 464, 105 P.2d 461.

102–1–1. Title Designated "Probate Code."

This title shall be known as the Probate Code. (C. L. 17, § 7553.)

History.
This section was R. S. 1898, § 3773; Comp. Laws 1907, § 3773.

Comparable provisions.
Cal. Probate Code, § 1 ("Probate Code" composed of four divisions: I. Wills; II. Succession; III. Administration of Estates of Decedents; IV. Guardian and Ward).

102–1–2. Where Wills Proved, and Letters Granted.

Wills must be proved and letters testamentary or of administration granted:

(1) If the decedent was a resident of the state, in the county in which he had his residence at the time of his death.

(2) If the decedent was a nonresident of the state: first, in the county in which he may have died leaving estate therein; second, in any county in which any part of the estate may be, the decedent not having left estate in the county in which he died, or having died without the state.

(3) In all other cases, in the county where application for letters is first made. (C. L. 17, § 7554.)

History.
This section was Comp. Laws 1876, § 734. It is practically identical with R. S. 1898, § 3774; Comp. Laws 1907, § 3774.

Comparable provisions.
Cal. Probate Code, § 301, Idaho Code, § 15-101, Mont. Rev. Codes, § 10018 (similarly specifying proper county in which will must be proved and letters granted).

Cross-references.
Civil business arising in county must be tried there, Const. Art. VIII, § 5.

1. Nonresidents.
Under this section a claim for damages for death by wrongful act is a sufficient asset of the estate for the purpose of appointing an administrator. In re Lowham's Estate, 30 U. 436, 441, 85 P. 445, following In re Estate of Tasanen, 25 U. 396, 71 P. 984. Administrator is properly appointed for estate of nonresident decedent, although latter left no property within state. Matter of Estate of Tasanen, 25 U. 396, 71 P. 984.

Decisions from other jurisdictions.
— California.
The appropriate court of a jurisdiction in which assets of the estate of a nonresident testator are found may grant probate of his will even though the will has not been presented for probate in the state of his domicile; every state has plenary power with respect to administration and disposition of all property of deceased persons found within the jurisdiction. In re Estrem's Estate, 16 Cal. 2d 563, 107 P.2d 36.

102-1-3. Id. Conflicting Jurisdiction.

When a case is originally within the jurisdiction of the courts of two or more counties, the district court of that county in which application is first made for letters testamentary or of administration has exclusive jurisdiction of the settlement of the estate. (C. L. 17, § 7555.)

Comparable provisions.
Iowa Code 1939, § 11824 (similar).

Decisions from other jurisdictions.
— Federal.
The probate jurisdiction is not exclusive of the jurisdiction of the federal courts in cases properly brought befnre them. Clark v. Bever, 139 U. S. 96, 35 L. Ed. 88, 11 S. Ct. 468, aff'g 31 F. 670, affirming judgment of Circuit Court for Southern District of Iowa.

— Iowa.
Judgment of district court first assuming jurisdiction cannot be attacked collaterally unless record discloses lack of jurisdiction. In re Estate of Riese, 230 Iowa 397, 297 N. W. 796.

There cannot be two administrations of same estate at one time, and court which first obtains jurisdiction will retain such jurisdiction until it is set aside by direct attack. Brown v. Tank, 230 Iowa 370, 297 N. W. 801.

102-1-4. Disqualification of Judge.

Where a judge is next of kin to the decedent, or is a legatee or devisee under the will, or is a witness thereto, or is otherwise interested or disqualified in any probate matter, he shall order the same to be transferred to the district court of another district, or to be heard before another judge of the same district, or procure a judge of another district to hold court for the hearing of such matter. Any proceeding so removed may be returned upon petition of any person interested, upon the election or appointment of another judge not disqualified.

The clerk making such transfer must transmit to the clerk of the court to which the proceeding is transferred a certified copy of the order of transfer, and all the papers on file in his office relating to the matter. (C. L. 17, § 7556.)

Comparable provisions.

Cal. Probate Code, § 303 (no will may be admitted to probate or letters of administration granted or other proceeding had (except ordering transfer) before any judge who is interested as heir of decedent, or as legatee or devisee under will, or when named as executor or trustee, or is witness thereto).

Idaho Code, § 15–367, Mont. Rev. Codes, § 10120 (no probate court [Idaho] no judge [Montana] may admit to probate a will or grant letters where judge thereof is interested as next of kin to decedent, or as legatee or devisee, or when named executor or trustee, or is witness thereto).

Iowa Code 1939, § 11823 (where judge is a party, or connected by blood or affinity with a person interested nearer than fourth degree, or is personally interested in any probate matter, he must order same transferred).

Cross-references.

Disqualification of judges, Const. Art. VIII, § 13, 20–6.

102–1–5. Orders at Chambers—Hearings Any Place in District.

The judge of the district court in which any probate or guardianship matter is pending may make any order relating to such proceeding in chambers at any place in his district, and such order shall have the same force and effect as if made by the court sitting in the proper county. The hearing of any matter requiring notice shall be had at the time and place appointed or at the time to which the same may be postponed, except that where there is no contest or where all the parties consent such hearing may be had at any place within the judicial district in which the matter is pending. (C. L. 17, § 7557.)

History.

This section is identical with R. S. 1898, § 3777; Comp. Laws 1907, § 3777.

Cross-references.

Powers in chambers, 20–3–16; powers of judge as contradistinguished from those of court, 20–7–17; place of holding court by stipulation, 20–3–17.

1. Validity of orders.

Probate court order, made without authority of statute, is void. Andrus v. Blazzard, 23 U. 233, 63 P. 888, 54 L. R. A. 364.

102–1–6. Powers of Courts and Judges—Code of Civil Procedure Applicable.

The district and supreme courts and the judges thereof sitting in probate and guardianship matters shall exercise all such powers, consistent with the provisions of this title, as are or may be conferred upon those courts or judges, respectively, in other proceedings; and, except as otherwise provided in this title, the provisions of the code of civil procedure shall be applicable to and constitute the rules of practice in probate and guardianship proceedings. (C. L. 17, § 7558.)

History.

This section is identical with R. S. 1898, § 3778; Comp. Laws 1907, § 3778.

Comparable provisions.

Cal. Probate Code, § 300 (decedent's property subject to possession of executor or administrator and to control of superior court for purposes of administration, sale or other disposition); § 301 (wills must be proved in superior court and letters testamentary or of administration granted thereby, and administration of estates of decedents had therein).

Idaho Const. Art. 5, § 21 (probate courts are courts of record, and have original jurisdiction in all matters of

probate, settlement of estates of deceased persons, appointment of guardians; also have jurisdiction to hear and determine civil cases wherein debt or damage claimed does not exceed $500, exclusive of interest; have concurrent jurisdiction with justices of the peace in criminal cases); Idaho Code, § 1-1202 (stating scope of jurisdiction of probate court); § 1-1301 (enumerating duties of probate judge).

Iowa Code 1939, § 10763 (district court has jurisdiction of probate of wills, granting administration upon estates, appointment of guardians); § 10764 (appointment of executors and trustees); § 11825 (court of county in which will is probated, or in which administration or guardianship is granted, has jurisdiction coextensive with the state in settlement of estate and sale and distribution thereof).

Mont. Const. Art. VIII, § 11 ("The district courts shall have original jurisdiction * * * of all matters of probate * * *"); Art. XX, § 4 ("Except as herein otherwise provided, the word 'district' shall be substituted and read in lieu of the word 'probate' in the terms 'probate court' or 'probate judge' whenever the same occur in the laws of the territory of Montana * * * upon a change from territorial to state government [laws which by their terms apply to probate courts or probate judges shall] be deemed and taken to apply to district courts and district judges * * *"); Mont. Rev. Codes, § 8829 ("The district court has original jurisdiction * * * of all matters of probate * * *").

Cross-references.

Appeals to supreme court in probate matters, Const. Art. VIII, § 5; jurisdiction of district court, Const. Art. VIII, § 7, 20-3-4; trial according to Code of Civil Procedure, 102-14-17; trial by court or jury, 102-14-18.

1. Nature of probate courts.

In this state there is no independent probate or surrogate court. Our district courts, which are courts of general jurisdiction, are clothed with power to exercise, and exercise under our "Probate Code," all probate powers and judicial functions. In re Thompson's Estate, 72 U. 17, 33, 269 P. 103.

2. Jurisdiction and power of probate courts.

3. — In general.

"The source of the administrator's power and that of the probate court must be found in the Probate Code." In re Harris' Estate, 99 U. 464, 466, 105 P.2d 461. Accordingly, probate court order, made without authority of statute, is void. Andrus v. Blazzard, 23 U. 233, 63 P. 888, 54 L. R. A. 354. In absence of statute, probate court would have no authority to adjudicate interests of grantees of heirs or devisees. Snyder v. Murdock, 26 U. 233, 237, 73 P. 22.

"District courts are, and as a matter of necessity must be given a wide discretion in the conduct of estates, and should not be limited or restricted unnecessarily." In re Robison's Estate, 59 U. 431, 436, 204 P. 321.

State district court had jurisdiction to determine who were proper heirs and beneficiaries to proceeds of war risk insurance carried by deceased killed while serving with American Expeditionary Forces in France. Cuff v. United States, 64 F.2d 624. State district court had jurisdiction to determine who was entitled to administer estate of soldier killed in World War I, and to whom war risk insurance should be made payable. Cuff v. United States, 64 F.2d 624.

Formerly probate courts were given jurisdiction in all cases of divorce and alimony. Kenyon v. Kenyon, 3 U. 431, 24 P. 829. Formerly probate courts had and exercised jurisdiction to grant divorces, and act conferring that jurisdiction was valid. Whitmore v. Hardin, 3 U. 121, 127, 1 P. 465, explaining Cast v. Cast, 1 U. 112.

4. — concurrent jurisdiction.

If probate courts have concurrent jurisdiction with courts of equity in proceedings for the enforcement of assignment by heir of his interest while estate is in course of administration, they possess it only because they possess the power to adjudicate questions in equity. Dunn v. Wallingford, 47 U. 491, 155 P. 347, applying Comp. Laws 1907, § 3778, which is identical with present section.

5. — trial of issues.

Under this section, issues of fact in probate proceedings must be tried in accordance with requirements of 104-26-3. In re Love's Estate, 75 U. 342, 350, 285 P. 299.

Probate court was without jurisdiction to try all issues raised by pleadings in action by administratrix to cancel contract for conveyance of land in which defendant filed counterclaim for specific performance. Rogers v. West, 82 U. 525, 25 P.2d 971.

6. — enforcement of attorney's lien.

In view of this provision and 102-14-17, 102-14-18, attorney's lien for services rendered decedent may be enforced in probate proceeding, separate action

being unnecessary. In re Agee's Estate, 39 U. 130, 252 P. 891.

7. Applicability of Code of Civil Procedure.

Denial of petition to set aside order of appointment of administrator is final order and appealable as such. Matter of Estate of Tasanen, 25 U. 396, 400, 71 P. 984, applying R. S. 1898, §§ 3303 and 3778.

Decisions from other jurisdictions.

— Federal.

The controverted question of debt or no debt is one which, if the representative of the decedent is a citizen of a state different from that of the other party, the party properly situated has a right given by the Constitution of the United States to have tried originally, or by removal, in a court of the United States, which cannot be defeated by state statutes enacted for the more convenient settlement of estates of decedents, the court thus reiterating its language stated formerly in Hess v. Reynolds, 113 U. S. 73, 28 L. Ed. 927, 5 S. Ct. 377; Clark v. Bever, 139 U. S. 96, 35 L. Ed. 88, 11 S. Ct. 468, aff'g 31 F. 670, affirming judgment of Circuit Court for Southern District of Iowa.

— California.

Probate proceedings being purely statutory, and therefore special in their nature, the superior court, although a court of general jurisdiction, is circumscribed in this class of proceedings by the provisions of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided, the court thus repeating its language stated formerly in Estate of Strong, 119 Cal. 663, 51 P. 1078. Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 6 Cal. 2d 35, 53 P.2d 127.

— Idaho.

The orders and decrees of the probate court import verity and cannot be attacked collaterally. Walker Bank & Trust Co. v. Steely, 54 Idaho 591, 34 P.2d 56.

Order settling final account of an executor, administrator or guardian is a judgment in rem, final and conclusive against all the world after the time for appeal has expired. Short v. Thompson, 56 Idaho 361, 55 P.2d 163.

A court of general jurisdiction is one whose judgment is conclusive until modified or reversed on direct attack, and which court is competent to decide on its own jurisdiction, and exercise it to a final judgment, without setting forth the evidence. The record of such a court is absolute verity. The probate court of Idaho, as far as its jurisdiction in regard to probate and guardian matters is concerned, is such a court. Short v. Thompson, 56 Idaho 361, 55 P.2d 163, the court reiterating its earlier statement enunciated in Clark v. Rossier, 10 Idaho 348, 78 P. 358, 3 Ann. Cas. 231.

Probate courts are courts of record in probate matters and have exclusive original jurisdiction in all matters of probate, and they have jurisdiction to hear and decide upon petitions and motions to set aside their decrees. Snow v. Probate Court of Jefferson County, 60 Idaho 611, 95 P.2d 844.

— Iowa.

The probate court is a court of general jurisdiction in Iowa. In re Kladivo's Estate, 188 Iowa 471, 176 N. W. 262; In re Estate of Riese, 230 Iowa 397, 297 N. W. 796.

Probate powers are distinct from law and equity, although all these powers may be exercised by the same court as a court of general jurisdiction. In re Watter's Estate, 201 Iowa 884, 208 N. W. 281.

A district court has jurisdiction of an application of an administratrix and distributees for authority to continue business conducted by deceased on leased premises. In re Groom's Estate, 204 Iowa 746, 216 N. W. 78.

The district court has original and exclusive jurisdiction of matters in probate, such as the appointment of an administrator. Reidy v. Chicago, B. & Q. Ry. Co., 216 Iowa 415, 249 N. W. 347.

The jurisdiction of the probate court is separate and distinct from its ordinary law and equity jurisdiction. Coulter v. Petersen, 218 Iowa 512, 255 N. W. 684.

Where estate was pending in probate court, which had custody and control of property thereof, beneficiaries under will were not permitted to maintain action in court of equity in their attempt to secure prompt and early settlement of estate, and were obliged to make such request to probate court. First Methodist Episcopal Church of Ottumwa v. Hull, 225 Iowa 306, 280 N. W. 531.

A probate court is charged with duty of seeing that estates are properly and promptly administered, and that its officers act efficiently and effectively, and if, because of conflicting interests, they cannot so act, it has inherent power to appoint officer to see that all parties are protected, and no rights are lost because of inaction. Jackson v. Jones, 231 Iowa 106, 300 N. W. 668.

— Montana.

Heirship proceedings in Montana are committed to the district courts with all the power, authority and jurisdiction made inherent in such courts by the Constitution and statutes; "all matters of probate and, necessarily, the administration of all laws relating thereto, are under the original jurisdiction of the district courts, as such," the court reiterating its former language as expressed in Thelen v. Vogel, 86 Mont. 33, 281 P. 753. In re Baxter's Estate, 101 Mont. 504, 54 P.2d 869.

Under the present Montana system all probate matters come within the jurisdiction of district courts; the courts of California have been confronted and embarrassed from time to time, as have also the courts of Montana, by questions involving the jurisdiction and power of the district court when sitting as a court of probate; reliance placed on the old theory that the district court, when acting in probate matters, is a court of limited jurisdiction, is without merit; there is no dual personality in the court; and a district judge, when acting in ordinary judicial matters, is still not subject to the ancient frailties inherent in the old probate judge when exercising probate powers. In re Baxter's Estate, 101 Mont. 504, 54 P.2d 869.

A. L. R. notes.

Who entitled to appeal from decree admitting will to probate or denying probate, 88 A. L. R. 1158.

102-1-7. Jurisdiction Properly Acquired, Irregularities Do Not Invalidate Subsequent Orders and Decrees.

No order or decree affecting the title to real property, heretofore or hereafter made in any probate or guardianship matter, shall be held to be void at the suit or instance of any person claiming adversely to the title of the decedent or ward, or under a title not derived from or through the decedent or ward, on account of any want of notice, defect or irregularity in the proceedings, or of any defect or irregularity in such order or decree, if it appears that, before the order or decree was entered, the executor, administrator or guardian, as the case may be, was appointed by a court of competent jurisdiction upon such notice as was or may be prescribed by law; and in a probate matter in which a competent court shall have appointed an executor, administrator or guardian upon due notice, no objection to any subsequent order or decree therein can be taken by any person claiming under the deceased or under the ward, on account of any such want of notice, defect or irregularity, in any other manner than on direct application to the same court, made at any time before distribution, or on appeal.

(C. L. 17, § 7559.)

History.

This section is practically identical with R. S. 1898, § 3779; Comp. Laws 1907, § 3779.

Cross-references.

Validity of clerk's orders, 102-2-4; conclusiveness of decrees, 102-11-37, 102-12-9, 102-14-12; jurisdictional facts need not be recited, 102-14-15.

1. Acquisition of jurisdiction and notice.

Probate proceedings are deemed to be proceedings in rem, and court acquires jurisdiction of property of estate and of all persons who have any interest in property by notice required to be given for appointment of administrator or executor, and other notices provided for are not jurisdictional, and disregard thereof is mere irregularity and may be assailed, in absence of fraud, only in direct proceeding. Barrette v. Whitney, 36 U. 574, 106 P. 522, 37 L. R. A. (N. S.) 368. (Straup, C. J., dissenting.)

Where statutory notice of hearing of petition for letters was given as required by this section, failure to give notice of final settlement and distribution, held, not to affect validity of decree of final distribution except upon direct proceeding. Barrette v. Whitney, 36 U. 574, 106 P. 522, 37 L. R. A. (N. S.) 368. (Straup, C. J., dissenting.)

2. Validity of orders and decrees.

Where court acquired jurisdiction of person and estate of minor, contention that it made an order allowing fee to

attorneys, employed to represent minor in personal injury suit, without hearing or taking any evidence relative to value of services rendered, could not be sustained. Erickson v. McCullough, 91 U. 159, 63 P.2d 595, 109 A. L. R. 332.

3. Presumptions.
Probate court, having acquired jurisdiction of cause, its orders and judgments are presumed to be based upon evidence, stipulations or proceedings sufficient to support such orders or judgments. Erickson v. McCullough, 91 U. 159, 63 P.2d 595, 109 A. L. R. 332.

4. Relief against orders and decrees.

5. — in general.
Decree of final distribution rendered without notice could be attacked by application to probate court by one having interest, though as general rule only parties to record may prosecute appeal. Barrette v. Whitney, 36 U. 574, 106 P. 522, 37 L. R. A. (N. S.) 368. (Straup, C. J., dissenting.)

6. — equitable relief in case of fraud.
In action to have judgments and decrees obtained in probate proceedings by fraud declared void, wherein it appeared that husband had left wife and children, and had eloped with young woman with whom he lived until his death, and that such woman had fraudulently represented that she was lawful wife of decedent, was appointed administratrix, and probated estate, held court of equity had jurisdiction to grant relief against such probate proceedings and to charge administratrix' bond. Weyant v. Utah Savings & Trust Co., 54 U. 181, 182 P. 189, 9 A. L. R. 1119.

102-1-8. Id. No Collateral Attack.

An objection to any paper, petition, decree or order in any probate or guardianship matter, for an erroneous or defective statement or determination of any fact necessary to jurisdiction which actually existed, or for an omission to find or state any such fact in such paper, petition, decree or order, is available only on direct application to the same court, or on appeal. (C. L. 17, § 7560.)

History.
This section is identical with R. S. 1898, § 3780; Comp. Laws 1907, § 3780.

Cross-references.
All interested parties have right to be heard, 102-14-14; correction of mistakes in settlements, 102-11-37, 102-14-23.

1. Conclusiveness.
A decree of the probate court, by which the interest of certain heirs in the estate of their father was distributed to one of the judgment creditors of the heirs, was conclusive, where no appeal was taken, on the assignee for creditors of the heirs. Snyder v. Murdock, 26 U. 233, 73 P. 22.

2. Collateral attack.
Where court acquired jurisdiction of person and estate of minor, questions relating to contract for fees of attorneys employed by guardian to represent minor in personal injury suit, and power of guardian to bind infant, became collateral and could be successfully urged in collateral attack only if order making appointment of guardian was void for want of jurisdiction. Erickson v. McCullough, 91 U. 159, 63 P.2d 595, 109 A. L. R. 332.

CHAPTER 2

POWERS OF CLERK *

102-2-1. Enumerated.
102-2-2. Clerk's Orders—Record of.
102-2-3. Id. Review of.
102-2-4. Id. Have Force and Effect as Court's Orders.

* History of act. This chapter was R. S. 1898, Title 74, Ch. 2, p. 828; Comp. Laws 1907, Title 89, Ch. 2, p. 1209.

102-2-1. Enumerated.

The clerk of the district court shall have and exercise within his county the power and jurisdiction of the court, and of the judge thereof, as follows:

(1) He may consider petitions for the appointment of administrators, executors and guardians, and for the probate of wills, and any other petition or written motion filed in any probate or guardianship matter, and may set the time for the hearing of the same and prescribe the notice to be given.

(2) He may fix the amount of the bond of the executor, administrator or guardian, and for that purpose may take evidence as to the property, rents, issues and profits.

(3) He may in all cases examine sureties, and approve bonds and undertakings.

(4) He may appoint a special administrator, and fix the amount of his bond.

(5) He may appoint appraisers.

(6) He may designate the terms of, and enter the order for, publication of notice to creditors.

(7) He may grant an order of sale of perishable property.

(C. L. 17, § 7561.)

Comparable provisions.

Iowa Code 1939, § 11832 (similar to opening paragraph herein, and specifically enumerating clerk's duties).

Mont. Rev. Codes, § 10376 as amended by Laws of 1937 (enumerating clerk's functions; he may make necessary orders and issue notices of hearing, file and approve bonds, claims, accounts except final accounts when no objections are made or filed; in absence of judge he may grant letters on hearing, and may make orders).

Cross-references.

Notices generally, 102-14; validity of orders and decrees generally, 102-1-7; fees of clerk, 28-2-2; to keep probate records, 19-17-2.

102-2-2. Clerk's Orders—Record of.

All orders made and proceedings had by the clerk under the provisions of the next preceding section shall be by him spread at length upon the minutes of the court. (C. L. 17, § 7562.)

102-2-3. Id. Review of.

Any person aggrieved by any order made or entered by the clerk under the powers conferred in this chapter may have the same reviewed in court at the same or at the next term, and not afterwards, upon motion filed and upon such notice as the court may prescribe. Upon the filing of such notice the clerk shall place the cause or proceeding on the calendar, and the matter shall stand for hearing or trial de novo in open court. (C. L. 17, § 7563.)

Comparable provisions.

Iowa Code 1939, § 11834 (similar; aggrieved person may have clerk's order reviewed in court, on motion filed at next term and not afterwards, unless upon good cause shown within one year).

102-2-4. Id. Have Force and Effect as Court's Orders.

The records, orders and judgments made and entered by the clerk as hereinbefore provided, and not reversed, set aside or modified by the court, shall stand and be of the same force, validity and effect, and shall be entitled to the same faith and credit, as if made by the court.

(C. L. 17, § 7564.)

Comparable provisions.

Iowa Code 1939, § 11836 (identical, coupled with following concluding phrase: "or by the judge thereof").

Mont. Rev. Codes, § 10376 as amended (court or judge may at any time within 30 days thereafter set aside or modify clerk's orders, but, unless so set aside or modified, they have same effect as if made by judge or court).

CHAPTER 3

PROBATE OF WILLS *

102–3–1. Custodian of Will Must Surrender—Liability.
102–3–2. Petition for Probate—By Whom and When.
102–3–3. Id. Contents.
102–3–4. Executor Named Forfeits Rights When.
102–3–5. Notice and Hearing.
102–3–6. Nuncupative Wills—Petition for Probate.
102–3–7. Contests Before Probate—Grounds, Notice, Pleadings.
102–3–8. Proof by Subscribing Witnesses.
102–3–9. Id. Testimony to Be Reduced to Writing.
102–3–10. Certificate of Proof.
102–3–11. Will to Be Recorded—Record of Testimony to Be Filed.
102–3–12. Contests After Probate—Limitation of Action.
102–3–13. Id. Citation to Show Cause Against Revocation.
102–3–14. Letters Testamentary, When to Issue.
102–3–15. Who Incompetent to Act as Executor.
102–3–16. Objection to Executor Named.
102–3–17. Competency of Woman to Act as Executrix.
102–3–18. Executor of an Executor.
102–3–19. When Executor Named Is a Nonresident or a Minor.
102–3–20. Letters Testamentary — Form.
102–3–21. Letters of Administration with Will Annexed — Form.
102–3–22. Foreign Wills—May Be Admitted to Probate.
102–3–23. Id. Proceedings on Production.
102–3–24. Id. Hearing and Proof.
102–3–25. Lost or Destroyed Wills—Establishing—Notice.
102–3–26. Id. Proof of.
102–3–27. Id. Certification and Record of Proof.

* **History of act.** This chapter was R. S. 1898, Title 74, Ch. 3, p. 829; Comp. Laws 1907, Title 89, Ch. 3, p. 1210.

102–3–1. Custodian of Will Must Surrender—Liability.

Every custodian of a will, within thirty days after receipt of information that the maker thereof is dead, must deliver the same to the district court having jurisdiction of the estate or to the executor named therein. Any person who fails to produce the same after receiving reasonable notice so to do may be committed to jail until he does, and shall be liable for all damages occasioned by his failure.

(C. L. 17, § 7565.)

Comparable provisions.

Cal. Probate Code, § 320, Idaho Code, § 15–201, Mont. Rev. Codes, § 10020 (substantially identical with first sentence herein; "* * * must deliver same to the probate court * * *"; coupled with the following sentence: "A failure to comply with the provisions of this section makes the person failing responsible for all damages sustained by anyone injured thereby"; California provision's concluding sentence reads as follows: "Failure to do so makes such person responsible for all damages sustained by anyone injured thereby").

Iowa Code 1939, § 11862 (substantially identical, except that phrase "within thirty days" is omitted; reads: "* * * as soon as he is informed of the death * * *").

Cross-references.

Wills and succession, Title 101.

Decisions from other jurisdictions.

— California.

Unprobated holographic will was not admissible to prove title of person named therein as devisee. McMillan v. Boese, 45 Cal. App.2d 764, 115 P.2d 37.

— Iowa.

Neither the Federal nor Iowa Constitution secures to anyone the right to take property by inheritance. Boyer v. Emerson, 191 Iowa 900, 183 N. W. 327.

Ownership of both real and personal intestate property is fixed by statutes of descent, and neither administration of estate nor distribution of property thereunder adds or creates any title or gives any new title, but merely ascertains property and particular person among distributees to whom it belongs. Reichard v. Chicago, B. & Q. R. Co., 231 Iowa 563, 1 N. W. 2d 721.

A. L. R. notes.

Constitutionality, construction, and application of statute requiring production of wills for probate or declaring consequences of failure or delay in that regard, 119 A. L. R. 1259; suppression of will, or agreement for suppression, as contrary to public policy or statute in that regard, 117 A. L. R. 1249.

102–3–2. Petition for Probate—By Whom and When.

Any person interested may, at any time after the death of the testator, petition the court to have the will proved. (C. L. 17, § 7566.)

A. L. R. notes.

Estoppel to offer for probate, or to claim under will because of prior claim based upon deceased's alleged intestacy or another purported will, 135 A. L. R. 1222; probate of will or proceedings subsequent thereto as affecting right to probate later codicil or will, and rights and remedies of parties thereunder, 107 A. L. R. 249.

102–3–3. Id. Contents.

A petition for the probate of a will should show:

(1) The jurisdictional facts.

(2) Whether the person named as executor consents to act or renounces his right to letters testamentary.

(3) The names, ages and residences of the heirs, legatees and devisees of the decedent, so far as known to the petitioner.

(4) The probable value and character of the property of the estate.

(5) The name of the person for whom letters testamentary are prayed. (C. L. 17, § 7567.)

Comparable provisions.

Cal. Probate Code, § 326, Mont. Rev. Codes, § 10022 (substantially identical, coupled with the following concluding sentence: "No defect of form, or in the statement of jurisdictional facts actually existing, shall make void the probate of a will").

Idaho Code, § 15–203 (substantially identical except as to concluding sentence herein).

102–3–4. Executor Named Forfeits Rights When.

If the person named in a will as executor, for thirty days after he has knowledge of the death of the testator and that he is named as executor, fails to petition for the probate of the will and for letters testamentary, he may be held to have renounced his right to letters, and the court may appoint any other competent person administrator, unless good cause for the delay is shown. (C. L. 17, § 7568.)

History.

This section is identical with R. S. 1898, § 3788; Comp. Laws 1907, § 3788.

Comparable provisions.

Cal. Probate Code, § 324, Idaho Code, § 15–204, Mont. Rev. Codes, § 10023 (substantially identical).

1. Discretion of court.

Failure to make timely application for letters testamentary leaves it in the court's discretion whether he should appoint the person having the preferential right or some other competent person. In re Love's Estate, 75 U. 342, 353, 285 P. 209.

102–3–5. Notice and Hearing.

When the petition is filed it must be set for hearing, notice of which shall be given by publication or by posting as the court or clerk may

direct and by the mailing of notices to the heirs, and to the executor, if he is not the petitioner. (C. L. 17, § 7569.)

History.
This was section 3789 of R. S. 1898, before its amendment. It appears in Comp. Laws 1907 as section 3789, and is identical with present section except for addition of words "or clerk."

1. Extent of court's jurisdiction.
While a probate court may not attempt to construe a will upon a petition for its probate, it may examine the offered document to determine whether or not it is in fact a will. In re Love's Estate, 75 U. 342, 360, 285 P. 299.

102–3–6. Nuncupative Wills—Petition for Probate.

Nuncupative wills may be admitted to probate at any time after the decedent has been dead ten days and within six months after the testamentary words were spoken, on petition and notice as provided for the probate of written wills. The petition, in addition to the jurisdictional facts, should allege that the testamentary words or the substance thereof were reduced to writing within thirty days after they were spoken, which writing must accompany the petition.

(C. L. 17, § 7570.)

Comparable provisions.
Cal. Probate Code, § 325 (nuncupative will must be offered within six months after testamentary words were spoken, and words or substance thereof must have been reduced to writing within 30 days after they were spoken; such writing must be filed with petition for probate).

Idaho Code, § 15–234 (substantially the same; may be admitted to probate "at any time within six months after the testamentary words are spoken ° ° °").

Cross-references.
Nuncupative wills, 101-1-16 to 101-1-18.

102–3–7. Contests Before Probate—Grounds, Notice, Pleadings.

If any one appears to contest the will, he must file written grounds of opposition to the probate thereof, and serve a copy on the petitioner and on the proposed executor, if he is not the petitioner, and shall mail notices of such contest to the heirs. Any one or more of such persons may demur thereto upon any of the grounds of demurrer provided in the code of civil procedure. If the demurrer is sustained, the court must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may, within such time as the court may allow, jointly or separately answer the contestant's grounds, traversing or otherwise obviating or avoiding the objections.

(C. L. 17, § 7571.)

History.
This section was Comp. Laws 1876, § 751. It assumed its present form in 2 Comp. Laws 1888, § 4002, and that section does not differ materially from the present one. The present section is practically identical with R. S. 1898, § 3791; Comp. Laws 1907, § 3791, except for addition of words "within such time as the court may allow."

Comparable provisions.
Idaho Code, § 15–213, Mont. Rev. Codes, § 10032 (include similar provision).

Cross-references.
Grounds for demurrer, 104-8-1.

1. Nature of action.
A will contest is a law case; it is regarded as an action at law. In re Hanson's Estate, 87 U. 580, 52 P.2d 1103; In re Dong Ling Hing's Estate, 78 U. 324, 329, 2 P.2d 902; In re Ford's Estate, 70 U. 456, 261 P. 15; In re Swan's Estate, 61 U. 410, 170 P. 452; In re Frandsen's Will, 60 U. 156, 167 P. 362; In re Hanson's Will, 50 U. 207, 167 P. 256; Anderson v. Anderson, 43 U. 26, 134

P. 553; In re Whitaker's Estate, 61 U. 577, 217 P. 248.

An action to contest probate of will on ground of undue influence is action at law. Miller v. Livingstone, 31 U. 415, 88 P. 338.

2. Parties to contest.

Contestant of will must be an interested party, and failure to affirmatively show this can be reached by a general demurrer. In re Goldsberry Estate, 95 U. 379, 81 P.2d 1106, 117 A. L. R. 1444.

If one is an heir of deceased he has right to contest the will, otherwise he is a stranger to the proceeding. In re Dong Ling Hing's Estate, 78 U. 324, 328, 2 P.2d 902.

3. Jury trial.

A will contest is a law action triable by jury if either of the parties chooses to have it so tried. In re Dong Ling Hing's Estate, 78 U. 324, 329, 2 P.2d 902.

4. Evidence.

5. — in general.

In will contest, testimony as to inherent brain weakness is admissible although observed years before making of will, but infirmities coming from old age must be observed in fair proximity to date of execution of will. In re Hanson's Estate, 87 U. 580, 52 P.2d 1103.

6. — circumstantial evidence.

Since it is not usually possible in will contests to produce direct evidence of statements and conduct which one accused of undue influence has used on decedent, usual way is to give surrounding circumstances from which deductions can be made. In re Hanson's Estate, 87 U. 580, 52 P.2d 1103.

7. — expert and opinion evidence.

In will contest, opinions of lay witnesses as to mental condition cannot be given unless one offering opinion has had personal acquaintanceship with testator and unless witness details underlying facts upon which his opinion is based. In re Hanson's Estate, 87 U. 580, 52 P.2d 1103.

8. — privileged communications.

Testimony of former wife as to injury of deceased's private parts and that she thought they were diseased, held inadmissible as privileged communications in will contest wherein it was contended that wife of deceased, who was such at time of his death, had submitted to sexual relations of a perverted nature with deceased both before and after her marriage to him, and hence, unduly influenced him in preparation of his will. In re Ford's Estate, 70 U. 456, 261 P. 15.

Communication to be privileged between husband and wife under 104-49-3 must be such as to pertain to confidence of marriage relation, and testimony of former wife in will contest as to deceased's mania for sexual perversion, his forcing her to submit thereto and conversation after consummation of such act, was admissible on issue of whether deceased was unduly influenced by woman who was deceased's wife at time of his death, and who allowed deceased to have sexual relations with her of a perverted nature both before and after her marriage to him. In re Ford's Estate, 70 U. 456, 261 P. 15.

9. — provisions of former will.

In will contest based on duress, fraud, or undue influence, provisions contained in former will may become very material in determining issue, and changes made in later will may therefore be of some probative force and should not be excluded from consideration, unless it is made clear beyond reasonable doubt by all evidence and circumstances that changes could not affect result of contest. In re Young's Estate, 33 U. 382, 94 P. 731, 17 L. R. A. (N. S.) 108, 126 Am. St. Rep. 843, 14 Ann. Cas. 596.

10. — weight and sufficiency.

The preponderance of evidence rule obtains in will contests. In re Hanson's Will, 50 U. 207, 167 P. 256.

In a will contest, where protestant alleges that will was executed under undue influence, that testator was insane, etc., he has burden of proving such allegations by a preponderance of the evidence. In re Hanson's Will, 50 U. 207, 167 P. 256.

In will contest wherein proponent was deceased's second wife and contestants were an adopted daughter and a son by deceased with his first wife from whom he had been divorced, evidence, including evidence of sexual relations of a perverted nature with proponent before and after marriage, was insufficient on issues of undue influence and lack of testamentary capacity to sustain verdict of jury that will was not that of deceased. In re Ford's Estate, 70 U. 456, 261 P. 15.

Evidence in will contest held to support findings of undue influence. In re Hanson's Estate, 87 U. 580, 52 P.2d 1103.

11. — presumptions on appeal.

Where action to contest will is tried to court without jury, supreme court must presume that court ignored incompetent evidence in making finding if there is any substantial evidence to support it. In re Hanson's Estate, 87 U. 580, 52 P.2d 1103.

12. —burden of proof.

If answer of petitioner traverses the grounds relied on by contestants, they have burden of sustaining issues thus formed. In re Estate of Van Alstine, 26 U. 193, 72 P. 942.

Where contest is initiated before will is formally admitted to probate, proponent must produce his proof respecting mental capacity of testator at time of execution of will, and the due execution thereof, unless these matters are admitted by protestant. When proponent has made a prima facie case by making proof of the foregoing preliminary matters, then burden of proof is upon protestant to overcome the prima facie case, and to produce proof respecting the matters presented in his protest. In re Hanson's Will, 50 U. 207, 167 P. 250.

13. Open and close.

The side that carries the burden of proof has the right to open and close the argument. In re Estate of Van Alstine, 26 U. 193, 208, 72 P. 942.

14. New trials.

As this is a law case, the contestants may be entitled to a new trial, where they have moved therefor in court below. In re Whitaker's Estate, 61 U. 577, 217 P. 248.

15. Costs and expenses.

Where contestants incurred costs in successful effort to prevent admission of will to probate, in an estate which they affirmatively alleged to be insolvent, they were not entitled to have costs incurred by them charged against estate; costs should have been disallowed and all parties required to pay costs incurred by them respectively. In re Jones' Estate, 59 U. 99, 202 P. 206.

Expense incurred by special administrator in contest of will held no special concern of administrator, and court would not allow charge against estate for any amount paid or incurred in such contest. In re Jones' Estate, 59 U. 99, 202 P. 206.

16. Appellate review.

Will contests are regarded as actions at law, and findings of trial court, upon questions of fact in case there is substantial evidence to support findings, are conclusive on appeal. In re Swan's Estate, 51 U. 410, 170 P. 452; In re Hanson's Estate, 87 U. 580, 52 P.2d 1103; In re Estate of Yowell, 75 U. 312, 285 P. 285.

Judgment of district court denying will to probate on ground of fraud and undue influence would not be disturbed where supported by substantial evidence. In re Jones' Estate, 59 U. 99, 202 P. 206.

Proceeding to contest will is action at law so that assignment of error that evidence was insufficient to support verdict would not be sustained if there was substantial evidence to support verdict. In re Ford's Estate, 70 U. 456, 261 P. 15.

A. L. R. notes.

Compromise or settlement of controversy over will as changing nature of interest or estate under will, 5 A. L. R. 1384.

Consideration for compromise of family dispute over estate, 38 A. L. R. 734.

Contest based on probable cause and in good faith as within provision of will forfeiting share of contesting beneficiary, 58 A. L. R. 1555.

Contract to refrain from contesting will, 55 A. L. R. 811.

Creditor of heir, right to contest will, 46 A. L. R. 1490.

Form and particularity of allegations to raise issue of undue influence, 107 A. L. R. 832.

Legal capacity of one whom testator had agreed to adopt, but whose adoption had not been effected, to contest will, 112 A. L. R. 1422.

Necessity of allegations that contestant of will is interested party, 117 A. L. R. 1455.

Right of assignee of expectancy to contest will, 112 A. L. R. 84.

Right of creditor of heir to contest will, 128 A. L. R. 963.

Right of heirs, next of kin, or others who would have benefited by denial of probate of will, to share in the consideration for an agreement to which they were not parties, to withdraw objections to probate, 120 A. L. R. 1495.

Right of one to contest will as passing to his assignee, personal representative, heir or next of kin; revival of pending contest upon death of contestant, 129 A. L. R. 324.

Right of trustee named in earlier will to contest later will, 112 A. L. R. 659.

Right to settle or compromise will contest, and validity of agreement to induce others to do so, 81 A. L. R. 1187.

Validity and applicability of provision of will or trust instrument forfeiting share of contesting beneficiary as affected by probable cause and good faith in contest, 125 A. L. R. 1136.

Validity of provision of will for forfeiture in case of contest, 67 A. L. R. 52.

What constitutes contest or attempt to defeat will within provision thereof forfeiting share of contesting beneficiary, 26 A. L. R. 764.

102–3–8. Proof by Subscribing Witnesses.

If the will is not contested, it may be admitted to probate on the testimony of one subscribing witness. If the will is contested, all the subscribing witnesses who are present in the county and who are of sound mind must be produced and examined, and the death, absence or insanity of any of them must be satisfactorily shown. If none of the subscribing witnesses resides in the county at the time appointed for proving the will, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and as evidence of the execution it may admit proof of the handwriting of the testator and of the subscribing witnesses or any of them.

(C. L. 17, § 7572.)

History.

This section is practically identical with R. S. 1898, § 3792; Comp. Laws 1907, § 3792.

Comparable provisions.

Idaho Code, § 15–216, Mont. Rev. Codes, § 10035 (substantially identical provisions, applicable, when will is contested).

Cross-references.

Attorney for absent parties, 102–14–25; subscribing witnesses, 101–1–5, 101–1–7.

1. Necessity for prima facie case.

When will is offered for probate, even though there is no contest, proponents must make prima facie case by offering some evidence of mental capacity of testator and of absence of fraud and undue influence. In re Whitaker's Estate, 61 U. 577, 217 P. 248.

2. Competency of subscribing witnesses.

The subscribing witnesses must determine the sanity of the testator. In re Swan's Estate, 51 U. 410, 170 P. 452. A subscribing witness may testify as to mental condition of the testator at time of subscribing to will without necessity of laying foundation for conclusion. In re Hanson's Estate, 87 U. 580, 52 P.2d 1103.

3. Approved method of procedure.

Where there is no contest, the testimony of the subscribing witnesses to will is usually taken either by deposition or by written answers in open court, or answers are made to the formal statutory questions propounded to such witnesses. Where there is a contest, however, court may impanel the jury before hearing the evidence respecting the due execution of the will, etc., and witnesses may be compelled to answer all questions respecting due execution of will, etc., the protestants having the privilege of cross-examination, as in other cases. In re Hanson's Will, 50 U. 207, 167 P. 256.

4. Presumptions and burden of proof.

The law of this state is not satisfied with mere presumption of sanity, but requires affirmative proof of fact. In re Swan's Estate, 51 U. 410, 170 P. 452.

Burden of proof is on proponent of will to establish by preponderance of the evidence both the lawful execution by the testator, and attestation thereof by the witnesses. In re Dong Ling Hing's Estate, 78 U. 324, 329, 2 P.2d 902.

A. L. R. notes.

Proof, or possibility of proof, of will without testimony of attesting witness as affecting application of statute relating to invalidation of will, or of devise or legacy, where attesting witness is beneficiary under will, 133 A. L. R. 1286.

102–3–9. Id. Testimony to Be Reduced to Writing.

The testimony of each witness shall be reduced to writing and signed by him, and the same shall be evidence in any subsequent contests concerning the validity of the will or the sufficiency of the proof thereof, if the witness is dead or has permanently removed from the state.

(C. L. 17, § 7573.)

History.
This section is identical with R. S. 1898, § 3793; Comp. Laws 1907, § 3793.

Comparable provisions.
Idaho Code, § 15–217, Mont. Rev. Codes, § 10036 (substantially identical).

Cross-references.
As to approved method of procedure, see 102–3–8.

102–3–10. Certificate of Proof.

If the court is satisfied, upon the proof taken or from the facts found by the jury, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind and not acting under duress, menace, fraud or undue influence, a certificate of the proof and of the facts found, signed by the judge and attested by the seal of the court, must be attached to the will. (C. L. 17, § 7574.)

History.
This section is identical with R. S. 1898, § 3794; Comp. Laws 1907, § 3794.

Comparable provisions.
Idaho Code, § 15–218, Mont. Rev. Codes, § 10037 (substantially identical).
Iowa Code 1939, § 11867 (similar as to certificate, signed by clerk and attested by seal of court).

Cross-references.
Seal required, 20–7–16.

1. Nature of proceeding to contest.
An action to contest probate will on ground of undue influence is action at law. Miller v. Livingstone, 31 U. 415, 88 P. 338. For other citations, see 102–3–7.

102–3–11. Will to Be Recorded—Record of Testimony to Be Filed.

The will and the certificate of the proof thereof must be filed and recorded by the clerk, and the same, when so filed and recorded, shall constitute part of the record in the cause or proceeding. All testimony reduced to writing shall be filed by the clerk. (C. L. 17, § 7575.)

History.
This section is identical with R. S. 1898, § 3795; Comp. Laws 1907, § 3795.

Comparable provisions.
Idaho Code, § 15–219 (similar in purport).
Iowa Code 1939, § 11868 (similar, except as to concluding sentence herein).
Mont. Rev. Codes, § 10038 (substantially the same).

1. Effect of recordation of will.
In view of this section making will part of record, decree which did not set out will in full but provided for execution of the trust set up in will and further provided that trustee was directed to invest estate according to terms of will was proper, since will can be resorted to to explain and interpret decree. In re Efferson's Estate, 70 U. 258, 259 P. 919.

102–3–12. Contests After Probate—Limitation of Action.

Any person who has not contested a will, or who has contested by attorney appointed by the court without his knowledge, may contest the same or the probate thereof at any time within one year after the admission to probate, and not afterward, except that infants and persons of unsound mind shall be entitled to the period of one year after their respective disabilities are removed in which to contest; *provided*, that this section shall not be construed to permit any heir, devisee or legatee, in the event of the annulment of a will or the annulment of the probate thereof, to pursue the property of the decedent or any part of the same in the hands of any person who purchased such property prior to such revocation in good faith and for value at executors' or administrators' sale, or from any heir, devisee, legatee or distributee after distribution. (C. L. 17, § 7576.)

History.
This section is practically identical with R. S. 1898, § 3796; Comp. Laws 1907, § 3796.

Comparable provisions.
Idaho Code, § 15–223, Mont. Rev. Codes, § 10042 (any person interested may, within one year [Mont.], within eight months [Idaho] after probate, contest same or validity of the will).

1. Rights of proponent.
In suit to contest will in which testator left entire property to Catholic school and made priest executor, where contestant showed that priest visited testator at hospital and called attorney to draw will, proponent on cross-examination could show that he visited testator in response to request by third person and that attorney was called because testator desired to make arrangements of his affairs and the substance of conversation with reference to disposal of his property, since proponent had right to show entire transaction after contestant proved only part of it. In re Bryan's Estate, 82 U. 390, 25 P.2d 602.

2. Evidence.
Burden of proof is on contestant to show mental incapacity and undue influence, and the proponent of will can meet this by proof of a negative; that is, that he did not procure the execution of the will by undue influence, and that testator was not mentally incapable. In re Bryan's Estate, 82 U. 390, 25 P.2d 602, discussing at length rule as to presumptions and burden of proof.
Where contestant proved that priest visited testator in hospital and called attorney who drew will in which priest was made executor and property was given to Catholic school, there was insufficient evidence of undue influence so that trial court properly granted motion for nonsuit. In re Bryan's Estate, 82 U. 390, 25 P.2d 602.

A. L. R. notes.
Compromise or settlement of controversy over will as changing nature of interest or estate under will, 5 A. L. R. 1384.
Consideration for compromise of family dispute over estate, 38 A. L. R. 734.
Contest based on probable cause and in good faith as within provision of will forfeiting share of contesting beneficiary, 58 A. L. R. 1556.
Contract to refrain from contesting will, 55 A. L. R. 811.
Creditor of heir, right to contest will, 46 A. L. R. 1490.
Form and particularity of allegations to raise issue of undue influence, 107 A. L. R. 832.
Legal capacity of one whom testator had agreed to adopt, but whose adoption had not been effected, to contest will, 112 A. L. R. 1422.
Necessity of allegations that contestant of will is interested party, 117 A. L. R. 1455.
Right of assignee of expectancy to contest will, 112 A. L. R. 84.
Right of creditor of heir to contest will, 128 A. L. R. 963.
Right of one to contest will as passing to his assignee, personal representative, heir or next of kin; revival of pending contest upon death of contestant, 129 A. L. R. 324.
Right of trustee named in earlier will to contest later will, 112 A. L. R. 659.
Right to settle or compromise will contest, and validity of agreement to induce others to do so, 81 A. L. R. 1187.
Validity and applicability of provision of will or trust instrument forfeiting share of contesting beneficiary as affected by probable cause and good faith in contest, 125 A. L. R. 1135.
Validity of provision of will for forfeiture in case of contest, 67 A. L. R. 52.
What constitutes contest or attempt to defeat will within provision thereof forfeiting share of contesting beneficiary, 26 A. L. R. 764.

102–3–13. Id. Citation to Show Cause Against Revocation.

Upon filing a petition for revocation citation must be issued to the executors of the will or to the administrators with the will annexed, and to all the legatees and devisees mentioned in the will, and to heirs residing in the state so far as known to the petitioner, or to their guardians, if any of them are minors, or to their personal representatives, if any of them are dead, requiring them to appear before the court on a day therein specified to show cause why the probate of the will should not be revoked. (C. L. 17, § 7577.)

Comparable provisions.
Cal. Probate Code, § 381, Idaho Code, § 15–224, Mont. Rev. Codes, § 10043 (substantially the same).

Cross-references.
Citation generally, 102–14–10.

102–3–14. Letters Testamentary, When to Issue.

The court admitting a will to probate, after the same is proved and allowed, must issue letters thereon to the persons named therein as executors who are competent to discharge the trust, unless objection is made as provided in this chapter. (C. L. 17, § 7578.)

History.
This section is identical with R. S. 1898, § 3798; Comp. Laws 1907, § 3798, except that formerly the words "who must appear and qualify" appeared after the word "trust."

Cross-references.
See annotations 102–3–15.
When person indicated but not named in will entitled to letters, 101–3–17.

A. L. R. notes.
Brevity of period after death of decedent as affecting propriety of grant of letters testamentary or of administration, 133 A. L. R. 1483.
Contract in consideration of renunciation of one's status, or right to appointment, as guardian, executor, administrator, trustee or other fiduciary, as contrary to public policy, 121 A. L. R. 677.
Eligibility of foreign corporation to appointment as executor, administrator, or testamentary trustee, 65 A. L. R. 1237.
Power of court to refuse letters testamentary to one named in will as executor in absence of specific statutory disqualification, 95 A. L. R. 828.
Premature granting of letters testamentary or of administration as affecting acts or proceedings thereunder, 113 A. L. R. 1398.
Right of guardian of infant or incompetent to appointment as executor or administrator as representative or substitute for infant or incompetent, 135 A. L. R. 585.

102–3–15. Who Incompetent to Act as Executor.

No person is competent to serve as an executor who, at the time the will is admitted to probate, is either:

(1) Under the age of majority;

(2) Convicted of an infamous crime; or,

(3) Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.

If the sole executor or all the executors are incompetent, or renounce or fail to apply for letters or to appear and qualify within thirty days after his or their appointment, letters of administration with the will annexed must be issued as provided for the granting of letters in cases of intestacy. (C. L. 17, § 7579.)

History.
This section is for the most part identical with R. S. 1898, § 3799; Comp. Laws 1907, § 3799.

Comparable provisions.
Cal. Probate Code, § 401 (substantially identical, except that closing paragraph herein is omitted; includes following sentence: "Marriage does not disqualify a woman from serving as executrix").
Idaho Code, § 15–302, Mont. Rev. Codes, § 10057 (substantially identical, except that following bracketed words are omitted from concluding paragraph: "* * * or to appear and qualify [within thirty days after his or their appointment] * * * must be issued [as provided for the granting of letters in cases of intestacy]"; however, in Montana provision there is included the following equivalent concluding clause: "* * * as designated and provided for the grant of letters in cases of intestacy").

1. Appointment.
Testator has province of appointing his own executors, and a person who might otherwise be disqualified can properly be appointed. Welsh, Driscoll & Buck v. Buck, 64 U. 579, 232 P. 911.

2. Qualifications.

The general rules governing qualifications of executors and administrators are set out in Farnsworth v. Hatch, 47 U. 62, 72, 151 P. 537.

A person is not disqualified to act as executor or administrator merely because he claims property which is also claimed by the estate. Farnsworth v. Hatch, 47 U. 62, 72, 151 P. 537.

Executor of an estate was not disqualified to act as such because he was stockholder in corporation which had claim against the estate. Welsh, Driscoll & Buck v. Buck, 64 U. 579, 232 P. 911.

A. L. R. notes.

Power of court to refuse letters testamentary to one named in will as executor in absence of specific statutory disqualification, 95 A. L. R. 828.

102–3–16. Objection to Executor Named.

Any person interested in a will may file objections in writing to granting letters testamentary to the persons named as executors, or any of them, and the objections must be heard and determined by the court. A petition may at the same time be filed for letters of administration with the will annexed. (C. L. 17, § 7580.)

Comparable provisions.

Idaho Code, § 15–303 (identical).

Mont. Rev. Code, § 10058 (substantially identical).

102–3–17. Competency of Woman to Act as Executrix.

When an unmarried woman, appointed executrix, marries, the court or a judge thereof may, upon the motion of any person interested in the estate, revoke her authority and appoint another person in her place. When a married woman is named in a last will as executrix, she may be appointed and may serve in every respect as a femme sole. (C. L. 17, § 7581.)

Comparable provisions.

Idaho Code, § 15–304, Mont. Rev. Codes, § 10059 (when unmarried woman, appointed as executrix, marries, her authority is not extinguished; second sentence is substantially the same).

Iowa Code 1939, § 11871 (married woman may act as "executor," independent of her husband).

102–3–18. Executor of an Executor.

No executor of an executor shall, as such, be authorized to administer on the estate of the first testator, but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed of the estate of the first testator left unadministered must be issued. (C. L. 17, § 7582.)

Comparable provisions.

Cal. Probate Code, § 406 (no executor of an executor shall, as such, be authorized to administer estate of first testator).

Idaho Code, § 15–305, Mont. Rev. Codes, § 10060 (identical).

Iowa Code 1939, § 12058 (executor or administrator has no authority to act in matter wherein his decedent was merely executor, administrator, or trustee).

Cross-references.

Authority to executor to appoint executor, 101–3–18; powers of administrator c. t. a., 102–11–2.

102–3–19. When Executor Named Is a Nonresident or a Minor.

Where a person absent from the state or a minor is named executor, if there is another executor who accepts the trust and qualifies, the latter may have letters testamentary and administer the estate until the return of the absentee, or until the majority of the minor, who may then

be admitted as joint executor. If there is no other executor, letters of administration with the will annexed must be granted; but the court may in its discretion revoke them on the return of the absent executor or the arrival of the minor at the age of majority. This section shall not be construed to prevent the court from appointing as executor any person appointed as such by a court of any other state, territory or foreign country. (C. L. 17, § 7583.)

History.
This section is practically identical with R. S. 1898, § 3803; Comp. Laws 1907, § 3803.

Comparable provisions.
Cal. Probate Code, § 405, Idaho Code, § 15-306, Mont. Rev. Codes, § 10061 (substantially identical except as to concluding sentence herein).

Cross-references.
One intended by testator to be named although not named as executor, 101-3-17.

1. Nonresidence of personal representative.
While mere nonresidence does not, under the terms of this section, disqualify a person as executor, provided he appears and qualifies and thus submits to court's jurisdiction, yet it is within discretion of probate court to appoint a resident administrator with will annexed, where nonresident failed to offer will for probate within time required by 102-3-4, the estate is small, and person named in will lives at great distance from this state. In re Love's Estate, 75 U. 342, 352, 285 P. 299.

A. L. R. notes.
Time and manner of taking advantage in action commenced or continued by foreign executor or administrator of his failure to qualify in state, 108 A. L. R. 1282.

102-3-20. Letters Testamentary—Form.

Letters testamentary must be substantially in the following form:

State of Utah, County of.....

The last will of ....., deceased, a copy of which is hereto annexed, having been proved and recorded in the district court in and for the county of ....., ..., who is named therein as such, is hereby appointed executor.

Witness, ..., clerk of the district court in and for the county of ....., Dated the..... day of....., 19....

By order of the Court.

....., Clerk.

(Seal) (C. L. 17, § 7584.)

Comparable provisions.
Idaho Code, § 15-309 (substantially identical: "* * * State of Idaho * * * proved and recorded in the probate court * * *").
Mont. Rev. Codes, § 10064 (substantially identical: "* * * State of Montana * * * proved and recorded in the district court * * *").

Cross-references.
When seal required, 20-7-16.

102-3-21. Letters of Administration with Will Annexed—Form.

Letters of administration with the will annexed must be substantially in the following form:

State of Utah, County of.....

The last will of ....., deceased, a copy of which is hereto annexed, having been proved and recorded in the district court in and for the county of .....,

and there being no executor named in the will (or as the case may be), ..., is hereby appointed administrator with the will annexed.

Witness, ..., clerk of the district court in and for the county of .....

Dated the ..... day of....., 19..

By order of the court.

....., Clerk.

(Seal) (C. L. 17, § 7585.)

Comparable provisions.

Idaho Code, § 15-310, Mont. Rev. Codes, § 10065 (substantially identical).

Cross-references.

When seal required, 20-7-16.

102-3-22. Foreign Wills—May Be Admitted to Probate.

Wills duly proved and allowed in any other state or any territory of the United States, or in any foreign country or state, may be allowed and recorded in any county in which the testator shall have left any estate. (C. L. 17, § 7586.)

Comparable provisions.

According to the 1941 Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings, the original act entitled "An Act Relative to the Probate in this State of Foreign Wills" was approved in 1892 and again in 1895, and was adopted by the states of Massachusetts, Michigan, New York, Rhode Island, Utah, Washington and Wisconsin. This act was superseded in 1915 by the "Uniform Foreign Probated Wills Act," which latter act was adopted by Illinois, Louisiana, Nevada, South Dakota, Tennessee and Wyoming.

Uniform Foreign Probated Wills Act, § 1 (will duly proved, allowed and admitted to probate outside of state may be allowed and recorded in proper court of any county in this state in which testator shall have left any estate).

Cal. Probate Code, § 360 (similar in purport).

Idaho Code, § 15-220 (similar).

Iowa Code 1939, § 11877 (will probated in any other state or country must be admitted to probate without notice required in case of domestic wills).

Mont. Rev. Codes, § 10039, as amended by Laws of 1939 (similar; amendment added, however, "or shall have been a resident at the time of his death").

Cross-references.

Validity of foreign will, 101-1-14; interpretation of foreign will, 101-3-21.

Decisions from other jurisdictions.

— California.

The words "a will" appearing in section 360 of the California Probate Code are comprehensive and sufficiently broad to include the will of a resident, as well as a nonresident, of California. In re Reynolds Estate, 217 Cal. 557, 20 P.2d 323.

A. L. R. notes.

Full-faith and credit provision as applying to decree of another state admitting a will to probate, 13 A. L. R. 498; probate in state where assets are found of will of nonresident which has not been admitted to probate in state of domicile, 119 A. L. R. 401.

102-3-23. Id. Proceedings on Production.

When a copy of such will and the probate thereof, duly authenticated, shall be produced by any person interested in the will with a petition for letters, the same must be filed, and the court or clerk must appoint a time for the hearing, of which notice must be given as hereinbefore provided for an original petition for the probate of a will. (C. L. 17, § 7587.)

Comparable provisions.

Uniform Foreign Probated Wills Act, § 2 (similar).

Idaho Code, § 15-221 (substantially the same).

Mont. Rev. Codes, § 10040 ("* * * and that no notice of the hearing of said petition need be given").

102–3–24. Id. Hearing and Proof.

If on the hearing it appears upon the face of the record that the will has been proved, allowed and admitted to probate in any other state or territory of the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate and shall have the same force and effect as a will first admitted to probate in this state, and letters testamentary or of administration shall issue thereon.

(C. L. 17, § 7588.)

Comparable provisions.

Uniform Foreign Probated Wills Act, § 3 (similar; phrase "to the satisfaction of the court" is used in lieu of "upon the face of the record").

Cal. Probate Code, § 362 (similar).

Idaho Code, § 15–222, Mont. Rev. Codes, § 10041 (substantially the same)

Cross-references.

Delivery of property to foreign representative, 102–12–22, 102–12–23.

102–3–25. Lost or Destroyed Wills—Establishing—Notice.

Whenever any will is lost or destroyed the court must take proof of the execution and validity thereof, and establish the same; notice to all persons interested being first given as prescribed in regard to proof of wills in other cases.

(C. L. 17, § 7589.)

History.

This section is identical with R. S. 1898, § 3809; Comp. Laws 1907, § 3809.

This section is also practically identical with 3 Remington's Rev. Stats. of Washington, § 1390. See In re Frandsen's Will, 50 U. 156, 162, 167 P. 362.

Comparable provisions.

Idaho Code, § 15–230, Mont. Rev. Codes, § 10049 (substantially identical, and coupled with the following sentence: "All the testimony given must be reduced to writing and signed by the witnesses").

1. Admissibility of copy of will.

The record of an unprobated will is not competent as independent evidence. But anyone who has compared the original with the record could, as a matter of course, testify to the correctness of the copy, and the copy could then be used as an examined copy of the original will. In re Frandsen's Will, 50 U. 156, 166, 167 P. 362.

A. L. R. notes.

Action for damages for destruction or spoliation of a will, 65 A. L. R. 1119.

102–3–26. Id. Proof of.

No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.

(C. L. 17, § 7590.)

History.

This section differs in no material respects from Comp. Laws 1876, § 769. And it is identical with R. S. 1898, § 3810; Comp. Laws 1907, § 3810.

This section is in force in various other states. See In re Frandsen's Will, 50 U. 156, 167 P. 362.

The section in California's Probate Code is not exactly like ours, but is the source thereof. 1941 Cal. Probate Code, § 350. But the section in Washington is almost identical. 3 Remington's Rev. Stats. of Washington, § 1390. The section in New York is similar, except that a correct copy or draft of the will, in establishing its provisions, is equivalent to one witness. 13 McKinney's Consolidated Laws of New York, § 204. See In re Frandsen's Will, 50 U. 156, 167 P. 362.

Comparable provisions.

Cal. Probate Code, § 350 (includes similar provision).

Idaho Code, § 15–231, Mont. Rev. Codes, § 10050 (identical).

1. Purpose of section.

The purpose of this section is to prevent the probate of wills that have been revoked by the testators and also to prevent probate of wills, unless it is shown that the proposed will existed at the death of the testators. The purpose of the section is to prevent spurious wills from being proved. In re Frandsen's Will, 50 U. 156, 161, 167 P. 362.

2. General construction of section.

This section is remedial, and hence should be given a fair and reasonable construction and application. In re Frandsen's Will, 50 U. 156, 162, 167 P. 362.

3. Applicability of section.

When it is once shown that a testator is bereft of the power either to change or revoke an existing will, and it is further shown that the will existed long after the power to revoke passed from the testator, then such will is fairly within the provisions of this section, and should be admitted to probate the same as though the testator had physically died. In re Frandsen's Will, 50 U. 156, 166, 167 P. 362.

4. Presumptions.

When it is shown that testator made a will but it cannot be found at his death, ordinarily presumption arises that he destroyed it for the purpose of revoking it before his death. But this presumption is overcome where testator left will with a depositor and it is shown that he did not have access to it after its deposit and before his death. In re Frandsen's Will, 50 U. 156, 167 P. 362.

Decisions from other jurisdictions. — Idaho.

Statute authorizing proof of contents of lost will is intentionally strict and prescribes definite and certain proof that must be produced; the statute is clear, plain, unambiguous, and mandatory. Hull v. Cartin, 61 Idaho 578, 105 P.2d 196.

A. L. R. notes.

Establishment of will lost before testator's death, 34 A. L. R. 1304; proof of contents in establishment of lost will, 126 A. L. R. 1139.

102–3–27. Id. Certification and Record of Proof.

When a lost will is established, the provisions thereof must be distinctly stated and certified by the judge under his hand and the seal of the court, and the certificate must be filed and recorded as other wills are filed and recorded, and letters testamentary or of administration with the will annexed must be issued thereon in the same manner as upon wills produced and duly proved. The testimony must be reduced to writing, signed, certified and filed as in other cases, and shall have the same effect as evidence as hereinbefore provided. (C. L. 17, § 7591.)

Comparable provisions.

Idaho Code, § 15–232 (substantially the same as first sentence herein; "* * * certificate, together with the testimony upon which it is founded, must be filed and recorded as other wills * * *"; see note under 102–3–25).

Mont. Rev. Codes, § 10051 (substantially identical).

CHAPTER 4

LETTERS OF ADMINISTRATION

102–4–1. To Whom Granted.
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102–4–1. To Whom Granted.

Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate or some portion thereof; and they are, respectively, entitled thereto in the following order:

(1) The surviving husband or wife.
(2) The children.
(3) The father or mother.
(4) The brothers or sisters.
(5) The grandchildren.
(6) The next of kin.

Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled filed in the court. (C. L. 17, § 7596.)

History.

This section was Comp. Laws 1876, § 783. It is practically identical with R. S. 1898, § 3812; Comp. Laws 1907, § 3812.

Comparable provisions.

Cal. Probate Code, § 422 (stating order of priority as to granting of letters; "* * * the relatives of the decedent being entitled to priority only when they are entitled to succeed to the estate or some portion thereof * * *").

Idaho Code, § 15–312, Mont. Rev. Codes, § 10068 as amended by Laws of 1939 (stating order of preference as to administration of estate of person dying intestate; by the amendment to the Montana provision the following words were deleted from opening paragraph: "the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof"; nor are said words included in the Idaho provision).

Iowa Code 1939, § 11882 (wills, foreign or domestic, shall not be carried into effect until admitted to probate); § 11883 ("In other cases," where executor is not appointed by will, administration must be granted to any suitable person or persons on request and application of (1) surviving spouse, (2) next of kin, (3) creditors, (4) any other person showing good grounds therefor).

Cross-references.

Petition for determination of heirs where no letters of administration or testamentary have been granted, 102–12–34.

1. Reason for making appointment.

The principal purpose of appointing an administrator in probate matters is to preserve the estate, collect the assets, and, when necessary, institute proceedings for the purpose of reducing the property of the estate to the possession of the administrator or for other relief. Coray v. Perry Irrigation Co., 50 U. 70, 75, 166 P. 672.

2. Surviving spouse.

The surviving wife will be given the letters, where the evidence fails to support charges that she is hostile to the other heirs of deceased, or that her administration would not be fair and impartial. If her application is filed in time, she is entitled to letters of administration as a matter of right, in absence of a showing of some good and sufficient reason to the contrary. In re Pingree's Estate, 74 U. 384, 279 P. 901, and cases cited.

3. Appointment of "competent persons."

Where a person having a preferred right nominates a competent person, appointment of such nominee is mandatory. In re Johnson's Estate, 84 U. 168, 35 P.2d 305.

Appointment of competent party, although not interested party, held, not abuse of discretion in action for appointment of administrator three years after death of intestate. In re Smith's Estate, 85 U. 606, 40 P.2d 180.

Under this section and 102–4–3, it may be the court's duty to appoint the nominee of alien relative instead of appointing a creditor of deceased. In re Owen's Estate, 30 U. 351, 85 P. 277; s. c., 32 U. 469, 91 P. 283.

Where husband died after entry of interlocutory divorce decree awarding wife alimony but before it became final, wife's nominee was entitled to letters of administration as against brother of deceased, since entry of decree did not terminate marriage relationship and such relationship was not dissolved until de-

cree became final, and allowance of alimony was not property settlement so as to preclude wife from having any interest in estate. In re Johnson's Estate, 84 U. 168, 35 P.2d 305.

4. Waiver, loss or forfeiture of preference.

Upon failure of person having preference to appear within three months, preference is lost, and possessor of preference, although qualified to act, has no greater right than any other competent person. In re Smith's Estate, 85 U. 606, 40 P.2d 180.

Son of decedent forfeited or lost preferential right to administer estate by delaying nearly 25 years before applying for appointment. In re Slater's Estate, 55 U. 252, 184 P. 1017.

5. Operation and effect of letters.

Letters relate back to time of appointment and validate action brought during interim for benefit of estate. Anderson v. Union Pac. R. Co., 76 U. 324, 328, 289 P. 146.

Decisions from other jurisdictions.

— Idaho.

When the jurisdiction of the probate court once attaches to the estate of a deceased person, then it continues until the property belonging to the estate is distributed and the estate is closed according to law. Walker Bank & Trust Co. v. Steely, 54 Idaho 691, 34 P.2d 56.

— Iowa.

The naming of one in a will as executor does not make him executor in fact, but gives him the right only to become such by complying with the provisions of the statute. In re Estate of Birkholz (Iowa), 197 N. W. 896.

An executor or administrator acts in a representative capacity, and by fiction of identity he is the person of the testator, represents all parties and interests in the estate, and it is to him that all interested parties must look. Packer v. Overton, 200 Iowa 620, 203 N. W. 307.

An executor is an officer of the court. Leach v. Beazley, 201 Iowa 337, 207 N. W. 374.

An executor or administrator is not only the personal representative of decedent, but is also the representative of the creditors and of the legatees and distributees. Leach v. Farmers' Sav. Bank of Hamburg, 205 Iowa 114, 213 N. W. 414, 56 A. L. R. 801, petition for rehearing overruled and judgment modified, 217 N. W. 437.

Administratrix was representative of surviving spouse and heir, and by fiction of identity she was person of the deceased, charged with the duty of resisting all unfounded or barred claims, and of resisting any improper diversion of the property of the estate, whether a party defendant or not. Federal Land Bank of Omaha v. Bonnett, 226 Iowa 126, 284 N. W. 105.

The "next of kin," within meaning of provision designating persons entitled to apply for administration, are those who take the personal estate of the deceased under the statutes of distribution. In re Estate of Wright, 210 Iowa 25, 230 N. W. 552.

Executor holds testator's property as trustee. In re Estate of Cooper, 229 Iowa 921, 295 N. W. 448.

Court has discretion in matter of who shall be appointed administrator, and making of appointment in accordance with priorities fixed by statute cannot be insisted on by interested individual as matter of right. In re Estate of Christensen, 229 Iowa 1162, 296 N. W. 198.

Statute, fixing priority rights to appointment as administrator, operates only in case of original appointment and not in case of appointment to fill vacancy. In re Estate of Christensen, 229 Iowa 1162, 296 N. W. 198.

A. L. R. notes.

Brevity of period after death of decedent as affecting propriety of grant of letters testamentary or of administration, 133 A. L. R. 1483.

Choice in appointment of administrator as between nominee of one in higher order of statutory preference and one in lower order of preference, 113 A. L. R. 780.

Consul's right to appointment as administrator, 100 A. L. R. 1527.

Contract in consideration of renunciation of one's status, or right to appointment, as guardian, executor, administrator, trustee or other fiduciary, as contrary to public policy, 121 A. L. R. 677.

Creditor's or debtor's right to attack issuance of letters of administration, 123 A. L. R. 1225.

Eligibility of foreign corporation to appointment as executor, administrator, or testamentary trustee, 65 A. L. R. 1237.

Preference respecting appointment as executor or administrator in favor of person in deferred class of next of kin named in statute, but not beneficially interested in particular estate, 70 A. L. R. 1466.

Premature granting of letters testamentary or of administration as affecting acts or proceedings thereunder, 113 A. L. R. 1398.

Right in appointment of administrator to pass over eligible person inter-

ested in estate and appoint a stranger, 80 A. L. R. 824.
Right of guardian of infant or incompetent to appointment as executor or administrator as representative or substitute for infant or incompetent, 135 A. L. R. 585.
Who are within class of persons contemplated by statute which includes among those eligible to appointment as administrator grantees of, or successors to, interest of one eligible because of specified relationship to deceased, 114 A. L. R. 275.

102–4–2. Relatives of Whole Blood Preferred—When a Creditor Entitled.

When there are several persons equally entitled to administration, the court may grant letters to one or more of them. Of several persons claiming and equally entitled to administer, relatives of the whole blood must be preferred to those of the half blood. If none of the relatives entitled or their guardians will accept, then the creditors shall be entitled to letters, but when a creditor is applying, the court may, in its discretion, at the request of another creditor, grant letters to any other person legally competent. If a dispute arises as to relationship between applicants, or if there is any other good and sufficient reason, the court may appoint any competent person. (C. L. 17, § 7597.)

History.
This was section 784 of Comp. Laws of 1876. It is practically identical with R. S. 1898, § 3813; Comp. Laws 1907, § 3813.

Comparable provisions.
Cal. Probate Code, § 424, Idaho Code, § 15–313, Mont. Rev. Codes, § 10069 (similar as to relatives of the whole blood who are preferred to relatives of the half blood); Idaho Code, § 15–314, Cal. Probate Code, § 425 (similar as to creditors); Idaho Code, § 15–313, Mont. Rev. Codes, § 10069 (males must be preferred to females).

1. Discretion of court.
Under this section the court, in making an appointment of an administrator for an intestate estate, is vested with a broad judicial discretion. See Farnsworth v. Hatch, 47 U. 62, 151 P. 537.
Court was in exercise of authority given it by this section in refusing to name heir as administrator of state against whom executor, who had tendered his resignation, had instituted suit to quiet title, and in naming disinterested person to complete administration. In re Burt's Estate, 58 U. 353, 198 P. 1108.

2. Appointment of disinterested person.
Where judgment of district court refusing will to probate on ground of fraud and undue influence was affirmed, district should name as administrator of estate, which was insolvent, one who was in no way interested in or related to any of proponents or contestants. In re Jones' Estate, 59 U. 99, 202 P. 206.

3. "Creditors" entitled to letters.
Officer of corporation which was a creditor of a decedent was not himself a creditor within this section. In re Owen's Estate, 30 U. 351, 85 P. 277; s. c., 32 U. 469, 91 P. 283.

4. Nominee of alien relative.
Where relative of decedent applied for letters of administration within three months but court appointed creditor of decedent as administrator, such appointment, though erroneous, was not void or open to collateral attack, and such administrator was entitled to allowance of reasonable costs, commissions and expenses, including attorney fees. In re Owen's Estate, 32 U. 469, 91 P. 283; s. c., 30 U. 351, 85 P. 277.
Where alien relative of decedent requested appointment of certain person and no nearer relative made such application, it was duty of court to appoint nominee of alien relative instead of appointing creditor of deceased. In re Owen's Estate, 30 U. 351, 85 P. 277; s. c., 32 U. 469, 91 P. 283.

5. "Competent person."
Appointment of competent party, although not interested party, held not abuse of discretion in action for appointment of administrator three years after death of intestate. In re Smith's Estate, 85 U. 606, 40 P.2d 180.

A. L. R. notes.
Selection of administrator from among members of class equally entitled, 1 A. L. R. 1245.

102–4–3. When Persons Preferred Fail to Appear.

Letters of administration must be granted to any interested applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear within three months after the death of the decedent and claim the issuance of letters to themselves. (C. L. 17, § 7598.)

History.

This section is identical with R. S. 1898, § 3814; Comp. Laws 1907, § 3814.

Comparable provisions.

Iowa Code 1939, § 11884 (to each class, in succession, period of 20 days, commencing with burial of deceased, is allowed within which to apply for administration).

1. Discretion of court.

Appointment of competent party, although not interested party, held not abuse of discretion in action for appointment of administrator three years after death of intestate. In re Smith's Estate, 85 U. 606, 40 P.2d 180.

2. Surviving widow.

Under this section it was held that widow of intestate was entitled to letters as matter of right, in absence of showing of some good and sufficient reason to the contrary. In re Pingree's Estate, 74 U. 384, 388, 279 P. 901.

3. Appointment of competent nominee.

Under this section it was held that court should appoint nominee of alien relative rather than a creditor, where no nearer relative made application. In re Owen's Estate, 30 U. 351, 85 P. 277; s. c., 32 U. 469, 91 P. 283.

Where a person having a preferred right nominates a competent person, appointment of such nominee is mandatory. In re Johnson's Estate, 84 U. 168, 35 P.2d 305.

Where husband died after entry of interlocutory divorce decree awarding wife alimony but before it became final, wife's nominee was entitled to letters of administration as against brother of deceased, since entry of decree did not terminate marriage relationship and such relationship was not dissolved until decree became final, and allowance of alimony was not property settlement so as to preclude wife from having any interest in estate. In re Johnson's Estate, 84 U. 168, 35 P.2d 305.

4. Waiver or loss of preference.

Upon failure of person having preference to appear within three months, preference is lost, and possessor of preference, although qualified to act, has no greater right than any other competent person. In re Smith's Estate, 85 U. 606, 40 P.2d 180.

Son of decedent forfeited or lost preferential right to administer estate by delaying nearly 25 years before applying for appointment. In re Slater's Estate, 55 U. 252, 184 P. 1017.

5. Appellate practice.

It is sufficient on appeal if record shows that applicant for letters was within statutory time in filing petition therefor. In re Pingree's Estate, 74 U. 384, 279 P. 901.

A. L. R. notes.

Appointment as administrator of one not a member or nominee of a member of the class of persons designated by statute as eligible to appointment, where no one in better right has applied, 119 A. L. R. 143.

102–4–4. Persons Incompetent to Act.

No person is competent or entitled to serve as administrator or administratrix who is either:

(1) Under the age of majority or an incompetent person; but in such cases letters must be granted to his or her guardian, or, in the discretion of the court, to any person entitled to administration;

(2) Not a bona fide resident of the state; but if the person entitled to serve is not a resident of the state, he may request the court or judge to appoint a resident of the state to serve as administrator, and such person may be appointed;

(3) Convicted of an infamous crime;

(4) Adjudged by the court incompetent to execute the duties of the trust by reason of drunkennesa, improvidence, or want of understanding or integrity; or,

(5) The surviving partner of a firm of which the decedent was a member. (C. L. 17, § 7599.)

History.
This section was Comp. Laws 1876, § 785. It is practically identical with R. S. 1898, § 3815; Comp. Laws 1907, § 3815.

Cross-references.
Death of limited partner, 69–2–21; right of surviving general partner to wind up, 69–1–34.

1. Nominee of alien relative.
Where alien relative of decedent requested appointment of certain person, and no nearer relative made such application, it was duty of court to appoint nominee of alien relative instead of appointing creditor of deceased. In re Owen's Estate, 30 U. 351, 85 P. 277; s. c., 32 U. 469, 91 P. 283.

A. L. R. notes.
Status and acts of one appointed executor or administrator who was ineligible, 14 A. L. R. 619.

102–4–5. Competency of Married Women.

When objection is made by any person interested in an estate, a married woman must not be appointed administratrix. When an unmarried woman appointed administratrix marries, the court may, upon the motion of any such interested person, revoke her authority and appoint another person in her place. (C. L. 17, § 7600.)

History.
This section is of ancient origin. Comp. Laws 1876, § 786. It is identical with R. S. 1898, § 3816; Comp. Laws 1907, § 3816.

Comparable provisions.
Cal. Probate Code, § 401 (marriage does not disqualify a woman from serving as executrix).

102–4–6. Letters Upon Several Estates Jointly.

In all cases where the estate left by a deceased person has descended from another deceased person whose estate has never been probated, or where two or more deceased persons held property during their lifetime as tenants in common, and neither estate has been probated, and where the heirs are the same, the court may grant letters of administration upon such estates jointly, and they may be administered the same as if they were but one estate. (C. L. 17, § 7601.)

History.
This section came from Laws 1915, p. 89.
"This section seems to be original in this State and such research as has been made has not revealed it in the laws of any other state." In re Cloward's Estate, 95 U. 453, 458, 82 P.2d 336, 119 A. L. R. 123.

1. Words and phrases defined.
Phrase "never has been probated" in this section means "administration never has been commenced," rather than "administration has not been completed." In re Cloward's Estate, 95 U. 453, 82 P.2d 336, 119 A. L. R. 123.

2. Effect where administration not completed.
Two estates cannot be combined where the probate of one estate has partly proceeded when the attempt to combine another with it is made. In re Cloward's Estate, 95 U. 453, 82 P.2d 336, 119 A. L. R. 123.

102–4–7. Petition for Letters of Administration.

Petitions for letters of administration must be in writing, signed by the applicant or his attorney, and filed with the clerk of the court, stating the facts essential to give the court jurisdiction of the matter; and when known to the applicant, he must state the names, ages and residence of the heirs of the decedent, and the value and character of the property. (C. L. 17, § 7602.)

History.
This was section 787 of Comp. Laws 1876. It is practically identical with R. S. 1898, § 3817; Comp. Laws 1907, § 3817.

Comparable provisions.
Cal. Probate Code, § 440, Idaho Code, § 15–318, Mont. Rev. Codes, § 10074 (include substantially identical provision).

1. Nature of probate proceedings.
This section has been cited as authority for the proposition that probate proceedings are proceedings in rem and not in personam. Barrette v. Whitney, 36 U. 574, 582, 106 P. 522, 37 L. R. A. (N. S.) 368.

2. Sufficiency of petition.
Where a petition for appointment as administrator of an estate recited that deceased was a resident of a certain town in Idaho, that an administrator had been appointed for his estate in that state, and gave the names of decedent's heirs, and that petitioner was advised that W., who at the time of filing the petition was acting guardian for deceased's minor children, held in trust for the estate, personal property of the value of $50,000, the petition sufficiently showed the domicile of the heirs. In re Bunting's Estate, 30 U. 251, 84 P. 109.

102–4–8. Id. Hearing and Notice.

When a petition praying for letters of administration is filed, the court or clerk must set the petition for hearing and give notice thereof by publication or by posting and by mailing notices to the heirs.
(C. L. 17, § 7603.)

History.
This was section 788 of Comp. Laws 1876. It is identical with R. S. 1898, § 3818, except as to provision for "posting," and it is identical with Comp. Laws 1907, § 3818.

Comparable provisions.
Cal. Probate Code, § 441, Idaho Code, § 15–320, Mont. Rev. Codes, § 10076 (10-day notice of hearing must be given by clerk).

1. Purpose of law.
"The purpose of the law in requiring notice to be given of the time and place of hearing petitions for letters of administration is to advise those who are interested in the proceedings, and give them an opportunity to be present, and, if they so desire, make objections to the issuance of letters to the party petitioning therefor." In re Bunting's Estate, 30 U. 251, 84 P. 109.

2. Nature of probate proceedings.
This section has been cited as authority for the proposition that probate proceedings are in rem and not in personam. Barrette v. Whitney, 36 U. 574, 582, 106 P. 522, 37 L. R. A. (N. S.) 368.

3. Necessity for notice.
Probate proceedings are deemed to be proceedings in rem, and court acquires jurisdiction of property of estate and of all persons who have any interest in property by notice required to be given for appointment of administrator or executor, and other notices provided for are not jurisdictional, and disregard thereof is mere irregularity and may be assailed, in absence of fraud, only in direct proceeding. Barrette v. Whitney, 36 U. 574, 106 P. 522, 37 L. R. A. (N. S.) 368. (Straup, C. J., dissenting.)

4. Mailing notice.
Under this section, the notice provided for by 102–14–1 must be mailed. In re Bunting's Estate, 30 U. 251, 260, 84 P. 109.

5. Presumptions on appeal.
It will be presumed on appeal that the facts required to be shown were proven in the probate court before the issuance of the letters. Uebel v. Maltese, 2 U. 430.

102–4–9. Id. Contest.

Any person interested may contest the petition by filing an answer thereto on the ground of the incompetency of the applicant, or may assert his own rights to the administration and pray that letters be issued to himself. In the latter case the contestant must file a cross petition, of which notice shall be given, and the court must hear the two petitions together. (C. L. 17, § 7604.)

History.
This was section 789 of Comp. Laws 1876. It is identical with R. S. 1898, § 3819; Comp. Laws 1907, § 3819.

Comparable provisions.
Idaho Code, § 15–321, Mont. Rev. Codes, § 10077 (substantially the same; contestant must file "written opposition").

Cross-references.
Provisions of Code of Civil Procedure as applicable, 102–1–6, 102–14–17; court may appoint attorney to represent absent parties, 102–14–25.

1. Contesting application.
Those desiring a different person for administrator should appear. Uebel v. Maltese, 2 U. 430, applying Comp. Laws 1876, § 789, p. 291.

102–4–10. Letters of Administration—Form.

Letters of administration must be substantially in the following form: State of Utah, County of.....
..... is hereby appointed administrator of the estate of....., deceased.

Witness, ..., clerk of the district court, in and for the county of ....., with the seal thereof affixed, the.....day of....., 19....

By order of the court.

....., Clerk.

(Seal) (C. L. 17, § 7605.)

History.
This was section 781 of Comp. Laws 1876, p. 290. It is substantially identical with R. S. 1898, § 3820; Comp. Laws 1907, § 3820.

Cross-references.
When seal required, 20–7–16.

102–4–11. Special Administrators—When Appointed.

When there is delay in granting letters testamentary or of administration from any cause, or when such letters are granted irregularly, or no sufficient bond is filed as required, or when no application is made for such letters, or when an executor or administrator dies or is suspended or removed, the court must appoint a special administrator to collect and take charge of the estate of the decedent in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate. (C. L. 17, § 7606.)

History.
This section does not differ in any material respect from section 813 of Comp. Laws 1876. It is practically identical with R. S. 1898, § 3821; Comp. Laws 1907, § 3821.

Comparable provisions.
Cal. Probate Code, § 460 (similar, coupled with "* * * or he [judge] may direct the public administrator to take charge of the estate").

Idaho Code, § 15–352 (similar provision, coupled with following sentence: "or he [probate judge] may direct the public administrator of his county to take charge of the estate").

Iowa Code 1939, § 11885 (when, from any cause, general administration or probate of will cannot be immediately granted, one or more special administrators may be appointed to collect and preserve property of deceased; no appeal from such appointment prevents their proceeding in discharge of their duties).

Mont. Rev. Codes, § 10107 (substantially identical).

Cross-references.
Appointment by clerk, 102–2–1; when decedent dies without heirs, 102–12–29, 102–12–30.

1. Extent of court's power.
District court is given power by this section to appoint a special administrator ex parte and without notice to take charge of the estate when executor or administrator is suspended or is re-

moved, as where removed executrix appeals from order of removal and special administrator is appointed pending appeal to take charge of estate and preserve it. In such case removed executrix may be required to turn over assets of estate to such special administrator. Breiting v. District Court of Salt Lake County, 73 U. 93, 272 P. 562.

2. The order and its appealability.

Order appointing special administrator of estate of decedent was not final judgment nor an appealable order. In re Jones' Estate, 56 U. 291, 190 P. 783.

3. Effect of appeal.

Where, after wife of deceased was appointed special administratrix, her petition for general letters of administration was denied and bank appointed general administrator, which denial was reversed on appeal and wife was appointed administratrix, it was her duty to turn over property to bank notwithstanding appeal was pending, so that bank was entitled to expenses incurred in attempting to gain possession of the property while it was general administrator, including reasonable attorney's fee, and such expenses were proper charges against estate which were not made lien on estate property but were directed to be paid when there were sufficient funds in estate. In re Pingree's Estate, 82 U. 437, 25 P.2d 937, 90 A. L. R. 96.

Decisions from other jurisdictions.

— California.

The object of special administration is to preserve the estate until general letters testamentary or of administration are granted, and the executor or administrator empowered to take charge of it. O'Bryan v. Superior Court of Los Angeles, 18 Cal.2d 490, 116 P.2d 49.

— Iowa.

Since appointment of special administrator is conditioned on inability to obtain general administration or immediate probate of will, and court of county in which will is probated has jurisdiction coextensive with state, it naturally follows that there cannot be general administration in one county and special administration in another. In re Estate of Riese, 230 Iowa 397, 297 N. W. 796.

"Special" administrator has no authority to sell real estate, and order of probate court authorizing such sale will be set aside. Jackson v. Jones, 231 Iowa 106, 300 N. W. 668.

— Montana.

Montana Revised Codes, § 10107, interpreted literally, would seem to require imperatively of the judge that he appoint a special administrator when certain specified conditions exist; however, the concluding phrase of the section, "as may be necessary for the preservation of the estate," would seem to make it the more reasonable view that such compulsory appointment need be made only where a showing of necessity is made demanding such an appointment for the preservation of the estate, and the court so holds. State v. District Court of Thirteenth Judicial District in and for Yellowstone County, 106 Mont. 272, 76 P.2d 634.

102–4–12. Id. How Appointed.

The appointment may be made at any time and without notice, and must be made by entry upon the minutes of the court specifying the powers to be exercised by such administrator. (C. L. 17, § 7607.)

History.

This section is practically identical with Comp. Laws 1876, § 814. It is identical with R. S. 1898, § 3822; Comp. Laws 1907, § 3822.

Comparable provisions.

Cal. Probate Code, § 461 (includes similar provision).

Idaho Code, § 15–353, Mont. Rev. Codes, § 10108 (includes substantially identical provision).

1. Collateral attack.

The order appointing an administrator cannot be collaterally attacked in suit by administrator to recover for wrongful death of decedent. Chilton v. Union Pac. Ry. Co., 8 U. 47, 29 P. 963.

102–4–13. Id. Preference in Appointment.

In making the appointment of a special administrator the court or judge must give preference to the person entitled to letters testamentary or of administration. (C. L. 17, § 7608.)

Comparable provisions.

Cal. Probate Code, § 461 (includes substantially identical provision, coupled with clause "* * * but such order is not appealable").

Idaho Code, § 15–354, Mont. Rev. Codes, § 10109 (substantially the same, with following words added: "* * * but no appeal must be allowed from the appointment").

102–4–14. Id. Oath and Bond.

Before letters issue to any special administrator he must give bond in such sum as the court may direct, with sureties to the satisfaction of the court, conditioned for the faithful performance of his duties; and he must take the usual oath, which must be attached to the letters.

(C. L. 17, § 7609.)

Comparable provisions.

Cal. Probate Code, § 462 (similar; exception made as to public administrator).

Idaho Code, § 15–355, Mont. Rev. Codes, § 10110 (substantially the same; "* * * and he must take the usual oath and have the same indorsed on his letters").

102–4–15. Id. Powers and Duties.

The special administrator must collect and preserve for the executor or administrator all the goods, chattels, debts and effects of the decedent, and all incomes, rents, issues, profits, claims and demands of the estate; must take the charge and management of, enter upon and preserve from damage, waste and injury, the real estate, and for such and all necessary purposes may commence and maintain or defend actions and other legal proceedings as an administrator, and exercise such other powers as are conferred upon him by his appointment; but in no case is he liable to an action by any creditor on a claim against the decedent.

(C. L. 17, § 7610.)

History.

This was section 817 of Comp. Laws 1876, and differs therefrom in no material respects. It is practically identical with R. S. 1898, § 3825; Comp. Laws 1907, § 3825.

Comparable provisions.

Cal. Probate Code, § 463, Idaho Code, § 15–356 (include similar provision). Mont. Rev. Codes, § 10111 (similar).

Cross-references.

Executor, etc., may sue, 102–3–1; petition for determination of heirs where no letters of administration or testamentary have been granted, 102–12–34.

1. **Expenses as chargeable against estate.**

Expenses incurred by special administrator in recovery of, or preservation for, estate of any property likely to be lost, held chargeable against estate, but expense incurred in contest of will was no special concern of administrator, and court should not allow charge against estate for any amount paid or incurred in such contest. In re Jones' Estate, 59 U. 99, 202 P. 206.

CHAPTER 5

OATHS AND BONDS *

102–5–1. Letters, Oaths and Bonds to Be Recorded.
102–5–2. Bonds — Form — Qualifications of Sureties.
102–5–3. Id. Additional on Sale of Real Estate.
102–5–4. Id. Conditions of.
102–5–5. Id. Several Recoveries May Be Had on.
102–5–6. Id. Justification of Sureties.
102–5–7. Id. Examination of Sureties.
102–5–8. Id. When Dispensed with.
102–5–9. Id. Release of Surety—Application for.
102–5–10. Id. On Giving New Sureties.
102–5–11. Id. Failure to Give New Sureties — Revocation of Letters.

* **History of act.** This chapter was Comp. Laws 1876, §§ 799–812; 2 Comp. Laws 1888, §§ 4054–4074; R. S. 1898, Title 74, Ch. 5, p. 836; Comp. Laws 1907, Title 89, Ch. 5, p. 1218.

102-5-1. Letters, Oaths and Bonds to Be Recorded.

Before letters testamentary or of administration or of guardianship are issued the executor, administrator or guardian must take and subscribe an oath that he will perform according to law the duties of executor, administrator or guardian, which oath must be attached to the letters. All letters testamentary, of administration and of guardianship issued to, and all bonds executed by, executors, administrators or guardians, with the affidavits and certificates thereon, must be forthwith recorded by the clerk of the court having jurisdiction of the estate, in books to be kept by him in his office for that purpose.

(C. L. 17, § 7616.)

History.

This section has come down without material change from Comp. Laws 1876, § 799, and it is identical with R. S. 1898, § 3826; Comp. Laws 1907, § 3826, except for the provision with respect to guardianship.

Comparable provisions.

Cal. Probate Code, § 540 (substantially the same as first sentence herein; guardian is not mentioned).

Idaho Code, § 15-332, Mont. Rev. Codes, § 10087 (substantially identical, except that guardian and guardianship are not mentioned in this section).

Iowa Code 1939, § 11887 (requiring that bond be given and that oath be taken and subscribed; oath and bond must be filed with clerk); § 11888 (new bonds may be required by court or judge, to be given in new penalty and with new securities, when it is found necessary).

Cross-references.

Powers of executor before qualifying, 101-3-19.

1. Right of action and parties.

Under former statutes, where administrator failed to sue to recover real property for estate within statutory time, whereby intestate's posthumous son was barred from suing to establish his alleged claim to property, son had right of action against administrator and his bondsmen. Jenkins v. Jensen, 24 U. 108, 66 P. 773, 91 Am. St. Rep. 783.

2. Equity jurisdiction.

In action to have judgment and decrees obtained in probate proceedings by fraud declared void, wherein it appeared that husband had left wife and children and had eloped with young woman with whom he lived until his death, and that such woman had fraudulently represented that she was lawful wife of decedent, was appointed administratrix, and probated estate, held court of equity had jurisdiction to grant relief against such probate proceedings and to charge administratrix' bond. Weyant v. Utah Savings & Trust Co., 54 U. 181, 182 P. 189, 9 A. L. R. 1119.

Decisions from other jurisdictions.

— Iowa.

Where an administrator collected funds of the estate before giving a second bond and dissipated the same afterwards, the second surety was liable. In re Donlon's Estate, 203 Iowa 1045, 213 N. W. 781.

Where widow and some of the beneficiaries of decedent executed an administration bond for purpose of saving expense of surety company bond, bond was statutory and sureties were bound whether or not there was a consideration. New Amsterdam Casualty Co. v. Bookhart, 212 Iowa 994, 235 N. W. 74, 76 A. L. R. 897.

The bond of an executrix is a statutory bond, and regardless of its terms, the provisions of the statute are considered as written into it. In re Estate of Durey, 215 Iowa 257, 245 N. W. 236.

Where delay in closing estate was not due to any willful or fraudulent acts of the administratrix, estate was properly charged with additional premiums paid on her bond after the expiration of the period for which it was issued. In re Estate of Paulson, 221 Iowa 706, 266 N. W. 563.

Sureties on bond of an administrator are not entitled to notice of proceedings wherein probate court determines amount administrator is short in his accounts, and adjudication made therein by court is final as to such sureties. In re Estate of Davie, 224 Iowa 1177, 278 N. W. 616.

A. L. R. notes.

Accounting by guardian, executor, administrator, or trustee as a necessary condition of action on his bond, 119 A. L. R. 83.

Acts or omissions in respect of cause of action for death, or the funds received on that account, as within coverage of bond of executor or administrator, 68 A. L. R. 1543.

Delay of executor or administrator in completing administration as affecting liability on bond, 85 A. L. R. 440.
Liability of guardian, or his surety, as affected by agreement by which he limits his control over funds or investments, 102 A. L. R. 1108.
Liability of sureties on bond of administratrix who secures her appointment by misrepresenting the decedent's identity or her relationship to him, 9 A. L. R. 1138.
Liability of sureties on bond of executor or administrator c. t. a. in respect of proceeds of sale of real property under testamentary direction or power, 91 A. L. R. 943.
Liability of sureties on bond of guardian, executor, administrator, or trustee for defalcation or deficit occurring before bond was given, 82 A. L. R. 585.
Official bond of executor, administrator, guardian, or trustee as covering appeal taken by him, 132 A. L. R. 1280.

102–5–2. Bonds—Form—Qualifications of Sureties.

Every person to whom letters testamentary, of administration or of guardianship are directed to issue must, before receiving them, execute a bond to the state of Utah, with two or more sufficient sureties, if such sureties are persons, or one sufficient surety, if such surety is a corporate surety, to be approved by the judge or the clerk. In form the bond must be joint and several, and, if the sureties are persons, the penalty must be not less than twice the value of the personal property and twice the probable value of the annual rents, profits and issues of the real property belonging to the estate; if the surety is a corporate surety, the penalty must be not less than the value of the personal property and the probable value of the annual rents, profits and issues of the real property belonging to the estate plus ten per cent. Said values must be ascertained by the court by examining on oath the party applying or any other person. A separate bond shall be required of each executor, administrator or guardian appointed. (L. 21, p. 388, § 7617.)

History.
This section is practically identical with R. S. 1898, § 3827; Comp. Laws 1907, § 3827, except as to provision respecting corporate surety.

Comparable provisions.
Cal. Probate Code, § 541, Idaho Code, § 15–333, Mont. Rev. Codes, § 10088, as amended by Laws of 1937 (similar, but guardianship is not mentioned; phrase "plus ten per cent" is omitted; the concluding two sentences herein are also omitted; to Montana provision is added a clause authorizing the court to fix penalty of bond at sum less than value of personal property and annual rents and profits of the real property, provided that all heirs, devisees or legatees over 21 years of age make such written request; in California provision is inserted the clause "unless the testator has waived such requirement").

Cross-references.
Cost of bond allowed as an expense, 43–3–45.

1. Collateral attack.
Letters of administration cannot be attacked collaterally upon ground that no bond had been given by the administrator. Harris v. Chipman, 9 U. 101, 33 P. 242.

A. L. R. notes.
Lapse of time after guardian's settlement as affecting liability of guardian or his sureties, 50 A. L. R. 61; power or discretion of court, after bond of executor, administrator, or testamentary trustee has been given, to dispense with, discontinue, or modify bond, 121 A. L. R. 951.

102–5–3. Id. Additional on Sale of Real Estate.

The court may require an additional bond from each executor, administrator or guardian whenever the sale of any real estate belonging to the estate is ordered, but no such additional bond shall be required when it satisfactorily appears to the court that the penalty of the bond

given before receiving letters, or of any bond given in place thereof, in cases where the surety on the bond is a person, is equal to twice the value of the personal property remaining in, or that will come into, the possession of the executor, administrator or guardian, and the annual rents, profits and issues of the real estate, and twice the probable amount to be realized on the sale of the real estate ordered to be sold; or in cases where the surety is a corporate surety, it is equal to the value of the personal property remaining in, or that will come into, the possession of the executor, administrator or guardian, and the annual rents, profits and issues of real estate plus ten per cent, and the probable amount to be realized on the sale of the real estate ordered to be sold plus ten per cent. (L. 21, p. 388, § 7618.)

Comparable provisions.

Cal. Probate Code, § 542 (additional bond required before sale of real property is confirmed).

Idaho Code, § 15–334 (similar; "The probate court must require an additional bond * * *; but no such additional bond must be required when it satisfactorily appears * * *"; "guardian" is not mentioned in this section, nor the phrase "plus ten per cent").

Mont. Rev. Codes, § 10089, as amended by Laws of 1937 (similar; "Except when it is expressly provided in the will that no bond shall be required of the executor, the court or judge must require an additional bond * * *"; the concluding portion herein as to corporate surety is not included).

102–5–4. Id. Conditions of.

Bonds must be conditioned that the executor, administrator or guardian will faithfully execute the duties of the trust according to law. (C. L. 17, § 7619.)

Comparable provisions.

Idaho Code, § 15–335, Mont. Rev. Codes, § 10090 (substantially identical as to bond of executor or administrator).

A. L. R. notes.

Rights and liabilities as between sureties on successive bonds given by executor, administrator, trustee, or guardian, 76 A. L. R. 904.

102–5–5. Id. Several Recoveries May Be Had on.

A bond shall not become void upon the first recovery, but may be sued and recovered upon from time to time by any person aggrieved, in his own name, until the whole penalty is exhausted. (C. L. 17, § 7620.)

Comparable provisions.

Idaho Code, § 15–337, Mont. Rev. Codes, § 10092 (substantially identical).

Cross-references.

Successive actions generally, 104–54–11, 104–54–12.

102–5–6. Id. Justification of Sureties.

In all cases where bonds or undertakings are required to be given under this title, the sureties must justify thereon in the same manner and in like amount as required in the general provisions of the code of civil procedure, and the certificate thereof must be attached to and filed and recorded with the bond or undertaking. (C. L. 17, § 7621.)

Comparable provisions.

Mont. Rev. Codes, § 10093 (substantially the same, coupled with following concluding sentence: "All such bonds and undertakings must be approved by a judge of the district court before being filed or recorded").

Cross-references.

Corporate suretyship, 43–3–39, et seq.; qualification of sureties, 104–54–16.

102–5–7. Id. Examination of Sureties.

Either before or after the approval of any bond, the court, of its own motion or upon motion of any person interested, may examine the sureties and such witnesses as may be produced touching the property qualifications of the sureties; and if upon such examination the court is satisfied that the bond is insufficient, it must require sufficient additional security, and if the same is not given within the time fixed by the court, the authority of the executor, administrator or guardian shall cease. (C. L. 17, § 7622.)

102–5–8. Id. When Dispensed with.

When it is expressly provided in the will that no bond shall be required of the executor, letters testamentary may issue and sales of real estate may be made and confirmed without any bond, unless the court at any time, for good cause, requires one to be executed. (C. L. 17, § 7623.)

102–5–9. Id. Release of Surety—Application for.

When a surety of an executor, administrator or guardian desires to be released from responsibility on account of future acts, he may make application to the court for relief. The court must cause a citation to the executor, administrator or guardian to be issued, requiring him to appear at a time and place to be therein specified, and to give other security. (C. L. 17, § 7624.)

History.
This was section 810 of Comp. Laws 1876, and became Comp. Laws 1888, § 4070. It is identical with R. S. 1898, § 3834; Comp. Laws 1907, § 3834, except for provision respecting guardians.

Comparable provisions.
Idaho Code, § 15–348, Mont. Rev. Codes, § 10103 (similar as to executor or administrator).

1. Procedure on application for release.
Under former statute, held that administrator, by appearing, by counsel, at hearing on sureties' release-application, without making any objection to court's jurisdiction, waived any technical right, as to service of citation, which he might have had. Wells v. Kelley, 12 U. 437, 42 P. 1133, on rehearing in 11 U. 421, 40 P. 705.

A. L. R. notes.
Right of surety on bond of trustee, executor, administrator or guardian to terminate liability as regards future defaults of principal, 118 A. L. R. 1261.

102–5–10. Id. On Giving New Sureties.

If new sureties are given to the satisfaction of the judge, he may thereupon make an order that the sureties who applied for relief shall not be liable on their bond for any subsequent act, default or misconduct of the executor or administrator. (C. L. 17, § 7625.)

Comparable provisions.
Mont. Rev. Codes, § 10104 (identical).

102–5–11. Id. Failure to Give New Sureties—Revocation of Letters.

If the executor, administrator or guardian neglects or refuses to give new sureties to the satisfaction of the judge, on the return of the citation, or within such reasonable time as the judge may allow, the

court or judge must revoke his letters, unless the surety making the application shall consent to a longer extension of time. (C. L. 17, § 7626.)

Comparable provisions.
Mont. Rev. Codes, § 10105 (substantially identical as to executor or administrator).

CHAPTER 6

REVOCATION OF LETTERS *

102–6–1. Grounds for.
102–6–2. Resignation.
102–6–3. Appointment of a Successor.
102–6–4. For Contempt of Court's Orders.

* **History of act.** This chapter was R. S. 1898, Title 74, Ch. 6, p. 838; Comp. Laws 1907, Title 89, Ch. 6, p. 1220.

102–6–1. Grounds for.

The court may at any time suspend any administrator, executor or guardian; and may, upon citation, revoke the letters of any administrator upon petition of a competent person having a prior right thereto who had no opportunity to apply, or of any administrator of the estate of a supposed intestate whose will was subsequently found and admitted to probate, or of any executor, administrator or guardian for neglect, mismanagement, waste, embezzlement, incompetency or incapacity, or because of his conviction of an infamous crime, or for any other reason deemed sufficient by the court. (C. L. 17, § 7627.)

History.
This section is identical with R. S. 1898, § 3837; Comp. Laws 1907, § 3837, except as to provision respecting guardians.

Comparable provisions.
Iowa Code 1939, § 12066 (enumerating causes warranting court in removing person to whom there has been granted letters testamentary, of special administration, of administration with will annexed, or general administration; including, inter alia, incapacity to discharge his trust due to age or continued sickness or imbecility, or failure or refusal to return inventories or accounts of sales, or is guilty of waste or maladministration, or is likely to become insolvent in consequence of which his sureties have suffered or will suffer loss).

Cross-references.
Petition for revocation, 102–3–13; failure to make return on sales as ground for revocation, 102–10–7.

1. Discretion of court.
Under this section, the court appointing an executor or administrator has a very large discretion in determining whether, upon the facts presented, the officer shall either be removed or suspended, and such discretion will not be on appeal unless it appears to have been abused. In re Bogert's Estate, 76 U. 566, 573, 290 P. 947.

While the matter of removing or refusing to remove an executor or administrator is left to the discretion of the court which appointed him, and under whose direction such officer must act, nevertheless that discretionary power has its limitations. Farnsworth v. Hatch, 47 U. 62, 151 P. 537.

102–11–18 and 102–11–19, which relate to and provide means whereby any person suspected of having wrongful possession of effects of deceased, or having under his control any such effects, may be required to appear and submit to examination under oath touching such matters, do not limit duty of court to revoke letters of administration under

this section for failure to inventory certain property belonging to estate. In re Robison's Estate, 59 U. 431, 204 P. 321.

2. Petition to revoke.

If petition to revoke letters is neither ambiguous nor unintelligible, though uncertain in some respects, a general demurrer that it was ambiguous, unintelligible and uncertain will be overruled. In re Bogert's Estate, 76 U. 566, 290 P. 947.

If petition is not signed by petitioner nor verified, trial court may cause such error to be corrected if timely objection is made; if not raised below, it will not be considered on appeal. In re Bogert's Estate, 76 U. 566, 290 P. 947.

Petition by divorced wife of deceased for removal of succeeding wife as administratrix, which alleged that divorce was void for lack of jurisdiction, was good as against demurrer, could not be defeated on ground that petitioner should have instituted suit to set aside divorce decree, was not collateral attack on divorce decree but was direct attack where jurisdictional defect was set out, and action of trial court in sustaining demurrer was erroneous. In re Waters' Estate, 100 U. 246, 113 P.2d 1038.

3. Grounds for revocation.

Incompetency, mismanagement and want of integrity are often set up as grounds for removal. Farnsworth v. Hatch, 47 U. 62, 151 P. 537.

Under this section, executors and administrators may be removed on the ground that their interests conflict with those of the estates they represent. Farnsworth v. Hatch, 47 U. 62, 151 P. 537.

It constitutes incompetency and mismanagement under this section to use funds of estate to pay an attorney to enforce a claim against estate and at same time to pay him to try to defeat same claim, to acquire conflicting interests preventing personal representative from doing his duty, etc. In re Bogert's Estate, 76 U. 566, 290 P. 947.

4. Equity jurisdiction in case of fraud.

In action to have judgments and decrees obtained in probate proceedings by fraud declared void, wherein it appeared that husband had left wife and children and had eloped with young woman with whom he lived until his death, and that such woman had fraudulently represented that she was lawful wife of decedent, was appointed administratrix, and probated estate, held court of equity had jurisdiction to grant relief against such probate proceedings and to charge administratrix' bond. Weyant v. Utah Savings & Trust Co., 54 U. 181, 182 P. 189, 9 A. L. R. 1119.

5. Jury trial.

Under this section there is no right to a jury trial, the right to remove being conferred upon the court, and not upon a jury. Farnsworth v. Hatch, 47 U. 62, 151 P. 537.

6. Evidence.

Upon the issue of want of competency and integrity, it is proper to admit in evidence a judgment in a former proceeding, where issues and parties are the same in both. Farnsworth v. Hatch, 47 U. 62, 151 P. 537.

The petitioner has the burden of proof, but if respondent voluntarily assumes the burden of proof he may lose certain advantages, such as to ask for a continuance if matters are testified to which respondent is unprepared to meet. In re Bogert's Estate, 76 U. 566, 575, 290 P. 947.

7. Appeal and review.

Formerly when appeals were allowed from probate courts to the district courts, appeal would lie from an order refusing to remove an administrator, and revoke letters of administration. In re Estate of Reese, 9 U. 171, 33 P. 698, applying Act of Congress and Rule 24 of Supreme Court of Utah.

Decisions from other jurisdictions.

— Iowa.

Trial court must necessarily be allowed to exercise large discretion in matter of removal of executors; removal of executors was not abuse of trial court's discretion, where executors were guilty of irregularities such as, among others, purchase by them of property of estate, failure to compute interest on their individual claims, failure to make reports, allowing chattel mortgage to become barred by statute of limitations, and long delay in settlement of estate. In re Estate of Myers, 229 Iowa 170, 294 N. W. 235.

A. L. R. notes.

Dilatoriness of executor or administrator in filing inventory, or making reports, as ground for removal, 72 A. L. R. 956.

Effect of proceeding to supplant administrator or executor, or of appeal from order appointing or removing him, upon rights of persons who dealt with him pending such proceedings or appeal, 99 A. L. R. 862.

Failure of executor, administrator, trustee, or guardian to disclose self-dealing, as ground for vacating order or decree settling account, 132 A. L. R. 1522.

Improper handling of funds, investments or assets as ground for removal of guardian of infant or incompetent, 128 A. L. R. 535.
Insolvency of, or appointment of receiver or other liquidator for, corporation, as affecting its status as executor, administrator, guardian, or trustee, 102 A. L. R. 124.
Personal interest of executor or administrator adverse to or conflicting with those of other persons interested in estate as ground for revocation of letters or removal, 119 A. L. R. 306.
Revocation of letters testamentary as affecting expenses and disbursements by executor or administrator thereafter, 31 A. L. R. 846.
What effects removal of executor or administrator, 8 A. L. R. 175.

102–6–2. Resignation.

An executor, administrator or guardian may resign upon such terms as may be fixed by the will or by the court. (C. L. 17, § 7628.)

A. L. R. notes.
Right of executor or administrator to resign, 91 A. L. R. 712.

102–6–3. Appointment of a Successor.

In case of the removal, resignation or death of one of several executors or administrators, the court, if it deems it necessary, may appoint a successor, or may permit the remaining executor or executors, administrator or administrators, to complete the execution of the trust. In case of the death, resignation or removal of all, the court shall, upon notice, issue letters to the person having a prior right thereto, or to any competent person named by the person having such prior right. But the will may provide for the filling of vacancies among the executors. (C. L. 17, § 7629.)

History.
This section is practically identical with R. S. 1898, § 3839; Comp. Laws 1907, § 3839.

I. Appointment of successor.
Under this section, where one of two executors is removed for incompetency and want of integrity, the appointment of an impartial successor is proper. Farnsworth v. Hatch, 47 U. 62, 151 P. 537.

A. L. R. notes.
Effect of proceeding to supplant administrator or executor, or of appeal from order appointing or removing him, upon rights of persons who dealt with him pending such proceedings or appeal, 99 A. L. R. 862.

102–6–4. For Contempt of Court's Orders.

Whenever an executor, administrator or guardian is committed for contempt for disobeying any lawful order of the court, and has remained in custody for thirty days without obeying such order or purging himself otherwise of the contempt, the court may, by order reciting the facts and without further showing or notice, revoke his letters and appoint some other person entitled thereto executor, administrator or guardian in his stead. (C. L. 17, § 7630.)

Comparable provisions.
Cal. Probate Code, § 526, Idaho Code, § 15–1517, Mont. Rev. Codes, § 10373 (substantially identical; California provision does not, however, mention guardian).

CHAPTER 7

THE INVENTORY *

102–7–1. Required—Time for Making and Returning.
102–7–2. Appraisers — Appointment —Compensation.
102–7–3. Id. Oath—Duties.
102–7–4. Inventory to Be Signed—Oath of Personal Representatives.
102–7–5. Executor's Debt to Testator to Be Listed as an Asset.

* **History of act.** This chapter was R. S. 1898, Title 74, Ch. 7, p. 838; Comp. Laws 1907, Title 89, Ch. 7, p. 1220.

102–7–1. Required—Time for Making and Returning.

Every executor and administrator must make and return to the court, within three months after his appointment, a true inventory and appraisement of all the estate of the decedent which has come to his possession or knowledge; and within two months after any other property shall be subsequently acquired, or after other property shall have been discovered, a true inventory and appraisement of the same shall be made and returned to the court. (C. L. 17, § 7635.)

History.

This section is practically identical with R. S. 1898, § 3841; Comp. Laws 1907, § 3841.

Comparable provisions.

Cal. Probate Code, § 600 (inventory must be filed within three months after appointment of executor or administrator; clerk transmits copy to county assessor; inventory must include homestead and all the estate of decedent and an account of all moneys belonging to decedent); § 611 (inventory of subsequently discovered property must be filed within two months after discovery).

Idaho Code, § 15–401 (inventory and appraisement must be made and returned to court within 60 days after appointment); § 15–409 (inventory of property, of more than $250 in value, subsequently discovered, must be returned within two months after the discovery).

Mont. Rev. Codes, § 10129 (inventory and appraisement of all the estate of decedent, including the homestead, if any, must be made and returned to the court by executor or administrator within three months after appointment); § 10137 (when other property subsequently comes to possession or knowledge of executor or administrator, he must cause appraisement to be made and inventory returned within two months after the discovery).

1. Effect of failure to comply with law.

Letters of administration may be revoked under 102–6–1 for failure to inventory certain property belonging to estate. In re Robison's Estate, 59 U. 431, 204 P. 321.

A. L. R. notes.

Dilatoriness of executor or administrator in filing inventory, or making reports, as ground for removal, 72 A. L. R. 956.

102–7–2. Appraisers—Appointment—Compensation.

To make the appraisement the court must appoint three disinterested persons (any two of whom may act), who are entitled to receive a reasonable compensation for their services, not to exceed $5 per day, to be allowed by the court. The appraisers must, with the inventory, file a verified account of their services and disbursements. If any part of the estate is in any other county than that in which letters issued, appraisers thereof may be appointed, either by the court having jurisdiction of the estate or by the court of such other county on request of the court having jurisdiction. Appraisers need not be appointed if the whole estate consists of money. (C. L. 17, § 7636.)

Comparable provisions.
Cal. Probate Code, § 605 (court appoints one of the inheritance tax appraisers provided for by law to make appraisement; on request, however, court may in its discretion appoint three persons, one of whom must be inheritance tax appraiser; any two may act, provided one is such tax appraiser).

Idaho Code, § 15–402, Mont. Rev. Codes, § 10130 (substantially identical, except that concluding sentence herein is omitted; compensation not to exceed $4.00 per day [Idaho], $5.00 per day [Mont.]; in Montana provision there is inserted: "if only one day's service is charged, the account need not be verified").

102–7–3. Id. Oath—Duties.

The appraisers must take and subscribe an oath, to be attached to the inventory, that they will truly, honestly and impartially appraise the property exhibited to them according to the best of their knowledge and ability. They must then proceed to estimate and appraise the property; each article must be set down separately, with the value thereof in figures opposite the articles, respectively; the inventory must contain all the estate of the decedent, real and personal, and a statement of all debts, partnership and other interests, bonds, mortgages, notes and other securities for the payment of money belonging to the decedent, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon, if any, with their dates, and the sum which in the judgment of the appraisers may be collected on each. (C. L. 17, § 7637.)

Comparable provisions.
Cal. Probate Code, § 608, Idaho Code, § 15–403, Mont. Rev. Codes, § 10131 (similar).

102–7–4. Inventory to Be Signed—Oath of Personal Representatives.

The inventory must be signed by the appraisers; and the executor or administrator must take and subscribe an oath, indorsed upon the inventory, that the inventory contains a true statement of all the estate of the decedent which has come to his knowledge and possession, and particularly of all money belonging to the decedent and of all just claims of the decedent against the affiant. (C. L. 17, § 7638.)

102–7–5. Executor's Debt to Testator to Be Listed as an Asset.

The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but such claim must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due. (C. L. 17, § 7639.)

Comparable provisions.
Cal. Probate Code, § 602, Idaho Code, § 15–405, Mont. Rev. Codes, § 10133 (substantially identical).

CHAPTER 8

FAMILY SUPPORT *

102–8–1. Possession of Homestead and Exempt Property — Allowance During Administration.
102–8–2. Summary Administration and Distribution of Small Estates.

* **History of act.** This chapter was 2 Comp. Laws 1888, Part Eleventh, Ch. V, p. 489; R. S. 1898, Title 74, Ch. 8, p. 839; Comp. Laws 1907, Title 89, Ch. 8, p. 1222.

102–8–1. Possession of Homestead and Exempt Property—Allowance During Administration.

When a person dies leaving a surviving wife, husband or minor children, they shall be entitled to remain in possession of the homestead and to the use of the property exempt from execution until otherwise directed by the court; and during administration shall receive such allowance out of the estate as the court may deem necessary and reasonable for their support. Such allowance may date from the death of the decedent, but in case of insolvent estates shall not continue for longer than one year, and must be paid in preference to all other charges, except expenses of last sickness and funeral expenses of the decedent and costs and charges of administration. The court may, in its discretion, exclude from such family allowance, except homestead rights, any person who may have a separate property or income. (C. L. 17, § 7643.)

History.

This section was R. S. 1898, § 3846; Comp. Laws 1907, § 3846, and does not differ materially therefrom down to the last sentence thereof.

Comparable provisions.

Cal. Probate Code, §§ 660 and 680, Idaho Code, § 15–501, Mont. Rev. Codes, § 10144 (widow or children entitled to remain in possession of homestead, wearing apparel, household furniture; and are also entitled to reasonable provision for their support, to be allowed by judge); Cal. Probate Code, § 680, Idaho Code, § 15–503 (in case of insolvent estate, allowance must not be for longer than one year after granting letters); Cal. Probate Code, § 680, Idaho Code, § 15–504 (allowance paid in preference to other charges except funeral charges and expenses of administration).

Cross-references.

Homestead exemption to be provided, Const. Art. XXII, § 1; homestead exempt from execution, 104–37–13; homestead exempt from payment of debts, use and distribution, 101–4–6 to 101–4–8; homestead generally, Title 38; payment of encumbrances on homestead, 102–9–23.

1. General construction of section.

This section and 101–4–6, 102–8–2 and 102–9–21 must be construed together. In re Mower's Estate, 93 U. 390, 73 P.2d 967.

2. Right to family allowance.

Although a portion of the real estate of a decedent is set aside to the widow as her share of the estate, she has an absolute right to the allowance during administration, the amount being a matter in the court's discretion. In re Pugsley, 27 U. 489, 76 P. 560.

Wife, who had, for many years before death of husband, lived, pursuant to agreement, separate and apart from him, and was not dependent on him for support, was not entitled to family allowance on his death. Matter of Estate of Park, 25 U. 161, 69 P. 671.

3. Amount of allowance.

In fixing the amount of the allowance for support during administration of the estate of a decedent, the age of the survivor or survivors, their health, social position, and standing, the education of the children, the value of the estate, and its solvency or insolvency, should be taken into consideration. In re Pugsley, 27 U. 489, 76 P. 560.

4. Homestead.

Upon death of husband or wife, surviving spouse, by operation of law, is vested with right of occupancy and use of homestead, and this right continues

until otherwise directed by court, even though survivor remarries. In re Hansen's Estate, 55 U. 23, 184 P. 197.

Under this section, where the value of the homestead exceeds the amount exempt from execution, and where the estate is solvent, homestead does not descend to widow, but land passes to heirs of intestate, leaving widow and children subject to widow's rights under statute of descents. Knudsen v. Hannberg, 8 U. 203, 30 P. 749.

Under former 101–4–6, homestead belonged to heirs to whom it was set apart, and heirs who were of age at time of death of intestate or at time homestead was set apart had no interest therein. Christiansen v. Robinson, 35 U. 67, 99 P. 458.

5. Expenses of last illness, etc.

Reasonable expenses of decedent's last illness and funeral expenses, as well as administration expenses, are preferred claims against estate, and when necessary, homestead property is subject to their payment. In re Mower's Estate, 93 U. 390, 73 P.2d 967.

6. Forfeiture of allowance.

Under our statute, which is much like California statute, widow's delay in demanding her allowance does not forfeit her right thereto. Nor does she forfeit it where she is not voluntarily living separate and apart from him. In re Beason's Estate, 49 U. 24, 161 P. 678.

7. Appellate review.

On appeal from order excluding family allowance in fixing amount of inheritance tax, supreme court cannot consider propriety of amount allowed as such to widow and minor child. In re Green's Estate, 78 U. 139, 144, 1 P.2d 968.

A. L. R. notes.

Bank deposit to credit of decedent or other indebtedness to him as subject to widow's or family allowance or other estate exemption, as affected by right of bank to apply deposit, or of other debtor to assert counterclaim or set-off, 108 A. L. R. 773; widow's right of quarantine, 126 A. L. R. 796.

102–8–2. Summary Administration and Distribution of Small Estates.

After the return of the inventory the court may, on petition and after notice, set apart and distribute all the property of the decedent, if the whole value of the same does not exceed $1,500, in fee and absolutely, as follows, to wit: One-half to the surviving wife or husband, and one-half in equal shares to the minor children; or, if there is no surviving wife or husband, in equal shares to the minor children; or, if there is no minor child, to the surviving wife or husband. The expenses of the last illness, funeral charges and expenses of administration shall be paid before such distribution is ordered. In case the whole estate of the decedent is thus distributed, there must be no further proceedings in the administration, unless other property is discovered. The court may, in its discretion, exclude from the distribution of the property so set apart and distributed, other than the homestead, any surviving wife, husband or minor child having separate property or income. In all cases wherein the estate is valued at more than $1,500 the court may, on petition and notice, set apart and distribute property, not to exceed $1,500 in value, to the surviving wife or husband and minor children according to the foregoing provisions. This section shall not be construed to affect the right of a decedent to dispose of his estate by will as provided by law.

(C. L. 17, § 7644.)

History.

This section was 2 Comp. Laws 1888, § 4118. It is practically identical with R. S. 1898, § 3847, except the next to the last sentence thereof, and this is also true as to Comp. Laws 1907, § 3847.

Comparable provisions.

Cal. Probate Code, § 630 (applicable to estates wherein total value of decedent's property in California does not exceed $1,000, decedent leaving no real property nor interest therein nor lien thereon in California); § 630.5 (where value does not exceed $5,000, spouse of decedent, if entitled by succession or by last will and testament to decedent's money on deposit in bank, may collect same but not to exceed $500, without procuring letters); § 640 (pertaining to estate whose net value does not exceed $2,500); § 645 (hearing on petition

where estate does not exceed $2,500; decree assigning whole of such estate to surviving spouse, or minor children if there be no surviving spouse; no surviving spouse or minor child having other estate of $5,000 in value is entitled to such an assignment).

Idaho Code, § 15–506 (authorizing the court to distribute to widow the whole of the estate after payment of expenses of last illness of deceased, funeral charges and expenses of administration, where, upon a hearing on a day fixed, the court finds that value of estate does not exceed $1,500; if there be no widow, the estate is decreed to the minor children subject to payment of the said expenses).

Mont. Rev. Codes, § 10149, as amended by Laws of 1941 (where estate does not exceed $1,500 in value the court or judge must, by order of distribution, assign, set over and distribute, to widow and minor children, the whole of the estate, after payment of expenses of last illness, funeral charges and expenses of administration; where estate does not exceed value of $3,000, it is in discretion of court or judge, after notice of hearing, to assign whole of estate to widow and minor children).

1. General construction of section.

This section and 101–4–6, 102–8–1 and 102–9–21 must be construed together. In re Mower's Estate, 93 U. 390, 73 P.2d 967; In re Petersen's Estate, 69 U. 484, 256 P. 409.

This section is not in conflict with 38–0–1, which provides that homesteads and all exempt property shall be set apart for survivors. In re Syndergaard's Estate, 31 U. 490, 88 P. 616.

2. Nature of widow's title.

Formerly this assignment or distribution did not vest title in the fee in the widow alone, so that she could convey it absolutely, to the exclusion of the heirs and members of the family of the deceased. Now, however, it is set apart and distributed "in fee and absolutely," whereas only the "use" was set apart at the time of this decision. Apparently the widow and the minor children would each receive the fee in their own right under the present section. Rands v. Brain, 5 U. 197, 14 P. 129, applying Comp. Laws 1876, p. 304, § 850, which was re-enacted in Session Laws of 1884, pp. 407, 408, and now constitutes R. S. 1933, 102–8–2.

Under this section man cannot by will deprive his wife and children of homestead. In re Mower's Estate, 93 U. 390, 73 P.2d 967.

3. Right of disposal by husband.

In re Schenk's Estate, 53 U. 381, 178 P. 344, which held that widow, after having renounced provisions of will in her favor and thereby elected to accept her distributive share under law of succession, could not thereafter claim, as against will, all property which amounted to $1,100, as homestead under 101–4–6, or by way of summary distribution under this section, was discussed in In re Mower's Estate, 93 U. 390, 73 P.2d 967, which stated that when the legislature in 1933 eliminated the 1898 amendment to this section which read, "This section shall not be construed to prevent the disposition by will of homestead and exempt personal property," the basis of the Schenk decision had been repealed and that now husband may dispose of all his estate by will subject to homestead rights of widow and minor children, if wife's one-third interest is not in excess of homestead allowance, but if one-third exceeds the homestead, he may only devise from his widow two-thirds of his realty.

4. Value less than $1,500.

Realty, worth less than $1,500 and constituting, for all practical purposes, intestate's entire estate, should be sold by administrator to pay expenses of intestate's last sickness and his funeral charges and expenses of administration, and not, before such expenses are paid, be set off by court to intestate's widow and to others entitled to it. Matter of Estate of Thorn, 24 U. 209, 67 P. 22.

As against lessor's claim for rent, where proceedings to enforce alleged lien were not instituted until more than 30 days after lessee's death (see 52–3–1), lessee's widow and minor children were entitled to whole of lessee's estate, value of which was less than $1,500. In re Stone's Estate, 14 U. 205, 46 P. 1101.

5. Expenses of last illness, etc.

This section and 101–4–6 must be construed together, and funeral and administration expenses are prior to exemptions thereunder and under 104–37–13, and must be paid before any distribution of estate hereunder. In re Petersen's Estate, 69 U. 484, 256 P. 409.

Reasonable expenses of decedent's last illness and funeral expenses, as well as administration expenses, are preferred claims against estate, and when necessary, homestead property is subject to their payment. In re Mower's Estate, 93 U. 390, 73 P.2d 967.

6. Vendor's lien.

104–37–16 was not intended to apply to the estate referred to in this section. In re Farmer's Estate, 17 U. 80, 53 P. 972.

7. Summary distribution.

An heir of an estate, after voluntarily paying the ordinary obligations of a

deceased person, cannot claim the amounts of such payments and thus reduce the value of the property of the estate so as to entitle such heir to a summary distribution of an estate under the exemptions allowed by statute, in such manner preventing the probate court from assuming jurisdiction of the property of the estate. Columbia Trust Co. v. Anglum, 63 U. 353, 225 P. 1089.

CHAPTER 9

CLAIMS AND PAYMENT

102–9–1. Notice to Creditors—To Be Published.
102–9–2. Id. Time Limits for Presenting Claims.
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102–9–25. Order of Court for Payment of Debts and Discharge of Personal Representative.
102–9–26. Payment of Claims Contingent or Not Due.
102–9–27. After Decree Ordering Payment of Allowed Claim, Creditor May Enforce Against Personal Representative.
102–9–28. Rights of Creditors Whose Claims Are Not Included in Decree.

102–9–1. Notice to Creditors—To Be Published.

Every executor and administrator must, immediately after his appointment, cause to be published a notice to the creditors of the decedent; such notice must be published not less than once a week for four successive weeks, but such publication shall not be necessary in cases where summary distribution of estates shall apply, as provided in section 102–8–2; *provided*, that where an estate exceeds $1,500 in amount the publication of such notice shall be necessary. (C. L. 17, § 7645.)

History.
This section was R. S. 1898, § 3848, and the first five lines are identical therewith, but it is absolutely identical with Comp. Laws 1907, § 3848.

Comparable provisions.
Cal. Probate Code, § 700, Idaho Code, § 15–601, Mont. Rev. Codes, § 10170 (requiring publication of notice to creditors).

Cross-references.
Form of notice, 102-14-4.

1. Words and phrases defined.
"Successive weeks" as used in this section means successive weeks commencing with a Sunday after the first week commencing with a Sunday in which the first publication appeared. In re Phillips' Estate, 86 U. 358, 44 P.2d 699.

2. Presentation of claims.
In suit by legal representative on promissory note, which had been given in payment of corporation stock purchased by defendant, defended on ground that note had been obtained by fraud, wherein defendant interposed counterclaim for cash paid for stock, held that since no claim had ever been presented against estate, no action by way of counterclaim could be maintained. Rockhill v. Creer, 56 U. 119, 189 P. 668.

In suit by executors of deceased partner against legal representatives of surviving partners for partition of partnership mining property, wherein personal representatives of surviving partners sought to counterclaim for money paid out by surviving partners for partnership debts and obligations, held representatives of surviving partners were not barred by laches from presenting claim in partition suit for failure to file claim against deceased partner, where plaintiffs suffered no prejudice by lapse of time. Sharp v. Sharp, 54 U. 262, 180 P. 580.

3. Order of court.
It does not require "an order of the court to permit notice to creditors to be published less often than the paper in which it is published during the prescribed period over which notice must be published." In re Phillips' Estate, 86 U. 358, 369, 44 P.2d 690.

4. Notice.
"Where one of the world, such as a creditor, claims to be interested, but never has had actual notice of the proceedings, and wants to attack the final judgment or any of the proceedings as being void, his only method of direct attack is through petition." In re Phillips' Estate, 86 U. 358, 364, 44 P.2d 699.

5. Notice to nonresident creditors.
Notice mailed to nonresident creditors who had listed their claims with railroad company's receiver, which notice was also published in newspaper once weekly for six consecutive weeks before sale by receiver of company's property, held to constitute reasonable notice for service by publication. Chapman v. Schiller, 95 U. 514, 83 P.2d 249, 120 A. L. R. 906. (Moffat, J., dissenting.)

6. Summary distribution.
See 102-9-4.

Decisions from other jurisdictions.
— California.
The holder of a claim against an estate cannot maintain an action thereon unless the claim is first presented, and he can recover only upon the cause of action stated in the claim; nor can a complainant amend his complaint so as to set up another cause of action. Dugand v. Magnus, 107 Cal. App. 243, 290 P. 309.

While the claim presented is not required to state the facts with the precision and detail necessary in a complaint, it should afford the representative sufficient information to enable him to act upon it advisedly. Dugand v. Magnus, 107 Cal. App. 243, 290 P. 309.

102-9-2. Id. Time Limits for Presenting Claims.

The time expressed in the notice, unless otherwise ordered by the court, must be four months after its first publication when the estate exceeds in value the sum of $10,000, and two months when it does not. In case an executor or administrator resigns, is removed or dies before the time for presentation of claims has expired, his successor must give notice for the unexpired time allowed for such presentation.

(C. L. 17, § 7646.)

History.
This section was 2 Comp. Laws 1888, § 4121. In former sections "four months" was "ten months," and "two months" was "four months." In other respects the present section is very similar to R. S. 1898, § 3849, and Comp. Laws 1907, § 3849.

Comparable provisions.
Mont. Rev. Codes, § 10171 (time expressed in notice must be ten months after first publication when estate exceeds in value $10,000; four months, when it does not exceed such value).

102–9–3. Id. Proof of Publication—Decree.

Within thirty days after the publication of the notice is completed a copy thereof, with the affidavit of due publication, must be filed, and the court must enter an order or decree showing that due notice to creditors has been given. (C. L. 17, § 7647.)

Comparable provisions.

Cal. Probate Code, § 702 (includes similar provision).

Mont. Rev. Codes, § 10172 (copy of notice and affidavit of publication must be filed).

Cross-references.

Proof of publication, 102–14–11, 102–14–12.

102–9–4. Claims to Be Presented Within Time Limits—Exceptions.

All claims arising upon contract, whether the same are due, not due or contingent, must be presented within the time limited in the notice, and any claim not presented is barred forever; *provided*, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or judge thereof, that the claimant had no notice as provided in this chapter by reason of being out of the state, it may be presented at any time before a decree of distribution is entered; *provided further*, that nothing in this title contained shall be so construed as to prohibit the foreclosure of liens or mortgages as hereinafter provided. (C. L. 17, § 7648.)

History.

This section down through the first proviso is almost identical with 2 Comp. Laws 1888, § 4123. It is identical with Comp. Laws 1898, § 3851; Comp. Laws 1907, § 3851.

Comparable provisions.

Cal. Probate Code, § 707 (similar, except as to second proviso herein).

Idaho Code, § 15–604 (substantially identical except as to second proviso herein).

Mont. Rev. Codes, § 10173 (includes similar provision, coupled with following concluding language: "except that no balance of the debt secured by such mortgage remaining unpaid after foreclosure shall be a claim against the estate, unless such debt was presented as required by the provisions of this chapter").

1. **Presentation of claims.**

2. **—necessity for.**

Claims and demands arising out of contracts or transactions with the decedent must be presented as required by statute (Martin v. Saxton, 48 U. 488, 160 P. 441, applying Comp. Laws 1907, § 3858, which is 102–9–11); mere knowledge on part of executor or administrator of existence of debt or claim against estate is not sufficient to dispense with necessity of presentation. Clayton v. Dinwoodey, 33 U. 251, 93 P. 723, 14 Ann. Cas. 926.

Where payment is not sought out of assets of estate, presentation of claim is not necessary. Hatch v. Hatch, 46 U. 116, 131, 148 P. 1096. And see Martin v. Saxton, 48 U. 488, 160 P. 441.

Judgment claims must be presented like others, and await acquisition of funds with which to pay them. Wasatch Livestock Loan Co. v. Nielson, 90 U. 307, 321, 56 P.2d 613, rehearing denied 90 U. 331, 61 P.2d 616.

Claim by plaintiff for delinquent taxes on property which he purchased under warranty deed from deceased vendor arose under contract, and hence was required to be presented under this section. Clayton v. Dinwoodey, 33 U. 251, 93 P. 723, 14 Ann. Cas. 926.

In suit by legal representative on promissory note, which had been given in payment of corporation stock purchased by defendant, defended on ground that note had been obtained by fraud, wherein defendant interposed counterclaim for cash paid for stock, held that since no claim had ever been presented against estate, no action by way of counterclaim could be maintained. Rockhill v. Creer, 56 U. 119, 189 P. 668.

Attorney employed by decedent on contingent fee basis to sue on insurance contract has lien on sums recovered in such action in hands of administrator; and provisions of Probate Code relating to unsecured presentment of unsecured

claims (102-9-1, 102-9-2, 102-9-7, 102-9-9, 102-9-11, 102-9-15) are inapplicable; and notwithstanding provisions of 102–9–11, he may make claim without express waiver of recourse against other property, where petition is conclusive that he looks only to fund subject to lien. In re Agee's Estate, 69 U. 130, 252 P. 891.

3. —what constitutes.

Commencement of suit and service upon executors of verified complaint, within time in which claim could have been properly presented, operated as presentation of claim. Clayton v. Dinwoodey, 33 U. 251, 93 P. 723, 14 Ann. Cas. 926, followed and approved in Brown v. Skeen, 89 U. 568, 575, 58 P.2d 24.

4. —time for presentation.

Claims must be filed, after proper notice, within time limit of statute, or be forever barred. Jones v. State Tax Commission, 99 U. 373, 104 P.2d 210 (Larson, J., dissenting); Welsh, Driscoll & Buck v. Buck, 64 U. 579, 232 P. 911.

Where claims were barred for failure to file on time, administratrix was without power to pay them, and any money paid thereon would be considered to come from her personal funds, and could not be considered as deduction from inheritance tax. Jones v. State Tax Commission, 99 U. 373, 104 P.2d 210. (Larson, J., dissenting.)

In suit by executors of deceased partner against legal representatives of surviving partners for partition of partnership mining property, wherein personal representatives of surviving partners sought to counterclaim for money paid out by surviving partners for partnership debts and obligations, held representatives of surviving partners were not barred by laches from presenting claim in partition suit for failure to file claim against deceased partner, where plaintiffs suffered no prejudice by lapse of time. Sharp v. Sharp, 54 U. 262, 180 P. 580.

5. —claims presentable.

This section is limited to claims arising upon contracts, and has no reference to claims for damages arising from tortious acts. Van Wagoner v. Whitmore, 58 U. 418, 199 P. 670. Robison v. Robison, 59 U. 215, 203 P. 340.

In action by administrator to foreclose mortgage, wherein defendant counterclaimed, held defendant, in electing to treat his claims as sounding in tort for purpose of avoiding necessity of presenting them to administrator for allowance under this section, could not then in same action, when it was to his advantage to waive tort, treat claims as contracts and disregard former election in order to plead counterclaim under 104-9-2. Robison v. Robison, 59 U. 215, 203 P. 340.

This section applies only to claims against the decedent; it does not apply to obligations incurred by the administrator. However, the estate is under obligation to pay money used to protect its property, such as mortgaged, notwithstanding the mortgage was executed by administrator without the requisite authority. Wasatch Livestock Loan Co. v. Nielson, 90 U. 307, 327, 56 P.2d 613, rehearing denied 90 U. 331, 61 P.2d 616.

6. —contingent claims.

Claim arising from deceased's contract to allow plaintiff to manage building owned by deceased, and refusal by executors to allow such management, was contingent claim within meaning of this section, so that where such claim was not presented within time stated in notice as provided by this section, claim was barred notwithstanding that claim did not arise until executors refused to allow plaintiff to perform contract which was after time for presentation had passed. Halloran-Judge Trust Co. v. Heath, 70 U. 124, 258 P. 342, 64 A. L. R. 368.

7. Set-offs and counterclaims.

102–9–9, requiring actions on claims, rejected by administrator under this section, to be commenced within three months, not only prevents the claimant from obtaining judgment in independent action, but prevents the presentation of that claim as an offset against a claim prosecuted by the estate. Robison v. Robison, 63 U. 68, 222 P. 595.

8. Summary distribution.

Although widow had claim against estate of deceased husband for voluntary payment of deceased's obligations, funeral expense and expense of last illness, she could not claim amounts of such payments to reduce the value of the property of the estate so as to entitle her to summary distribution of the estate under the exemptions allowed by statute. Columbia Trust Co. v. Anglum, 63 U. 353, 225 P. 1089.

9. Foreclosure of liens.

Under a similar section in Comp. Laws 1907 it was held that warehouseman, by presenting to executor claim against an estate for storage charges, without mentioning his lien, and after rejection of claim, by suing thereon to recover amount of his charges, does not thereby make an election of remedies so as to bar assertion of his warehouseman's lien by way of counterclaim, in subsequent action by executor to recover prop-

erty. Howard v. J. P. Paulson Co., 41 U. 490, 127 P. 284.

10. Costs.

Where suit is commenced against administrator without presentation of claim, if administrator, on investigation, finds claim to be just, and determines that it ought to be paid by estate, he may confess demand within time in which he is required to appear in action and plead to merits, and, if he does so, there should be no judgment for costs; but if issues are joined as to merits of claim and material allegations with respect thereto are denied, and plaintiff is put upon his proof to establish his claim, then costs should follow as though suit had been brought on rejected claim. Clayton v. Dinwoodey, 33 U. 251, 93 P. 723, 14 Ann. Cas. 926.

Decisions from other jurisdictions.

— Idaho.

When an application has been made by a creditor to present a claim against the estate of a decedent, after the expiration of the time limited in the notice for presentation of claims, supported by affidavit containing statements which, if true, justify the issuance of an order that such claim may be presented at any time before decree of distribution is entered, an order should be made permitting its presentation; if, when presented, it is rejected, an action may be commenced to establish the claim against the estate, and the executor or administrator may present any defense thereto he may have, including the statute of limitations contained in section 16-604 of the Idaho Code. Penn Mut. Life Ins. Co. v. Beauchamp, 57 Idaho 530, 66 P.2d 1020.

A. L. R. notes.

Applicability of nonclaim statute to claims arising under contract executory at time of death, 47 A. L. R. 896.

Bar of statute of nonclaim of decedent's domicile as affecting assertion of claim elsewhere, 72 A. L. R. 1030.

Claim of government as within provision of statute fixing time for presenting claims against decedent's estate, 53 A. L. R. 569.

Claims for taxes as within contemplation of statute requiring presentation of claims against decedents' estates, 109 A. L. R. 1370.

Effect of recovery of judgment on unfiled or abandoned claim after expiration of time allowed for filing claim against estate, 60 A. L. R. 736.

Filing claim against estate of decedent as affecting or precluding other remedies against estate, 120 A. L. R. 1225.

Necessity of presenting claim against decedent's estate as affected by executor's or administrator's personal duty or obligation to claimant, 103 A. L. R. 337.

Necessity of presenting claim against decedent's estate for specific performance of contract to make will in favor of another or to will latter a specified sum or property, 113 A. L. R. 1070.

Nonclaim statute as governing claim barred, subsequent to death of obligor, by general statute of limitations, 112 A. L. R. 289.

Presentment of claim or notice to one or more coadministrators, coexecutors, coguardians or cotrustees as presentment or notice to all, 115 A. L. R. 390.

Prosecution of action or claim against estate by beneficiary as forfeiture of share in will by virtue of clause therein so providing, 30 A. L. R. 1014.

Right of nonresident creditor of decedent's estate to file claim in ancillary administration, 106 A. L. R. 893.

Superseded liability of stockholders as within statute of nonclaim, 87 A. L. R. 494.

102-9-5. Contents of Claim—Verification.

Every claim which is due, when presented to the executor or administrator, must be supported by the affidavit of the claimant or some one in his behalf that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. If the claim is not due when presented, or is contingent, the particulars of such claim must be stated. When the affidavit is made by a person other than the claimant he must set forth in the affidavit the reason why it is not made by the claimant. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the claim is founded on a bond, bill, note or any other instrument, a copy of such

instrument must accompany the claim, and the original instrument must be exhibited, if demanded, unless it is lost or destroyed; in which case the claimant must accompany his claim by his affidavit, containing a copy or particular description of such instrument, and stating its loss or destruction. If the claim or any part thereof is secured by a mortgage or other lien which has been recorded, it shall be sufficient to describe the mortgage or lien and refer to the date, volume and page of its record. If in any case the claimant has left any original voucher in the hands of the executor or administrator, or suffered the same to be filed in court, he may withdraw the same when a copy thereof has been already, or is then, attached to his claim. A brief description of every claim filed must be entered by the clerk in the register, showing the name of the claimant, the amount and character of the claim, rate of interest and date of allowance. (C. L. 17, § 7649.)

History.

This section is practically identical with R. S. 1898, § 3852; Comp. Laws 1907, § 3852.

Comparable provisions.

Idaho Code, § 15–605, Mont. Rev. Codes, § 10174 (similar, through words "in support of the claim" in line 10).

Iowa Code 1939, § 11957 (claims against estate must be clearly stated; if founded on written instrument, the same or copy thereof must be attached; if on account, itemized copy must be attached, showing the balance); § 11958 (statement must be sworn to and filed with clerk of district court).

1. Verification of claim.

Evidence supported court's finding that claim of corporation was properly verified. Welsh, Driscoll & Buck v. Buck, 64 U. 579, 232 P. 911.

2. Instrument to accompany claim.

Claim for broker's commission was properly allowed although application for loan embodying agreement to pay broker commission if loan was obtained was not attached to claim since such application was not an instrument upon which the claim was founded but at most was part of the evidence to prove the claim. Knowlton v. Thompson, 62 U. 142, 218 P. 117.

Decisions from other jurisdictions.

— Federal.

It may be convenient that all debts to be paid out of the assets of a deceased man's estate shall be established in the court to which the law of the domicile has confided the general administration of these assets; and the courts of the United States will pay respect to this principle in the execution of the process enforcing their judgments out of these assets, so far as the demands of justice require; but neither the principle of convenience nor the statutes of a state can deprive them of jurisdiction to hear and determine a controversy between citizens of different states when such a controversy is distinctly presented, because the judgment may affect the administration or distribution in another forum of the assets of the decedent's estate, the court thus repeating its former language as stated in Hess v. Reynolds, 113 U. S. 73, 28 L. Ed. 927, 5 S. Ct. 377. Clark v. Bever, 139 U. S. 96, 35 L. Ed. 88, 11 S. Ct. 468, aff'g 31 F. 670, affirming judgment of Circuit Court of the United States for the Southern District of Iowa.

— Iowa.

Holder of note secured by mortgage has election as to whether he will file claim against estate of deceased maker or depend upon security of mortgage. Ganoe v. Swisher, 229 Iowa 130, 294 N. W. 235.

Technical nicety of pleading is not required in framing claims in probate. Shoberg v. Rock, 230 Iowa 832, 298 N. W. 834.

Test often applied to determine whether, for purpose of probate statute of limitations, amendment to claim in probate is germane thereto, or states new cause of action, is whether same evidence would support both, or whether same measure of recovery is applicable to both, or whether recovery under one would bar other. In re Estate of Hoenig, 230 Iowa 718, 298 N. W. 887.

102–9–6. Allowance or Rejection of Claims.

When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator, he must indorse thereon

his allowance or rejection, with the date thereof. If he allows the claim, it must be presented to the judge, who must indorse upon it his allowance or rejection. If the executor or administrator or the judge refuses or neglects to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day; and if the presentation is made by a notary, the certificate of such notary under seal shall be prima facie evidence of such presentation and the date thereof. If the claim is presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator and by the judge after the expiration of such time. If the claim is payable in a particular kind of money or currency, it shall, if allowed, be payable only in such money or currency.

(C. L. 17, § 7650.)

Comparable provisions.

Cal. Probate Code, § 712, Idaho Code, § 15-607 (similar in purport).

Mont. Rev. Codes, § 10176 (substantially identical, except as to concluding sentence herein).

Decisions from other jurisdictions. — California.

Allowance of claims was prima facie evidence of their correctness, and cast upon respondent who contested the claims the burden of showing that they were not proper claims. In re Roberts' Estate, — Cal. App.2d —, 120 P.2d 933.

An application for approval of a claim is a motion made ex parte, and the approval of a claim is an ex parte order. In re Roberts' Estate, — Cal. App.2d —, 120 P.2d 933.

A. L. R. notes.

Right of executor or administrator to contest, or appeal from, court's rejection of claim against decedent's estate, 129 A. L. R. 922; who entitled to contest, or appeal from, allowance of claim against decedent's estate, 118 A. L. R. 743.

102-9-7. Claims Allowed to Be Filed—Claim of Judge Against Estate.

Every claim allowed by the executor or administrator and approved by the judge, or a copy thereof as hereinafter provided, must, within thirty days thereafter, be filed in the court, and be ranked among the acknowledged debts of the estate to be paid in due course of administration. If the judge has a claim against an estate in process of settlement before him, the same must be allowed or rejected by another judge of the district court of the same or of an adjoining county, and a right of action shall lie as in the case of other creditors. (C. L. 17, § 7651.)

Comparable provisions.

Idaho Code, § 15-608, Mont. Rev. Codes, § 10177 (includes provision substantially identical with first sentence herein).

102-9-8. Interest on Claim When Estate Insolvent.

If the estate is insolvent, no greater rate of interest shall be allowed upon any claim after the first publication of notice to creditors than is allowed on judgments obtained in the courts of this state.

(C. L. 17, § 7652.)

History.

This section is practically identical with R. S. 1898, § 3855; Comp. Laws 1907, § 3855.

Cross-references.

Interest on judgments, 44-0-4.

1. Interest on proceeds of sale.

Where mortgagee of perishable personal property is allowed, by stipulation between the parties, to sell said property and retain or "hold" proceeds therefrom to abide the event of a suit to determine validity of mortgage, such money or

proceeds remains in mortgagee's hands without liability for interest, where stipulation does not provide therefor. Wasatch Livestock Loan Co. v. Nielson, 90 U. 307, 328, 56 P.2d 613, rehearing denied 90 U. 331, 339, 61 P.2d 616.

102–9–9. Action on Rejected Claim—Limitation of Action.

When a claim is rejected, either by the executor or administrator or the judge, and notice of rejection has been filed with the clerk, the holder must bring suit in the proper court against the executor or administrator within three months after the filing of such notice, if the claim is then due, or within two months after it becomes due; otherwise the claim shall be forever barred. (C. L. 17, § 7653.)

History.

This section is identical with R. S. 1898, § 3856; Comp. Laws 1907, § 3856, except that part thereof with respect to notice of rejection.

Comparable provisions.

Cal. Probate Code, § 714 (includes similar provision).

Idaho Code, § 15–609 (similar).

Mont. Rev. Codes, § 10178, as amended by Laws of 1939 (includes provision of similar purport; and when claimant has been misled by false statements, the time for bringing suit is extended for period of three months from and after discovery of falsity of the statements; but suit must be commenced prior to approval of final account of executor or administrator).

Cross-references.

Limitation of action against representatives of deceased, 104–2–37, 104–2–38.

1. Action on rejected claim.

2. — in general.

Provisions of this section and others relating to presentment of unsecured claims are jurisdictional and must be complied with or claim is barred. In re Agee's Estate, 69 U. 130, 252 P. 891.

If action is commenced on the claim within the three-month period after its disallowance without prejudice to sue, the action is not barred. Welsh, Driscoll & Buck v. Buck, 64 U. 579, 232 P. 911. But this section not only prevents a claimant from obtaining judgment in action instituted after three months from the date of the disallowance of the claim, whether that defense is interposed by plea or not, but also prevents the presentation of an offset against a claim prosecuted by the estate. Robison v. Robison, 63 U. 68, 222 P. 595.

Accordingly, in suit by legal representative on promissory note, which had been given in payment of corporation stock purchased by defendant, defended on ground that note had been obtained by fraud, wherein defendant interposed counterclaim for cash paid for stock, held that since no claim had been ever presented against estate, no action by way of counterclaim could be maintained. Rockhill v. Creer, 56 U. 119, 189 P. 668.

3. —actionable claims.

This section has been applied to verified claim presented under 102–9–4 et seq. for storage and other charges incurred by decedent. Howard v. J. R. Paulson Co., 41 U. 490, 127 P. 284.

A contract to pay for care by daughter in deceased parents' illness may be implied from the facts and circumstances in evidence. Shields v. Ekman, 67 U. 474, 248 P. 122.

4. — running of statute.

Limitation in this section begins to run from the date of the rejection of the claim in part by the administrator. Robison v. Robison, 63 U. 68, 222 P. 595.

5. — defenses.

Where defendant died while action was pending and plaintiffs presented claim to administrator under 102–9–13, which was rejected, after which plaintiffs caused administrator to be substituted for defendant in original action, defense that claim was barred because substitution did not take place within three months as required under this section was without merit, in view of 104–3–19, providing that court may allow pending action to proceed against deceased's representative. Knowlton v. Thompson, 62 U. 142, 218 P. 117.

6. — waiver.

In action on rejected claim of daughter and husband for care of daughter's deceased parents, executors may waive provisions of 104–49–2, subd. (3) by failing to object to testimony of claimants respecting oral agreement with decedents as to payment for care. Shields v. Ekman, 67 U. 474, 248 P. 122.

7. — evidence.

Presumption that daughter's services to parents are gratuitous, held inapplicable in action on rejected claim for services during deceased parents' illnesses, where daughter left own home for purpose. Shields v. Ekman, 67 U. 474, 248 P. 122.

8. — findings.

Evidence supported court's finding that action was commenced on claim within three months after court had disallowed it without prejudice to sue, and hence, action on claim was not barred. Welsh, Driscoll & Buck v. Buck, 64 U. 579, 232 P. 911.

A. L. R. notes.

Prosecution of action or claim against estate by beneficiary as forfeiture of share in will by virtue of clause therein so providing, 30 A. L. R. 1014.

102-9-10. Claim Barred by Limitation Cannot Be Allowed—Judge May Inquire Into Validity.

No claim must be allowed by the executor or administrator or the judge which is barred by the statute of limitations. When a claim is presented to the judge for his allowance, he may, in his discretion, examine the claimant and others on oath and hear any legal evidence touching the validity of the claim. (C. L. 17, § 7654.)

History.

This section is practically identical with 2 Comp. Laws 1888, § 4129. It is absolutely identical with R. S. 1898, § 3857; Comp. Laws 1907, § 3857.

Comparable provisions.

Cal. Probate Code, § 708 (substantially the same, and coupled with the following sentence: "No claim which has been allowed is affected by the statute of limitations, pending the administration of the estate").

Idaho Code, § 15-610 (substantially identical except as reading in part, "* * * which was barred by the statute of limitations, at the time of the death of the decedent. When a claim is presented to the probate judge * * *").

Mont. Rev. Codes, § 10179 (substantially identical).

Cross-references.

Statute of limitations, 104-2.

1. Claims barred by statute of limitations.

Under this section an executor or administrator cannot waive or abandon statute of limitations, nor can court, in passing upon claim of a decedent, approve one against which statute has run (Holloway v. Wetzel, 86 U. 387, 45 P.2d 565, 98 A. L. R. 1006; Clayton v. Dinwoodey, 33 U. 251, 93 P. 723, 14 Ann. Cas. 926); therefore, where evidence shows that claim is barred, it cannot be allowed although administrator does not plead statute of limitations (Holloway v. Wetzel, 86 U. 387, 45 P.2d 565, 98 A. L. R. 1006), for defense of statute of limitations is available although not pleaded. Gulbranson v. Thompson, 63 U. 115, 222 P. 590.

In other words, administrator's failure to plead bar of statute of limitations does not make claim allowable. Fullerton v. Bailey, 17 U. 85, 53 P. 1020. While it is duty of administrator to plead statute against allowance of claim barred by its provisions, failure to do so does not remove statutory bar, and defense is not waived. Hawkley v. Heaton, 54 U. 314, 180 P. 440.

Where there was no evidence in action on note against estate that deceased who, as sole heir of husband who was jointly and severally liable on note with deceased, made assignment for benefit of creditors, authorized assignee to make any payments on note, action thereon was barred by limitations. Holloway v. Wetzel, 86 U. 387, 45 P.2d 565, 98 A. L. R. 1006.

A. L. R. notes.

Direction in will for payment of debts of testator, or for payment of specified debt, as affecting debts or debt barred by limitation, 109 A. L. R. 1440; effect of statement of claim against decedent's estate regarding debt apparently barred by the statute of limitations, 119 A. L. R. 426; nonclaim statute as governing claim barred, subsequent to death of obligor, by general statute of limitations, 112 A. L. R. 289.

102-9-11. Presentation a Prerequisite to Suit—Enforcement of Liens Excepted.

No holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administra-

tor, except that an action may be brought without notice by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint; but no attorneys' fees shall be recovered in such action unless such claim is so presented.

(C. L. 17, § 7655.)

History.

This section is in most respects identical with 2 Comp. Laws 1888, § 4130. It is practically and substantially identical with Comp. Laws 1898, § 3858; Comp. Laws 1907, § 3858.

Comparable provisions.

Idaho Code, § 15–611 (words "without notice" are omitted; reads in part: "* * * may be brought by any holder of a mortgage or lien * * * against the property of the estate subject thereto, whether homestead community or separate property of the deceased * * *"; attorneys' fees are not mentioned).

Mont. Rev. Codes, § 10180 (substantially the same; words "without notice" not included, nor mention of attorneys' fees).

1. Presentation as condition precedent to action.

This section prohibits the bringing of any action on a claim unless it is first presented to the administrator as provided by 102–9–4, except that holder of mortgage or lien on the property may enforce the same when recourse against all other property of the estate is expressly waived in the complaint. But the Probate Code affords general creditors of an insolvent estate ample protection by allowing them to request administrator to sue to recover property claimed by another, upon complying with 102–11–13. Wasatch Livestock Loan Co. v. Nielson, 90 U. 307, 321, 56 P.2d 613, rehearing denied 90 U. 331, 61 P.2d 616.

Claims against decedent's estate must be presented in the probate court, and may not be established in a court of equity. Such court will dismiss claim without prejudice, and not pass thereon. Welsh, Driscoll & Buck v. Buck, 48 U. 653, 161 P. 455. This case was again before the court in Welsh, Driscoll & Buck v. Buck, 64 U. 579, 232 P. 911.

Commencement of suit and service upon executors of verified complaint, within time in which claim could have been properly presented, operated as presentation of claim. Clayton v. Dinwoodey, 33 U. 251, 93 P. 723, 14 Ann. Cas. 926.

2. Claims contemplated by section.

The demands and claims referred to in this section are those arising out of contracts or transactions with the decedent, and not to claims or transactions had with the executor or administrator, as, for example, a mortgage executed by executor on behalf of the estate, by order and authority of the court, in the course of administration. Martin v. Saxton, 48 U. 488, 160 P. 441.

Claim arising from deceased's contract to allow plaintiff to manage building owned by deceased and refusal by executors to allow such management was contingent claim within meaning of 102–9–4, so that where such claim was not presented within time stated in notice as provided by such section, claim was barred notwithstanding that claim did not arise until executors refused to allow plaintiff to perform contract which was after time for presentation had passed. Halloran-Judge Trust Co. v. Heath, 70 U. 124, 258 P. 342, 64 A. L. R. 368.

3. Enforcement of liens.

4. —attorney's lien.

Attorney employed by decedent on contingent fee basis to prosecute action against insurance company, and retained by administrator for same purpose after decedent's death, may enforce attorney's lien in proceeding against administrator as such where he received sum recovered in action, and proceeding to enforce lien need not be against administrator personally, under such circumstances, notwithstanding usual rule to that effect. In re Agee's Estate, 69 U. 130, 252 P. 891.

Notwithstanding provisions of this section, attorney's lien on recovery in action originally brought on behalf of decedent may be enforced against administrator in probate proceeding, provisions relating to presentment of ordinary unsecured claims being inapplicable and separate action being unnecessary where it would be brought in same court having jurisdiction of probate proceeding. And waiver of all recourse against other property need not be expressly stated where petition to enforce attorney's lien is conclusive that he looks only to fund subject to lien. In re Agee's Estate, 69 U. 130, 252 P. 891.

5. — warehouseman's lien.

Under this section lien claimants such as a warehouseman, who make no claim

upon general assets of the estate, are excused from filing any claim against it, but may bring their action as in other cases to subject the particular property upon which the lien exists to satisfaction thereof. Howard v. J. P. Paulson Co., 41 U. 490, 494, 127 P. 284, applying Comp. Laws 1907, § 3858, which is practically identical with present section.

6. — mortgages.

Under former statute, held that person claiming right of subrogation to mortgagee's rights under deceased's mortgage was not required to present subrogation claim to probate court, but had right to sue administrator on such claim without invoking aid of either probate court or administrator. Fullerton v. Bailey, 17 U. 85, 53 P. 1020.

7. Election of remedies.

Warehouseman who presents a claim for amount claimed to be due for storage charges without saying anything about his lien thereon, and after claim was rejected brings an action upon said claim to recover amount thereof against estate without mentioning lien, which action was dismissed, does not make an election of remedies so as to bar assertion of his warehouseman's lien by way of counterclaim in subsequent action of replevin by executor to recover the property. Howard v. J. P. Paulson Co., 41 U. 490, 495, 127 P. 284, applying identical section in Comp. Laws 1907, followed and approved in Welsh, Driscoll & Buck v. Buck, 64 U. 579, 584, 232 P. 911.

A. L. R. notes.

Necessity of presenting claim to executor or administrator before bringing suit, 34 A. L. R. 362.

102–9–12. Vacancy in Administration Extends Time—Statute of Limitations Does Not Run Against Allowed Claim.

The time during which there shall be a vacancy in the administration must not be included in any limitation herein prescribed. No claim against any estate which has been presented and allowed is affected by the statute of limitations, pending the proceedings for the settlement of the estate. (C. L. 17, § 7656.)

Comparable provisions.

Cal. Probate Code, § 715, Idaho Code, § 15–612, Mont. Rev. Codes, § 10182 (substantially identical with first sentence herein).

102–9–13. Actions Pending at Death—Presentation Necessary.

If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof is made of the presentation required. (C. L. 17, § 7657.)

History.

This section is identical with R. S. 1898, § 3860; Comp. Laws 1907, § 3860.

Comparable provisions.

Cal. Probate Code, § 709, Idaho Code, § 15–613, Mont. Rev. Codes, § 10183 (substantially identical).

Cross-references.

Where party dies after verdict or decision and before judgment, judgment is not a lien, 104–30–13; when action does not abate by death, and substitution, 104–2–38; 104–3–19.

1. Applicability of section.

This section is limited to claims arising upon contracts, and has no reference to claims for damages arising from tortious acts. Van Wagoner v. Whitmore, 58 U. 418, 199 P. 670.

2. Substitution of parties.

Where defendant died while action was pending and plaintiffs presented claim to administrator under this section which was rejected, after which plaintiffs caused administrator to be substituted for defendant in original action, defense that claim was barred because substitution did not take place within three months required under 102–9–9 was without merit in view of 104–3–19, providing that court may allow pending action to proceed against deceased's representative. Knowlton v. Thompson, 62 U. 142, 218 P. 117.

102-9-14. Claims Allowed in Part.

Whenever any claim is presented to an executor or administrator or the judge, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow. If the creditor refuses to accept the amount allowed in satisfaction of his claim, he shall recover no costs in any action thereon brought against the executor or administrator, unless he recovers a greater amount than that offered to be allowed. (C. L. 17, § 7658.)

Comparable provisions.
Idaho Code, § 15-614, Mont. Rev. Codes, § 10184 (substantially identical).

102-9-15. Judgment Against Personal Representatives—Effect.

A judgment rendered against an executor or administrator upon any claim for money against the estate of his testator or intestate only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the judge; and the judgment must be that the executor or administrator pay in due course of administration the amount ascertained to be due. A certified transcript of the original docket of the judgment must be filed among the papers of the estate in court. No execution shall issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment. (C. L. 17, § 7659.)

History.
This section is practically identical with R. S. 1898, § 3862; Comp. Laws 1907, § 3862.

Comparable provisions.
Cal. Probate Code, § 730 (substantially identical, except as reading in part: "A judgment rendered * * * against the estate of his testator or intestate, when it becomes final, conclusively establishes the validity of the claim for the amount of the judgment; and the judgment must be that * * *").
Idaho Code, § 15-615, Mont. Rev. Codes, § 10185 (substantially identical).

1. Manner of rendering judgment.
A judgment against the defendant "as executor of the last will and testament of . . . . . ., deceased," is a judgment against the executor in his official capacity only, and can be paid only as provided by this section. Newton v. Tracy Loan & Trust Co., 88 U. 547, 566, 40 P.2d 204.

2. Personal judgment.
Judgment rendered against administrator on claim against estate, held improperly entered against him personally. Clayton v. Dinwoodey, 33 U. 251, 93 P. 723, 14 Ann. Cas. 926. Court erred in entering personal judgment against administratrix on claim against estate. Smith v. Hanson, 34 U. 171, 96 P. 1087, 18 L. R. A. (N. S.) 520.

3. Establishment of preferences.
Action by creditor against administrator in which it sought to establish preference over other creditors, after administrator allowed claim but denied petition for preference, was dismissed, since creditor cannot have his claim to priority determined in separate proceeding but must establish same in probate proceeding. United States Fidelity & Guaranty Co. v. Bletcher, 64 U. 49, 228 P. 188.

A. L. R. notes.
Rank of creditor's claim against decedent's estate or his rights in respect of property of estate as affected by reduction of his claim to judgment against executor or administrator, or levy of attachment or execution, 121 A. L. R. 656.

102-9-16. Judgments for or Against Decedent in Lifetime—Effect.

When any judgment has been rendered for or against the testator or intestate in his lifetime, no execution shall issue thereon after his death,

except as provided in the code of civil procedure relating to executions. Judgment against the decedent for the recovery of money must be presented to the executor or administrator like any other claim. If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof, and the officer making the sale must account to the executor or administrator for any surplus in his hands. A judgment creditor having a judgment which was rendered against the testator or intestate in his lifetime may redeem any real estate of the decedent from any sale under foreclosure or execution, in the same manner and with the same effect as if the judgment debtor were still living. (C. L. 17, § 7660.)

History.

This section is practically identical with 2 Comp. Laws 1888, § 4135; R. S. 1898, § 3863; Comp. Laws 1907, § 3863.

Comparable provisions.

Cal. Probate Code, § 732 (substantially identical as to judgment "rendered against the testator or intestate").

Idaho Code, § 15-616, Mont. Rev. Codes, § 10186 (substantially identical).

Cross-references.

Execution after death of judgment debtor or creditor, 104-37-7; redemption, 104-37-30; judgment when party dies after verdict but before judgment, 104-30-13.

1. Injunction against judgment.

This section makes no exception in a case where an injunction has been issued against judgment debtor. Weaver v. Pickard, 7 U. 296, 301, 26 P. 581, applying 2 Comp. Laws 1888, § 4135.

2. Effect of debtor's death.

A creditor, after his debtor's death, is precluded from securing a specific lien on the property of the estate by attachment, execution, or other legal process "unless it be in the course provided by the Probate Code"; that is, claims presented and allowed have the same standing whether they be founded upon a judgment or claims allowed and approved by the administrator and the court. In either event the claimant must be content to wait until the administrator of the estate acquires funds with which to pay his claim. Wasatch Livestock Loan Co. v. Nielson, 90 U. 307, 322, 56 P.2d 613, rehearing denied 90 U. 331, 61 P.2d 616.

A. L. R. notes.

Decree of foreclosure which ascertains amount of mortgage debt or other claim as judgment within statute relating to rank of claims against decedent's estate, 57 A. L. R. 489; rank of foreign judgment, or judgment of sister state, rendered in lifetime of debtor, in settlement of debtor's estate after his death, 128 A. L. R. 1400.

102-9-17. Reference of Doubtful Claims.

If the executor or administrator doubts the correctness of any claim presented to him, he may enter into an agreement, in writing, with the claimant to refer the matter in controversy to some disinterested person to be approved by the court. The report of the referee, if confirmed, shall be as valid and effectual in all respects as if the same had been rendered in a suit commenced by ordinary process. (C. L. 17, § 7661.)

Comparable provisions.

Cal. Probate Code, § 718 (includes provision similar to first sentence herein but qualified as follows: "* * * The court may remove the referee, appoint another in his place, set aside or confirm his report, and adjudge costs, as in actions against executors or administrators, and the judgment of the court thereon shall be as valid and effectual, in all respects, as if the same had been rendered in any suit commenced by ordinary process; but the report of the referee, if confirmed, merely establishes or rejects the claim, the same as if it had been allowed or rejected by the executor or administrator and judge").

Idaho Code, § 15-618, Mont. Rev. Codes, § 10188 (claim may be referred to disinterested person).

Cross-references.

Reference, 104-27; arbitration, 104-36.

102–9–18. When Personal Representative Is a Claimant—Presentment.

If the executor or administrator is a creditor of the decedent, his claim, duly authenticated by affidavit, must be presented for allowance or rejection to the court, and on its allowance by the court must be paid as other claims. If, however, the judge rejects the claim, action thereon may be had against the estate by the claimant, and summons must be served upon the judge, who may appoint an attorney at the expense of the estate to defend the action. If the claimant recovers no judgment, he must pay all costs, including defendant's reasonable attorneys' fees to be fixed by the court. (C. L. 17, § 7663.)

Comparable provisions.
Idaho Code, § 15–621, Mont. Rev. Codes, § 10101 (substantially identical).

102–9–19. Statement of All Claims to Be Returned.

The executor or administrator must return a statement of all claims against the estate which have been presented to him, when required by the court. In all such statements he must designate the names of the creditors, the nature of each claim, when it became due or will become due, and whether it was allowed or rejected by him.

(C. L. 17, § 7664.)

Comparable provisions.
Idaho Code, § 15–623, Mont. Rev. Codes, § 10193 (similar in purport).

102–9–20. Payment of Interest-Bearing Claims.

If there is any debt of the decedent bearing interest, whether presented or not, the executor or administrator may, by order of the court, pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim is then due or not; and interest shall thereupon cease to accrue upon the amount so paid. (C. L. 17, § 7665.)

Comparable provisions.
Idaho Code, § 15–624 (substantially identical; coupled, however, with the following concluding sentence: "This section does not apply to existing debts unless the creditor consent to accept the amount.").
Mont. Rev. Codes, § 10194 (substantially identical).

102–9–21. Payment of Funeral Expenses, Expenses of Last Illness and Family Allowance.

The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses and expenses of the last sickness and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or any legacy until the payment has been ordered by the court. (C. L. 17, § 7666.)

History.
This section is identical with R. S. 1898, § 3869; Comp. Laws 1907, § 3869.

Comparable provisions.
Iowa Code 1939, § 11960 (similar to first sentence herein).
Mont. Rev. Codes, § 10310 (substantially identical).

Cross-references.
Property subject to payment of debts, 101–1–1, 101–3–2, 101–4–5, 102–12–4; homestead exemption, 101–4–6; when

devisees and legatees must contribute, 101-3-3, 101-3-4, 101-3-8; executor may pay funeral expenses before qualifying, 101-3-19; when legacies due, 101-3-14, 101-3-15; summary distribution of small estates, 102-8-2; county's claim against estate of old age pensioner, 19-12-12.

1. General construction of section.

This section and 101-4-6, 102-8-1 and 102-8-2 must be construed together. In re Mower's Estate, 93 U. 390, 73 P.2d 967.

2. Funeral expenses and expenses of last illness.

3. — in general.

Funeral expenses take precedence over all claims against an estate. Columbia Trust Co. v. Anglum, 63 U. 353, 225 P. 1089. Reasonable expenses of decedent's last illness and funeral expenses, as well as administration expenses, are preferred claims against estate, and when necessary, homestead property is subject to their payment. In re Mower's Estate, 93 U. 390, 73 P.2d 967.

4. — presentation and allowance.

Under this section claims for funeral expenses and expenses of last sickness of deceased person are not required to be presented as other claims, but may be paid by administrator without having been presented and allowed. In re Hansen's Estate, 55 U. 23, 184 P. 197.

5. — payment by widow and strangers.

Widow voluntarily paying expenses of sickness of deceased husband was entitled to claim against estate. Columbia Trust Co. v. Anglum, 63 U. 353, 225 P. 1089.

A former wife of decedent cannot be ordered by probate court to pay his funeral expenses and costs of administration of estate from her undivided one-half interest in estate held by trust company. Rogers v. Nicols, 75 U. 290, 295, 284 P. 992.

If funeral expenses are paid by a third person, and not by personal representative, they become a legal charge against the estate, as law implies a promise to reimburse. And an heir may enter into a binding agreement to reimburse anyone who incurred funeral expenses in absence of heir. Dunn v. Wallingford, 47 U. 491, 155 P. 347.

6. Unauthorized mortgage.

Under this section, even though an administrator of an insolvent estate may have been without authority to mortgage the estate's personal property without court order granting such authority, still the obligation of the estate to pay the money used to protect its property remains, notwithstanding the mortgage fails. Wasatch Livestock Loan Co. v. Nielson, 90 U. 307, 328, 56 P.2d 613, rehearing denied 90 U. 331, 61 P.2d 616.

7. Withholding payment of claims.

Statute of limitations may not be invoked to defeat right of administrator of estate to withhold portion of share of heir on account of indebtedness to estate. In re Reiser's Estate, 57 U. 434, 195 P. 317.

A. L. R. notes.

Claims for expenses of last sickness or for funeral expenses as within contemplation of statute requiring presentation of claims against decedent's estate, or limiting the time for the bringing of action thereon after rejection by personal representative, 120 A. L. R. 275; when funeral expenses deemed ordered on personal credit rather than on credit of estate, 30 A. L. R. 444.

102-9-22. Order of Payment of Other Debts.

Other debts of the estate must be paid in the following order:

(1) The wages of each employee of the decedent for services rendered within sixty days next preceding his death, not exceeding $100.

(2) Debts having preference by the laws of the United States or of this state.

(3) All debts which are liens upon the real property occupied, selected or set apart as a homestead.

(4) All other debts which were liens on the property of the decedent at the time of his death.

(5) All other demands against the estate. (C. L. 17, § 7667.)

History.

This section is practically identical with R. S. 1898, § 3870; Comp. Laws 1907, § 3870.

Comparable provisions.

Iowa Code 1939, § 11970, as amended by Laws of 1941 (stating order in which demands against estate are payable).

Cross-references.
Vouchers, 102–11–34, 102–11–35; payment of local creditors before transmission of property to foreign representative, 102–12–23; rights of personal representative upon death of limited partner, 69–2–21; winding up partnership affairs, 69–1–34; rights of estate of deceased partner when business is continued, 69–1–30; wages as preferred debt, 49–7–1; order for recourse to property to pay debts, 101–3–3.

1. Purpose of section.
The very purpose of this section was to provide that the real estate should be discharged of its charge by using the general assets of the estate so as to save the real estate unencumbered for those who are entitled to it. But the widow's right under 101–4–3 does not depend upon sufficiency of general assets to pay mortgage debts. In re Reynolds' Estate, 90 U. 415, 420, 62 P.2d 270.

2. Judgment claims.
Judgment claims must be presented in the same manner as others, and wait until administrator of estate acquires funds with which to pay his claim. Wasatch Livestock Loan Co. v. Nielson, 90 U. 307, 322, 56 P.2d 613, rehearing denied 90 U. 331, 61 P.2d 616.

3. Proceedings to establish preference.
Action by creditor against administrator in which it sought to establish preference over other creditors, after administrator allowed claim but denied petition for preference, was dismissed, since creditor cannot have his claim to priority determined in separate proceeding but must establish same in probate proceeding. United States Fidelity & Guaranty Co. v. Bletcher, 64 U. 49, 228 P. 188.

A. L. R. notes.
Claim in respect of superadded liability on corporate stock owned by decedent, rank or preference of, 92 A. L. R. 1040; construction and application of statutory provisions as to classification or priority of claims against decedent's estate in respect of money or property received by decedent in trust or as a fiduciary, 125 A. L. R. 1487; priority in event of incompetent's death of claims incurred during guardianship over other claims against estate, 113 A. L. R. 402.

102–9–23. Payment of Debts Secured by Liens.

Debts secured by liens or encumbrances on the property occupied, selected or set apart as a homestead must be paid out of the funds of the estate; and such liens or encumbrances shall only be enforced for any deficiency remaining after such payment. The preference given in the preceding section to debts secured by liens on other property shall extend only to the proceeds of the property affected by such liens, and to the extent thereof, and, if such proceeds are insufficient to pay the liens, the part remaining unsatisfied must be classed with other demands against the estate. (C. L. 17, § 7668.)

Cross-references.
Homestead, distribution, 101–4–6 to 101–4–8.

A. L. R. notes.
Right of heir or devisee to have realty exonerated from lien thereon at expense of personal estate, 120 A. L. R. 577.

102–9–24. Payment When Estate Insufficient to Pay All Claims.

If the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim; and no creditor of any one class shall receive any payment until all those of the preceding class are fully paid. (C. L. 17, § 7669.)

A. L. R. notes.
Remedies of creditors of insolvent decedent's estate where other creditors have received excessive payments, 77 A. L. R. 981.

102–9–25. Order of Court for Payment of Debts and Discharge of Personal Representative.

Upon the settlement of the accounts of the executor or administrator the court must make an order for the payment of the debts as circum-

stances of the estate require. If there are not sufficient funds in the hands of the executor or administrator, the court must specify in the decree the sum to be paid to each creditor. If the whole property of the estate is exhausted by such payment or distribution, such account must be considered as a final account, and the executor or administrator is entitled to his discharge on producing and filing the necessary vouchers and proofs showing that such payments have been made and that he has fully complied with the decree of the court. (C. L. 17, § 7670.)

History.
This section is practically identical with R. S. 1898, § 3873; Comp. Laws 1907, § 3873.

Comparable provisions.
Mont. Rev. Codes, § 10311 (substantially identical).

1. Duties of administrator.
Duties of administrator are not fully performed until he has not only accounted for, but also distributed, all of assets of estate which have come into his possession as administrator. In re Brooks, 83 U. 506, 30 P.2d 1066.

102-9-26. Payment of Claims Contingent or Not Due.

If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established or absolute, must be paid into the court and there remain to be paid over to the party when he becomes entitled thereto, or if he fails to establish his claim, to be paid over or distributed as the circumstances of the case require. If any creditor whose claim has been allowed, but is not yet due, appears and assents to a deduction therefrom of the legal interest for the time the claim has yet to run, he is entitled to be paid accordingly. The payments provided for in this section are not to be made when the estate is insolvent, unless a pro rata distribution is ordered.
(C. L. 17, § 7671.)

History.
This section is practically identical with R. S. 1898, § 3874; Comp. Laws 1907, § 3874.

Comparable provisions.
Mont. Rev. Codes, § 10312 (substantially identical).

1. Words and phrases defined.
The term "contingent claim," as used in this section, was not intended to have any application in case of dissolution of partnership by death of one of its members in winding up and settlement of its affairs. Sharp v. Sharp, 54 U. 262, 180 P. 580.

2. Presentation of claim.
In suit by executors of deceased partner against legal representatives of surviving partners for partition of partnership mining property, wherein personal representatives of surviving partners sought to counterclaim for money paid out by surviving partners for partnership debts and obligations, held representatives of surviving partners were not barred by laches from presenting claim in partition suit for failure to file claim against deceased partner, where plaintiffs suffered no prejudice by lapse of time. Sharp v. Sharp, 54 U. 262, 180 P. 580.

3. Contingent claims.
Contingent claims of surviving members of unsettled partnership business cannot be presented against estate of deceased partners without accounting. Sharp v. Sharp, 54 U. 262, 180 P. 580.

4. Liability after complete administration.
After complete administration of decedent's estate, final distribution of all property and extinguishment of estate, the estate could not be held liable for assessment on national bank stock. Forrest v. Jack, 294 U. S. 158, 79 L. Ed. 829, 55 S. Ct. 370, 96 A. L. R. 1457, rev'g 71 F.2d 264.
Where estate of deceased stockholder in national bank had been distributed and closed 11 years before assessment was made on stock which had been distributed to widow, administrator was not required to retain or pay into court any

property or money to cover possible future liability in respect of stock and was not liable for devastavit, notwithstanding such stock still stood on books of bank in name of decedent. Forrest v. Jack, 294 U. S. 158, 79 L. Ed. 829, 55 S. Ct. 370, 96 A. L. R. 1457, rev'g 71 F.2d 264.

A. L. R. notes.

Unliquidated claim for damages arising out of tort as a contingent claim within statutes relating to presentation of claims against decedent's estate or action to enforce same after rejection, 125 A. L. R. 871.

102–9–27. After Decree Ordering Payment of Allowed Claim, Creditor May Enforce Against Personal Representative.

When a decree is made by the court for the payment of creditors, the executor or administrator is personally liable to each creditor for his allowed claim, or the dividend thereon, and execution may be issued on such decree as upon a judgment of the court in favor of each creditor, and the same proceedings may be had under such execution as in other cases. The executor or administrator is liable therefor on his bond to each creditor. (C. L. 17, § 7672.)

Comparable provisions.

Mont. Rev. Codes, § 10313 (substantially identical; term "order" used in lieu of "decree").

102–9–28. Rights of Creditors Whose Claims Are Not Included in Decree.

When the accounts of the administrator or executor have been settled and an order made for the payment of debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors who have been paid, or upon the heirs, devisees or legatees, to contribute to the payment of his claim; but if the executor or administrator has failed to give due notice to the creditors, any such creditor may recover on the bond of the executor or administrator. (C. L. 17, § 7673.)

History.

This section is practically identical with R. S. 1898, § 3876; Comp. Laws 1907, § 3876.

Comparable provisions.

Mont. Rev. Codes, § 10314 (includes substantially identical provision, and concluding as follows: "* * * such creditor may recover on the bond of the executor or administrator the amount of his claim or such part thereof as he would have been entitled to, had it been allowed. This section shall not apply to any creditor whose claim was not due ten months before the day of settlement, or whose claim was contingent, and did not become absolute ten months before such day").

1. **Effect of completion of administration.**

Real estate belonging to deceased stockholder, but which had been distributed to his widow, was not liable to stock assessment made 11 years after estate had been closed and property had been deeded by widow to her children. Forrest v. Jack, 294 U. S. 158, 79 L. Ed. 829, 55 S. Ct. 370, 96 A. L. R. 1457, rev'g 71 F.2d 264.

CHAPTER 10

SALES, MORTGAGES AND LEASES *

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102-10-36. Lease and Bond on Mining Property.
102-10-37. Id. Additional Bond.
102-10-38. Id. Conveyance — Confirmation.

* History of act. This chapter was Comp. Laws 1876, §§ 870-914; R. S. 1898, Title 74, Ch. 10, p. 845; Comp. Laws 1907, Title 89, Ch. 10, p. 1229.

102-10-1. Sales—When Allowed.

When a sale of property of the estate is necessary to pay the allowance to the family or the debts outstanding against the estate, or debts or expenses or charges of administration, or legacies, or when it appears that it is for the advantage, benefit and best interests of the estate and those interested therein that the real or personal estate or some part thereof be sold, the executor or administrator may sell any real as well as personal property of the estate as hereinafter provided.

(C. L. 17, § 7677.)

History.

This section formerly specifically provided that there must be an application and order of the court; in other respects the present section is identical with such earlier provisions. R. S. 1898, § 3877; Comp. Laws 1907, § 3877.

Comparable provisions.

Iowa Code 1939, § 11933, as amended by Laws of 1941 (if personal effects are found inadequate to satisfy debts and charges, sufficient portion of real estate may be ordered sold or mortgaged for that purpose; application therefor must be made in court granting administration; the amendment pertains to security required to be given by executor or administrator before sale or mortgage can be executed).

Mont. Rev. Codes, § 10210 (includes similar provision).

Cross-references.

Order of recourse to property for payment of debts, 101-3-3; property lia-

ble for debts, 101-1-1, 101-3-2, 101-4-5, 102-9-21, 102-12-4; limitation of action to recover land sold, 104-2-17; sale of property of absent heirs, 102-12-27; Blue Sky Law not applicable, 82-1-6; sales exempted from Bulk Sales Law, 33-2-5.

Decisions from other jurisdictions.

— Federal.

"Charges," as used in the Iowa statute providing for the sale of a decedent's real estate for the purpose of satisfying debts and charges, includes expenses of administration and also other expenditures properly made by the administrator though not strictly expenses of administration, such as funeral expenses. First Trust Co. of Omaha v. Allen, 60 F.2d 812.

— Iowa.

Real property of which a testator dies seized but which is not devised nor mentioned in his will is subject to the payment of his debts. Ramsey v. Ramsey, 192 Iowa 1356, 186 N. W. 627.

Administrator has no duty to perform or power to act with respect to real estate unless and until authorized by court of competent jurisdiction to sell it to pay debts. Richman v. Ady, 211 Iowa 101, 232 N. W. 813.

Upon death of decedent, his real estate vests in his heirs subject to right of administrator to subject the real estate to payment of debts, in accordance with procedure and method provided by statute. In re Estate of Jackson, 225 Iowa 359, 280 N. W. 563.

Authority of administrator over real estate must be derived through compliance with provisions of statute applicable thereto. In re Estate of Jackson, 225 Iowa 359, 280 N. W. 563.

An executor in a will has no interest in realty devised thereby, but title vests in devisees, subject to necessities of administration. In re Estate of Schwertley, 228 Iowa 1209, 293 N. W. 445.

A. L. R. notes.

Duty of executor or administrator of insolvent estate to sell real estate to pay debts, or duty of probate court to order such sale, as affected by mortgage or other encumbrances thereon, 116 A. L. R. 910; implied power of executor or testamentary trustee to sell real property, 134 A. L. R. 378; liability to heirs, devisees, legatees, or distributees of executor or administrator or his bond in respect of invalid sale of property of the estate, 106 A. L. R. 429; rights and remedies in respect to sale and proceeds of land located in a state other than domicile, for payment of decedent's debts, 81 A. L. R. 665.

102-10-2. Id. Must Be Reported to and Confirmed by Court.

All sales must be reported under oath to, and confirmed by, the court before the title to the property sold passes, except as hereinafter otherwise provided. (C. L. 17, § 7678.)

History.

This was formerly part of section 4145, 2 Comp. Laws 1888, p. 498, and of R. S. 1898, § 3878; Comp. Laws 1907, § 3878.

Comparable provisions.

Idaho Code, § 15-702 (similar).

102-10-3, 102-10-4. (Repealed by L. 39, ch. 113, § 1, eff. May 9.)

102-10-5. Sales—Report and Confirmation.

The executor or administrator may sell any property of the estate without order of the court, at either public or private sale and with or without notice as he may determine, but must make return of such sales in all cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such direction must be observed. In any case, no title passes unless the sale is confirmed by the court. (C. L. 17, § 7681.)

History.

As amended by L. 39, ch. 113, eff. May 9, making material changes in text.

This section is practically identical with section 4181 of 2 Comp. Laws 1888, p. 510, and with R. S. 1898, § 3881 and Comp. Laws 1907, § 3881.

Cross-references.

Notice of sale, 102-14-5 et seq.

1. Sale under power in will.

Under this section, where a will gave executors power to sell either at public or private sale, in their discretion, any

portion of the estate for the purpose of effectuating the intentions and commands of the will, a sale without the statutory notice is invalid, because this was a power not coupled with an interest. In re Walker's Estate, 6 U. 369, 23 P. 930.

A. L. R. notes.

Power of sale of real estate given to executor as impliedly conferring right to possession, 94 A. L. R. 1140; remedies in event of executor's or testamentary trustee's delay in exercise of power to sell real estate conferred by will, 132 A. L. R. 1473; right of administrator with will annexed, or trustee other than person named in will as such, to execute power of sale conferred by will, 116 A. L. R. 158; right to exercise power of sale of real estate after time limited by will, 31 A. L. R. 1394.

102-10-6. Id. Misconduct of Personal Representative—Liability.

If there is any neglect or misconduct in the proceedings of the executor or administrator in relation to any sale by which any person interested in the estate suffers damage, the party aggrieved may recover the same in an action upon the bond of the executor or administrator, or otherwise. (C. L. 17, § 7682.)

Comparable provisions.

Idaho Code, § 15-740 (identical).

Mont. Rev. Codes, § 10243 (substantially identical).

102-10-7. Id. Failure to Make Return—Penalty.

When a sale has been made by an executor or administrator of any property of the estate, real or personal, he must return to the court within thirty days thereafter an account of the sale verified by his affidavit. If he neglects to make such return, he may be punished by attachment, or his letters may be revoked, one day's notice having been first given him to appear and show cause why such attachment should not issue or such revocation should not be made. (C. L. 17, § 7683.)

Comparable provisions.

Idaho Code, § 15-744, Mont. Rev. Codes, § 10247 (substantially identical).

Cross-references.

Revocation generally, 102-6.

102-10-8. Id. Personal Representative Cannot Be Purchaser or Interested.

No executor or administrator shall, directly or indirectly, purchase any property of the estate he represents, nor be interested in any sale. (C. L. 17, § 7684.)

History.

This section does not differ materially from Comp. Laws 1876, § 914, and is almost identical with R. S. 1898, § 3884; Comp. Laws 1907, § 3884.

Comparable provisions.

Idaho Code, § 15-745, Mont. Rev. Codes, § 10248 (substantially identical; word "must" is used in lieu of "shall").

Cross-references.

Not to purchase claim against estate, 102-11-22; not to profit or suffer loss on account of estate, 102-11-21.

1. Operation and effect of section.

Section merely declares applicability, in case of executors and administrators, of long established rule of equity that trustee's purchase from himself of trust property is void. Haight v. Pearson, 11 U. 51, 39 P. 479.

Section does not invalidate executor's purchase of heir's interest in decedent's estate. Haight v. Pearson, 11 U. 51, 39 P. 479. Administratrix may purchase interest of an heir if transaction is fair. Norton v. Fuller, 68 U. 524, 251 P. 29.

102-10-9. Id. Of Perishable Property or Property Apt to Depreciate.

At any time after receiving letters the executor, administrator or special administrator may sell perishable and other personal property

likely to depreciate in value, or which will occasion loss or expense by being kept. The executor, administrator or special administrator is responsible for the property, unless he shall make a sworn return, and on proper showing the court shall approve the sale.

(C. L. 17, § 7685.)

Comparable provisions.

Cal. Probate Code, § 770, Idaho Code, § 15-703 (authorizing sale of perishable and other personal property, likely to depreciate in value or which will incur loss or expense by being kept, at any time after receipt of letters; and also sale of so much other personal property as may be necessary to pay allowance made to family of decedent).

Mont. Rev. Codes, § 10200 (application may be made and order obtained to sell perishable and other property liable to depreciate in value, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to pay allowance made to family of decedent).

102-10-10. Id. Of Personal Property Generally—When Allowed.

If claims against the estate have been allowed and a sale of property is necessary for their payment, or for the expenses of administration, or for the payment of legacies, or for the payment of any allowance made to the family of the decedent, the executor or administrator may sell all or so much of the personal property as may be necessary so long as any personal property remains in his hands, and if it appears for the best interests of the estate, he may at any time after filing the inventory in like manner sell the whole or any part of the personal property belonging to the estate whether necessary to pay debts or not; such sales to take effect, however, only upon confirmation by the court, except as otherwise provided in this chapter. (C. L. 17, § 7685; Code Report.)

Comparable provisions.

Idaho Code, § 15-704 (authorizing sale of personal property where necessary to pay claims allowed against estate, or for expenses of administration or for payment of legacies); Mont. Rev. Codes, § 10201 (application for order to sell personal property to make such payments).

1. Order of confirmation.

Order, refusing to confirm sale of decedent's personal property, held final order for purposes of appeal. In re Auerbach's Estate, 23 U. 529, 65 P. 488.

102-10-11. Id. Of Stocks, Bonds, etc.

In the case of sales of stocks, bonds or other choses in action likely to fluctuate in value and that are regularly sold and purchased on any stock exchange sanctioned by the securities commission, or other like institution, when sold by the executor or administrator upon such stock exchange or other like institution no confirmation thereof by the court shall be necessary before title passes; but title to property thus sold shall pass upon and by virtue of such sale.

(C. L. 17, § 7685; Code Report.)

Comparable provisions.

Cal. Probate Code, § 771 (stocks, bonds, and other designated securities may be sold, and title thereto passed, without necessity for confirmation, upon obtaining court order).

Cross-references.

Clerk may order sale of perishable property, 102-2-1, subd. (7); sanction of stock exchanges, 82-1-29.

102-10-12. Id. Manner of Sale of Personal Property.

Personal property may be sold at public auction or at private sale in the discretion of the executor or administrator. Public sales of personal property must be made at the courthouse door or at some other public place, or at the last residence of the decedent.

(C. L. 17, § 7686.)

Comparable provisions.

Cal. Probate Code, § 772 (except as otherwise provided in the Code, personal property may be sold only after public notice; includes sentence substantially identical with second sentence herein, "but no sale shall be made of any personal property which is not present at the time of sale, unless the court shall otherwise order").

Idaho Code, § 15-707 (authorizing sale of personal property at public auction or private sale).

102-10-13. (Repealed by L. 39, ch. 113, § 1, eff. May 9.)

102-10-14. [Sales]—Petition for Order Confirming Sale of Real Estate.

To obtain an order confirming the sale of real property the executor or administrator must present a verified petition to the court setting forth the amount of personal estate that has come to his hands, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or estimated; the amount due upon the family allowance, or that will be due after the same has been in force for one year; the debts, expenses and charges of administration already accrued, and an estimate of what will or may accrue during the administration; a general description of all the real property of which the decedent died seized, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof; and, if said order confirming the sale of real estate is petitioned for on the ground that it is for the advantage, benefit and best interests of the estate and those interested therein that the sale be confirmed, the petition, in addition to the foregoing facts, must be set forth in what way an advantage or benefit would accrue to the estate and those interested therein by such sale. If the executor or administrator neglects to apply for an order confirming said sale where it is necessary, any person interested may make application therefor.

(C. L. 17, § 7688.)

History.

As amended by L. 39, ch. 113, eff. May 9, making no material changes in text.

Comparable provisions.

Idaho Code, § 15-718 (requiring posting and publication in newspaper of notice of sale of real estate at private sale).

Mont. Rev. Codes, § 10220 (posting of notice and publication in newspaper as to lands and tenements ordered to be sold); § 10222 (notice to be posted and published in newspaper as to ordered sale of real estate at private sale).

Cross-references.

Additional bond on making sale, 102-5-3; sale of property of absent heir, 102-12-27.

1. Right to sell real estate.

Under a former section there were two jurisdictional prerequisites to authorize a probate court to order the personal representatives to sell lands of decedents'. They were: (1) There must be debts or charges against the estate unpaid; and (2) that the personal property of decedent is insufficient to pay these debts and charges. Without this the court had no jurisdiction. Needham v.

Salt Lake City, 7 U. 319, 322, 26 P. 920, applying Comp. Laws 1876, pp. 265–269. Probate court may order sale of real estate only to pay debts, and then only when the personal property is insufficient to pay the charges against the estate. Cain's Heirs v. Young, 1 U. 361, rev'd on another ground 99 U. S. 610, 25 L. Ed. 421.

102–10–15 to 102–10–20. (Repealed by L. 39, ch. 113, § 1, eff. May 9.)

102–10–21. [Sales]—Confirmation of Private Sale.

No sale of real estate at private sale shall be confirmed by the court unless the sum offered is at least ninety per cent of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or too low, appraisers must be appointed, and they must make an appraisement thereof as in the case of an original appraisement. This may be done at any time before the sale or the confirmation thereof. (C. L. 17, § 7695.)

Comparable provisions.
Cal. Probate Code, § 784, Idaho Code, § 15–719, Mont. Rev. Codes, § 10223 (substantially identical).

102–10–22. [Id.] On Credit—Exchange of Property.

The executor or administrator must, when the sale is made upon credit, take the notes of the purchaser for the purchase money with a mortgage on the property to secure their payment, or enter into a written contract with the purchaser for the sale of the property reserving title in the executor or administrator until the purchase money is paid and the contract performed. At least ten per cent of the purchase money shall be paid at the time of sale or the making of said contract. Whenever in the opinion of the executor or other person materially interested in the estate it would benefit the estate to exchange real or personal property belonging to the estate for other real or personal property which in the opinion of the court is of equal value or to accept part cash or other personal property or real property in exchange for real or personal property belonging to the estate the executor or administrator shall present a verified petition to the court setting forth the same facts and following the same procedure required by section 102–10–14 for obtaining an order confirming sale of real property and if such order for exchange is granted no confirmation thereof shall be required. (C. L. 17, § 7696.)

History.
As amended by L. 39, ch. 113, eff. May 9, making material changes in text and adding last sentence.

Comparable provisions.
Cal. Probate Code, § 787 (where sale is made on credit, executor or administrator must take notes for unpaid portion of purchase money, with mortgage or deed of trust on the property).

Idaho Code, § 15–720 (similar to first three lines herein, and concluding as follows: "* * * to secure their payment, with additional security if the court deems it necessary to secure the prompt payment of the amount so deferred and the interest thereon").

Mont. Rev. Codes, § 10224 (similar to first three lines herein, terminating "to secure the payment").

102–10–23. (Repealed by L. 39, ch. 113, § 1, eff. May 9.)

102–10–24. [Sales]—Return—Notice and Hearing.

The executor or administrator shall, within thirty days after making any sale of real estate, make a return of his proceedings to the court. A hearing upon the return of the proceedings may be asked for in the return or by petition subsequently, and thereupon the court or clerk must fix the day for the hearing, notice of which must be given by publication or posting, briefly indicating the land sold and the terms of sale. (C. L. 17, § 7698.)

Comparable provisions.
Idaho Code, § 15–721, Mont. Rev. Codes, § 10225 (requiring executor or administrator, after making any sale of real estate, to make a return of his proceedings to the court; hearing upon the return may be asked for).

102–10–25. [Id.] Vacation and Resale for Better Price.

If the sale was unfair or the sum bid disproportionate to the value, or if it appears that a sum exceeding such bid by at least ten per cent, exclusive of the expenses of a new sale, may be obtained, the court may vacate the sale and direct another to be had. If an offer greater in amount than that named in the return is made to the court in writing by a responsible person, the court may accept such offer and confirm the sale to such person, or order a new sale. (C. L. 17, § 7699.)

History.
As amended by L. 39, ch. 113, eff. May 9, making no material changes in text.

102–10–26. Id. Confirmation.

If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid is not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid mentioned in the next preceding section is accepted by the court, the court must make an order confirming the sale, and directing conveyances to be executed. The sale from that time is confirmed and valid. If after the confirmation the purchaser neglects or refuses to comply with the terms of sale, the court may, on motion of the executor or administrator and after notice to the purchaser, order a resale of the property to be made. If the amount realized on such resale does not cover the bid and the expenses of the previous sale, such purchaser is liable to the estate for the deficiency. (C. L. 17, § 7700.)

Comparable provisions.
Idaho Code, § 15–723, Mont. Rev. Codes, § 10227 (similar).

A. L. R. notes.
Lien of judgment against heir or devisee as attaching to land sold by executor or administrator, 68 A. L. R. 1479.

102–10–27. Id. Conveyance.

After confirmation conveyances must be executed to the purchaser by the executor or administrator, conveying all the right, title, interest and estate of the decedent in the premises at the time of his death. If prior to the sale, by operation of law or otherwise, the estate has acquired any right, title or interest in the premises, other than or in

addition to that of the decedent at the time of his death, such right, title or interest also passes by such conveyances. (C. L. 17, § 7701.)

History.
This section is practically identical with R. S. 1898, § 3901; Comp. Laws 1907, § 3901.

Comparable provisions.
Idaho Code, § 15–724, Mont. Rev. Codes, § 10228 (conveyances must thereupon be executed to purchaser, which must refer to court's orders authorizing and confirming the sale of the property of the estate).

Cross-references.
After-acquired property as passing under deed generally, 78–1–9; under will, 101–1–37; recording of decree, notice, 102–14–16.

1. Warranty.
At administrator's sale the rule of caveat emptor applies, and ordinarily at least, neither title, quality, nor quantity of estate sold is warranted. Moyle v. Thomas, 46 U. 542, 551, 151 P. 361.

102–10–28. Id. Sale of Decedent's Interest Under Contract to Purchase.

If the decedent at the time of his death was possessed of a contract for the purchase of lands, his interest in such lands thereunder may be sold in the same manner as if he had died seised of such lands, except as hereinafter provided. (C. L. 17, § 7702.)

Comparable provisions.
Idaho Code, § 15–734, Mont. Rev. Codes, § 10237 (similar).

102–10–29. Id. Purchaser to Give Indemnity Bond.

The sale of such an interest must be made subject to all payments that may thereafter become due on such contracts, and the sale must not be confirmed by the court until the purchaser executes a bond in double the whole amount of payments thereafter to become due on such contracts, with sureties to be approved by the court, conditioned that the purchaser will make all payments for such land that become due after the date of the sale and will fully indemnify the executor or administrator and the persons entitled to the decedent's interest in the land sold against all demands, costs, charges and expenses by reason of any covenant or agreement contained in such contract.
(C. L. 17, § 7703.)

Comparable provisions.
Idaho Code, §§ 15–735 and 15–736, Mont. Rev. Codes, §§ 10238 and 10239 (similar).

102–10–30. Id. Assignment to Purchaser—Rights Acquired.

Upon the confirmation of the sale the executor or administrator must execute to the purchaser an assignment of the contract, which vests in the purchaser, his heirs and assigns all the right, title and interest of the estate, or of the persons entitled to the interest of the decedent in the lands sold at the time of the sale; and the purchaser has the same rights and remedies against the vendor of such land as the decedent would have if he were living. (C. L. 17, § 7704.)

Comparable provisions.
Idaho Code, § 15–737, Mont. Rev. Codes, § 10240 (substantially identical).

102–10–31. Id. Of Lands Subject to Mortgage—Disposition of Proceeds.

When any sale is made by an executor or administrator, pursuant to provisions of this chapter, of lands subject to any mortgage or other lien which is a valid claim against the estate of the decedent and has been presented and allowed, the purchase money must be applied, after paying the necessary expenses of the sale, first to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course of administration. The application of the purchase money to the satisfaction of the mortgage or lien must be made without delay, and the land is subject to such mortgage or lien until the purchase money has been actually so applied. The purchase money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest, and any lawful costs and charges thereon, may be paid into the court, to be received by the clerk thereof; whereupon the mortgage or lien upon the land is canceled, and the purchase money must be paid over by the clerk of the court without delay, in payment of the expenses of the sale and in satisfaction of the debt to secure which the mortgage or other lien was taken, and the surplus, if any, must be at once returned to the executor or administrator, unless for good cause shown, after notice to the executor or administrator, the court otherwise directs. (C. L. 17, § 7705.)

Comparable provisions.

Idaho Code, § 15–738, Mont. Rev. Codes, § 10241 (substantially identical, except that a sentence is inserted so as to be worded, in part, "* * * and the land is subject to such mortgage or lien until the purchase money has been actually so applied. No claim against any estate which has been presented and allowed is affected by the statute of limitations, pending the proceedings for the settlement of the estate. The purchase money, or so much thereof as may be sufficient to pay such mortgage or lien * * *"; words "must cease" are used in lieu of "is canceled" so as to be worded "* * * whereupon the mortgage or lien upon the land must cease * * *").

102–10–32. Id. Mortgagee May Become Purchaser.

At any sale, under order of the court, of lands upon which there is a mortgage or lien the holder thereof may become the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment pro tanto. If the amount for which he purchases the property is insufficient to defray the expenses and discharge his mortgage or lien, he must pay to the court or the clerk thereof an amount sufficient to pay such expenses. (C. L. 17, § 7706.)

Comparable provisions.

Idaho Code, § 15–739, Mont. Rev. Codes, § 10242 (substantially identical).

102–10–33. Id. Fraudulent Sales—Liability.

Any executor or administrator who fraudulently sells any real estate of a decedent contrary to or otherwise than under the provisions of this chapter is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein. (C. L. 17, § 7707.)

Comparable provisions.

Cal. Probate Code, § 792 (substantially identical).

Idaho Code, § 15–741, Mont. Rev. Codes, § 10244 (identical).

Cross-references.

Limitation of action to recover land sold by executor, etc., 104–2–17.

102–10–34. Mortgages—Petition—Notice and Hearing.

Whenever in any estate now being administered, or that may hereafter be administered, it shall appear to the court or judge to be for the advantage of the estate to raise money by a mortgage of the property or any part thereof, the court, as often as occasion therefor shall arise in the administration of any estate, may, on petition, notice and hearing, authorize, empower and direct the executor or administrator to mortgage the same or any part thereof upon such terms and for such length of time as to the court may seem necessary or beneficial. The petition shall be verified, and shall state the purpose sought to be accomplished by the mortgage, the amount to be raised, a general description of the property proposed to be mortgaged, and such other facts as are required in a petition for the sale of real property. Upon filing such petition the court or clerk must set the same for hearing, and give notice thereof by publication or by posting and by mailing notice to the heirs. The order to mortgage shall describe the property, and shall prescribe the amount of the mortgage, the maximum rate of interest to be paid, the maximum period of time for which the same may be given, and such other terms and conditions as the court may deem advisable.

(C. L. 17, § 7708.)

History.

This section was R. S. 1898, § 3908; Comp. Laws 1907, § 3908, and is more or less identical therewith. The present section differs in that it makes no provision for leasing as was formerly the case.

Comparable provisions.

Idaho Code, § 15–901 (probate court may authorize executor or administrator, or guardian of minor or incompetent person to mortgage real or personal property, and to execute notes to be secured by mortgage, or to lease real estate or personal property).

Iowa Code 1939, § 11940 (where court is satisfied that it is for best interest of estate that real estate be "withheld," it may order executor or administrator to borrow money thereon and execute notes secured by mortgage on any real estate belonging to estate and not exempt as homestead, to secure payment thereof, and with the proceeds pay debts shown in statement set out in application, and to report his action to the court).

Mont. Rev. Codes, § 10249 as amended by Laws of 1941 (when, in administration of estate, or in guardianship proceeding, it appears to court to be advantageous to estate to raise money on notes to be secured by mortgage, or to make leases, or to sell or give option to purchase mining claims, court may, on petition and notice and hearing, authorize executor or administrator or guardian to mortgage such real property, to execute notes secured by mortgage, to give leases, or enter into agreements to sell or give option to purchase such real property).

1. **Order of court.**

Even though mortgage fails because executed without an order of court, still the obligation of the estate to pay the money used to protect its property remains, as in the case of mortgage of sheep. Wasatch Livestock Loan Co. v. Nielson, 90 U. 307, 328, 56 P.2d 613, rehearing denied 90 U. 331, 61 P.2d 616.

Decisions from other jurisdictions.

— Idaho.

The probate court, by statute, is given exclusive jurisdiction over the mortgaging of real property belonging to an estate, subject only to the limitations of the law therein set forth. Walker Bank & Trust Co. v. Steely, 54 Idaho 591, 34 P.2d 56.

— Iowa.

A decree authorizing the mortgaging of the land of a decedent for the payment of debts, made with jurisdiction of the persons involved and the subject matter, is res adjudicata of the liability of the land to mortgage for the debts concerned, and that the title of the heirs is subject to the mortgage. Reinsurance Life Co. of America v. Houser, 208 Iowa 1226, 227 N. W. 116.

Administrator of estate under law is bound to administer estate in accordance with provisions of will and it is his duty to obtain as much as possible for estate

out of mortgaged property. Baurer v. Myers, 224 Iowa 854, 278 N. W. 302.

Claims in reference to an accounting between executor, who was life tenant, and the remaindermen were not proper claims for determination on application of executor for authority to mortgage real estate to secure funds with which to pay claims against estate, where it had been previously adjudicated that claims in reference to such accounting were not proper claims for determination in involved proceedings. In re Estate of Christensen, 227 Iowa 1028, 290 N. W. 34, upon prior appeal, 225 Iowa 1258, 282 N. W. 721.

A. L. R. notes.

Construction and application of provision of will expressly giving executor or trustee power to mortgage realty, 116 A. L. R. 1417; right of executor or administrator personally to purchase mortgage or other lien on real property of decedent and enforce same, 117 A. L. R. 1371.

102-10-35. Leases—Petition—Notice and Hearing.

Whenever in any estate now being administered, or that may hereafter be administered, it shall appear to the court or judge to be for the best interests of the estate to lease the real property or any part thereof, the court, as often as occasion therefor shall arise in the administration of any estate, may, on petition, notice and hearing, authorize, empower and direct the executor or administrator to lease the real property or any part thereof upon such terms and for such length of time as to the court may seem for the best interests of the estate. The petition shall be verified, and shall set forth the facts showing the lease to be for the best interests of the estate, and a description of the property and the terms of the proposed lease. Upon the filing of such petition the court or clerk must set the same for hearing, and give notice thereof by publication or by posting and by mailing notice to the heirs.

(C. L. 17, § 7709.)

History.

See supra, 102-10-34.

1. Manner of leasing premises.

Under this section in leasing premises, the executor acts and is required to act under order of the court who directs, as under this section the court is required to direct, the terms and length of time of the lease. The personal opinions of the executor are unavailing, in so far as they run counter to opinion of court. Heywood v. Ogden Motor Car Co., 78 U. 564, 579, 6 P.2d 171.

102-10-36. Lease and Bond on Mining Property.

When all or any portion of the estate of any person deceased, or of any ward under guardianship, consists of mining claims, coal lands or other mining property, whether patented or unpatented, or of interests in mining claims, coal lands or other mining property, the administrator or executor of such deceased person, or the guardian of the property of the ward, may petition the court having jurisdiction of the estate for leave to lease such mining claims, coal lands or other mining property, or such interests in mining claims, coal lands or other mining property belonging to the estate of the decedent or to the ward, with an option to the lessee to purchase the same; and if upon the hearing it appears to the court that it is for the best interests of the estate or of the ward, the court may make an order authorizing the administrator, executor or guardian to lease all or any portion of such mining claims, coal lands or other mining property, or all or any portion of the interests therein belonging to the estate or to the ward, as he shall designate in the order, and to give an option to the lessee to purchase the same within a specified time at a stipulated price; and when such order has been

made, the executor, administrator or guardian may lease the property, or the interests in the property specified in said order, and give the lessee an option to purchase the same, within the time, at the price and on the terms specified in the order. (C. L. 17, § 7710.)

102-10-37. Id. Additional Bond.

Upon making such order the court may require the administrator, executor or guardian to give a bond and before the sale is confirmed may require an additional bond as in the case of other sales by an administrator, executor or guardian. (C. L. 17, § 7711.)

102-10-38. Id. Conveyance—Confirmation.

If the lessee complies with the terms of the lease and accepts the option and tenders the stipulated price, he shall be entitled to a deed for the mining claims, coal lands or other mining property, or the aforesaid interests therein, upon which the option was given, but no title shall pass under such option until its acceptance and the deed executed pursuant thereto have been reported to and approved by the court. (C. L. 17, § 7712.)

CHAPTER 11

POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS

102-11-1. When There Are Several Named or Appointed.
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102-11-36. Id. Final Account with Petition for Distribution —Notice.
102-11-37. Id. Conclusiveness of Settlement.
102-11-38. Id. Reference—Compensation to Referee.

History of act. This chapter was formerly Comp. Laws 1876, §§ 915-917; 2 Comp. Laws 1888, §§ 4197-4207; R. S. 1898, Title 74, Ch. 11, p. 851; Comp. Laws 1907, Title 89, Ch. 11, p. 1236.

102-11-1. When There Are Several Named or Appointed.

When all the executors named are not appointed by the court, those appointed have the same authority to perform all acts and discharge the trust required by the will as effectually for every purpose as if all were appointed and were acting together; where there are two executors or administrators, the act of one alone shall be effectual, if the other is absent from the state or laboring under any legal disability from serving, or if he has given his coexecutor or coadministrator authority in writing to act for both; and where there are more than two executors or administrators the act of a majority is valid. (C. L. 17, § 7716.)

History.
This section was derived from California Code of Civil Procedure, § 4030, which is now section 570 of the Probate Code. It is practically identical with 2 Comp. Laws 1888, p. 467, § 4030 and with R. S. 1898, § 3910 and Comp. Laws 1907, § 3910.

Cross-references.
Words giving joint authority construed as giving authority to majority, 88-2-10; where executor named is nonresident or minor, 102-3-19.

1. Leases.
Under this section, where one executor without authority from his coexecutors, who were not under a disability and not absent from the state, made a lease in writing for more than one year, the lease was invalid. Utah Loan & Trust Co. v. Garbutt, 6 U. 342, 23 P. 758.

2. Executor de son tort.
Executor de son tort is subject to all of the liabilities but has none of the privileges of a rightful executor. First Nat. Bank of Hailey, Idaho v. Lewis, 12 U. 84, 99, 41 P. 712.

3. Extraterritorial powers.
Executor or administrator cannot act extraterritorially with binding effect on estate. First Nat. Bank of Hailey, Idaho v. Lewis, 12 U. 84, 41 P. 712.

102-11-2. Authority of Administrators with Will Annexed.

Administrators with the will annexed have the same authority over the estates as executors named in the will would have, and their acts are as effectual for all purposes. (C. L. 17, § 7717.)

History.
This section is practically identical with R. S. 1898, § 3911; Comp. Laws 1907, § 3911.

Cross-references.
Letters of administration with will annexed, 102-3-18.

A. L. R. notes.
Duty and liability of executor (or administrator with will annexed) in respect of personal property specifically bequeathed, and not needed for payment of debts, 127 A. L. R. 1071.

102–11–3. Right to Possession of Property—Actions to Recover.

The executor or administrator is entitled to, and must take possession of, all the real and personal estate of the decedent, and shall receive the rents and profits of the real estate until the estate is settled or delivered over by order of the court to the heirs or devisees; and must keep in good tenantable repair all houses, buildings and fixtures thereon which are under his control, and collect all debts due to the decedent and to the estate. The heirs or devisees may alone, or jointly with the executor or administrator, maintain an action for the possession of the real estate or for the purpose of quieting title to the same, against any one except the executor or administrator; but this section shall not be so construed as to require them so to do. (C. L. 17, § 7718.)

History.

This section is substantially identical with R. S. 1898, § 3912; Comp. Laws 1907, § 3912.

Cross-references.

Actions to quiet title, 104–57; recovery of money found on dead bodies, 19–21–16; death of county treasurer, 19–21–18.

1. Scope and operation of section.

This section makes it the duty of the administrator to take possession of all the personal property of the estate and collect all debts due the decedent. Wasatch Livestock Loan Co. v. Nielson, 90 U. 307, 321, 56 P.2d 613, rehearing denied 90 U. 331, 61 P.2d 616.

2. Title and possession of personal representative.

Since immediately after appointment the legal, that is, the constructive possession of real estate passes to administrator for benefit of those who are ultimately entitled to the estate, administrator is bound to take notice of anyone in actual possession of property, which possession was open and notorious. Mansfield v. Neff, 43 U. 258, 272, 134 P. 1160.

The administrator's right to possession was also recognized by Comp. Laws 1876, Comp. Laws 1876, § 915, p. 319; Jenkins v. Jensen, 24 U. 108, 123, 66 P. 773, 91 Am. St. Rep. 783.

3. Duties of personal representatives in general.

"Ordinarily, it is the duty of every administrator to ascertain and to defend the property and rights of the estate as against any adverse claimant." In re Picot's Estate, 53 U. 195, 200, 178 P. 75.

4. Duty of special administrator.

Where, after wife of deceased was appointed special administratrix, her petition for general letters of administration was denied and bank appointed general administrator, which denial was reversed on appeal and wife was appointed administratrix, it was her duty to turn over property to bank notwithstanding appeal was pending, so that bank was entitled to expenses incurred in attempting to gain possession of property while it was general administrator, including reasonable attorney's fee, and such expenses were proper charges against estate which were not made lien on estate property but were directed to be paid when there were sufficient funds in estate. In re Pingree's Estate, 82 U. 437, 25 P.2d 937, 90 A. L. R. 96.

5. Collection of debts due estate.

Under this section an administrator may demand of corporation stock to which intestate was entitled, or bring action for damages for its failure to issue stock. Coray v. Perry Irrigation Co., 50 U. 70, 166 P. 672, applying Comp. Laws 1907, § 3912.

6. Revival of pending actions.

Administrator lacked authority to seek revival of federal bankruptcy proceedings pending at time of deceased's death and abated thereby. In re Harris' Estate, 99 U. 464, 105 P.2d 461.

7. Allowances on final accounting.

Under this section, on final accounting, administrator is entitled to allowance for expenditures necessarily made in repairing houses, buildings, fences, etc., In re Hansen's Estate, 55 U. 23, 184 P. 197. See also 102–11–32.

8. Actions by heirs or devisees.

Heirs could bring action to quiet title though there had been no adjudication of heirship. Chamberlain v. Larsen, 83 U. 420, 29 P.2d 355. And see In re Burt's Estate, 58 U. 353, 198 P. 1108.

9. Forms.

For form of complaint held sufficient in action by administrator to determine title and adverse claims to property of

estate, see Worley v. Peterson, 80 U. 27, 39, 12 P.2d 579.

A. L. R. notes.
Duty and liability of executor (or administrator with will annexed) in respect of personal property specifically bequeathed, and not needed for payment of debts, 127 A. L. R. 1071; power of sale of real estate given to executor as impliedly conferring right to possession, 94 A. L. R. 1140; right of executor or administrator to settle or compromise action or cause of action for death; and power of probate court to authorize such settlement, 103 A. L. R. 445.

102–11–4. Possession of Representative Possession of Heirs and Devisees.

For the purpose of bringing suits to quiet title, or for partition of the estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator for the purposes of administration as provided in this title.

(C. L. 17, § 7719.)

History.
This section is practically identical with Comp. Laws 1876, § 915; R. S. 1898, § 3913; Comp. Laws 1907, § 3913.

102–11–5. Actions by or Against Representatives for Recovery of Property.

Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates.

(C. L. 17, § 7720.)

History.
This section is practically identical with 2 Comp. Laws 1888, § 4198 and with Comp. Laws 1876, § 916, except as to provisions for quieting title and for the determination of adverse claims. And it is identical with R. S. 1898, § 3914; Comp. Laws 1907, § 3914.

Comparable provisions.
Idaho Code, § 15–803 (identical).
Mont. Rev. Codes, § 10258 (similar).

Cross-references.
Substitution of representative in action by or against deceased, 104–3–19; executor or administrator may sue, 104–3–1; action by or against special administrator, 102–4–15.

1. Scope and operation of section.
This section confers ample authority upon administrator of insolvent estate to represent general creditors thereof, and he will sue ordinarily upon proper and suitable request being made upon him by such creditors, thus making it nonprejudicial to deny them right to represent themselves. Wasatch Livestock Loan Co. v. Nielson, 90 U. 307, 321, 56 P.2d 613, rehearing denied 90 U. 331, 61 P.2d 616.

This section relates to the recovery of property, and to actions founded on contracts. It does not embrace those founded on torts against the persons, such as a trespass against the person by a carrier in wrongfully ejecting deceased from a train. Mason v. Union Pac. Ry. Co., 7 U. 77, 79, 24 P. 796.

2. Duties with respect to suing.
3. —in general.
The duties of an executor or administrator are stated as follows: "Executors and administrators are bound to prosecute all actions that may become necessary to recover debts owing to the estate, or property of any kind, and to protect the interest of the estate whenever the same is jeopardized. To this end they must act not only with honest intent and perfect integrity, but also with promptness and diligence and reasonable prudence and foresight." In re Burt's Estate, 58 U. 353, 198 P. 1108, quoting Woerner, American Law of Administration.

4. —suits for cancellation and rescission.

It is the duty of an executor to bring suit to cancel his testator's conveyances, thought to have been procured by undue influence, in order to conserve the estate. Hatch v. Hatch, 46 U. 218, 148 P. 433.

5. Statute of limitations.

Appointment of administrator did not set in motion statute of limitations in favor of one claiming property in estate by adverse possession, where administrator was discharged without filing inventory or taking any steps to protect interests of heirs. Baker v. Goodman, 57 U. 349, 355, 194 P. 117.

6. Pleadings.

Plaintiff has no capacity to sue as administrator, where complaint fails to allege that there are any funds or assets of any kind in his hands, as administrator, or that there is any property of the estate from which any assets can be derived. Barrette v. Dooly, 21 U. 81, 59 P. 718.

In action by administrator to quiet title to property alleged to belong to the estate, complaint must allege administrator's title, and pray that defendant be required to set forth whatever right, title or interest is claimed by him, and for other and general and equitable relief. An express averment of title, ownership or possession is not, however, required; it is sufficient if that may be inferred. Worley v. Peterson, 80 U. 27, 40, 12 P.2d 579.

Complaint must charge defendant, when sued as executor de son tort, as executor generally, same as though he was in all respects proper and legal executor. First Nat. Bank of Hailey, Idaho v. Lewis, 12 U. 84, 101, 41 P. 712.

7. Estoppel.

Conduct of Utah executors of Utah testator, which executors were also legatees of such testator, in appearing in Idaho court as defendants in action pending against testator at time of his death, and in failing to plead their want of capacity or interpose any other plea by way of abatement or otherwise, or to object to proceedings against them as executors, and in adopting testator's answer and contesting issues presented in cause, held to have estopped executors, when sued on Idaho plaintiff's judgment in Utah as executors de son tort, from denying that they were executors in Idaho and from pleading invalidity of such judgment. First Nat. Bank of Hailey, Idaho v. Lewis, 12 U. 84, 41 P. 712.

A. L. R. notes.

Right of administrator de bonis non to recover proceeds of personal property of the estate converted by his predecessor, 3 A. L. R. 1252; right of beneficiaries of decedent's estate to maintain action independent from executor or administrator to enforce contracts or other transactions entered into by executor or administrator on behalf of the estate, 135 A. L. R. 1130; right of executor or administrator to avoid contract or conveyance by decedent on ground of mental incapacity, 1 A. L. R. 1517; right or duty of executor or administrator to complete or enforce decedent's executory contract for purchase of real property, 58 A. L. R. 436.

102–11–6. Actions for Waste, Trespass, Conversion.

Executors and administrators may maintain actions against any person who has wasted, destroyed, taken or carried away, or converted to his own use, the goods of their testators or intestate in his lifetime. They may also maintain actions for trespass committed on real estate of the decedent in his lifetime. (C. L. 17, § 7721.)

History.

This section is practically identical with R. S. 1898, § 3915; Comp. Laws 1907, § 3915.

Comparable provisions.

Idaho Code, § 15–804 (identical).

Mont. Rev. Codes, § 10259 (substantially identical).

1. Applicability of section.

Under this section, administrator may demand of corporation stock to which intestate was entitled, or bring action for damages for its failure to issue stock. Coray v. Perry Irrigation Co., 50 U. 70, 166 P. 672, applying Comp. Laws 1907, § 3915.

102–11–7. Id.

Any person or his personal representative may maintain an action against the executor or administrator of any testator or intestate, who

in his lifetime has wasted, destroyed, taken or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person.

(C. L. 17, § 7722.)

History.

This section is identical with R. S. 1898, § 3916; Comp. Laws 1907, § 3916.

Comparable provisions.

Idaho Code, § 15–805 (substantially identical).

Mont. Rev. Codes, § 10260 (identical).

1. Actions for negligence.

Action against bank director and officer, guilty of negligence in his conduct of bank affairs, which negligence caused loss of bank funds, held to have survived and to have been maintainable against his executors. Warren v. Robinson, 21 U. 429, 61 P. 28.

2. Executor de son tort.

Where man so acts as to become in law executor de son tort, he thereby renders himself liable to be sued, not only by rightful executor, but also by creditor or legatee of testator. First Nat. Bank of Hailey, Idaho v. Lewis, 12 U. 84, 99, 41 P. 712.

102–11–8. Continuing Decedent's Business.

When the interests of creditors are not prejudiced thereby, the court may prescribe that the business in which the decedent was engaged at the time of his death may be continued for such length of time as may be necessary to permit the affairs of the estate to be wound up to the best advantage.

(C. L. 17, § 7723.)

History.

This wise provision is of ancient origin, and has not been changed since its original enactment. R. S. 1898, § 3917; Comp. Laws 1907, § 3917.

Comparable provisions.

Cal. Probate Code, § 572 (court may authorize executor or administrator to continue operation of decedent's business).

Iowa Code 1939, § 11950 (court, in its discretion, may authorize executor or administrator to continue prosecution of any business in which deceased was engaged at time of his death, in order to wind up his affairs with greater advantage).

Decisions from other jurisdictions.

— Iowa.

An order of the probate court which directed the continuation of decedent's private banking business under Code section 11956 was not void as made without notice to creditors, there being no creditors having liens on the assets of the bank, inasmuch as probate proceedings, as to nonlien creditors, are quasi in rem, not in personam; nor as not limiting the prosecution of the business to winding up the decedent's affairs to greater advantage. In re Estate of Harsh, 207 Iowa 84, 218 N. W. 537.

Without authorization of the court, the administrator of the estate of a deceased partner in a partnership bank could not bind the estate in the operation of a new business or the continuance of the old business by the surviving partners; allowance of a claim against the estate was not in the nature of an original investment in either the old or the new business. Williams v. Schee, 214 Iowa 1181, 243 N. W. 529.

A. L. R. notes.

Liability of executor or his sureties for losses incurred in carrying on business pursuant to direction or permission of will, 109 A. L. R. 639.

102–11–9. Partnership Interest of Decedent—Rights of Surviving Partner.

When a partnership exists between the decedent at the time of his death and any other person, the surviving partner has the right to continue in possession of the partnership and to settle its business, but the interest of the decedent in the partnership must be included in the inventory and be appraised as other property. The surviving partner must settle the affairs of the partnership without delay, and account

with the executor or administrator and pay over such balances as may from time to time be payable to him in right of the decedent. Upon the application of the executor or administrator the court or judge may, whenever it appears necessary, order the surviving partner to give a bond in a prescribed sum or render an account, and in case of neglect or refusal may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained. (C. L. 17, § 7724.)

History.

This section is practically identical with R. S. 1898, § 3918; Comp. Laws 1907, § 3918, and "was doubtless borrowed from California." Wilson v. Meyer, 23 U. 529, 536, 65 P. 488.

Comparable provisions.

Idaho Code, § 15-806, Mont. Rev. Codes, § 10261 (similar in purport).

Cross-references.

Nature of general partner's right in specific partnership property, 69-1-22; death of limited partner, 69-2-21; compensation to surviving partner winding up, 69-1-15; right to wind up partnership business, 69-1-34; surviving partner incompetent as administrator, 102-4-4, subd. (5).

1. **Scope and operation of section.**

This section is simply declaratory of the common law. Wilson v. Meyer, 23 U. 529, 535, 65 P. 488, reviewing the authorities at length. In other words, ordinarily, when partnership is dissolved by death of one of its members, settlement of its business affairs belongs to surviving partners, and it becomes their duty to make settlement without delay, and account to legal representatives of deceased partner. Sharp v. Sharp, 54 U. 262, 180 P. 580.

Under this section, in case a partnership is dissolved by death of one of the partners, the firm's business affairs are all to be settled by the surviving partner, and not by the administrator or executor of the deceased one. Cobb v. Hartenstein, 47 U. 174, 152 P. 424, applying Comp. Laws 1907, § 3918, which is identical with present section. Accordingly, the court has no jurisdiction, under this section, to order a sale of the personal property of a deceased partner which was in the possession of the surviving partner. Wilson v. Meyer, 23 U. 529, 65 P. 488, applying R. S. 1898, § 3918.

Title to property which was in partner at date of his death descends as real estate to heirs subject only to equity of surviving partner to have it applied primarily to trust for which it was acquired. Bankers' Trust Co. v. Riter, 56 U. 525, 100 P. 1113.

Administrator of deceased partner held entitled to maintain an action against heirs of another partner for general accounting of partnership affairs, where it appeared that accounting was necessary, coupled with additional fact that estate of other partner had been closed and personal representative released from further duty in administration of his estate. Bankers' Trust Co. v. Riter, 56 U. 525, 190 P. 1113.

2. **Extent of powers and rights of surviving partner.**

Under this section a "surviving partner" may sue to recover payments on a usurious contract, notwithstanding 44-0-7 contemplates suit in such case by "personal representatives." Cobb v. Hartenstein, 47 U. 174, 152 P. 424.

3. **Duty of surviving partner.**

If surviving partner dies before partnership business is settled, his legal representative has duty of closing up partnership business and accounting to representative of deceased partner. Sharp v. Sharp, 54 U. 262, 180 P. 580.

By this section it is made duty of surviving partner to account for whatever property is in his possession that rightfully belongs to deceased's personal representative after settlement and adjustment of partnership affairs; it is also his duty and right, upon death of surviving partner, of his administrator or executor to proceed with settlement of partnership affairs and to account with representative of first deceased partner. Bankers' Trust Co. v. Riter, 56 U. 525, 190 P. 1113.

4. **Accounting.**

If the surviving partner refuses to account, the probate court may order and require him to do so, and then determine the sufficiency of the account when rendered, but on coming in of surviving partner's account, if surviving partner and administrators cannot agree upon settlement, then proceedings must be instituted by suit in equity predicated on proper pleadings for an accounting and settlement of partnership affairs. In re Tripp's Estate, 51 U. 359, 170 P. 975.

The district court, sitting as court of probate, in first instance, has no jurisdiction to settle accounts between surviving partner and representative of deceased partner, but is limited to power of requiring surviving partner properly to account. In re Tripp's Estate, 51 U. 359, 170 P. 975.

5. Contingent claims.

Contingent claims of surviving members of unsettled partnership business cannot be presented against estate of deceased partners without accounting. Sharp v. Sharp, 54 U. 262, 180 P. 580. The term "contingent claim," as employed and used in 102–9–26, was not intended to have any application in case of dissolution of partnership by death of one of its members in winding up and settlement of its affairs. Sharp v. Sharp, 54 U. 262, 180 P. 580.

102–11–10. Right to Sue on Bond of Former Representative.

An administrator or executor may, in his own name, for the use and benefit of all parties interested in the estate, maintain an action on the bond of any former executor or administrator of the same estate.

(C. L. 17, § 7725.)

Comparable provisions.

Cal. Probate Code, § 576 (substantially identical).

Idaho Code, § 15–807, Mont. Rev. Codes, § 10262 (giving substantially the same authority to an administrator).

102–11–11. Representative Failing to Qualify Not Necessary Party.

In actions by or against executors or administrators it is not necessary to join those as parties who may have been appointed by the court but who have not qualified. (C. L. 17, § 7726.)

Comparable provisions.

Idaho Code, § 15–808, Mont. Rev. Codes, § 10263 (similar as to actions by or against executors).

102–11–12. Compromising with Debtors.

Whenever a debtor of the decedent is unable to pay all his debts, the executor or administrator, with the approval of the court or judge, may compound with him and give a discharge upon receiving a fair and just dividend of his effects. A compromise may also be authorized when it appears to be just and for the best interests of the estate.

(C. L. 17, § 7727.)

History.

This section is substantially similar to Comp. Laws 1876, § 917, and is practically identical with R. S. 1898, § 3921; Comp. Laws 1907, § 3921.

Comparable provisions.

Idaho Code, § 15–809, Mont. Rev. Codes, § 10264 (substantially identical).

1. Validity of contracts.

Compromise agreements between heirs and claimants against the estate are not against public policy. Dunn v. Wallingford, 47 U. 491, 155 P. 347. This case is cited with approval in Bingham v. Walker Bros., Bankers, 75 U. 149, 161, 283 P. 1055, holding that widow could not confer authority to compromise.

A. L. R. notes.

Power and responsibility of executor or administrator in respect of waiver or compromise of claim due estate, 85 A. L. R. 176.

102–11–13. Fraudulent Conveyances by Decedent—Setting Aside.

When there is a deficiency of assets in the hands of an executor or administrator, and the decedent in his lifetime has conveyed any real estate, or any rights or interest therein, with intent to defraud his creditors, or to avoid any right of, or debt or duty to, any person, or has

so conveyed such real estate that by law the deeds or conveyances are void as against creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same, and may recover for the benefit of the creditors all such real estate so fraudulently conveyed, and may also for the benefit of the creditors sue for and recover all goods, chattels, rights or credits which have been so conveyed by the decedent in his lifetime, whatever may have been the manner of such fraudulent conveyance.

(C. L. 17, § 7728.)

History.
This section is practically identical with R. S. 1898, § 3922; Comp. Laws 1907, § 3922.

Comparable provisions.
Idaho Code, § 15–810, Mont. Rev. Codes, § 10265 (substantially identical).

Cross-references.
Fraudulent conveyances, 33–1.

1. Conditions precedent to action.
Creditors of insolvent estate may not bring, in their own names, action to set aside conveyance made by decedent without first making unsuccessful demand on executor or administrator to bring such action. Fehringer v. Commercial Nat. Bank of Ogden, 23 U. 393, 64 P. 1108. The Fehringer case, supra, was followed in Wasatch Livestock Loan Co. v. Nielson, 90 U. 307, 321, 56 P.2d 613, rehearing denied 90 U. 331, 61 P.2d 616.

102–11–14. Id. Creditors Must Contribute to Costs and Expenses.

No executor or administrator is bound to sue for the benefit of the creditors to recover such estate except on application of creditors who will pay such part of the costs and expenses of the suit, or give such security to the executor or administrator therefor, as the court or judge shall direct. (C. L. 17, § 7729.)

History.
This section is substantially identical with R. S. 1898, § 3923; Comp. Laws 1907, § 3923.

Comparable provisions.
Idaho Code, § 15–811, Mont. Rev. Codes, § 10266 (similar).

1. Extent of creditor's right where estate insolvent.
Creditors of insolvent estate may not bring, in their own names, action to set aside conveyance made by decedent without first making unsuccessful demand on executor or administrator to bring such action. Fehringer v. Commercial Nat. Bank of Ogden, 23 U. 393, 64 P. 1108. Even though a creditor believes that he is entitled to have his claim against an estate satisfied with property claimed by another, such creditor may not bring an action for the recovery thereof until after he has requested the administrator to bring an action therefor and the request has been refused. Wasatch Livestock Loan Co. v. Nielson, 90 U. 307, 322, 56 P.2d 613, rehearing denied 90 U. 331, 61 P.2d 616.

Even if an administrator complies with request of a creditor and brings an action, and even though at the expense of the creditor the property is recovered, still the creditor acquires no other or greater right to the property recovered than he has in the other property of the insolvent estate. Wasatch Livestock Loan Co. v. Nielson, 90 U. 307, 323, 56 P.2d 613, rehearing denied 90 U. 331, 61 P.2d 616.

102–11–15. Id. Estate Recovered Used to Pay Debts.

All real estate so recovered must be sold for the payment of debts in the same manner as if the decedent had died seised thereof, upon obtaining an order therefor from the court; and the proceeds of all goods, chattels, rights and credits so recovered must be appropriated to the payment of the debts of the decedent in the same manner as other property in the hands of the executor or administrator. (C. L. 17, § 7730.)

History.
This section is substantially identical with R. S. 1898, § 3924; Comp. Laws 1907, § 3924.

Comparable provisions.
Mont. Rev. Codes, § 10267 (substantially identical).
Idaho Code, § 15–812 (clause "upon ob-

taining an order therefor from the court" is omitted).

Cross-references.
Death of joint obligor, 47-0-6.

1. Applicability of section.
This section applies to claims evidenced by judgment as well as all others, except where otherwise provided. Wasatch Livestock Loan Co. v. Nielson, 90 U. 307, 320, 66 P.2d 613, rehearing denied 90 U. 331, 61 P.2d 616.

102-11-16. Investment of Estate Funds—Petition—Notice.

Pending the settlement of any estate, on the petition of any party interested therein and upon good cause shown therefor, the court may upon notice order any moneys in the hands of the executor or administrator to be invested for the benefit of the estate in securities of the United States or other good securities to be approved by the court or judge. (C. L. 17, § 7731.)

History.
This section is practically identical with R. S. 1898, § 3925; Comp. Laws 1907, § 3925.

Comparable provisions.
Cal. Probate Code, § 584 (includes similar provision).

1. Liability of executor.
Where executor for approximately six months after court directed investment of certain funds of estate in government bonds permitted, without any investigations, the funds of estate to remain with banking institution in which he was financially interested both as stockholder and depositor, and, as result, such funds were lost to estate, executor was held for amount lost, and in addition was liable to estate for interest which such bonds would have earned. In re Listman's Estate, 57 U. 471, 197 P. 590.

A. L. R. notes.
Liability of trustee, guardian, executor or administrator for loss of funds, as affected by failure to obtain order of court authorizing investment, in absence of mandatory statute, 116 A. L. R. 437; liability of trustee, guardian, executor, or administrator for loss of funds invested, as affected by order of court authorizing the investment, 88 A. L. R. 325; power and duty of trustee, executor, administrator, or guardian as regards protection of investment in stocks by submitting to voluntary assessment, 104 A. L. R. 979.

102-11-17. Embezzlement of Decedent's Property—Liability.

If any person embezzles or alienates any of the moneys, goods, chattels, or effects of a decedent, he shall be liable for double the value of the property so embezzled or alienated, to be recovered by action for the benefit of the estate. (C. L. 17, § 7732.)

Cross-references.
Damages for fraudulently selling real property, 102-10-33; embezzlement generally, 103-15-4.

102-11-18. Id. Citation to Person Suspected—Order to Return.

The court may require any person suspected of having taken wrongful possession of any of the effects of the decedent, or of having had such effects under his control, to appear and submit to an examination under oath touching such matters; and if on such examination it appears that he has wrongful possession of any such property, not adversely claimed, the court may order the delivery of the same to the executor or administrator of the estate. (C. L. 17, § 7733.)

History.
This section is practically identical with R. S. 1898, § 3927; Comp. Laws 1907, § 3927, except for words "not adversely claimed."

Cross-references.
Citation generally, 102-14-10.

1. Purpose and effect of section.
The purpose and effect of this section is to provide a means of discovery of

property and effects belonging to the estate, and it provides special proceedings for the disclosure of assets belonging to the estate under the following circumstances: (1) Where a person is suspected of having taken wrongful possession of any of the effects of the deceased; (2) or having had such effects under his control. It provides a more speedy and less expensive remedy than is found in the ordinary remedies at law or in equity to compel the production and delivery of property suspected of being concealed or withheld from personal representatives of deceased persons. Hampshire v. Woolley, 72 U. 106, 269 P. 135.

2. Scope and operation of section.
Under the provisions of this section and 102–11–19 the court is not given the power to hear and determine the title to property where the same is held under a claim of title. In other words, it is not a proper remedy to try contested rights and title to property between the executor and others, in the absence of express authorization, and this section contains no such authorization. Hampshire v. Woolley, 72 U. 106, 269 P. 135.

3. Revocation of letters.
Neither this section nor following one limits power of court to revoke letters of administration under 102–6–1 for failure to inventory certain property belonging to estate. In re Robison's Estate, 59 U. 431, 204 P. 321.

102–11–19. Id. Contempt—Penalty.

If, on being duly served with the order of the court requiring him to do so, any person fails to appear in accordance with such order; or if, having appeared, he refuses to answer any question which the court deems proper to put to him in the course of such examination; or if he fails to comply with the order of the court requiring him to deliver the property, he may be committed to the jail of the county until a compliance is yielded. (C. L. 17, § 7734.)

History.
This section is practically identical with R. S. 1898, § 3928; Comp. Laws 1907, § 3928.

1. Scope and operation of section.
This section, when read in connection with the preceding section, does not authorize the court to hear and determine the right and title to property where it is held under claim of title. Hampshire v. Woolley, 72 U. 106, 269 P. 135.

2. Revocation of letters.
Neither this section nor preceding one limits power of court to revoke letters of administration under 102–6–1 for failure to inventory certain property belonging to estate. In re Robison's Estate, 59 U. 431, 204 P. 321.

102–11–20. Representative Charged with Whole of Estate.

Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession at the value of the appraisement contained in the inventory, except as provided in the following sections, and with all the interest, profits and income of the estate. (C. L. 17, § 7735.)

History.
This section is identical with R. S. 1898, § 3929; Comp. Laws 1907, § 3929.

Comparable provisions.
Mont. Rev. Codes, § 10282 (substantially identical).

Cross-references.
Executor not discharged from claim testator held against him, 102–7–5.

1. Interest.
Charging interest against executors is also a matter of general law. In re Listman's Estate, 57 U. 471, 484, 197 P. 596, and authorities cited.

Generally an executor or administrator is not prima facie chargeable with interest during the time the law allows for collecting the estate and settling the account. In re Raleigh's Estate, 48 U. 128, 139, 158 P. 705.

Charging interest against executor or administrator should be predicated upon some fault or wrong of the executor or administrator, or upon his having made use of the funds or in some way profited by delay in final settlement, or in withholding them after demand upon him.

In re Raleigh's Estate, 48 U. 128, 138, 158 P. 705.

Decisions from other jurisdictions.

— Montana.

An administrator is chargeable with the whole of an estate coming into his possession, at the value of the appraisement thereof, but is not to suffer loss by reason of decrease in value or destruction, without his fault, of any part of the estate; he is not an insurer; therefore he is liable only for losses which are the consequence of bad faith or the want of due diligence in handling the estate. In re Astibia's Estate, 100 Mont. 224, 46 P.2d 712.

A. L. R. notes.

Liability of estate for torts of executor, administrator, or trustee, 127 A. L. R. 687.

102-11-21. Id. Not to Profit or Suffer Loss on Account of.

He shall not make profit by the increase, nor suffer loss by the decrease or destruction without his fault, of any part of the estate. He must account for the excess when he sells any part of the estate for more than the appraisement, and if any is sold for less than the appraisement, he is not responsible for the loss, if the sale has been justly made.

(C. L. 17, § 7736.)

History.

This section is practically identical with R. S. 1898, § 3930; Comp. Laws 1907, § 3930.

Comparable provisions.

Mont. Rev. Codes, § 10283 (identical).

A. L. R. notes.

Liability for interest or profits on funds of estate deposited in bank or trust company which is itself executor, administrator, trustee, or guardian, or in which executor, etc., is interested, 88 A. L. R. 205; liability of executor or his sureties for losses incurred in carrying on business pursuant to direction or permission of will, 109 A. L. R. 639; loss or depreciation of assets for which executor, administrator, or trustee is not responsible, as affecting the amount of his compensation, 110 A. L. R. 994; penalties or interest incurred because of delinquency of executor, administrator, or trustee, in respect of taxes as a charge against him personally or against estate, 129 A. L. R. 448.

102-11-22. Id. May Not Purchase Claim Against Estate.

No administrator or executor shall purchase any claim against the estate he represents; and if he pays any claim for less than its nominal value, he is only entitled to charge in his account the amount he actually paid.

(C. L. 17, § 7737.)

Comparable provisions.

Cal. Probate Code, § 583 (no executor or administrator may purchase property of estate, or claim against estate; may have credit in his accounts only for amount actually paid, if he pays claim for less than its full amount).

Mont. Rev. Codes, § 10286 (identical).

Cross-references.

Not to purchase property of estate, 102-10-8.

A. L. R. notes.

Purchase by executor, administrator, or trustee of claims against estate or trust, 128 A. L. R. 917.

102-11-23. Id. Not Accountable for Uncollectible Debts.

No executor or administrator is accountable for any debts due the decedent, if it appears that they remain uncollected without his fault.

(C. L. 17, § 7738.)

Comparable provisions.

Mont. Rev. Codes, § 10284 (identical).

102-11-24. Expenses—Compensation Provided by Terms of Will.

He shall be allowed all necessary expenses in the care, management and settlement of the estate, including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in court, and for his

services the fees provided in this chapter; but when the decedent, by his will, makes some other provision for the compensation of his executor, that shall be full compensation for his services, unless, by a written instrument filed in the court, he renounces all claim for compensation provided for by the will. (C. L. 17, § 7739.)

History.
This section is practically identical with R. S. 1898, § 3933; Comp. Laws 1907, § 3933.

Comparable provisions.
Mont. Rev. Codes, § 10285 (similar).

Cross-references.
Expenses of bond allowed, 43–3–45.

1. Expenses incurred in preservation of estate.
Administrator of deceased wife's estate, who was interested in preserving the estate by preventing it from being sold for taxes, was entitled to credit for all taxes paid out of his own funds, together with interest thereon from date of payment. In re Hansen's Estate, 55 U. 23, 184 P. 197. For example, administrator of deceased wife's estate was entitled to credit for expenses incurred in making repairs on buildings, but it was matter for district court to determine, from all facts and circumstances, whether administrator should be allowed credit for new additions to buildings. In re Hansen's Estate, 55 U. 23, 184 P. 197.

2. Personal expenses.
Administrator of deceased wife's estate held not entitled to credit for amount paid in satisfaction of notes given for money borrowed by administrator for his own use, and which his wife signed merely as surety, since administrator in paying notes was paying his own debt. In re Hansen's Estate, 55 U. 23, 184 P. 197.

3. Expenses in litigation over letters.
An estate may not be charged with expenses incident to two or more persons litigating their relative rights to letters of administration. In re Pingree's Estate, 82 U. 437, 25 P.2d 937, 90 A. L. R. 96.

Where, after wife of deceased was appointed special administratrix, her petition for general letters of administration was denied and bank appointed general administrator, which denial was reversed on appeal and wife was appointed administratrix, it was her duty to turn over property to bank notwithstanding appeal was pending, so that bank was entitled to expenses incurred in attempting to gain possession of property while it was general administrator, including reasonable attorney's fee, and such expenses were proper charges against estate which were not made lien on estate property but were directed to be paid when there were sufficient funds in estate. In re Pingree's Estate, 82 U. 437, 25 P.2d 937, 90 A. L. R. 96.

4. Temporary improvements.
Administrator of deceased wife's estate was not entitled to credit for cost of erection of windmill placed on premises, this being an improvement of temporary character and necessitated mainly for convenience of administrator while occupying premises. In re Hansen's Estate, 55 U. 23, 184 P. 197.

A. L. R. notes.
Allowance out of decedent's estate for costs and attorneys' fees incurred by parties interested in granting or revoking of letters of administration or letters testamentary, 90 A. L. R. 101.
Expenses incurred in unsuccessful attempt to uphold particular provisions of will, right of executor to an allowance for, 7 A. L. R. 1499.
Revocation of letters testamentary as affecting expenses and disbursements by executor or administrator thereafter, 31 A. L. R. 846.
Right of executor, administrator, or testamentary trustee to allowance of attorneys' fees and expenses incident to controversy over surcharging his account, 101 A. L. R. 806.
Right of executor, administrator, or testamentary trustee, who is himself an attorney, to employ attorney at the expense of the estate, 18 A. L. R. 635.
Right of executor or administrator to extra compensation for legal services rendered by him, 49 A. L. R. 1033.
Right of executor or administrator to extra compensation for services other than attorney's services, 66 A. L. R. 512.
Right of personal representative to allowance, out of property involved, for attorneys' fees or other expenses incurred in unsuccessful effort to claim the property for the estate, 126 A. L. R. 1349.
Right to allowance out of estate of attorneys' fees incurred in attempt to establish or defeat will, 128 A. L. R. 1002.

102-11-25. Commissions.

When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of estate accounted for by him, as follows: for the first $1,000 at the rate of five per cent; for all above that sum, and not exceeding $5,000, at the rate of four per cent; for all above $5,000, and not exceeding $10,000, at the rate of three per cent; for all above $10,000, and not exceeding $20,000, at the rate of two per cent; for all above $20,000, at the rate of one per cent. The same commissions shall be allowed to administrators. In all cases such further allowance may be made as the court may deem just and reasonable for any extraordinary service, but the aggregate amount of both commission and extra allowance shall not exceed twice the amount of the commissions above specified. All contracts between an executor or administrator and an heir, devisee or legatee for a higher compensation than that allowed by this section shall be void. (L. 29, p. 24, § 7740.)

History.

This section was R. S. 1898, § 3934; Comp. Laws 1907, § 3934, and is more or less identical therewith, except for changes in some of the figures in the present section.

Comparable provisions.

Mont. Rev. Codes, § 10287 (stating percentage rate of executor's commissions).

1. Commissions and attorney's fees.

Where relative of decedent applied for letters of administration within three months but court appointed creditor of decedent as administrator, such appointment, though erroneous, was not void or open to collateral attack and such administrator was entitled to allowance of reasonable costs, commissions and expenses, including attorney fees. In re Owen's Estate, 32 U. 469, 91 P. 283.

A. L. R. notes.

Change in statute after decedent's death and before final account or after creation of trust as affecting compensation, 91 A. L. R. 1421.

Computation of commissions of executors, administrators, or trustee as affected by lien on or outstanding interest in property, 46 A. L. R. 239.

Death of trustee, executor, administrator, or guardian as affecting right to compensation, 7 A. L. R. 1595.

Double commission, right to, where same person is named as executor and trustee, 84 A. L. R. 667.

Faults in administration, right of executor or administrator to commissions as affected by, 83 A. L. R. 726.

Fees of executor or administrator as applicable to discharge of his indebtedness to decedent, 123 A. L. R. 1285.

Loss or depreciation of assets for which executor, administrator, or trustee is not responsible, as affecting the amount of his compensation, 110 A. L. R. 994.

Resignation or removal of executor, administrator, guardian, or trustee before final administration or termination of trust as affecting his compensation, 94 A. L. R. 1101.

Right of executor or administrator to extra compensation for legal services rendered by him, 49 A. L. R. 1033.

Right of executor or administrator to extra compensation for services other than attorney's services, 66 A. L. R. 512.

Validity and effect of provision in will limiting amount of fees of executor or trustee, 34 A. L. R. 918.

102-11-26. Specific Performance of Decedent's Contracts.

When a person, who is bound by contract in writing to convey any real estate or who is bound by contract in writing to assign, transfer or deliver any personal property, shares of capital stock, bonds or other choses in action, dies before making the conveyance, assignment, transfer or delivery; and in all cases when such decedent, if living, might be compelled to make such conveyance, assignment, transfer or

delivery, the court may make a decree authorizing and directing his executor or administrator to convey such real estate, or to assign, transfer or deliver such personal property, shares of capital stock, bonds or other choses in action, to the person entitled thereto.

(C. L. 17, § 7741.)

History.

This section has been somewhat extended beyond terms of its counterpart in R. S. 1898, § 3935; Comp. Laws 1907, § 3935.

Comparable provisions.

Idaho Code, § 15–1001 (probate court may make decree authorizing and directing executor or administrator to convey real estate, where person who was bound by contract to convey same has died before making the conveyance, and where such decedent if living might be compelled to make such conveyance).

Cross-references.

Statute of frauds, specific performance after part performance, 33–5–8.

1. Jurisdiction of probate court.

"A probate court may, in a proper case, direct an executor or an administrator of an estate to specifically perform a contract of a decedent, but is without jurisdiction to hear or determine a suit brought by a stranger to a probate proceeding to quiet title to property claimed to belong to the estate." In re Rogers' Estate, 75 U. 290, 301, 284 P. 992.

In order to invoke the jurisdiction of the probate court under this section and 102–11–27 to 102–11–31, there must be appropriate pleadings. In re Rogers' Estate, 75 U. 290, 284 P. 992.

Where purchaser of land under contract knew of grantor's death and probate of his estate, but failed to file petition in probate court until after estate was closed, held, he was not entitled thereafter to maintain action for specific performance of contract. Free v. Little, 31 U. 449, 88 P. 407.

Probate court was without jurisdiction to try all issues raised by pleadings in action by administratrix to cancel contract for conveyance of land in which defendant filed counterclaim for specific performance. Rogers v. West, 82 U. 525, 26 P.2d 971.

2. Escrows.

The depositary of an escrow is the agent of both parties and escrow contract is not revocable at the will of either party or their representatives, but may be enforced under the provisions of this section. Gammon v. Bunnell, 22 U. 421, 64 P. 958, applying R. S. 1898, § 3935.

Decisions from other jurisdictions. — Idaho.

The clear purpose of section 15–1001 of the Idaho Code is to give one who would be entitled to specific performance of a contract, evidenced by writing, to convey real estate, against a deceased person, if alive, a right to require conveyance of it from the executor or administrator of his estate; if the right to the conveyance is clear, relief is to be granted by the probate court; if doubtful, recourse must be had to specific performance in the dist. court. Wilson v. Fackrell, 54 Idaho 515, 34 P.2d 409.

102–11–27. Id. Petition—Notice and Hearing.

On the presentation of a verified petition by any person claiming to be entitled to such conveyance, assignment, transfer or delivery from an executor or administrator, setting forth the facts upon which the claim is predicated, the court or clerk must appoint a time and place for hearing the petition, which shall be upon notice. (C. L. 17, § 7742.)

History.

In so far as "conveyance" is concerned, this section is practically identical with R. S. 1898, § 3936; Comp. Laws 1907, § 3936.

Comparable provisions.

Idaho Code, § 15–1002 (similar as to petition for conveyance).

1. Applicability of section.

This section was applied and discussed in Free v. Little, 31 U. 449, 88 P. 407.

2. Pleadings.

Without appropriate pleadings as provided for by this section the probate court is without jurisdiction to grant relief provided for by 102–11–26. In re Rogers' Estate, 75 U. 290, 284 P. 992. And see Gammon v. Bunnell, 22 U. 421, 64 P. 958, as to pleadings in specific performance actions.

102-11-28. Id. Decree.

If after a full hearing upon the petition and objections and examination of the facts and circumstances of the claim the court is satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, or to an assignment, transfer or delivery of the personal property, shares of capital stock, bonds or other choses in action described in the petition, a decree authorizing and directing the executor or administrator to execute a conveyance, assignment, transfer or delivery thereof to the petitioner must be made; but the entry of the decree shall give the person entitled to the conveyance, assignment or transfer a right to the possession of the lands, personal property, shares of capital stock, bonds or other choses in action contracted for and to hold the same according to the terms of the intended contract in the same manner as if a conveyance, assignment or transfer had been made in pursuance of the decree. (C. L. 17, § 7743.)

History.
In so far as "conveyance" is concerned, this section is more or less identical with R. S. 1898, § 3937; Comp. Laws 1907, § 3937.

Comparable provisions.
Idaho Code, § 15-1004 (similar as to conveyance).

1. Applicability of section.
This section was discussed and applied in Free v. Little, 31 U. 449, 88 P. 407.

2. Validity of decree.
There must be a finding of facts to support the decree. In re Rogers' Estate, 75 U. 290, 284 P. 992.

3. Joint judgment.
On joint demand against executor of deceased obligor and surviving obligors, joint judgment cannot be rendered, since, as to former, judgment will be payable de bonis testatoris and, as to latter, de bonis propriis. First Nat. Bank of Hailey, Idaho v. Lewis, 12 U. 84, 102, 41 P. 712.

Decisions from other jurisdictions.
— Idaho.
Where probate court decrees specific performance of a contract, one objecting to the petition has no remedy except by appeal. Wilson v. Fackrell, 54 Idaho 515, 34 P.2d 409.

102-11-29. Id. Denied When Right Doubtful—Action—Limitation of Action.

If upon a hearing as hereinbefore provided the right of the petitioner to have a specific performance of the contract is found to be doubtful, the court must dismiss the petition without prejudice to the rights of the petitioner, who may, at any time within six months thereafter, proceed by action to enforce specific performance thereof. (C. L. 17, § 7744.)

History.
This section is practically identical with R. S. 1898, § 3938; Comp. Laws 1907, § 3938.

Comparable provisions.
Idaho Code, § 15-1006 (substantially identical).

1. Effect of delay in presenting petition.
Under this section, where the purchaser in a contract for the sale of land knew of the vendor's death, and of the administration of his estate, but failed to present any petition under the statute before the closing of the administration, he could not thereafter sue for specific performance, and this though, when the estate was closed, the purchaser's option had not expired. Free v. Little, 31 U. 449, 88 P. 407, applying Comp. Laws 1898.

102-11-30. Id. Right Survives in Case of Claimant's Death.

If the person entitled to the conveyance, assignment, transfer or delivery dies before the commencement of proceedings therefor under

this chapter, or before the completion of the conveyance, assignment, transfer or delivery, any person entitled to succeed to his rights in the contract, or the executor or administrator of such decedent, may, for the benefit of the person so entitled, commence such proceedings or prosecute any already commenced, and the conveyance, assignment, transfer or delivery must be so made as to vest the estate in the persons entitled to it, or in the executor or administrator of such decedent for their benefit. (C. L. 17, § 7745.)

History.
In so far as "conveyance" is concerned, this section is substantially identical with R. S. 1898, § 3939; Comp. Laws 1907, § 3939.

Cross-references.
Substitution of parties generally, 104–3–19.

1. Discussion and application of section.
This and the other sections with respect to specific performance were discussed at length in an opinion of Mr. Justice Frick in Free v. Little, 31 U. 449, 88 P. 407, applying more or less identical sections in R. S. 1898.

102–11–31. Id. Decree May Be on Conditions.

The decree provided for in this chapter may direct the possession of the property therein described to be surrendered to the person entitled thereto upon his producing the deed, assignment or transfer and a certified copy of the decree, when by the terms of the contract possession is to be surrendered. (C. L. 17, § 7746.)

History.
In so far as a "deed" is concerned, this section is identical with R. S. 1898, § 3940; Comp. Laws 1907, § 3940, and the sections of R. S. 1898 are discussed at length in Free v. Little, 31 U. 449, 88 P. 407.

102–11–32. Accounts—To Be Rendered.

Six months after his appointment, also within thirty days after the expiration of the time within which creditors must present their claims, and at any other time when required by the court, either upon its own motion or upon the application of any person interested in the estate, every executor or administrator must render for the information of the court an account of his administration, under oath, showing the sums of money received by him and from what sources, the amounts expended by him, a statement of all claims presented against the estate and the names of the claimants, and all other matters necessary to show the condition of its affairs. (C. L. 17, § 7747.)

History.
This section is practically identical with R. S. 1898, § 3941; Comp. Laws 1907, § 3941.

Comparable provisions.
Iowa Code 1939, § 12042 (on expiration of six and within seven months from first publication or notice of his appointment, and sooner if required by court, executor or administrator must render his account to court).

Cross-references.
Annual account of trustee after distribution, 102–12–31; statement of claims presented, form, 102–9–19.

1. Credits and allowances.
Administrator of deceased's wife's estate was entitled to credit for expenses incurred in making repairs on buildings, but it was matter for district court to determine, from all facts and circumstances, whether administrator should be allowed credit for new additions to buildings. In re Hansen's Estate, 55 U. 23, 184 P. 197.

So, also, administrator of deceased wife's estate, who was interested in preserving the estate by preventing it from being sold for taxes, was entitled to credit for all taxes paid out of his own funds, together with interest thereon from date of payment. In re Hansen's Estate, 55 U. 23, 184 P. 197.

But administrator of deceased wife's estate was not entitled to credit for cost of erection of windmill placed on premises, this being an improvement of temporary character and necessitated mainly for convenience of administrator while occupying premises. In re Hansen's Estate, 55 U. 23, 184 P. 197.

2. Raising and waiving objections to account.

Under this section order allowing account before final settlement can be assailed only in equity, and upon same grounds as judgments are assailed. In re Raleigh's Estate, 48 U. 128, 158 P. 705, applying Comp. Laws 1907, § 3941.

Decisions from other jurisdictions.

— Iowa.

Executor held not liable for expense of special accountant employed by persons challenging his account for their own purposes, where the books were honest and well kept and had frequently been audited by experts. In re Estate of Evans, 212 Iowa 1, 232 N. W. 72.

Administrator has burden of establishing nonprejudicial nature of an irregular report. In re Estate of Moe, 213 Iowa 95, 237 N. W. 228, 238 N. W. 718.

An executor or administrator is entitled to credit for the payment of valid claims though they are not filed. In re Estate of Plendl, 218 Iowa 103, 253 N. W. 819.

It is the duty of an executor or administrator to account to the estate and its beneficiaries for funds in his hands, and one of the rights of a beneficiary is to compel the accounting. In re Estate of McElfresh, 218 Iowa 97, 254 N. W. 84.

By accepting appointment, executrix acquiesced in requirement that she account to court for all property held by her as such officer, and waived trial by jury of her claim of ownership as individual of certain securities formerly belonging to deceased. In re Estate of Rinard, 224 Iowa 100, 275 N. W. 485.

A. L. R. notes.

Surchargeability of trustee, executor, administrator or guardian in respect of mortgage investment, as affected by matters relating to value of property, 117 A. L. R. 871.

102–11–33. Id. Notice and Hearing.

When any account is rendered for settlement the court or clerk must appoint a day for the settlement thereof, of which the clerk must give notice. (C. L. 17, § 7748.)

History.

This section is identical with R. S. 1898, § 3942, except for words "or clerk," but it is absolutely identical with Comp. Laws 1907, § 3942.

1. Objections to allowance of account.

Under this section, allowance of executor's account before final settlement can be assailed only in equity, and upon same grounds as other judgments. In re Raleigh's Estate, 48 U. 128, 158 P. 705.

102–11–34. Id. Vouchers Required.

In rendering his account the executor or administrator must produce and file vouchers for all charges, debts, claims and expenses which he has paid, which must remain in the court; and he may be examined on oath touching such payments, and also touching any property and effects of the decedent and the disposition thereof. When any voucher is required for other purposes it may be withdrawn on leaving a certified copy on file. If a voucher is lost, or for other good reason cannot be produced on the settlement, the payment may be proved by the oath of any competent witness. (C. L. 17, § 7749.)

102–11–35. Settlement Without Vouchers.

On the settlement of his account he may be allowed any item of expenditure not exceeding $20 for which no voucher is produced, if such item is supported by his own uncontradicted oath positive to the fact of payment, specifying when, where and to whom it was made, but such allowances in the whole must not exceed $500 against the estate; and if upon such settlement of accounts it appears that the debts against the

deceased have been paid without the affidavit and allowance prescribed by statute, and it shall be proved by competent evidence to the satisfaction of the court that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-offs, and that the estate is solvent, it shall be the duty of the court to allow the said sum so paid in the settlement of said accounts. (C. L. 17, § 7750.)

History.
This section is substantially identical with R. S. 1898, § 3944; Comp. Laws 1907, § 3944.

1. Payment of claims.
In paying any claims, without requiring their presentation and allowance, administrator acts at his peril, and he assumes burden of proving all facts required by this section to be proven to satisfaction of court. In re Hansen's Estate, 55 U. 23, 184 P. 197.

2. Credits and allowances.
Administrator of deceased wife's estate was entitled to credit for any debts against decedent which were actually paid him in good faith, upon making satisfactory proof to court that such debts were justly due and that amount paid was true amount of such indebtedness over and above all payments or set-off, and that estate was solvent, notwithstanding no claim for such indebtedness had been presented and allowed as provided by Probate Code. In re Hansen's Estate, 55 U. 23, 184 P. 197.

102-11-36. Id. Final Account with Petition for Distribution—Notice.

If the account mentioned in the preceding sections is for a final settlement, and a petition for the final distribution or for final distribution and partition of the estate is filed with said account, the notice of the filing of account for settlement must state those facts. On the settlement of said account, distribution or distribution and partition of the estate to all entitled thereto may be had in the manner hereinafter provided, without further notice or proceedings. (C. L. 17, § 7751.)

History.
This section is substantially identical with R. S. 1898, § 3945; Comp. Laws 1907, § 3945.

Comparable provisions.
Iowa Code 1939, § 12043 (must render further accounts from time to time, as may be required by court, until estate is finally settled); § 12044 (final settlement must be made within three years unless court orders otherwise).

Cross-references.
Final account and petition for distribution, 102-12-6; notice, 102-14-1 et seq.; proof of notice, decree as conclusive, 102-14-12; waiver of notice, 102-14-13; trustee to tender accounts, 102-12-31; annual report of agent for nonresident holder, 102-12-26; partial distribution, 102-12-1; distribution of real estate, 102-12-4; discharge of executor or administrator, 102-12-19.

1. Duty of representative.
It was duty of executrix under law to see that estate was distributed in accordance with will. In re Kohn's Estate, 56 U. 17, 23, 189 P. 409.

2. Presumptions.
It is presumed that executrix administers estate in accordance with provisions of will. In re Kohn's Estate, 56 U. 17, 23, 189 P. 409.

102-11-37. Id. Conclusiveness of Settlement.

The settlement of the account, and the allowance thereof by the court or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability their right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator, either individually or upon his bond, at any time before final distribu-

tion; and in any action brought by any such person the allowance and settlement of the account is prima facie evidence of its correctness.
(C. L. 17, § 7752.)

History.
This section is practically identical with R. S. 1898, § 3946; Comp. Laws 1907, § 3946, and with Comp. Laws 1888, § 4241. It is a transcript of the section in the California Code of Civil Procedure, and was incorporated into Rev. Stats. of Utah for 1898 by the code commissioners as section 3946 of that revision. It conflicts with 102-14-23. In re Raleigh's Estate, 48 U. 128, 134, 158 P. 705.

Cross-references.
Corrections of mistakes in statement, 102-14-23; conclusiveness of orders and decrees, 102-1-7, 102-1-8, 102-2-4, 102-14-12, 102-14-15.

1. Interest.
See 102-11-20.

2. Decree.
Decree in settling final account of executors should find what amount, if any, the executors are to be charged with, in addition to an amount disclosed by their final account, and order it paid into court for proper distribution or application. In re Raleigh's Estate, 48 U. 128, 158 P. 705.

3. Assailing account.
Under this section and 102-11-32, 102-11-33 and 102-14-23, an allowance of an executor's account before final settlement may be assailed only in equity, and upon same grounds as other judgments, and such interlocutory accounting cannot be assailed upon final settlement. Such attack cannot be made by mere reference to some items in the objections filed to the allowance of the final account, but attack must be made as in other cases where a judgment is assailed for fraud, etc. In re Raleigh's Estate, 48 U. 128, 158 P. 705. The Raleigh case was followed in Moyes v. Agee, 53 U. 360, 365, 178 P. 753. This is ancient ground of equity jurisdiction. Weyant v. Utah Savings & Trust Co., 54 U. 181, 182 P. 189, 9 A. L. R. 1119; In re Tripp's Estate, 51 U. 359, 363, 170 P. 975.

Objections to settlement of an executor's account for fraud or mistake, merely referring to some items of the final account, are insufficient to assail intermediate accounts approved by court, but the attack must be made as in other cases where a judgment is assailed. In re Raleigh's Estate, 48 U. 128, 158 P. 705.

4. Collateral attack.
A decree of the probate court settling an executor's or administrator's final account and discharging him from his trust, after due legal notice, is conclusive in absence of fraud, and decree cannot be impeached in any collateral proceeding. In re Evans, 42 U. 282, 326, 130 P. 217, quoting Black on Judgments. But a suit in equity on the administration bond is a direct, as contradistinguished from a collateral, attack upon probate proceedings. Weyant v. Utah Savings & Trust Co., 54 U. 181, 201, 182 P. 189, 9 A. L. R. 1119.

5. Form of account.
For form of account and report, see In re Hansen's Estate, 55 U. 23, 28, 184 P. 197.

A. L. R. notes.
Right of executor, administrator, or testamentary trustee to allowance of attorneys' fees and expenses incident to controversy over surcharging his account, 101 A. L. R. 806.

102-11-38. Id. Reference—Compensation to Referee.

The court may appoint one or more referees to examine the accounts and make report thereon subject to confirmation; and may allow reasonable compensation to the referees, to be paid out of the estate of the decedent. (C. L. 17, § 7753.)

Cross-references.
Reference generally, 104-27; reference of doubtful claims, 102-9-17.

CHAPTER 12

DISTRIBUTION AND PARTITION *

102-12-1. Partial Distribution—Petition, Bond, Notice.
102-12-2. Id. Order for—Partition When Necessary—Costs.
102-12-3. Id. Recourse to Bond.
102-12-4. After Time for Presenting Claims Expired—Distribution of Real Estate.
102-12-5. Id. Partial Distribution Without Bond.
102-12-6. Final Distribution—Settlement of Accounts — Petition—Notice.
102-12-7. Id. Of Share of Child or Issue Dying During Administration — Supplementary Account and Estimate of Costs of Closing Estate.
102-12-8. Id. Decree—Rights of Distributees.
102-12-9. Id. Advancements to Be Determined — Conclusiveness of Decree.
102-12-10. Id. Payment of Taxes on Personal Property a Condition Precedent.
102-12-11. Id. Partition May Be Adjudged by Decree.
102-12-12. Id. Partition by Referees.
102-12-13. Id. Report of Referees—Confirmation.
102-12-14. Id. Of Estate in Different Counties.
102-12-15. Id. Distribution to Grantees of Heirs or Beneficiaries.
102-12-16. Id. When Partition Impracticable—Owelty.
102-12-17. Id.
102-12-18. Id. Sale and Distribution of Proceeds.
102-12-19. Discharge of Personal Representative.
102-12-20. Distribution of Property Afterwards Discovered.
102-12-21. (Repealed.)
102-12-22. Distribution in Ancillary Administration.
102-12-23. Id. Local Creditors Must Be First Paid.
102-12-24. Agent for Absent Beneficiary—Appointment of.
102-12-25. Id. Bond, Compensation and Expenses—Right to Sue and Be Sued.
102-12-26. Id. Annual Account by Agent.
102-12-27. Id. Sales of Property by.
102-12-28. Id. Payment of Proceeds to Claimants—Escheat.
102-12-29. Estates of Intestates Without Heirs—Special Administration.
102-12-30. Id. Escheat Within Two Years.
102-12-31. Testamentary Trustees — Accounting by.
102-12-32. Id. Expenses and Compensation — Vacancies and Successors.
102-12-33. Agents, Special Administrators, Trustees—Final Settlements.
102-12-34. Determination of Heirship —Petition.
102-12-35. Id. Decree.

*History of act. This chapter was Comp. Laws 1876, §§ 956–986; R. S. 1898, Title 74, Ch. 12, p. 857; Comp. Laws 1907, Title 89, Ch. 12, p. 1243.

102-12-1. Partial Distribution—Petition, Bond, Notice.

At any time after the lapse of four months from the issuance of letters testamentary or of administration, any heir, devisee or legatee may present his petition to the court for the distribution to him of the legacy or share of the estate to which he is entitled, or any person to whom any parcel or parcels of real estate left by the decedent may have been conveyed by the heirs or devisees of the decedent may present his petition to the court for the distribution to him of such real estate so conveyed. Any partial distribution aforesaid may be made upon such distributee's giving bond with security for the payment of his proportion of the debts of the estate as hereinafter provided. Notice of such application for partial distribution must be given. (C. L. 17, § 7758.)

History.

This section does not differ materially from Comp. Laws 1876, § 956; R. S. 1898, § 3948, and it is practically identical with Comp. Laws 1907, § 3948.

Comparable provisions.

Idaho Code, § 15-1301, Mont. Rev. Codes, § 10318 (after lapse of four months from issuing of letters, any heir, devisee or legatee may present petition for legacy or share of estate to which he is entitled; must give bond with security for payment of his proportion of debts of the estate).

1. **Agreements for settlement of estate.**

Agreement to settle estate executed by executor, who was also beneficiary, and widow of deceased was not void as against public policy because of provision that widow was to approve of executor's accounts, and such provision applied only to existing accounts and not to future transactions. In re Blodgett's Estate, 93 U. 1, 70 P.2d 742.

Correspondence between attorneys representing beneficiaries of estate relating to construction of contract entered into by parties for distribution of estate and containing suggestions for administration of the contract did not indicate that contract was not entered into, but rather constituted recognition thereof. In re Blodgett's Estate, 93 U. 1, 70 P.2d 742.

Consideration existed for agreement for settlement of estate where will was not so clear as to present no difficulties or differences in the application of its provisions. In re Blodgett's Estate, 93 U. 1, 79 P.2d 742.

Evidence failed to show that agreement to settle estate between executor, who was also beneficiary, and widow of decedent was obtained by executor by overreaching. In re Blodgett's Estate, 93 U. 1, 70 P.2d 742.

2. **Right to withhold part of assets.**

Statute of limitations may not be invoked to defeat right of administrator of estate to withhold portion of share of heir on account of indebtedness to estate. In re Reiser's Estate, 57 U. 434, 195 P. 317.

102-12-2. Id. Order for—Partition When Necessary—Costs.

If at the hearing it appears that the estate is but little indebted, and that the share of the party applying, or real estate granted to the party applying, as aforesaid, may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the applicant, requiring:

(1) Each heir, legatee or devisee obtaining such order, before receiving his share or any portion thereof, and each grantee of the heirs or devisees obtaining such order, before receiving distribution of the real estate granted to him, to execute and deliver to the executor or administrator a bond in such sum as shall be designated by the court, with sureties to be approved by the judge or court, payable to the executor or administrator, conditioned for the payment whenever required of his proportion of the debts due from the estate, not exceeding the value or amount of the legacy or portion or parcel of the estate distributed to him hereunder; and,

(2) On the giving of such bond, the executor or administrator to deliver to such heir, legatee, devisee or grantee the whole portion of the estate distributed to him as aforesaid, designating it.

If in the execution of the order a partition is necessary between two or more of the parties interested it must be made in the manner hereinafter prescribed. The costs of these proceedings shall be paid by the applicant or, if there are more than one, shall be apportioned equally among them. When any such partial distribution shall be made as herein provided, the title to the estate so distributed shall be freed from the claims of creditors and from the debts, expenses and obligations of the estate and of the administration thereof. (C. L. 17, § 7759.)

Comparable provisions.
Idaho Code, § 15–1304, Mont. Rev. Codes, § 10321 (similar in purport).

A. L. R. notes.
Payment or delivery of legacy or distributive share before decree of distribution as defense to action by legatee or distributee against personal representative or surety on his bond, 121 A. L. R. 1069; right of executor or administrator to credit on account of advances to distributees before obtaining order of distribution, 126 A. L. R. 780.

102–12–3. Id. Recourse to Bond.

If it becomes necessary that any part of any such bond should be paid, the court, after notice and hearing, must make a decree accordingly, designating the amount and giving a time within which the payment must be made. If the money is not paid as ordered, an action may be maintained by the executor or administrator on the bond.
(C. L. 17, § 7760.)

102–12–4. After Time for Presenting Claims Expired—Distribution of Real Estate.

Unless it satisfactorily appears to the court that the rents, issues and profits of the real estate are necessary to be received by the executor or administrator for a longer period in order to pay the debts of the deceased, or that it will probably be necessary to sell the real estate for the payment of such debts, the court, at the end of the time limited for the presentation of claims against the estate, must direct the executor or administrator to deliver possession of all the real estate to the heirs at law or devisees. (C. L. 17, § 7761.)

102–12–5. Id. Partial Distribution Without Bond.

Upon the verified petition of any beneficiary or of the executor or administrator, and upon proof showing that the time limited for the presentation of claims against the estate of any deceased person has expired, and that all such claims presented, all inheritance taxes payable from the estate, all debts of the estate, all legacies and expenses of administration then payable, and all state, county and municipal taxes legally levied upon the personal property of the estate, have been paid and satisfied in full, and showing to the satisfaction of the court that it is for the best interests of the beneficiaries of the estate, or that they have in writing requested or consented, that a portion only of the estate be distributed and the remainder of the estate be held by the executor or administrator for future administration or for sale, and that no person interested in the estate will be prejudiced, the district court having jurisdiction of the estate may settle the account of the executor or administrator to the date of such petition, and may at the same time, in its discretion, order such partial distribution of such portion of the estate to the persons entitled thereto, without requiring any bond from the distributees; and the undistributed portion of the estate shall be held by the executor or administrator subject to further administration, and to sale, if for the best interests of all persons interested therein, and to final distribution thereof or of the proceeds thereof at a future time when proper and required by any beneficiary or by the court. (C. L. 17, § 7762.)

102-12-6. Final Distribution—Settlement of Accounts—Petition—Notice.

When all debts are paid, or sooner if before that time all the property of the estate has been sold or there are sufficient funds in his hands for the payment of all the debts due by the estate, and the estate is in proper condition to be closed, the executor or administrator must render a final account and pray for settlement of his administration. Such petition shall contain the names and addresses of the heirs, devisees or other persons entitled to participate in such distribution, according to the best knowledge, information and belief of the executor or administrator. The clerk shall file the petition, and the court or clerk shall fix the date of hearing thereon, notice of which shall be given.

(C. L. 17, § 7763.)

History.

The first sentence of this section is identical with R. S. 1898, § 3952. The second sentence was added subsequently, and this section is now identical with Comp. Laws 1907, § 3952.

Cross-references.

Notice generally, 102-14; notice when account is final, 102-11-36.

1. Right to final distribution.

Where judgment creditor of heir intervened and objected to petition of administrator for final distribution, and court found that assignment by heir was intended as mortgage, and hence, assignee was not entitled to distribution, court erred in dismissing administrator's petition and in not ordering final distribution to heir subject to rights, if any, of judgment debtor and assignee. In re Miles' Estate, 63 U. 144, 223 P. 337.

2. Delaying final distribution.

The language of a contract "at the time of final settlement and distribution of said estate" will be deemed to have reference to this section. Final distribution will not be delayed during life of life tenant. Weight v. Bailey, 45 U. 584, 147 P. 899.

A creditor who has obtained and docketed a judgment has a specific lien upon the real estate which vests by inheritance in the judgment debtor, and this lien attaches subject to the administration before the real estate is distributed to the judgment debtor. In re Miles' Estate, 63 U. 144, 223 P. 337. Assignment by heir of equity in estate in probate to bank as security for note and "any and all claims due or not due" from assignor to bank is in effect a mortgage and is prior to judgments subsequently obtained against assignor by other creditors. Sheffer v. Griffiths, 67 U. 54, 245 P. 698.

3. Notice.

Where statutory notice of hearing of petition for letters was given as required by 102-1-7, failure to give notice of final settlement and distribution held not to affect validity of decree of final distribution except upon direct proceeding. Barrette v. Whitney, 36 U. 574, 106 P. 522, 37 L. R. A. (N. S.) 368. (Straup, C. J., dissenting.)

4. Remedies.

Decree of final distribution rendered without notice could be attacked by application to probate court by one having interest, though as general rule only parties to record may prosecute appeal. Barrette v. Whitney, 36 U. 574, 106 P. 522, 37 L. R. A. (N. S.) 368. (Straup, C. J., dissenting.)

A. L. R. notes.

Postponing distribution until payment of debts or settlement of estate as violating rule against perpetuities, 13 A. L. R. 1033; validity of agreement among beneficiaries for distribution in manner or proportions other than that provided by will, 97 A. L. R. 468.

102-12-7. Id. Of Share of Child or Issue Dying During Administration—Supplementary Account and Estimate of Costs of Closing Estate.

Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time upon the petition of the executor

or administrator or of any heir, legatee or devisee, and upon notice, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator among the persons who by law are entitled thereto; and if the decedent has left a surviving child or the issue of other children, and any of them, before the close of the administration, have died intestate while under age and not having married, no administration on such deceased child's estate is necessary, but all the estate to which such deceased child was entitled by inheritance must, without administration, be distributed to such child's heirs at law. A statement of any receipts and disbursements of the executor or administrator since the rendition of his final account must be reported and filed at the time of making such distribution, and a settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court and included in the order or decree, or the court may order notice of the settlement of such supplementary accounts, and refer the same as in other cases of the settlement of accounts.

(C. L. 17, § 7764.)

History.
This section does not differ materially from R. S. 1898, § 3953; Comp. Laws 1907, § 3953.

Comparable provisions.
Idaho Code, § 15–1306 (substantially the same).
Mont. Rev. Codes, § 10327 (similar in purport).

Cross-references.
Descent and distribution, 101–4; distribution of homestead, 101–4–6 to 101–4–8, 102–8–2; appointment of attorney for nonresident heir, 102–14–25.

102–12–8. Id. Decree—Rights of Distributees.

In the order or decree the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand and sue for and recover their respective shares from the executor or administrator or any person having the same in possession.

(C. L. 17, § 7765.)

History.
This section does not differ materially from R. S. 1898, § 3954; Comp. Laws 1907, § 3954, or from 2 Comp. Laws 1888, § 4262.

Comparable provisions.
Idaho Code, § 15–1307, Mont. Rev. Codes, § 10328 (includes identical provision, coupled with the following concluding sentence: "Such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside or modified on appeal"; Montana provision omits word "decree").

Cross-references.
Recording decree, effect, 102–14–16.

1. Compliance with decree.
Where there is entered decree directing executor to deposit certain money in bank for use and benefit of legatee, executor cannot be released and his bondsmen discharged until he fully complies with such decree. Ehrngren v. Gronlund, 19 U. 411, 57 P. 269.

2. Effect of distribution.
After distribution, administrator is precluded from exercising control, as representative, over the property distributed, and if assets fully set apart remain in his possession, he holds them as agent or bailee of the distributee and not as representative. Robbins v. Duggins, 61 U. 542, 216 P. 232.

3. Conclusiveness of decree.
A decree of distribution in probate proceedings, after due and legal notice, by a court having jurisdiction of the subject matter, is conclusive as to the fund, items, and matters covered by and properly included within the decree until set aside or modified by the court entering the decree in the manner prescribed by law, or until reversed on appeal. In re Evans, 42 U. 282, 130 P. 217.

1. Statute of limitations.
Rule that where administrator is barred by lapse of time, heirs are also barred, and no application where property had been distributed in accordance with this section, and plaintiff, seeking to recover such property distributed to him while he was minor within two years after he attained majority, was not barred from maintaining action, since limitation did not start to run against him until he had attained majority under 104-2-19. Robbins v. Duggins, 61 U. 542, 216 P. 232.

A. L. R. notes.
Decree directing distribution of estate to person who is dead, 25 A. L. R. 1563.
Failure of decree or order of distribution of decedent's estate to describe specifically the property or property interests involved, or misdescription thereof, 120 A. L. R. 630.
Order or decree of distribution of decedent's estate as protection of executor or administrator against claims of one not named therein who was entitled to a share of the estate, 106 A. L. R. 817.
Payment or delivery of legacy or distributive share before decree of distribution as defense to action by legatee or distributee against personal representative or surety on his bond, 121 A. L. R. 1069.
Right of executor or administrator to credit on account of advances to distributees before obtaining order of distribution, 126 A. L. R. 780.

102-12-9. Id. Advancements to Be Determined—Conclusiveness of Decree.

All questions as to advancements made or alleged to have been made by the decedent to his heirs may be heard and determined by the court, and must be specified in the decree assigning and distributing the estate; and the final judgment or decree of the court is binding on all parties interested in the estate, subject only to be reversed, modified or set aside on appeal. (C. L. 17, § 7766.)

Comparable provisions.
Cal. Probate Code, § 1054, Idaho Code, § 15-1323, Mont. Rev. Codes, § 10345 (substantially the same).

Cross-references.
Advancements, 101-4-18 to 101-4-22; conclusiveness of probate decrees, 102-1-7, 102-1-8, 102-2-4, 102-11-37, 102-14-12, 102-14-15.

102-12-10. Id. Payment of Taxes on Personal Property a Condition Precedent.

Before any decree of distribution of any estate is made the court must be satisfied, by the oath of the executor or administrator or otherwise, that all state, county and municipal taxes legally levied upon personal property of the estate have been fully paid.
(C. L. 17, § 7767.)

History.
This section is practically identical with R. S. 1898, § 3956; Comp. Laws 1907, § 3956.

Comparable provisions.
Idaho Code, § 15-1311 (includes substantially identical provision).

1. Assessment of taxes.
That property of decedent was assessed to estate and not to executor or beneficiary under will was immaterial, where executor had notice of assessment against property and had duty of paying all taxes due from estate. In re Thourot's Estate, 52 U. 106, 172 P. 697.

2. Reimbursement of administrator.
Under this section, administrator is entitled to be credited in settlement of his accounts where he has paid taxes levied against the real estate, because he was simply performing his duty in paying taxes. In re Hansen's Estate, 55 U. 23, 39, 184 P. 197.

102-12-11. Id. Partition May Be Adjudged by Decree.

The administrator or executor may include in the petition for distribution, or any person interested may at any time before distribution

separately file, a petition for the partition of the estate among the persons entitled thereto in proportion to their respective rights. Notice of such petitions shall be given, and the court, after a hearing, may in one decree distribute and partition the whole property of the estate, setting out by metes and bounds or description the share of each individual so that the same can be easily distinguished, or the court may, upon request of two or more parties, set off their shares so as to be held by them in common and undivided. (C. L. 17, § 7768.)

Cross-references.
Partition, 104–58; partition on partial distribution, 102-12–1, 102–12–2; recording decree, 102–14–16.

A. L. R. notes.
Right of executor or administrator to bring proceedings for partition of real property, 57 A. L. R. 573; testamentary provision operating to prohibit or postpone partition, 85 A. L. R. 1321.

102–12–12. Id. Partition by Referees.

Whenever it is impracticable or inconvenient for the court to make a complete partition among all the parties in the first instance, or on petition of any interested person, the court, having first ascertained and determined the shares or interests of the persons entitled, may appoint one or more disinterested persons to act as referees for the purpose of making the partition. In making the partition the referees must divide the property and allot the several portions thereof to the several parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, designating the several portions by proper landmarks, and may take testimony, order surveys and take such other steps as may be necessary. (C. L. 17, § 7769.)

History.
This section is practically identical with R. S. 1898, § 3958; Comp. Laws 1907, § 3958.

1. Manner of complying with section.
The partition must in every case be equitable, and no one given an unnecessary advantage. In re Ferguson's Estate, 44 U. 234, 139 P. 436, applying Comp. Laws 1907, § 3958.

102–12–13. Id. Report of Referees—Confirmation.

As soon as practicable the referees must make a report to the court in writing, and the court may confirm, change, modify or set aside the report, and if necessary appoint new referees. Upon the confirmation of the report the court may include distribution and partition in one decree. (C. L. 17, § 7770.)

102–12–14. Id. Of Estate in Different Counties.

If the real estate is in different counties, the court may, if deemed proper, appoint referees, who shall make division of such real estate wherever situated within this state. (C. L. 17, § 7771.)

Comparable provisions.
Idaho Code, § 15–1314 (probate court may appoint a commissioner, or different commissioners for each county, if the real estate is in different counties).

Mont. Rev. Codes, § 10336 (commissioners may be appointed, where real estate is in different counties).

102-12-15. Id. Distribution to Grantees of Heirs or Beneficiaries.

Partition or distribution of the real estate may be made as provided in this chapter, although some of the original heirs, legatees or devisees may have conveyed their shares to other persons, and such shares must be assigned to the persons holding the same in the same manner as they otherwise would have been to such heirs, legatees or devisees.

(C. L. 17, § 7772.)

History.

This section is practically identical with R. S. 1898, § 3961; Comp. Laws 1907, § 3961.

Comparable provisions.

Idaho Code, § 15-1315 (identical); Mont. Rev. Codes, § 10337 (substantially identical).

Cross-references.

Conveyance by heirs before distribution, 101-3-10.

1. Assignment of shares.

Assignment, though absolute in form, but in fact intended as a mortgage, was not conveyance as contemplated by this section entitling assignee or mortgagee to have estate distributed to him. In re Miles' Estate, 63 U. 144, 223 P. 337.

Where judgment creditor of heir intervened and objected to petition of administrator for final distribution, and court found that assignment by heir was intended as mortgage, and hence, assignee was not entitled to distribution, court erred in dismissing administrator's petition and in not ordering final distribution to heir subject to rights, if any, of judgment debtor and assignee. In re Miles' Estate, 63 U. 144, 223 P. 337.

2. Assignees of heirs.

The rights of an assignee from an heir have been clearly defined in Dunn v. Wallingford, 47 U. 491, 155 P. 347.

102-12-16. Id. When Partition Impracticable—Owelty.

When the real estate cannot be divided without prejudice or inconvenience to the owners, the court may assign the whole to one or more of the parties entitled to share therein who will accept it. The parties accepting the whole must pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, or in case of the minority of such party, to the satisfaction of his guardian and the court having jurisdiction of the guardianship matter; and the true value of the estate must be ascertained and reported by the referees. When the referees appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to the court, and recommend that the whole be assigned as herein provided, and must find and report the true value of such real estate. On filing the report of the referees and the making or securing of the payment as before provided, the court, if it appears just and proper, must confirm the report, and thereupon the assignment is complete, and the title to the whole of such real estate vests in the person to whom the same is so assigned.

(C. L. 17, § 7773.)

Comparable provisions.

Idaho Code, § 15-1317, Mont. Rev. Codes, § 10339 (similar).

102-12-17. Id.

When any tract of land or tenement is of greater value than any one person's share in the same estate to be divided, and it cannot be divided without injury to the same, it may be set off by the referees appointed

to make partition to any of the parties who will accept it. The party accepting must pay or secure to the others such sums as the referees shall award to make the partition equal, and the referees must make their award accordingly; but such partition must not be established by the court until the sums awarded are paid to the parties entitled to the same, or secured to their satisfaction. (C. L. 17, § 7774.)

Comparable provisions.
Idaho Code, § 15–1318, Mont. Rev. Codes, § 10340 (substantially the same; term "commissioners" is used in lieu of "referees" throughout the several pertinent provisions).

102–12–18. Id. Sale and Distribution of Proceeds.

When it appears to the court from the referees' report that it cannot otherwise be fairly divided and should be sold, the court may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a referee appointed for that purpose, and the proceeds distributed. The sale must be conducted, reported and confirmed in the same manner and under the same requirements as provided in chapter 10 of this title. (C. L. 17, § 7775.)

Comparable provisions.
Idaho Code, § 15–1319, Mont. Rev. Codes, § 10341 (substantially identical).

102–12–19. Discharge of Personal Representative.

When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered under the order of the court all the property of the estate to the parties entitled, and performed all the acts lawfully required of him, the court must make a judgment or decree discharging him from all liability to be incurred thereafter. (C. L. 17, § 7776.)

History.
This section is practically identical with 2 Comp. Laws 1888, § 4284; R. S. 1898, § 3965; Comp. Laws 1907, § 3965.

Cross-references.
Final account and discharge of executor or administrator, 102–9–25, 102–11–36.

1. When entitled to discharge.
Duties of administrator are not fully performed until he has not only accounted for, but also distributed, all of assets of estate which have come into his possession as administrator. In re Brooks, 83 U. 506, 30 P.2d 1065.

2. Compliance with decree.
Where there is entered decree directing executor to deposit certain money in bank for use and benefit of legatee, executor cannot be released and his bondsmen discharged until he fully complies with such decree. Ehrngren v. Gronlund, 19 U. 411, 57 P. 268.

102–12–20. Distribution of Property Afterwards Discovered.

The final settlement of an estate shall not prevent a subsequent distribution and partition of property afterwards discovered, upon petition and notice, without a reissue of letters. Letters may be reissued at any time if necessary. (C. L. 17, § 7777.)

102–12–21. (Repealed by L. 39, ch. 114, § 1, eff. May 9.)

102–12–22. Distribution in Ancillary Administration.

Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a nonresident of this state,

leaving a will which has been duly proved or allowed in the state of his residence, an authenticated copy whereof has been admitted to probate in this state, and it is necessary, in order that the estate or any part thereof may be distributed according to the will, that the estate in this state should be delivered to the executor or administrator in the state or place of his residence, the court may order such delivery to be made, and, if necessary, order a sale of the real estate and a like delivery of the proceeds. Such delivery in accordance with the order of the court is a full discharge of the executor or administrator with the will annexed in this state in respect to all property embraced in such order, which, unless reversed on appeal, binds and concludes all parties in interest. Sales of real estate ordered by virtue of this section must be made in the same manner as other sales of real estate of decedents by order of the court. (C. L. 17, § 7779.)

History.
This section is practically identical with R. S. 1898, § 3968; Comp. Laws 1907, § 3968.

Comparable provisions.
Idaho Code, § 15-1308 (substantially identical).

Cross-references.
Proof of foreign will, 102-3-22 to 102-3-24; aliens take by succession, 101-1-24.

1. Ancillary administration.
Courts have jurisdiction to hold assets in ancillary administration subject to claims of creditors who have proved their claims in ancillary administration, and to distribute surplus to legatees and distributees within such administration according to their respective interests in surplus assets of estate. In re Campbell's Estate, 53 U. 487, 173 P. 688.

Legatee is as much entitled to recover, and to be protected as to assets, inside state where ancillary administration is had, as general creditor. In re Campbell's Estate, 53 U. 487, 173 P. 688.

102-12-23. Id. Local Creditors Must Be First Paid.

The property of a nonresident decedent shall not be transmitted to a foreign executor or administrator until all the creditors who are citizens of this state have been paid, if the estate is solvent, or until such creditors have received their just proportions, if the estate is insolvent. (C. L. 17, § 7780.)

History.
This section is identical with R. S. 1898, § 3969; Comp. Laws 1907, § 3969.

1. Protection of domestic legatees and creditors.
Legatee is as much entitled to recover, and to be protected as to assets, inside state where ancillary administration is had, as general creditor. In re Campbell's Estate, 53 U. 487, 173 P. 688.

102-12-24. Agent for Absent Beneficiary—Appointment of.

When any estate is assigned or distributed by a judgment or decree of the court to any person residing out of and having no agent in this state, and it is necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose and authorize him to take charge of such estate as well as to act for such absent person in the distribution; *provided*, that if such estate is in money when so assigned or distributed, the executor or administrator of such estate may deposit the share of such person, in his name as far as known, with

the state treasurer, who shall give duplicate receipts for the same, one of which must be filed with the state auditor and the other with the clerk of the court. (C. L. 17, § 7781.)

Comparable provisions.
Idaho Code, § 15–1324, Mont. Rev. Codes, § 10346 (similar, except as to proviso herein).

Cross-references.
Attorney for nonresident heirs to be appointed, 102–14–25.

102–12–25. Id. Bond, Compensation and Expenses—Right to Sue and Be Sued.

The agent must execute a bond to the state, to be approved by the court, conditioned that he will faithfully manage and account for the estate. The court appointing such agent may allow a reasonable sum out of the estate for his services and expenses. Such agent may sue and be sued as such. (C. L. 17, § 7782.)

Comparable provisions.
Idaho Code, § 15–1325, Mont. Rev. Codes, § 10347 (similar, although last sentence herein is not included; court may allow reasonable sum out of the "profits of the estate" for agent's services and expenses).

102–12–26. Id. Annual Account by Agent.

The agent must render annually to the court appointing him a detailed account showing the condition of the estate.
(C. L. 17, § 7783.)

Comparable provisions.
Idaho Code, § 15–1327, Mont. Rev. Codes, § 10349 (specifying items required to be shown in agent's annual account).

102–12–27. Id. Sales of Property by.

The court may at any time direct the sale of all or part of such real or personal property, and such sale shall be conducted and report made to the court in the same manner as is hereinbefore provided for the sale of property of decedents. The proceeds of such sale, after deducting the expenses thereof, must be paid into the state treasury, and receipts taken and filed therefor as hereinbefore provided.
(C. L. 17, § 7784.)

Cross-references.
Sales generally, 102–10.

102–12–28. Id. Payment of Proceeds to Claimants—Escheat.

When any person appears and claims the money paid into the treasury, the court making the distribution must inquire into such claim, and, being first satisfied of his right thereto, must grant him a certificate to that effect, under its seal; and upon presentation of the certificate to him the clerk of the court must draw his requisition on the state auditor for the amount; and upon presentation to him of such requisition the state auditor shall draw his warrant on the state treasurer in the sum called for in said requisition. If no claimant appears within five years after the decedent's death to claim succession, the property or the proceeds thereof shall escheat to the state for the benefit of the state school fund. (C. L. 17, § 7785.)

History.
Formerly the county clerk acted in place of the state auditor. R. S. 1898, § 3974; Comp. Laws 1907, § 3974. But in other respects those sections and the present one are identical.

Cross-references.
Escheats to go to school fund, Const. Art. X, § 3, 101-4-5.

1. Establishment of right of state to escheat.
All the state must establish to claim property by escheat hereunder is the death of the intestate and expiration of five-year period, following death, in which no one claimed by right of succession. In re Apostolopoulos' Estate, 68 U. 344, 250 P. 469, 253 P. 1117, 48 A. L. R. 1322.

2. Effect of expiration of five-year period.
In view of last sentence of this section and 101-4-5, subd. (9), and notice by publication under 102-12-7, an unclaimed estate escheats upon the expiration of five years notwithstanding the existence of nonresident alien heirs unaware of their rights. (But this may be modified by provisions of treaty between the United States and country of an alien intestate, requiring local authorities having jurisdiction of estate to notify consular authorities respecting death of any such person without apparent heirs.) In re Apostolopoulos' Estate, 68 U. 344, 250 P. 469, 253 P. 1117, 48 A. L. R. 1322.
Where local authorities having jurisdiction of unclaimed estate of alien intestate fail to give actual notice of death to consular authorities of his country, as required by treaty with the United States, when citizen or subject of said country dies without apparent heirs, then heirs may claim estate notwithstanding expiration of five-year period provided hereunder, where they were unaware of rights prior thereto. In re Apostolopoulos' Estate, 68 U. 344, 250 P. 469, 253 P. 1117, 48 A. L. R. 1322.
Estate did not escheat to state as against heir who appeared more than five years after death of deceased where death was unknown until seven years after it occurred. In re French's Estate, 64 U. 66, 228 P. 194.

102-12-29. Estates of Intestates Without Heirs—Special Administration.

When any person dies intestate and without heirs, leaving property in this state, it shall be the duty of the court, upon notice of that fact, to appoint a special administrator to take charge of such property. The special administrator shall give a bond conditioned for the faithful performance of his trust, and shall annually render to the court appointing him a detailed account of the condition of the estate. The special administrator may sue and be sued, and he shall be allowed by the court out of the estate a reasonable sum for his services and expenses. (C. L. 17, § 7786.)

Cross-references.
Special administration in general, 102-4-11 to 102-4-15; clerk may appoint special administrator, 102-2-1.

102-12-30. Id. Escheat Within Two Years.

At the expiration of two years after such appointment, if no claimant shall have appeared and established his right to the estate, the same shall be deemed to have escheated to the state, and the court shall direct the sale of all of the property, and shall cause the proceeds thereof, after the payment of debts, expenses and taxes, to be paid into the state treasury for the benefit of the state school fund. The special administrator shall file a receipt for such payment with the state auditor and a duplicate thereof with the clerk of the court. (C. L. 17, § 7787.)

A. L. R. notes.
Necessity and sufficiency of notice to support title by escheat to decedent's estate, 48 A. L. R. 1342; necessity of judicial proceeding to vest title to real property in state by escheat, 79 A. L. R. 1364.

102–12–31. Testamentary Trustees—Accounting by.

Any trustee created by will or appointed to execute any trust so created shall, annually, pending the execution of his trust, and at the termination thereof, render his account as such trustee to the court in which the will was probated. Such accounting shall be heard by the court upon notice. Any such trustee may, in the discretion of the court, upon application of any beneficiary be ordered to appear and render his account. (C. L. 17, § 7788.)

Cross-references.
Principal and income, Title 73A; succession on death of trustee, 29–2–1; general provisions for rendering accounts, 102–11–32, 102–11–36, 102–12–4 to 102–12–15.

A. L. R. notes.
Conflict of laws as to administration of testamentary trusts and proper forum for judicial proceedings relating thereto, 115 A. L. R. 802.

102–12–32. Id. Expenses and Compensation—Vacancies and Successors.

The court shall allow such trustee his proper expenses and such compensation as may be reasonable. Unless the will provides for the resignation of a trustee and the manner of filling the vacancy caused by such resignation, the court may determine upon what terms the resignation of a trustee may be effected, and may appoint a successor. The court may also appoint a successor to such trustee or his successor when a vacancy shall occur from any cause. Any successor appointed pursuant to the provisions of this section shall be subject to the provisions of this section, and to the provisions of sections 102–12–31 and 102–12–33, and any such trustee and his successor shall be subject to the orders of the court in the administration of, or with reference to, the trust. (C. L. 17, § 7789.)

Cross-references.
Trust estate vests in successor upon death of trustee, 29–2–1.

102–12–33. Agents, Special Administrators, Trustees—Final Settlements.

Sections 102–12–19 and 102–12–20 relating to final settlements shall apply to agents, special administrators and trustees, and to the estates administered by them. (C. L. 17, § 7790.)

102–12–34. Determination of Heirship—Petition.

Whenever letters of administration or letters testamentary have not been applied for, any interested person may, at any time after the expiration of three months from the decedent's death, present to any court that would have jurisdiction to appoint an administrator or an executor a verified petition setting forth the name and residence of the decedent, the date of his death, the fact that he died testate or intestate, the names and addresses of the heirs so far as he knows, a description of any real property concerning which a determination of heirship is de-

sired, and praying for a decree determining the heirs of such deceased. Upon the presentation of such petition notice by posting or publication shall be given and notice mailed to all the heirs of the decedent so far as known.

History.
Added by L. 39, ch. 115, eff. Feb. 21.

1. Determination of heirship.
Heirship may be determined on a proper application before the time for final distribution, and a probate court, in the exercise of proper discretion, has jurisdiction to determine and may determine the question of heirship at any time during the probate proceeding. The jurisdiction to determine heirship is inherent in the probate court to protect the interest of all heirs. Child v. District Court of Second Judicial Dist., 80 U. 243, 14 P.2d 1110.

102-12-35. Id. Decree.

When the facts are established to the satisfaction of the court a decree shall be given specifying who are the heirs of such deceased person and such decree is conclusive upon the parties and their successors in interest with respect to such property.

History.
Added by L. 39, ch. 115, eff. Feb. 21.

CHAPTER 13

GUARDIANSHIP

102-13-1. "General Guardian," "Special Guardian" Defined.
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102-13-12. Of Minors — Petition — Notice—Appointment.
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102-13-16. Id. Discharge After Ward's Attaining Majority.
102-13-17. Id. Support Out of Ward's Estate.
102-13-18. Id. Parents Are Joint Guardians, with Equal Rights.
102-13-19. Of Insane Persons—Petition — Notice — Appointment.
102-13-20. Id. "Incompetent," etc., Defined.
102-13-21. Id. Restoration to Capacity — Petition, Notice, Hearing, Decree.
102-13-22. Id. Of Insane Wife—Relinquishment of Statutory Interest.
102-13-23. Id. Petition.
102-13-24. Id. Notice and Hearing.
102-13-25. Id. Findings and Decree.
102-13-26. Id. Special Guardian — Appointment, Bond, Duties.
102-13-27. Id. Relinquishment by Guardian.
102-13-28. Id. Disposition of Payment Received.
102-13-29. Powers and Duties—Of General Guardians.
102-13-30. Id. Of Guardians Appointed by Court.
102-13-31. Id. Of Guardians of Person.
102-13-32. Id. Of Guardians of Property.

102–13–33. Id. Power to Sell, Mortgage and Lease.
102–13–34. Id. Payment of Debts—First Out of Personalty.
102–13–35. Id. Settling Accounts—Compounding Debts—Actions.
102–13–36. Id. Inventory and Appraisement.
102–13–37. Id. Special Accountings—After-Acquired Property.
102–13–38. Id. May Assent to Partition.
102–13–39. Id. Support and Education of Ward.
102–13–40. Compensation and Expenses.
102–13–41. Sales, Mortgages and Leases.
102–13–42. Id. Application of Proceeds.
102–13–43. Id. Investments.
102–13–44. Id.
102–13–45. Embezzlement, etc., of Ward's Estate—Citation to Person Suspected.
102–13–46. Of Nonresident Wards — Powers.
102–13–47. Id. Bond.
102–13–48. Id. Exclusive Jurisdiction of Court First Making Appointment.
102–13–49. Id. When Guardian Also Nonresident—Removal of Property.
102–13–50. Id. Application for Removal—Order.
102–13–51. Id. Order Discharges Local Guardian.

History of act. This chapter was Comp. Laws 1876, §§ 1023–1034; 2 Comp. Laws 1888, Part Fifth, Chap. II, p. 83; R. S. 1898, Title 74, Ch. 14, p. 863; Comp. Laws 1907, Title 89, Ch. 14, p. 1251.

102–13–1. "General Guardian," "Special Guardian" Defined.

A general guardian is the guardian of the person, or of all the property of the ward within this state, or of both; every other is a special guardian. (C. L. 17, § 7798.)

History.
This section is practically identical with Laws 1878–1880, p. 70, §§ 5 and 6; and it is identical with R. S. 1898, § 3983; Comp. Laws 1907, § 3983.

Comparable provisions.
Cal. Probate Code, § 1401 (similar).

102–13–2. Appointment by Parents.

A guardian of the person or estate, or of both, of a child born or likely to be born may be appointed by will or by deed to take effect upon the death of the parent appointing; such appointment may be made by the father, with the written consent of the mother; or by either parent, if the other is dead or incapable of consenting. (C. L. 17, § 7799.)

History.
This section is identical with Laws 1878–1880, p. 70, § 7, and with R. S. 1898, § 3984; Comp. Laws 1907, § 3984.

102–13–3. Guardians of Property Must Be Appointed by Court.

No person, whether a parent or other person, shall have any power as a guardian of property, except by appointment as hereinafter provided. (C. L. 17, § 7800.)

A. L. R. notes.
Right of natural guardian to custody or control of infant's property, 6 A. L. R. 115.

102–13–4. Exclusive Jurisdiction of Court First Making Appointment.

In all cases the court first making the appointment of a guardian shall have exclusive jurisdiction to control him. (C. L. 17, § 7801.)

Cross-references.
As to guardian for nonresident ward, 102–13–48.

102–13–5. Several Guardians—Appointment—Survivorship.

The court, whenever necessary, may appoint more than one guardian of any person subject to guardianship, who must each give bond and be governed and be liable in all respects as a sole guardian. On the death of one of two or more joint guardians the power shall continue to the survivor until a further appointment is made by the court. (C. L. 17, § 7802.)

Cross-references.
Seal of court necessary on appointment, 20–7–16; words giving joint authority construed as giving authority to majority, 88–2–10.

102–13–6. Court May Impose Special Duties.

When a person is appointed guardian the court may insert in the order of appointment conditions not otherwise obligatory, providing for the care, treatment, education and welfare of the ward. The performance of such conditions shall be a part of the duties of the guardian, for the faithful performance of which he and the sureties on his bond shall be responsible. (C. L. 17, § 7803.)

102–13–7. Testamentary Guardians—Bond, Powers, Duties.

Every testamentary guardian must give bond and qualify, and has the same powers and must perform the same duties with regard to the person and estate of his ward, as guardians appointed by the court, except so far as his powers and duties are legally modified, enlarged or changed by the will by which such guardian was appointed. (C. L. 17, § 7804.)

Comparable provisions.
Cal. Probate Code, § 1484 (substantially identical, except that bond is not mentioned); § 1485 (testamentary guardian need not give bond unless required by the court from which the letters issued).
Idaho Code, § 15–1813, Mont. Rev. Codes, § 10410 (substantially identical).

A. L. R. notes.
Bonds of guardians generally, see notes under 102–5–1; power of parent to appoint testamentary guardian for adult imbecile child, 24 A. L. R. 1458.

102–13–8. Guardian ad Litem Not Affected Hereby.

Nothing contained in this title affects or impairs the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein. (C. L. 17, § 7805.)

History.
This section is practically identical with 2 Comp. Laws 1888, § 4317, and is identical with R. S. 1898, § 3990; Comp. Laws 1907, § 3990.

Comparable provisions.
Idaho Code, § 15–1814 (identical); Mont. Rev. Codes, § 10411 (substantially identical).

Cross-references.
Guardians ad litem, 104–3–6 et seq.

1. Guardian ad litem.
It is plain from this section that the law in relation to the appointment of a general guardian does not interfere with the power of the court to appoint a guardian ad litem. Accordingly, trial court may appoint a guardian ad litem to conduct the suit, although the minor's nonresident guardian began the suit, as he had a right to do. Hyndman v. Stowe, 9 U. 23, 30, 33 P. 227.

102–13–9. Oath—Bond—Resignation—Removal.

The provisions of this title respecting the oaths of office and bonds of executors and administrators and their resignation and removal, so far as applicable, shall apply to and govern the oaths of office, bonds, resignation and removal, respectively, of guardians.

(C. L. 17, § 7806.)

Cross-references.
Oaths and bonds, 102–5; removal and resignation, 102–6.

102–13–10. Of Insane Persons—Discharge of Guardian.

The guardian of an insane or other person may be discharged by the court when it appears, on the application of the ward or otherwise, that the guardian is no longer necessary. (C. L. 17, § 7807.)

102–13–11. Laws Relative to Estates of Decedents Applicable.

The provisions of this title relative to the estates of decedents shall, as far as conformable, apply also to guardianship matters.

(C. L. 17, § 7808.)

102–13–12. Of Minors—Petition—Notice—Appointment.

The district court for each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county or who reside without the state and have estate within the county. Such an appointment may be made on the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if fourteen years of age. Before making such appointment the court must cause such notice as it deems reasonable to be given to any person having the care of the minor, and to such relatives of the minor residing in the county as the court may deem proper. (C. L. 17, § 7809.)

History.
This section is practically identical with R. S. 1898, § 3994; Comp. Laws 1907, § 3994.

Comparable provisions.
Mont. Rev. Codes, § 10401 (substantially identical).

Cross-references.
Notice, 102–14.

1. Necessity for notice.

Part of this section relating to notice, requiring that before making appointment of guardian for minor, court must cause such notice as it deems reasonable to be given to any person having care of minor, means that reasonable notice must be given to any person having custody of minor, or that notice must be properly waived. Erickson v. McCullough, 91 U. 159, 63 P.2d 595, 109 A. L. R. 332.

Part of this section providing that before appointment of guardian, court must cause notice to be given to such relatives of minor residing in county as it deems proper, vests in court power to select or determine relatives, if any, to whom notice should be given, and failure to give notice to relatives, other than those having custody of minor, is not jurisdictional. Erickson v. McCullough, 91 U. 159, 63 P.2d 595, 109 A. L. R. 332.

2. What constitutes notice.

When any person having custody of minor petitions for appointment of guardian, such petitioning is equivalent of notice required by this section to be given to person having care of minor. Erickson v. McCullough, 91 U. 159, 63 P.2d 595, 109 A. L. R. 332.

On appointment of mother as guardian of minor son, on petition of mother, contention that court was without juris-

diction to make appointment because of failure to give notice to minor's aunt, who resided in county, was without merit. Erickson v. McCullough, 91 U. 159, 63 P.2d 595, 109 A. L. R. 332.

A. L. R. notes.
Construction and application of statute prescribing that notice of petition or hearing for appointment of guardian be of such nature or be given to such persons as court deems reasonable or proper, 109 A. L. R. 338; validity of appointment of guardian or curator for infant without service of process upon, or notice to, latter, 1 A. L. R. 919.

102–13–13. Id. Preferred Rights to Letters.

In appointing a guardian for a minor the court shall be guided by the following considerations: If the minor is fourteen years of age, he may nominate his guardian, subject to the approval of the court, but if the court does not approve such nomination, or if the minor resides out of the state, or if, after having been duly cited by the court, he neglects for ten days thereafter to nominate a suitable person, the court may appoint a guardian. If the minor is not fourteen years of age, the court may appoint the guardian, giving due consideration to the preference of the child, if he is of sufficient age to form an intelligent preference, but in such case the minor at any time after attaining the age of fourteen years may appoint his own guardian, subject to the approval of the court. Of persons equally entitled to the custody in other respects, preference shall be given as follows: first, to a parent, but as between parents adversely claiming the guardianship neither parent shall be entitled to it as of right; other things being equal, if the child is of tender age, it shall be given to the mother, or, if it is of an age to require education and preparation for labor or business, then to the father; second, to a person who was indicated by the wishes of a deceased parent; third, to the trustee of a fund applied to the child's support; fourth, to a relative. (C. L. 17, § 7810.)

A. L. R. notes.
Contract in consideration of renunciation of one's status, or right to appointment, as guardian, executor, administrator, trustee or other fiduciary, as contrary to public policy, 121 A. L. R. 677.

102–13–14. Id. Termination.

The power of a guardian of a minor shall be terminated: first, by order of the court; second, by the ward's attaining majority; third, by the marriage of the ward; *provided*, that the guardianship of the estate of the ward may be continued, at the discretion of the court, after the guardianship of his person has been terminated by marriage, and until he reaches the age of majority. (C. L. 17, § 7811.)

Cross-references.
Termination of minority, 14–1–1.

102–13–15. Id. Release of Guardian by Ward.

After a ward has come to his majority he may settle accounts with his guardian, and give him a release, which shall be valid, if obtained fairly and without undue influence. (C. L. 17, § 7812.)

102–13–16. Id. Discharge After Ward's Attaining Majority.

A guardian appointed by a court shall not be entitled to his discharge until one year after the ward's majority. (C. L. 17, § 7813.)

102–13–17. Id. Support Out of Ward's Estate.

If any minor, having a father living, has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of his father's family and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property, in whole or in part, as judged reasonable, and the court must so direct; and the charges therefor may be allowed accordingly in the settlement of the accounts of his guardian. (C. L. 17, § 7814.)

102–13–18. Id. Parents Are Joint Guardians, with Equal Rights.

Husband and wife living together are joint guardians of their minor children, with equal powers, rights and duties with respect to the control and custody and the services and earnings of their minor children; and neither husband nor wife has any right paramount to that of the other with respect to the custody and control of or to the earnings of their minor children. (C. L. 17, § 7815.)

A. L. R. notes.

Minority of parent as affecting right to guardianship or custody of person or estate of child, 19 A. L. R. 1043.

102–13–19. Of Insane Persons—Petition—Notice—Appointment.

The district court of each county, when it appears necessary, may appoint guardians for the persons and estates of persons who are insane or from any cause mentally incompetent to manage their property, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county. Such appointment may be made on the petition of a relative or friend, after such notice of the time and place of hearing as the court may direct, to the person supposed to be insane or incompetent and to such other persons as the court may designate. (C. L. 17, § 7816.)

History.

This section is practically identical with R. S. 1898, § 4000; Comp. Laws 1907, § 4000.

Comparable provisions.

Idaho Code, § 15–1815, Mont. Rev. Codes, § 10412 (notice must be given by judge of hearing as to person's insanity or mental incompetency to manage said person's property; under Idaho provision, in case of veteran of World War, notice also given to United States Veterans' Bureau).

Cross-references.

District judge may commit insane, 85–7–15 to 85–7–29; guardian in divorce suit for insane wife, 40–3–1.

1. General construction.

Section and following section not in conflict with 88–2–12, subd. (16). In re Lamont's Estate, 95 U. 219, 79 P.2d 649.

2. Grounds of appointment.

Appointment of guardian for elderly woman 84 years of age, who was forgetful, and likely to be imposed upon, held warranted by the evidence although she had conveyed away all of her property already. In re Lamont's Estate, 95 U. 219, 79 P.2d 649.

3. Petition and notice.

Court, in its order setting time for hearing on petition, must specify notice to be given and not merely direct clerk to "cause due notice to be given as prescribed by law." Mosby v. Gisborn, 17 U. 257, 54 P. 121.

Decisions from other jurisdictions.

— Montana.

Notice must be given to the alleged incompetent of the proceeding to determine his mental condition for the purpose of taking charge of his person or property, or both. State v. District

Court, Sixteenth Judicial District, Custer County, 106 Mont. 578, 81 P.2d 422.

A. L. R. notes.

Construction and application of statute prescribing that notice of petition or hearing for appointment of guardian be of such nature or be given to such persons as court deems reasonable or proper, 109 A. L. R. 338.

Contract in consideration of renunciation of one's status, or right to appointment, as guardian, executor, administrator, trustee, or other fiduciary, as contrary to public policy, 121 A. L. R. 677.

May proceedings to have a person declared insane and to appoint conservator or committee of his person or estate rest upon substituted or constructive service of process, 77 A. L. R. 1227.

Necessity and sufficiency of notice to alleged incompetent of application for appointment of guardian or committee, 23 A. L. R. 594.

Remedy for conservation of property of alleged incompetent prior to his adjudication as such, 107 A. L. R. 1392.

102–13–20. Id. "Incompetent," etc., Defined.

The words "incompetent," "mentally incompetent" and "incapable," as used in this title, shall be construed to mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons.

(C. L. 17, § 7817.)

History.

This section is practically identical with R. S. 1898, § 4001; Comp. Laws 1907, § 4001.

Comparable provisions.

Cal. Probate Code, § 1460 (includes similar definition).

Cross-references.

Insane persons, 88–2–12, subd. (16).

1. Contractual capacity.

This section does not alter the ordinary test of contractual capacity, which is impairment of the mental faculties to such an extent that the subject has not power to comprehend the matter of the contract, its nature and probable consequences, and to act with discretion in relation thereto, or to the ordinary affairs of life. Hatch v. Hatch, 46 U. 218, 148 P. 433, applying Comp. Laws 1907, § 4001, which is identical with present section. This section does not change test of capacity to execute ordinary contracts, which is whether party executing contract had sufficient mental faculties to understand subject, nature, and consequences of contract. O'Reilly v. McLean, 84 U. 551, 37 P.2d 770.

2. Old age.

Appointment of guardian for elderly woman 84 years of age, who was forgetful, and likely to be imposed upon, held warranted by the evidence although she had conveyed away all of her property already. In re Lamont's Estate, 95 U. 219, 79 P.2d 649.

3. Presumptions.

No presumption of incompetency can arise from fact that grantor was 86 years of age. O'Reilly v. McLean, 84 U. 551, 37 P.2d 770.

A. L. R. notes.

Constitutionality of statute making physical disability ground for appointment of guardian of person or property, 30 A. L. R. 1381; mental condition which will justify appointment of guardian, committee or conservator of estate for incompetent or spendthrift, 113 A. L. R. 354.

102–13–21. Id. Restoration to Capacity—Petition, Notice, Hearing, Decree.

Any person who has been declared insane or incompetent, or his guardian, or any relative of such person within the third degree, or any friend, may apply, by petition, to the district court of the county in which he was declared insane to have the fact of his restoration to capacity judicially determined. The petition shall be verified, and shall state that such person is then sane and competent. Upon receiving the

petition the court must appoint a day for a hearing, and if the petitioner requests it, shall order an investigation before the court. The court shall cause notice of the trial to be given to the guardian of the person so declared insane or incompetent, if there is a guardian; and to his or her husband or wife, if there is one; and to his or her father or mother, if living in the county. Witnesses may be required to appear and testify as in civil cases, and may be called and examined by the court on its own motion. If it is found that the person is of sound mind and capable of taking care of himself and his property, his restoration to capacity shall be adjudged and the guardianship of such person, if he is not a minor, shall cease. (C. L. 17, § 7818.)

Comparable provisions.
Idaho Code, § 15-1818 (includes similar provision; petitioner may request, whereupon the court must order, an investigation before a jury).
Mont. Rev. Codes, § 10415 (substantially identical; petitioner may request investigation before a jury).

Cross-references.
Notice, 102-14; petition for restoration to capacity, 85-7-30.

102-13-22. Id. Of Insane Wife—Relinquishment of Statutory Interest.

Whenever the wife of any person is mentally incompetent to join her husband in a conveyance of real estate and has remained in that condition for more than two years, or when it is made to appear to the court that such married woman is permanently so mentally incompetent, her inchoate interest in the real estate of her husband may be relinquished and cut off as hereinafter provided. (C. L. 17, § 7819.)

Cross-references.
Limitation on husband's right to will property, 101-1-1; wife's inchoate interest, 101-4-3.

102-13-23. Id. Petition.

The husband or any person interested in such real estate may apply to the district court of the county in which such mentally incompetent wife is an inhabitant or resident, by petition under oath, for the appointment of a guardian and for leave to sell her inchoate interest in the real estate of her husband. Such petition shall set forth the name, age and residence of such married woman, and the name, age and residence of her husband, as near as may be ascertained; the nature of the disability of such married woman, and the length of time it has existed; a full description of the real estate in this state to be affected by such proceedings, the value of each piece thereof, and the amount of encumbrance upon it, if any, not affected by or prior to her claim to such inchoate interest; if the real estate is to be sold by the husband, or has been sold by him, the amount of the consideration of such sale as made or agreed upon, and the reason why such sale is desirable to such husband or petitioner. (C. L. 17, § 7820.)

102-13-24. Id. Notice and Hearing.

Upon the filing of such petition the court shall enter an order that the petition be heard on a certain day, and that notice thereof, such as

the court may direct, stating the time and place of such hearing, be given to the person supposed to be mentally incompetent and to such other persons as the court may designate. (C. L. 17, § 7821.)

102-13-25. Id. Findings and Decree.

At such hearing the wife may appear by counsel or in person, or by guardian ad litem appointed as in other cases, and may answer such petition in the time and manner the court shall direct, and upon the filing of an answer the case shall be deemed at issue; or, if the wife shall fail to appear as herein provided, the court shall appoint some competent attorney at law to represent her interests, who in her behalf shall be granted time in which to answer or otherwise plead therein. Said cause shall be brought to issue as nearly as may be in the same manner as civil actions. When the case is at issue the court shall hear and determine the same, and make findings and decree therein, or in its discretion may refer the matter to a referee, to be appointed by the court for that purpose, to take the proofs and report the same to the court with his findings thereon as follows:

(1) As to the mental incompetency of such wife.

(2) As to the necessity or propriety of selling such real estate and relinquishing the wife's inchoate interest therein.

(3) The cash value, at the time, of such inchoate interest, taking into consideration the respective ages of such husband and wife, and the likelihood of survival.

Upon the coming in of said report the court shall consider the same, and may change or modify said findings, if in the court's opinion they do not conform to the evidence, and shall make such decree pursuant to the findings as may be just and equitable. (C. L. 17, § 7822.)

102-13-26. Id. Special Guardian—Appointment, Bond, Duties.

If the court shall decide that the wife is mentally incompetent and that it is proper that her inchoate interest should be relinquished, it shall fix the then present value of such inchoate interest, and shall thereafter appoint a special guardian for such wife, other than her husband, who shall give bond in a sum to be fixed by the court, with sureties to be approved by the court, conditioned to receive and invest any money that may come into his hands and preserve the same until it shall be disposed of under the order and direction of the court. (C. L. 17, § 7823.)

102-13-27. Id. Relinquishment by Guardian.

Upon the approval of such bond, the special guardian may, upon the payment to him of the amount fixed by the court as the value of such inchoate interest, convey such inchoate interest and relinquish the same to the purchaser of such real estate, or to his heirs or assigns, but to no other person. Such conveyance shall be effective as a relinquishment of such inchoate interest in the same manner as if the wife, being of sound mind, had executed such conveyance by joining her husband in a deed to such premises. (C. L. 17, § 7824.)

102–13–28. Id. Disposition of Payment Received.

Such guardian shall allow said money to accumulate and shall dispose thereof as the court shall direct, and upon the restoration of such married woman to sound mind shall, upon the order of the court, transfer said money to her, in the event she shall survive her husband, or to her heirs, if she shall not be restored to sound mind before her death In the event such wife shall not survive her husband, upon her death said money, together with the interest accrued thereon, less the expenses of the special guardianship as allowed by the court, shall be transferred to her husband. (C. L. 17, § 7825.)

102–13–29. Powers and Duties—Of General Guardians.

Every general guardian has the care and custody of the person of his ward, and the management of all his estate until such guardianship is legally terminated. (C. L. 17, § 7826.)

History.

This section is identical with R. S. 1898, § 4003; Comp. Laws 1907, § 4003.

1. Powers of guardians.

This section prescribes, defines and limits powers and duties of general guardian. In re Hansen's Guardianship, 67 U. 256, 261, 247 P. 481.

Neither guardian nor court having jurisdiction over estate of incompetent has power to bind latter's person or estate unless expressly authorized by law so to do. Andrus v. Blazzard, 23 U. 233, 63 P. 888, 54 L. R. A. 354.

2. Contractual power.

Guardian has no power to make contract binding on ward or on his estate, however beneficial to ward contract may be. Andrus v. Blazzard, 23 U. 233, 63 P. 888, 54 L. R. A. 354. (Miner, C. J., dissenting.)

A. L. R. notes.

Ademption of specific devise or bequest by guardian or conservator of incompetent testator, 30 A. L. R. 676; power of guardian or committee of incompetent in respect of insurance on ward's life, or of policy under which he has interest, 84 A. L. R. 366.

102–13–30. Id. Of Guardians Appointed by Court.

A guardian appointed by the court shall have power over the person and property of the ward, unless otherwise ordered.

(C. L. 17, § 7827.)

Comparable provisions.

Idaho Code, § 15–1807 ("Every guardian appointed" has custody and care of minor's education, and care and management of his estate, until minor arrives at age of majority or marries, or until guardian is legally discharged).

102–13–31. Id. Of Guardians of Person.

A guardian of the person shall be charged with the custody of the ward, and must look to his support, health and education. He may fix the residence of the ward at any place within the state, but not elsewhere without the permission of the court. (C. L. 17, § 7828.)

102–13–32. Id. Of Guardians of Property.

A guardian of the property must keep safely the property of his ward. He must not permit any unnecessary waste or destruction of the real property, nor make any sale of such property without the order of the court, but must, so far as it is in his power, maintain the same, with its buildings and appurtenances, out of the income or other property of the estate, and deliver it to the ward at the close of his guardian-

ship in as good condition as he received it, natural wear and tear excepted. (C. L. 17, § 7829.)

History.
This section is practically identical with R. S. 1898, § 4006; Comp. Laws 1907, § 4006.

Cross-references.
Action for waste against guardian, treble damages, 104-56-2.

1. Operation and effect of section.
This section defines, prescribes and limits the powers and duties of the guardian. In re Hansen's Guardianship, 67 U. 256, 261, 247 P. 481.

A. L. R. notes.
Care required of trustee or guardian with respect to retaining securities coming into his hands as assets of the estate, 112 A. L. R. 355; right of guardian or committee of incompetent to incur obligations so as to bind incompetent or his estate, or to make expenditures, without prior approval by court, 130 A. L. R. 113; right of trustee or guardian to retain unauthorized securities held by testator or creator of trust, 122 A. L. R. 801.

102-13-33. Id. Power to Sell, Mortgage and Lease.

Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as necessary, for the comfortable and suitable maintenance and support of the ward and his family, if any; and if such income and profits are insufficient for that purpose, the guardian may sell, mortgage or lease the real estate, upon obtaining an order of the court therefor, as herein provided, and must apply the proceeds thereof as far as may be necessary for the maintenance and support of the ward and his family, if any. (C. L. 17, § 7830.)

History.
This section is practically identical with R. S. 1898, § 4007; Comp. Laws 1907, § 4007.

Comparable provisions.
Cal. Probate Code, § 1502 (includes similar provision).
Idaho Code, § 15-1821 (substantially the same; however, leasing is not specifically mentioned in this section, nor court order, and thus reading in part: "* * * the guardian may sell or mortgage the real estate, as provided in this title, and must apply the proceeds * * *").
Mont. Rev. Codes, § 10419 (substantially identical, except that neither mortgage nor lease is specifically mentioned).

Cross-references.
Sale, mortgage and lease of property of estate of decedent, 102-10; lease and bond of mining property by guardian, 102-10 et seq.; expenses of ward in state hospital, 85-7-43.

1. General construction.
This section must be construed with 102-13-41. Stockyards Nat. Bank of South Omaha v. Bragg, 67 U. 60, 245 P. 966.

2. Mortgages.
Guardian may mortgage real estate of his ward only when necessary to provide for suitable maintenance of ward and his family. Andrus v. Blazzard, 23 U. 233, 63 P. 888, 54 L. R. A. 364.

3. Order of court.
In view of provisions of this section requiring court order for disposal or encumbrance of real property, and provisions of Const. Art. VIII, § 7, 102-1-6, 102-13-29, and 102-13-32, guardian cannot, by failing to make election for widow to take under will, as required by 101-4-4, within four-month period, thereby deprive widow of benefits of will, notwithstanding provision of 101-4-4 that failure to make timely election to take under will is deemed election to take distributive share provided under 101-4-3. In re Hansen's Guardianship, 67 U. 256, 247 P. 481.

A. L. R. notes.
Constitutionality of statutes authorizing guardian to sell or lease land of ward, 4 A. L. R. 1552.
Duty of one purchasing ward's property, or loaning money on security of such property, to see that proceeds are properly applied, 56 A. L. R. 105.
Power of court or guardian as to mortgaging infant's real property, 95 A. L. R. 839.
Power of guardian to sell ward's property without order of court, 108 A. L. R. 936.
Right of guardian to expend principal of ward's estate for maintenance and support, 5 A. L. R. 632.

102–13–34. Id. Payment of Debts—First Out of Personalty.

Every guardian appointed under the provisions of this title must pay all just debts due from the ward out of the personal estate and the income of the real estate of the ward, if sufficient; if not, then out of his real estate. (C. L. 17, § 7831.)

History.
This section is practically identical with R. S. 1898, § 4008; Comp. Laws 1907, § 4008.

Comparable provisions.
Cal. Probate Code, § 1501 (includes similar provision).
Idaho Code, § 15–1819 (similar).

Cross-references.
Claims and payment of debts in decedents' estates, 102–9.

1. General construction.
This section must be construed with 102–13–41. Stockyards Nat. Bank of South Omaha v. Bragg, 67 U. 60, 245 P. 966.

A. L. R. notes.
Priority in event of incompetent's death of claims incurred during guardianship over other claims against estate, 113 A. L. R. 402.

102–13–35. Id. Settling Accounts—Compounding Debts—Actions.

Every guardian must settle all accounts of the ward, and demand, sue for and receive all debts due to him, or may, with the approval of the court, compound the same and give discharge to the debtor on receiving a fair and just dividend of his estate and effects; and he must appear for and represent his ward in all actions and legal proceedings, unless another person is appointed for that purpose.

(C. L. 17, § 7832.)

Comparable provisions.
Idaho Code, § 15–1820, Mont. Rev. Codes, § 10418 (substantially the same).

Cross-references.
Service on guardian as service on ward, 103–14–22; ward to appear by guardian, 102–14–22, 104–3–6, 104–72–4; substitution of guardian for predecessor, 102–14–20.

A. L. R. notes.
Guardianship of incompetent or infant as affecting venue of action, 111 A. L. R. 167.

102–13–36. Id. Inventory and Appraisement.

Every guardian must return to the court, within three months after his appointment, an inventory and appraisement of the estate of his ward, which shall be made by the guardian and appraisers in the manner and form hereinbefore provided for the making of the inventory and appraisement of the estates of decedents. Annually thereafter, or semiannually if the value of the estate exceeds $20,000, every guardian must present to the court for settlement and allowance an itemized account and inventory, duly verified as to correctness and completeness by himself, or by another with the express permission of the court, containing a full and true statement of all the guardian's receipts and disbursements on account of his ward, and of all money and other personal property of the ward which have come to the hands of the guardian or have been received by any other person by his order or authority, or for his use, since his appointment, or since the filing of the last inventory and account, as the case requires, and of the value of all such property, together with a full and true statement and account of the manner in which he has disposed of the same, and of all

the property remaining in his hands at the time of filing the inventory and account; and a full and true description of the amount and nature of each investment made by him since his appointment, or since the filing of the last inventory and account as the case requires.

(C. L. 17, § 7833.)

History.
This section is substantially similar to Comp. Laws 1888, § 4327, and with R. S. 1898, § 4010, and Comp. Laws 1907, § 4010.

Comparable provisions.
Idaho Code, § 15-1825 (similar in purport).

Cross-references.
Inventory and appraisement in decedents' estates, 102-7.

1. Interest.
When such accountings are to be so rendered, interest may be properly computed annually for sums not reported. In such cases this is the rule independently of the statute. Scheib v. Thompson, 23 U. 564, 65 P. 499, applying Comp. Laws 1888.

A. L. R. notes.
Conclusiveness and effect of annual or intermediate account of guardian of infant or incompetent, 99 A. L. R. 996; right of trustee or guardian to retain unauthorized securities held by testator or creator of trust, 122 A. L. R. 801; surchargeability of trustee, executor, administrator or guardian in respect of mortgage investment, as affected by matters relating to value of property, 117 A. L. R. 871.

102-13-37. Id. Special Accountings—After-Acquired Property.

The court may, upon application made for that purpose by any person, compel the guardian to render an account to the court of the estate of his ward. All the estate of the ward described in the first inventory must be appraised by appraisers appointed, sworn and acting in the manner provided for regulating the settlement of the estates of decedents; such inventory, with the appraisement of the property therein described, must be recorded by the clerk of the court in a proper book kept in his office for that purpose. Whenever any other property of the estate of a ward is discovered, not included in the inventory of the estate already returned, and whenever any other property has been succeeded to or acquired by a ward or for his benefit, like proceedings must be had for the return and appraisement thereof as are herein provided in relation to the first inventory and return.

(C. L. 17, § 7834.)

102-13-38. Id. May Assent to Partition.

The guardian may, with the approval of the court, join in and assent to a partition of the real estate of the ward, either when action has been brought or otherwise. (C. L. 17, § 7835.)

Comparable provisions.
Idaho Code, § 15-1824, Mont. Rev. Codes, § 10421 (guardian may join in and assent to partition of ward's real estate, wherever such assent may be given by any person).

Cross-references.
Guardian may assent to partition, 104-58-44.

102-13-39. Id. Support and Education of Ward.

When a guardian has advanced for the necessary maintenance, support or education of his ward any amount not disproportionate to the value of his estate or his condition in life and the same is made to appear to the satisfaction of the court by proper vouchers and proofs, the

guardian must be allowed credit therefor in his settlements. Whenever a guardian fails, neglects or refuses to furnish suitable and necessary maintenance, support or education for his ward, the court may order him to do so and enforce such order by proper process. Whenever any third person, at his request, supplies a ward with such suitable and necessary maintenance, support or education and it is shown to have been done after refusal or neglect of the guardian to supply the same, the court may direct the guardian to pay therefor out of the estate, and enforce such payment by due process. (C. L. 17, § 7836.)

History.
This section is practically identical with R. S. 1898, § 4013; Comp. Laws 1907, § 4013.

Comparable provisions.
Cal. Probate Code, § 1502 (includes provision substantially identical with first sentence herein); § 1503 (substantially identical with remainder of this section).
Idaho Code, § 15–1822, Mont. Rev. Codes, § 10420 (substantially identical).

Cross-references.
Support of ward in state hospital, 85–7–43.

Decisions from other jurisdictions.
— California.
A guardianship presents an entirely different problem from that involved in the estate of decedents; the personal representative of an estate may not be granted a lien for advances to a legatee because until final distribution it cannot be ascertained if that legatee is entitled to any portion of the estate, but in a guardianship proceeding there is always the ward's estate; it will be noted that section 1502 of the California Probate Code provides that the guardian shall be allowed credit for advancement "in his settlements," the legislature being careful not to say on "final settlement" but using the plural, obviously including intermediate settlements; and, under this section the trial court acted well within its jurisdiction in granting the guardian a lien to secure her advancements. Mitchell v. Bagot, 48 Cal. App.2d 281, 119 P.2d 758.

102–13–40. Compensation and Expenses.

Every guardian must be allowed the amount of his reasonable expense incurred in the execution of his trust, and he must also have such compensation for his services as the court in which his accounts are settled deems just and reasonable. (C. L. 17, § 7837.)

History.
This section is identical with R. S. 1898, § 4014; Comp. Laws 1907, § 4014.

Comparable provisions.
Mont. Rev. Codes, § 10425 (substantially identical).

Cross-references.
Expense of bond allowed, 43–3–45.

1. Compensation and disbursements.
Where a guardian is guilty of negligence in the management of the estate of his ward, he is entitled to no compensation. Money actually paid out by guardian for court costs and attorney's fees should be allowed him on accounting. Scheib v. Thompson, 23 U. 564, 65 P. 499.

A. L. R. notes.
Death of trustee, executor, administrator, or guardian as affecting right to compensation, 7 A. L. R. 1595.
Resignation or removal of executor, administrator, guardian, or trustee before final administration or termination of trust as affecting his compensation, 94 A. L. R. 1101.
Right and obligation of guardian other than parent in respect of services rendered by, or board or services furnished to, ward, 64 A. L. R. 692.
Right of guardian to allowance for expenditures prior to appointment, 67 A. L. R. 1405.
Right of guardian who promises to provide out of own estate for ward to allowance out of ward's estate, 56 A. L. R. 536.

102–13–41. Sales, Mortgages and Leases.

When a sale of the property of a ward is necessary to maintain him or his family, or to maintain and educate the ward when a minor, or to pay the debts and expenses of guardianship, or when it appears to

the satisfaction of the court that it is for the best interests of the estate that the real or personal property, or some part thereof, be sold, mortgaged or leased, the guardian may sell, mortgage or lease the same, upon an order of the court; *provided*, that if a ward is insane and confined in the Utah state hospital and has a family in this state, the property of such ward exempt from execution shall not be sold nor used for his care and maintenance in the hospital. The provisions of this title respecting the selling, mortgaging and leasing of the property of decedents, and the powers, duties, rights and obligations thereby conferred and imposed shall, as far as applicable, govern the selling, mortgaging and leasing of property under guardianship. (C. L. 17, § 7838.)

History.

This section is identical with R. S. 1898, § 4015; Comp. Laws 1907, § 4015, except that the words "Utah state hospital" formerly read "state insane asylum" and "state mental hospital."

Cross-references.

Limitation of action to recover land sold by guardian, 104–2–16; sale, mortgage and lease of estate of decedent, 102–10; property exempt from execution, 104–37–13; lease and bond on mining property, 102–10–37.

1. Words and phrases defined.

"Best interests of the estate," as used herein, means the greatest or most advantageous use, and court must be satisfied, before authorizing guardian to mortgage ward's property, that it is not only proper, "but that it is to the greatest advantage of the estate or that it is necessary." Stockyards Nat. Bank of South Omaha v. Bragg, 67 U. 60, 245 P. 966.

2. Mortgages.

Property may be mortgaged upon order of court where it appears that it is for best interests of estate, and mortgage may be given for other purposes than those mentioned herein. Stockyards Nat. Bank of South Omaha v. Bragg, 67 U. 60, 245 P. 966.

Mortgage of ward's land by guardian for purpose of obtaining funds for irrigating land through purchase of stock in irrigation company is within power and discretion of court hereunder. Robison v. Kelly, 69 U. 376, 255 P. 430.

Mortgage of minor's interest in real estate is not in the best interests of his estate, and court is without jurisdiction to authorize same, where it is requested principally for purpose of securing interests of others, and only incidentally that of the minor, in a corporation which is insolvent or in failing circumstances. Stockyards Nat. Bank of South Omaha v. Bragg, 67 U. 60, 245 P. 966.

Mortgage of ward's land by guardian, authorized by court for purpose of obtaining funds for irrigating land, subsequently foreclosed, is not sufficient on which to predicate action against guardian for waste, where no bad faith but merely error of judgment is shown. Robison v. Kelly, 69 U. 376, 255 P. 430.

3. Order of court.

A guardian becomes personally liable where he does not act under court order. Andros v. Blazzard, 23 U. 233, 63 P. 888, 54 L. R. A. 354.

Under this section a guardian may mortgage the property of his ward when licensed by the proper court. Fillmore Commercial & Savings Bank v. Kelly, 62 U. 514, 220 P. 1064.

Although order or decree need not recite jurisdictional facts, in view of 102–14–15, court may not, without any formal application or pleading showing jurisdictional facts hereunder, authorize mortgage of minor ward's real estate; and where facts are recited in order authorizing mortgage, conclusion that it was for best interests of minor's estate may be refuted by recitals of order itself, in which case the order is null and void, being on its face beyond the court's jurisdiction. Stockyards Nat. Bank of South Omaha v. Bragg, 67 U. 60, 245 P. 966.

A. L. R. notes.

Constitutionality of statutes authorizing guardian to sell or lease land of ward, 4 A. L. R. 1552; duty of one purchasing ward's property, or loaning money on security of such property, to see that proceeds are properly applied, 56 A. L. R. 105; power of court or guardian as to mortgaging infant's real property, 95 A. L. R. 839; power of guardian to sell ward's property without order of court, 108 A. L. R. 936.

102–13–42. Id. Application of Proceeds.

If the estate is sold for the purposes mentioned in this chapter, the guardian must apply the proceeds of the sale to such purposes as far as

necessary, and put out the residue, if any, on interest, or invest it in the best manner in his power until the capital is wanted for the maintenance of the ward and his family, or the education of his children, or for the education of the ward when a minor; in which case the capital may be used for that purpose, as far as may be necessary, in the same manner as if it were personal estate of the ward.

(C. L. 17, § 7839.)

History.
This section is practically identical with R. S. 1898, § 4016; Comp. Laws 1907, § 4016.

Comparable provisions.
Mont. Rev. Codes, § 10430 (substantially identical).

1. Mortgages.
Under this and the preceding section a mortgage to secure the debt of another is not for the best interests of the ward. Stockyards Nat. Bank of South Omaha v. Bragg, 67 U. 60, 245 P. 966.

102–13–43. Id. Investments.

If the estate is sold for the purpose of putting out or investing the proceeds, the guardian must make the investment according to his best judgment, or in pursuance of any order that may be made by the court.

(C. L. 17, § 7840.)

Comparable provisions.
Mont. Rev. Codes, § 10431 (substantially identical).

A. L. R. notes.
Liability for interest or profits on funds of estate deposited in bank or trust company which is itself executor, administrator, trustee, or guardian, or in which executor, etc., is interested, 88 A. L. R. 205.

102–13–44. Id.

The court, on the application of a guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the court shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other money of the ward in his hands, in real estate, or in any other manner most to the interest of all concerned therein; and the court may make such other orders and give such directions as are needful for the management, investment and disposition of the estate and effects as circumstances require.

(C. L. 17, § 7841.)

History.
This section is practically identical with R. S. 1898, § 4018; Comp. Laws 1907, § 4018.

1. Order of court.
"An order thus obtained would protect the guardian even if misfortune were to follow such investment. But when the guardian acts upon his own judgment in making such investment, independent of an order of the court, or otherwise converts the proceeds of the estate to his own use, he takes upon himself responsibilities which the law does not permit; and is held not only to a strict accountability for the money used, but to such actual or punitive damages as may be lawfully imposed for an official neglect of his duty." Scheib v. Thompson, 23 U. 564, 65 P. 499.

A. L. R. notes.
Liability of trustee, guardian, executor or administrator for loss of funds, as affected by failure to obtain order of court authorizing investment, in absence of mandatory statute, 116 A. L. R. 437; liability of trustee, guardian, executor, or administrator for loss of funds invested, as affected by order of court authorizing the investment, 88 A. L. R. 325; power and duty of trustee, executor, administrator, or guardian as regards protection of investment in stocks by submitting to voluntary assessment, 104 A. L. R. 979.

102-13-45. Embezzlement, etc., of Ward's Estate—Citation to Person Suspected.

Upon complaint made by any guardian, ward or creditor, or other person interested in the estate or having a prospective interest therein as heir or otherwise, against anyone, suspected of having concealed, embezzled or conveyed away any of the money, goods or effects, or an instrument in writing, belonging to the ward or to his estate, the court may cite such suspected person to appear before it, and may examine and proceed with him on such charge in the manner provided in this title with respect to persons suspected of and charged with concealing or embezzling the effects of a decedent. (C. L. 17, § 7842.)

Comparable provisions.
Idaho Code, § 15-1848 (substantially the same).

Cross-references.
Embezzlement of decedent's property, 102-11-17, 102-11-18.

102-13-46. Of Nonresident Wards—Powers.

Every guardian appointed for a nonresident ward shall have the same powers and perform the same duties with respect to the estate of the ward found within this state, and with respect to the person of the ward, if he shall come to reside therein, as are prescribed with respect to any other guardian appointed under this chapter.

(C. L. 17, § 7843.)

Comparable provisions.
Idaho Code, § 15-1842, Mont. Rev. Codes, § 10445 (substantially identical).

102-13-47. Id. Bond.

Every such guardian must give bond to the ward in the manner and with the same conditions as hereinbefore provided for other guardians, except that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardian must be confined to such estate and effects as come to his hands in this state.

(C. L. 17, § 7844.)

Comparable provisions.
Mont. Rev. Codes, § 10446 (substantially identical).

102-13-48. Id. Exclusive Jurisdiction of Court First Making Appointment.

The guardianship which is first lawfully granted of any person residing without this state extends to all the estate of the ward within this state, and excludes the jurisdiction of the court of every other county.

(C. L. 17, § 7845.)

Comparable provisions.
Idaho Code, § 15-1844, Mont. Rev. Codes, § 10447 (substantially identical).

102-13-49. Id. When Guardian Also Nonresident—Removal of Property.

When the guardian and his ward are both nonresidents, and the ward is entitled to property in this state, which may be removed to another

state or foreign country without conflict with any restriction or limitation thereupon or impairing the right of the ward thereto, such property may be removed to the state or foreign country of the residence of the ward upon the application of the guardian to the court.

(C. L. 17, § 7846.)

Comparable provisions.
Cal. Probate Code, § 1572 (similar).
Idaho Code, § 15–1845, Mont. Rev. Codes, § 10448 (substantially the same; "territory" is also mentioned).

102–13–50. Id. Application for Removal—Order.

Such application must be made upon ten days' notice to the resident executor, administrator or guardian, if there are such, otherwise without notice, and upon such application the nonresident guardian must produce and file a certificate, under the hand of the clerk and seal of the court from which his appointment was derived, showing:

(1) A transcript of the record of his appointment.

(2) That he entered upon the discharge of his duties.

(3) A description of the property of the ward with its estimated value.

(4) That he is entitled by the laws of the state, territory or foreign country of his appointment to the possession of the estate of the ward; or he must produce and file a certificate under the hand and seal of the clerk of the court having jurisdiction in the country of his residence of the estates of persons under guardianship, or of the highest court of such country, attested by a minister, consul or vice consul of the United States resident in such country, that by the laws of such country the applicant is entitled to the custody of the estate of his ward without the appointment of any court. Upon such application, unless good cause to the contrary is shown, the court must make an order granting to such guardian leave to take and remove the property of his ward to the state or place of his residence, which is authority to him to sue for and receive the same in his own name for the use and benefit of his ward. (C. L. 17, § 7847.)

Comparable provisions.
Cal. Probate Code, §§ 1573 and 1574 (substantially identical).
Idaho Code, § 15–1846 (similar).
Mont. Rev. Codes, § 10449 (similar).

Cross-references.
When property of nonresident decedent may be removed, 102–12–22, 102–12–23.

102–13–51. Id. Order Discharges Local Guardian.

Such order is a discharge of the executor, administrator, local guardian or other person in whose possession the property may be at the time the order is made, on filing with the court the receipt therefor of the foreign guardian of such ward and transmitting a duplicate receipt or a certified copy of such receipt to the court from which such nonresident guardian received his appointment. (C. L. 17, § 7848.)

Comparable provisions.
Cal. Probate Code, § 1574 (includes substantially identical provision).
Idaho Code, § 15–1847, Mont. Rev. Codes, § 10454 (substantially the same, through and terminating with the words "of the foreign guardian of such absent ward").

CHAPTER 14

NOTICES, ORDERS AND PROCEDURE

102-14-1. Notices—Time and Manner of Giving.
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102-14-17. Trial of Issues of Fact—Judgment and Execution.
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102-14-20. Actions — Parties — Successor May Be Substituted for Predecessor.
102-14-21. Id. Costs—In Discretion of Court.
102-14-22. Id. Service on Guardian Is Service on Ward—Authority of Guardian.
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102-14-25. Attorney for Minors and Nonresidents.
102-14-26. Sufficiency of Proof—Noncontested Proceedings.

102-14-1. Notices—Time and Manner of Giving.

Whenever it is provided in this title, or whenever the court, judge or clerk may direct, that notice shall be given, and the manner of giving the same is not provided or directed, it shall be sufficient, if the notice is published in any newspaper having general circulation in the county, or if posted, as provided in section 102-14-9; and in any case in which the time is not provided or directed it shall be sufficient, whether the notice is given by publication or posting, that the notice be given for not less than ten days; but the court or judge, or the clerk when authorized, may order or direct the precise manner of giving notice, or more than one manner of giving the same, or may prescribe a longer notice than ten days. The clerk shall give the notice where not otherwise provided, and it shall be his duty to mail copies of all notices in probate proceedings to the known heirs, devisees and legatees.

(C. L. 17, § 7856.)

History.

Except as to the provision for mailing, this section is substantially identical with R. S. 1898, § 4026; Comp. Laws 1907, § 4026.

Cross-references.

Party may designate newspaper, 104-43-6; interference with notice as crime, 103-20-75.

1. Necessity for notice.

Probate proceedings are deemed to be proceedings in rem, and court acquires jurisdiction of property of estate and of all persons who have any interest in property by notice required to be given for appointment of administrator or executor, and other notices provided for are not jurisdictional, and disregard thereof is mere irregularity and may be assailed, in absence of fraud, only in direct proceeding. Barrette v. Whitney, 36 U. 574, 106 P. 522, 37 L. R. A. (N. S.) 368. (Straup, C. J., dissenting.)

2. Sufficiency of notice.

Court acquired no jurisdiction to appoint administrator under notice which failed to comply with this section and was not mailed as required by 102-4-8. In re Bunting's Estate, 30 U. 251, 84 P. 109.

Under this section an order for notice of an application for the appointment of an administrator required that the notice be published in two issues of a newspaper for a period of at least a week prior to September 28, and by mailing a copy of the notice to the heirs as required by section 102-4-8. The notice was first published on September 20, and the second and last insertion was on September 27, the day prior to the time set for hearing, and no notice was mailed. Held, that the court acquired no jurisdiction under such notice to appoint an administrator. In re Bunting's Estate, 30 U. 251, 84 P. 109.

Notice mailed to nonresident creditors who had listed their claims with railroad company's receiver, which notice was also published in newspaper once weekly for six consecutive weeks before sale by receiver of company's property, held to constitute reasonable notice for service by publication. Chapman v. Schiller, 95 U. 514, 83 P.2d 249, 120 A. L. R. 906. (Moffat, J., dissenting.)

3. Computation.

The ten-day notice provided for herein is computed as provided for by 88-2-7. Pearson v. Butler, 79 U. 583, 11 P.2d 972.

102-14-2. Id. Publication in Newspapers.

Newspapers shall publish all probate and guardianship notices under the heading "Probate and Guardianship Notices. Consult clerk of district court or the respective signers for further information." Such notices shall be published as often during the prescribed period as the paper is regularly issued, unless otherwise provided by law or directed by the court, judge or clerk, and as far as possible in one column in the alphabetical order of the surnames of decedents and wards.

(C. L. 17, § 7857.)

History.

This section is practically identical with R. S. 1898, § 4027; Comp. Laws 1907, § 4027.

1. Applicability of section.

This section does not apply to notices to creditors. In re Phillips' Estate, 86 U. 358, 44 P.2d 699.

It does not require order of court to permit notice to creditors to be published less often than paper in which it is published during prescribed period over which notice must be published. In re Phillips' Estate, 86 U. 358, 44 P.2d 699.

102-14-3. Id. In Case of Petitions—Form.

In the case of petitions the notice shall be substantially in the following form:

Estate of .....
.....—Petition for ("probate of will," "letters of administration," "letters of guardianship," "sale of personal property," "sale of real property," "approval of annual account," "distribution," or "distribution and partition," or other purpose, as the case may be) has been set for hearing at (hour, day and date), at the courthouse (name of city or town). ....., Clerk.

Notice of hearing on petitions for letters of administration, letters testamentary and for guardianship shall state to whom it is asked to

have letters issued. Notices for the hearing of petitions for the sale of real or personal property shall briefly indicate the property sought to be sold. (C. L. 17, § 7858.)

102-14-4. Id. Notice to Creditors—Form.

Notice to creditors shall be substantially in the following form:

Estate of .....
—Creditors will present claims with vouchers to the undersigned at (stating place), on or before (stating the last day on which claims may be presented). ....., (administrator or executor). (C. L. 17, § 7859.)

Cross-references.
Time of publication, proof, 102-9-1, 102-9-3; time for presenting claims, 102-9-1 et seq.

102-14-5. Id. Of Sales at Public Auction—Form.

Notices of the sale of personal or real property at public auction shall be substantially in the following form:

Estate of .....
—The undersigned will sell at public auction (in case of personal property, describing the articles in general terms; and in the case of real property, stating the number of square rods or the number of acres, with the lot, block, plat or quarter section, and city or county in which the same is situated), at (stating the hour, day and date of sale), at (stating place of sale), for (stating terms of sale as ordered by the court). ....., (administrator, executor or guardian).
Dated....., 19....
(C. L. 17, § 7860.)

102-14-6. Id. Of Sales at Private Sale.

Notices of the sale of real or personal property at private sale shall be substantially in the following form:

Estate of .....
—The undersigned will sell at private sale (describing the property as hereinbefore prescribed in the case of sales at public auction) on or after (stating the day and date), and written bids will be received at (stating place). Terms of sale (describing the same).....
....., (administrator, executor or guardian). Dated....., 19....
(C. L. 17, § 7861.)

102-14-7. Id. Other Notices to Conform to Foregoing.

Other notices shall conform as nearly as may be to the forms hereinbefore prescribed. (C. L. 17, § 7862.)

102-14-8. Id. By Mail—Duty of Clerk—Personal Service Equivalent to Mailing.

In all cases in which it is provided that notice by mail shall be given it shall be the duty of the clerk to address to each person entitled to such

notice at his place of residence, if known, a written or printed copy of the order or a notice containing the substance of the order, and to deposit the same in the post office with postage thereon prepaid. Personal service of such notice at least ten days before the day of hearing is equivalent to mailing. (C. L. 17, § 7863.)

102–14–9. Id. By Posting—Requirements.

In all cases in which it is provided in this title, or in which the court, judge or clerk may direct, that notice be given by posting, it shall be sufficient if the notice or order is posted in at least three public places in the county, one of which must be at the courthouse of the county, for the time required by law, or prescribed by the court, judge or clerk. (C. L. 17, § 7864.)

History.
This section is practically identical with Comp. Laws 1907, § 4033x.

1. Posting notice.
Where notice of hearing for appointment of administratrix was not posted in at least three places as required by this section, posting was insufficient and court did not thereby obtain jurisdiction. In re Phillips' Estate, 86 U. 358, 44 P.2d 699.

102–14–10. Citations—Contents and Service.

Upon application of any person interested, or where personal notice is required and no mode of giving it is prescribed, the court or clerk must issue a citation under the seal of the court, containing the title of the proceeding, a brief statement of the nature thereof, and a direction to the person cited to appear at the time and place specified. The citation must be served in the same manner as a summons in a civil action, and when no other time is or may be prescribed must be served at least five days before the return day thereof. (C. L. 17, § 7865.)

History.
This section is identical with R. S. 1898, § 4034; Comp. Laws 1907, § 4034, except for addition of words "the court" before words "or clerk."

Comparable provisions.
Idaho Code, § 15–1506, Mont. Rev. Codes, § 10361 (citation must be served in same manner as summons in civil action).

Cross-references.
Service of summons, 104–5–3 et seq.

1. Five-day period.
Requiring party to appear within three days instead of five days as this section provides may be nonprejudicial. In re Bogert's Estate, 76 U. 566, 290 P. 947.

102–14–11. Proof of Publication and Posting.

Evidence of the due publication or posting of a notice required to be published or posted may be given by affidavit of the publisher, foreman or principal clerk of the newspaper in which notice was published, or of the person who posted the notice. (C. L. 17, § 7866.)

102–14–12. Proof of Notice—Conclusiveness of Decree.

In all cases in which notice is required or directed as a prerequisite to the action of the court, judge or clerk, proof of due notice must be made to the satisfaction, respectively, of the court, judge or clerk; and the decrees of the court in such cases, showing that due notice was given, shall be conclusive evidence of that fact. (C. L. 17, § 7867.)

102-14-13. When Notice Dispensed with.

If all persons interested in the estate join in any petition, or signify in writing their assent thereto, notice may be dispensed with and the hearing had at any time. (C. L. 17, § 7868.)

History.
This section is identical with R. S. 1898, § 4037; Comp. Laws 1907, § 4037.

1. Notice as jurisdictional.
Probate proceedings are deemed to be proceedings in rem, and court acquires jurisdiction of property of estate and of all persons who have any interest in property by notice required to be given for appointment of administrator or executor, and other notices provided for are not jurisdictional, and disregard thereof is mere irregularity and may be assailed, in absence of fraud, only in direct proceeding. Barrette v. Whitney, 36 U. 574, 106 P. 522, 37 L. R. A. (N. S.) 368. (Straup, C. J., dissenting.)

102-14-14. Any Interested Person Has Right to Be Heard.

Any person shall have a right to be heard by the court at any hearing on any question affecting a probate or guardianship matter in which he is interested. (C. L. 17, § 7869.)

History.
This section is identical with R. S. 1898, § 4038; Comp. Laws 1907, § 4038.

Cross-references.
Procedure in uncontested proceedings, 102-14-26.

1. Hearing.
Under this section court properly permitted judgment debtor of heir to show that proposed distribution of real estate was without authority of law. In re Miles' Estate, 63 U. 144, 223 P. 337.

102-14-15. Decrees—Need Not Recite Jurisdictional Facts—To Be Recorded; Other Papers May Be Filed.

Orders or decrees made by the court or judge in probate proceedings need not recite the existence of facts or the performance of acts upon which the jurisdiction of the court may depend, but it shall only be necessary that they contain the matters ordered or adjudged, except as otherwise provided. All orders and decrees of the court must be entered at length in the record books of the court provided and kept for that purpose, and all other papers in the matter must be filed. (C. L. 17, § 7870.)

History.
This section is identical with R. S. 1898, § 4039; Comp. Laws 1907, § 4039.

Cross-references.
Validity and conclusiveness of orders and decrees, 102-1-7, 102-1-8, 102-2-4, 102-11-37, 102-12-9, 102-14-12.

1. Recitals in order or decree.
Provision of this section that order or decree need not recite jurisdictional facts, does not mean that no petition or affidavit or other pleading, or any allegation of facts, is necessary to invest court with jurisdiction, since no judgment can stand unsupported by pleadings establishing jurisdiction of court. Stockyards Nat. Bank of South Omaha v. Bragg, 67 U. 60, 245 P. 966.

In view of 102-3-11 making will part of record, decree which did not set out will in full but provided for execution of the trust set up in will and further provided that trustee was directed to invest estate according to terms of will was proper, since will can be resorted to to explain and interpret decree. In re Efferson's Estate, 70 U. 268, 259 P. 919.

102-14-16. Id. Affecting Real Estate, to Be Recorded by County Recorder—Constructive Notice.

When a judgment or decree is made determining any matter affecting the title to real property a certified copy of the same must be recorded in the office of the recorder of the county in which the property is situ-

ated; and from the time of filing the same notice of the contents thereof is imparted to all persons. (C. L. 17, § 7871.)

Comparable provisions.
Cal. Probate Code, § 1222 (similar).
Idaho Code, § 15–1515 (similar; but does not specifically mention "imparted" notice of contents).

Cross-references.
Recording conveyances, judgments, etc., gives notice, 78–3–2.

102–14–17. Trial of Issues of Fact—Judgment and Execution.

All issues of fact joined in probate and guardianship proceedings must be tried in conformity with the requirements of the code of civil procedure, and in all such proceedings the party affirming is the plaintiff, and the one denying or avoiding is the defendant. Judgments therein, on the issues joined as well as for costs, may be entered and enforced by execution or otherwise by the court as in civil actions. (C. L. 17, § 7872.)

History.
This section is practically identical with R. S. 1898, § 4041; Comp. Laws 1907, § 4041.

Comparable provisions.
Cal. Probate Code, § 1230 (includes substantially identical provision, although "guardianship" is not specifically mentioned).
Idaho Code, § 15–1512 (similar).
Mont. Rev. Codes, § 10368 (substantially identical, except that guardianship proceeding is not specifically mentioned).

1. Probate procedure.
Probate procedure is designed for determination of uncontested matters and is usually ex parte. McLaren v. McLaren, 99 U. 340, 106 P.2d 766. (Pratt, J., dissenting.)

2. Scope and operation of section.
Section does not require that a new and independent action be commenced to determine issues relating to adverse claims of an estate. McLaren v. McLaren, 99 U. 340, 106 P.2d 766. (Pratt, J., dissenting.)

3. Pleadings.
Under this section, the pleadings may be recast in a proper case. In re Agee's Estate, 69 U. 130, 158, 252 P. 891.

4. Intervention.
Where judgment creditor of heir intervened and objected to petition of administrator for final distribution, and court found that assignment by heir was intended as mortgage, and hence, assignee was not entitled to distribution, court erred in dismissing administrator's petition and in not ordering final distribution to heir subject to rights, if any, of judgment debtor and assignee. In re Miles' Estate, 63 U. 144, 223 P. 337.

5. Conflicting claims.
In strictly probate proceeding court cannot properly settle the conflicting claims of creditors and their rights must be determined in an appropriate action, independent of the probate proceeding. In re Miles' Estate, 63 U. 144, 223 P. 337.

6. Procedure for trial of contested questions.
Proper procedure when contested question arises in probate proceeding involving determination of disputed facts is to strike matters from probate calendar and transfer them to civil calendar to be heard and determined as contested civil matter, but if parties come before court with issues defined and are ready to proceed, and no objections are made, and court follows rules of practice in contested civil cases, court is not in its nature changed nor its jurisdiction affected, because it proceeds according to rules applicable to a cause under prescribed procedure. McLaren v. McLaren, 99 U. 340, 106 P.2d 766. (Pratt, J., dissenting.)
Transferring cause from probate to civil calendar in same court is not matter of jurisdiction but one of procedure, and relief and rights which may be involved or to which parties may be entitled are based on and measured by established rules of procedure. McLaren v. McLaren, 99 U. 340, 106 P.2d 766. (Pratt, J., dissenting.)

7. Manner of trial.
Under this section issues of fact in probate proceedings must be tried in accordance with requirements of 104–26–3. In re Love's Estate, 75 U. 342, 350, 285 P. 299.

8. Raising and waiving objections.
Where heirs contested validity of assignment of life insurance proceeds, and objected to jurisdiction of district court sitting in probate to hear controversy, but, after consulting with court, proceeded to hear controversy without further objection, they waived their objection to the hearing. McLaren v. McLaren, 99 U. 340, 106 P.2d 766. (Pratt, J., dissenting.)
Under this section, a failure to demur to a petition to set aside appointment of administrator is a waiver of the objection. In re Estate of Tasanen, 25 U. 396, 71 P. 984.

9. Evidence.
The time, place and circumstance of making of admissions and declarations of legatee, who is sole beneficiary, go to weight, not to competency, of evidence. Miller v. Livingstone, 31 U. 415, 88 P. 338. This case was followed in In re Young's Estate, 33 U. 382, 395, 94 P. 731, 17 L. R. A. (N. S.) 108, 126 Am. St. Rep. 843, 14 Ann. Cas. 596.
Admissions and declarations of legatee are admissible in evidence against will where he is sole beneficiary under it, not only as bearing upon credibility of legatee when witness, but also as substantive evidence of admission against interest of fact in issue. Miller v. Livingstone, 31 U. 415, 88 P. 338.

10. Findings of fact and judgment.
In contested proceeding to appoint guardian for insane person, held, findings of fact were essential to support judgment rendered by court. In re Manning, 38 U. 281, 112 P. 167.

11. Appellate practice.
Action to contest probate of will on ground of undue influence is action at law, and supreme court cannot weigh or pass on conflicting evidence, or pass on credibility of witnesses, such matters being within province of trial court. Miller v. Livingstone, 31 U. 415, 88 P. 338.

102-14-18. Id. Trial by Court—Trial by Jury—Reference.

If no jury is demanded, the court must try the issues joined. If on written demand a jury is called by either party and the issues are not sufficiently made up by the written pleadings on file, the court may direct the preparation of more specific pleadings, or, on due notice to the opposite party, may settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury. If the trial of the issues joined requires the examination of an account, the court must try the matter or refer it, and no jury can be called.

(C. L. 17, § 7873.)

History
This section is substantially identical with R. S. 1898, § 4042; Comp. Laws 1907, § 4042, except that formerly "the court or judge" could try the issues.

Comparable provisions.
Cal. Probate Code, § 1230 (includes similar provision; examination of account is not mentioned).
Idaho Code, § 15-1513 (similar, except as to concluding sentence herein).
Mont. Rev. Codes, § 10369 (substantially the same).

Cross-references.
Issues triable by jury, 104-23-5; applicable provisions of Code of Civil Procedure, 102-1-6; demand for jury and deposit of fee, 28-5-12, 104-23-6; jury waived unless demanded, Const. Art. I, § 10, 104-26-1.

1. Pleadings.
Under this section, the pleadings may be recast in a proper case. In re Agee's Estate, 69 U. 130, 158, 252 P. 891.

2. Findings.
It is likely that any finding of a jury under this section would be merely advisory and not binding upon court. See Smith v. Richardson, 2 U. 424.

102-14-19. Appeals—Appointment of Representative Reversed, Acts Not Invalid.

When the judgment or order appointing an executor, administrator or guardian is reversed on appeal, for error and not for want of jurisdiction of the court, all lawful acts in administration upon the estate

performed by such executor, administrator or guardian, if he has qualified, are as valid as if such judgment or order were affirmed.

(C. L. 17, § 7874.)

History.
This section is practically identical with R. S. 1898, § 4043; Comp. Laws 1907, § 4043.

1. Power of district court.
Where district court, on appeal from order of probate court appointing administrator, upholds action of probate court in denying petition for appointment but makes another appointment, such action of district is beyond its jurisdiction, and will be reversed on appeal. Matter of Application of Whetstone, 9 U. 156, 36 P. 633.

102-14-20. Actions—Parties—Successor May Be Substituted for Predecessor.

Executors, administrators or guardians appointed to fill vacancies may be substituted for their respective predecessors in any action to which such predecessors were parties. (C. L. 17, § 7875.)

Cross-references.
Continuation of action by successor or representative, 104-3-19; actions by guardians, 102-13-35.

102-14-21. Id. Costs—In Discretion of Court.

When not otherwise prescribed in this title, the district court, or the supreme court on appeal from the district court, may, in its discretion, order costs to be paid by any party to the proceedings or out of the assets of the estate as justice may require. (C. L. 17, § 7876.)

Comparable provisions.
Cal. Probate Code, § 1232 (substantially the same).
Idaho Code, § 15-1516, Mont. Rev. Codes, § 10372 (similar; and execution for costs may issue).

Cross-references.
When executor, etc., personally liable, 104-44-12.

102-14-22. Id. Service on Guardian Is Service on Ward—Authority of Guardian.

Whenever an infant, insane or incompetent person has a guardian of his estate residing in this state, personal service upon the guardian of any process, notice or order of the court concerning the estate of a deceased person or any guardianship matter in which the ward is interested is equivalent to service upon the ward. Such guardian may also appear for his ward and waive any process, notice or order to show cause that an adult or a person of sound mind might waive.

(C. L. 17, § 7877.)

Comparable provisions.
Idaho Code, § 15-1518, Mont. Rev. Codes, § 10374 (similar).

Cross-references.
Guardian for insane wife, 40-3-1, 102-13-25; guardian to appear for ward, 102-13-35, 104-3-6, 104-72-5.

102-14-23. Correction of Mistakes in Settlements.

Mistakes in settlement may be corrected at any time before final settlement and discharge, and after that time by an action in equity, on such showing as will justify the interference of the court.

(C. L. 17, § 7879.)

History.
This section is practically identical with R. S. 1898, § 4048; Comp. Laws 1907, § 4048.

Cross-references.
Conclusiveness of settlement of accounts, 102-11-37; validity and conclusiveness of orders and decrees, 102-1-7, 102-1-8, 102-2-4, 102-11-37, 102-12-9, 102-14-12, 102-14-15.

1. History and construction.
This section was taken from Iowa, and conflicts with 102-11-37. They must, however, be reconciled, if that can be done. The construction placed upon this section by supreme court of Iowa was likewise adopted, and that construction is that mistakes may be corrected at any time before settlement of final account and discharge of executor or administrator, where settlement was ex parte, without notice to interested parties, and without contest. In re Raleigh's Estate, 48 U. 128, 158 P. 705.

102-14-24. Service by Publication on Personal Representative.

When the court shall make an order affecting an executor or administrator and it cannot be personally served upon him, service thereof may be made by publication of a notice, stating the substance of such order, for four weeks in some newspaper having general circulation in the county where such order was made. (C. L. 17, § 7880.)

Cross-references.
Service by publication, civil procedure, 104-5-12, 104-5-13.

102-14-25. Attorney for Minors and Nonresidents.

At or before the hearing of petitions and contests for the probate of wills, for letters testamentary or of administration, for sales of real estate and confirmations thereof, settlements, partitions and distributions of estates, setting apart homesteads, and all other proceedings where notice is required or prescribed, and before any hearing in any guardianship matter, the court may, in its discretion, appoint some competent attorney at law to represent in all such proceedings all persons interested who are minors and have no general guardian in the county, or who are nonresidents of the state, and all those interested who, though they are neither such minors nor nonresidents, are unrepresented. The order must specify the names of the parties so far as known for whom the attorney is appointed, and he is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The attorney may receive a fee, to be fixed by the court, for his services, which must be paid in the case of estates of decedents out of the funds of the estate as necessary expenses of administration, and upon distribution may be charged to the party represented by the attorney, and in guardianship matters shall be paid as the court may direct. If for any cause it becomes necessary, the court may substitute another attorney for the one first appointed, in which case the fee must be proportionately divided. The nonappointment of an attorney will not affect the validity of any of the proceedings.

(C. L. 17, § 7881.)

Comparable provisions.
Idaho Code, § 15-1514, Mont. Rev. Codes, § 10370 (substantially identical).
Iowa Code 1939, §§ 12074 to 12077 (substantially the same).

Cross-references.
Allowance of attorneys' fees, 102-11-24.

Decisions from other jurisdictions.
— Montana.
The purpose of the statute, in a proper case, is to enable the court to secure the services of an attorney to protect the rights of those who are not otherwise represented in a proceeding pending for hearing; as soon as heirs or legatees are represented, the appointment made

by the court should be terminated. State v. District Court of Second Judicial District in and for Silver Bow County, 102 Mont. 341, 57 P.2d 1227.

102–14–26. Sufficiency of Proof—Noncontested Proceedings.

In all hearings of petitions in probate matters where the petition is verified and regular in form and no objection or contest is made to the same, the judge may in his discretion accept the verified petition as sufficient proof of the facts therein alleged and make and enter findings and order or decree thereon as prayed for without requiring further testimony or evidence of such facts, or he may require additional evidence; *provided*, this section shall not apply to the hearing of petitions to probate wills or petitions for confirmation of sale of real estate.

History.
Added by L. 39, ch. 116, eff. May 9.

Cross-references.
Right of interested person to be heard, 102–14–14.

TITLE 103

PENAL CODE

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Chapter 3. Abuse of Process.
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Chapter 5. Animals, Cruelty to, etc.
Chapter 6. Arson.
Chapter 7. Assaults and Batteries.
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Chapter 10. Cemeteries.
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CHAPTER 1

GENERAL PROVISIONS *

ARTICLE 1

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* History of act. These sections grouped under the head "General Provisions" came from Chapter 1, Title 75, of R. S. 1898, and Chapter 54 of the same title; and became Chapter 1 of Title 90 of Comp. Laws 1907, and Chapter 54 of the same title.

ARTICLE 1

DEFINITIONS, ETC.

103–1–1. Title Known as "Penal Code."

This title shall be known as the Penal Code. (C. L. 17, § 7891.)

History.

This section is identical with R. S. 1898, § 1; Comp. Laws 1907, § 4051.

Comparable provisions.

Cal. Penal Code, § 1 ("The Penal Code of California"; divided into three parts: I. Of Crimes and Punishments, II. Of Criminal Procedure, III. Of the State Prison and County Jails).

Idaho Code, Title 17 (pertaining to crimes).

Iowa Code 1939, Title XXXV (pertaining to public offenses).

Mont. Rev. Codes, § 10708 ("Penal Code of Montana").

Decisions from other jurisdictions.

— Federal.

The doing of an act by one who acts as officer or agent of the United States in and about a matter which is within federal control and when engaged in the performance of duties imposed upon him by the law or authority of the United States cannot constitute a crime against the laws of the state. In re Waite, 81 F. 359 (District Court, Northern District of Iowa), aff'd 88 F. 102.

— Idaho.

An information in the language of the statute is sufficient. State v. Huff, 56 Idaho 652, 57 P.2d 1080.

Where a defendant relies upon the defense of alibi, the burden of establishing such defense is upon him, and if he succeeds, by competent evidence, in establishing a reasonable doubt in the minds of the jury as to his presence at the time and place when and where the offense was committed, when the committing of the offense by him made his presence imperative, he is entitled to an acquittal, but the character and extent of the evidence requisite to create such doubt is a matter for the jury. State v. Vanek, 59 Idaho 514, 84 P.2d 567.

The essential elements of every crime must be established beyond a reasonable doubt, and no greater proof is required to establish the corpus delicti than is required to establish any other essential element of the crime of burglary. State v. Vanek, 59 Idaho 514, 84 P.2d 567.

— Iowa.

The term "corpus delicti" means, when applied to any particular offense, that the crime charged has actually been committed by someone. It is made up of two elements, first, that a certain result has been produced, as that a building has been burned or a piece of property is not in the owner's possession, second, that someone is criminally responsible for the result. State v. Millmeier, 102 Iowa 692, 72 N. W. 275.

In general a crime is an act committed in violation of a public law forbidding it. Bopp v. Clark, 165 Iowa 697, 147 N. W. 172, 52 L. R. A. (N. S.) 493, Ann. Cas. 1916 E 417.

To be entitled to a conviction of crime, the state must first establish the corpus delicti, the fact that the alleged crime was committed by someone. State v. Cristani, 192 Iowa 615, 185 N. W. 111.

Criminal statutes are to be construed strictly and are not to be extended by construction to include any offense not clearly within the fair scope of the language employed. State v. Bunn, 195 Iowa 9, 190 N. W. 155.

Broadly speaking, the insanity which absolves one from responsibility for acts which would otherwise be criminal must be of a character which causes the act and irresistibly compels it. State v. Cooper, 195 Iowa 258, 191 N. W. 891.

All saving clauses in regard to criminal offenses are to be construed strictly in favor of the defendant. State v. Brown, 215 Iowa 600, 246 N. W. 258.

There are no common-law crimes in Iowa. State v. Campbell, 217 Iowa 848, 251 N. W. 717, 92 A. L. R. 1176.

Partial drunkenness does not make impossible the formation of a criminal intent. State v. Heinz, 223 Iowa 1241, 275 N. W. 10, 114 A. L. R. 959.

Person is presumed to have intended natural result of his intentional act. State v. Van, — Iowa —, 2 N. W.2d 748.

Motive is not crime, nor is it essential element of crime, and evidence to show motive, unsupported by incriminatory facts and circumstances, is not sufficient to make prima facie case of guilt. State v. Whisler, — Iowa —, 3 N. W.2d 525.

103–1–2. Penal Statutes Not Strictly Construed.

The rule of the common law that penal statutes are to be strictly construed has no application to these revised statutes. The provisions of these revised statutes are to be construed according to the fair im-

port of their terms with a view to effect the objects of the statutes and to promote justice. (C. L. 17, § 7892.)

History.
This section is of ancient origin in this state, being first enacted by the territorial legislature. The present section is practically identical therewith, Comp. Laws 1876, Title XXI, § 1834, and with 2 Comp. Laws 1888, § 4369, R. S. 1898, § 4052, Comp. Laws 1907, § 4052.

Comparable provisions.
Cal. Penal Code, § 4, Mont. Rev. Codes, § 10710 (substantially identical).

Cross-references.
Statutes in derogation of common law not strictly construed, 88–2–2; effect of repeal on prosecution of offenses already committed, 88–1–7, 88–1–8, 88–2–5.

1. General construction of section.
This section was adopted by territorial legislature, but it certainly would not "promote justice" to judicially construe R. S. 1933, 88–1–7 and 88–1–8 into a general jail delivery and free pardon for all offenses committed before the passage of the act. People v. Sloan, 2 U. 326.

2. City ordinances.
This section has been applied to the construction of city ordinances. For example, city ordinance prohibiting sale of intoxicating liquors was given liberal construction so as to uphold its validity. Salina City v. Lewis, 52 U. 7, 172 P. 286.

3. Jury law.
This section has been applied to the jury law, and twelve-man jury held legally capable of being impaneled by district court after statehood for trial of defendant indicted for noncapital felony before statehood. State v. Hart, 19 U. 438, 449, 57 P. 415.

4. New trials.
Notwithstanding this section, it is beyond the court's power to extend the time limited by 105–39–4. State v. Sawyer, 54 U. 275, 279, 182 P. 206.

103–1–3. Definitions.

Whenever the terms mentioned in this section are employed in this code they are employed in the senses hereafter affixed to them, except where a different sense plainly appears:

(1) The term "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law or to injure another or to acquire any advantage.

(2) The terms "neglect," "negligence," "negligent" and "negligently" import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own affairs.

(3) The term "corruptly" imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person.

(4) The terms "malice" and "maliciously" import a wish to vex, annoy or injure another person, or an intent to do a wrongful act, established either by proof or by presumption of law.

(5) The term "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission.

(6) The term "bribe" signifies any money, goods, right in action, property, thing of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given or accepted with a corrupt intent to influence unlawfully the person to whom it is given in his action, vote or opinion in any public or official capacity.

(7) When the term "person" is used in this code to designate the party whose property may be the subject of any offense, it includes this state, and any other state, government and country which may lawfully own any property within this state, and all public and private corporations, joint associations and partnerships, as well as individuals.

(C. L. 17, § 7893.)

History.

This section is practically identical with the first six subdivisions and the 17th subdivision of Comp. Laws 1876, § 1836, and this is also true with respect to 2 Comp. Laws 1888, § 4371. It is identical with R. S. 1898, § 4053; Comp. Laws 1907, § 4053.

Comparable provisions.

Cal. Penal Code, § 7, Mont. Rev. Codes, § 10713 (include similar definitions).

Idaho Code, § 17-101 (substantially the same; word "partnerships" is not contained in subd. 7).

Cross-references.

Construction of terms generally, 88-2-12.

1. "Corruptly."

Prior to adoption of amendment of 1935, it was held that under subdivision (3) defining the word "corruptly," an accusation and complaint against a member of board of education under 105-7-2 and 105-7-15, for presenting illegal claim against school district, must charge that the "defendant did knowingly, willfully and corruptly collect and receive," etc. Atwood v. Cox, 88 U. 437, 443, 55 P.2d 377. But see 105-21-19.

2. "Malice" and "maliciously."

This definition in subdivision (4) is properly given by the court in its instructions to the jury on the trial of an indictment for homicide. People v. Callaghan, 4 U. 49, 57, 6 P. 49. And it is sufficient if the court follows substantially the definition of malice as given in that subdivision. State v. Inlow, 44 U. 485, 501, 141 P. 530, Ann. Cas. 1917 A 741, applying Comp. Laws 1907, § 4053, subd. (4).

Mulice will be implied or presumed from the intentional poisoning and killing of a dog belonging to another person. State v. Coleman, 29 U. 417, 82 P. 465.

Although the owner of a dog poisoned by defendant was unknown to defendant, that fact did not preclude a finding that the poison was administered maliciously. State v. Coleman, 29 U. 417, 82 P. 465.

But see in this connection 105-21-19.

3. "Knowingly."

In proceeding against public official for receiving illegal fees, it was not error for court to define term "knowingly" in language of this section. Skeen v. Chambers, 31 U. 36, 86 P. 492. And see in this connection 105-21-19.

Decisions from other jurisdictions.

— California.

Order allowing new trial was properly granted in prosecution of crime of assault with intent to commit murder, where it appeared that the trial court gave to the jury as one of its instructions section 20 of the Penal Code, reading as follows: "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence"; and then as a definition of criminal negligence the following: "The words 'neglect,' 'negligence,' 'negligent,' and 'negligently' import a want of such attention to the nature or probable consequences of the act or omission, as a prudent man ordinarily bestows in acting in his own concerns, as defined in section 7 of the Penal Code; for, though found in the Penal Code, this definition of "negligence" is only of an act which fixes civil liability; and, in order to constitute criminal negligence, there must enter into the act some measure of wantonness or flagrant or reckless disregard of the safety of others, or willful indifference, and if no one of these elements enters into the act, the person charged cannot be held guilty of criminal negligence. People v. Driggs, 111 Cal. App. 42, 295 P. 51.

The word "willfully" as used in the criminal law implies simply the purpose or willingness to commit the unlawful act; it does not necessarily imply any specific intent to violate law or to injure another and, where specific intent is not part of the definition of the crime, such intent as is required to make out the crime is conclusively presumed from the intentional performance of the act denounced though the offender was honestly mistaken as to the meaning of the law; where specific intent enters into the definition of a crime, however, mere intentional commission of the act denounced is not enough, and therefore it is not enough to charge that it was "willfully" done; a different question is presented by the allegation that it was "maliciously" done because malice is ordinarily understood as importing bad temper toward another which, combined

with the allegation of an overt injurious act, would appear inseparable from an intent to injure another. **People v.** Faber, 29 Cal. App. (Supp.) 2d 751, 77 P.2d 921.

A. L. R. notes.

Statement by candidate regarding salary or fees of office as violation of Corrupt Practice Acts or bribery, 106 A. L. R. 493.

103-1-4. Intent to Defraud—Victim May Include a Body Corporate.

Whenever by any of the provisions of this code an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association or body politic or corporate whatever. (C. L. 17, § 7894.)

Comparable provisions.

Cal. Penal Code, § 8, Idaho Code, § 17-102, Mont. Rev. Codes, § 10714 (identical).

103-1-5. Criminal Liability Does Not Affect Civil Liability.

The omission to specify or affirm in this code any liability to damages, penalty or forfeiture, or other remedy imposed by law and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein does not affect any right to recover or enforce the same. (C. L. 17, § 7895.)

Comparable provisions.

Cal. Penal Code, § 9, Idaho Code, § 17-103, Mont. Rev. Codes, § 10715 (identical).

Cross-references.

Civil and criminal remedies do not merge, 88-2-4.

103-1-6. Public Officers and Offices of Trust—Right of Removal or Forfeiture Not Affected.

The omission to specify or affirm in this code any ground of forfeiture of a public office, or other trust or special authority conferred by law, or any power conferred by law to impeach, remove, depose or suspend any public officer or other person holding any trust, appointment or other special authority conferred by law, does not affect such forfeiture or power, or any proceeding authorized by law to carry into effect such impeachment, removal, deposition or suspension. (C. L. 17, § 7896.)

History.

This section is practically identical with R. S. 1898, § 4056; Comp. Laws 1907, § 4066.

Comparable provisions.

Cal. Penal Code, § 10 (identical).

Idaho Code, § 17-104, Mont. Rev. Codes, § 10716 (substantially identical).

Cross-references.

Misconduct in office, forfeiture and disqualification by, 103-1-11, 103-1-17, 103-26-35, 103-26-59; removal by judicial proceedings, 105-7.

1. Removal of officers.

It is not necessary that specific acts for which removal is demanded are specified in some particular section of Code; it is enough if particular acts relied on by county attorney are specified in accusation filed against officer, and that in law such acts amount to malfeasance in office. Law v. Smith, 34 U. 394, 98 P. 300.

There may thus be causes for removal of an officer under 105-7-2 which are not assigned in the Code, yet they may constitute "malfeasance in office." Accordingly, it is a salutary rule to excuse from stating under what section accusation or complaint is brought, and to excuse a reference to 105-7-15 when it might have been good under section 105-7-2. Atwood v. Cox, 88 U. 437, 470, 55 P.2d 377.

103-1-7. Military Courts—Punishment for Contempt—Powers and Rights Not Affected.

This code does not affect any power conferred by law upon any court-martial, or other military authority or officer, to impose or inflict punishment upon offenders; nor any power conferred by law upon any public body, tribunal or officer to impose or inflict punishment for a contempt. (C. L. 17, § 7897.)

Comparable provisions.
Cal. Penal Code, § 11, Mont. Rev. Codes, § 10717 (identical).

Cross-references.
Contempt, 104-45; courts-martial, 54-1-40 et seq.

103-1-8. Courts to Impose Punishments Prescribed.

The several sections of this code which declare certain crimes to be punishable as therein mentioned devolve a duty upon the court authorized to pass sentence to impose the punishment prescribed. (C. L. 17, § 7898.)

History.
This section formerly read: "to determine and impose"; in other respects it is identical with such former sections. R. S. 1898, § 4058; Comp. Laws 1907, § 4058.

Comparable provisions.
Cal. Penal Code, § 12, Idaho Code, § 17-106, Mont. Rev. Codes, § 10718 (substantially the same; " * * * to determine and impose * * *").

1. Instructions to jury.
Since the court fixes the punishment, a failure or refusal to charge the jury with respect to the extent of punishment is not reversible error. It is better practice, however, to inform the jury of the prescribed penalty. State v. Inlow, 44 U. 485, 505, 141 P. 530, Ann. Cas. 1917 A 741.

103-1-9. Id. To Determine Punishments Between Limits Prescribed.

Whenever by law the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case must, except as otherwise provided, be determined by the court authorized to pass sentence, within such limits as may be prescribed by law. (C. L. 17, § 7899.)

History.
This section is substantially similar to R. S. 1898, § 4059; Comp. Laws 1907, § 4059.

Comparable provisions.
Cal. Penal Code, § 13, Idaho Code, § 17-107, Mont. Rev. Codes, § 10719 (substantially the same).

Cross-references.
Indeterminate sentence, 105-36-20; penalty when maximum term not fixed by law, 103-1-34.

1. Indeterminate sentences.
Under this section a sentence "for an indeterminate term between ten years and life," upon conviction of second degree murder, is fatally defective. The court must impose a fixed and definite term of imprisonment within prescribed limits. Lee Lim v. Davis, 75 U. 245, 284 P. 323, 76 A. L. R. 460.

103-1-10. Privilege of Witnesses Not Extended to Prosecution for Perjury.

The various sections of this code which declare that evidence obtained upon the examination of a person as a witness cannot be received against him in any criminal proceeding do not forbid such evidence

being proved against such person upon any proceedings founded upon a charge of perjury committed in such examination. (C. L. 17, § 7900.)

Comparable provisions.
Cal. Penal Code, § 14, Idaho Code, § 17–108, Mont. Rev. Codes, § 10720 (identical).

Cross-references.
Perjury, 103–43.

103–1–11. "Crime" Defined.

A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, any of the following punishments:

(1) Death.
(2) Imprisonment.
(3) Fine.
(4) Removal from office.
(5) Disqualification to hold and enjoy any office of honor, trust or profit in this state. (C. L. 17, § 7901.)

History.
This section is practically identical with R. S. 1898, § 4061; Comp. Laws 1907, § 4061.

Comparable provisions.
Cal. Penal Code, § 15, Idaho Code, § 17–109, Mont. Rev. Codes, § 10721 (substantially identical).

Cross-references.
Removal from office by impeachment, Const. Art. VI, §§ 17 to 20, 105–6; removal by judicial proceedings, Const. Art. VI, § 21, 105–7; power of removal not affected hereby, 103–1–6.

1. Common-law offenses.
No matter how reprehensible the conduct of a person may be, yet no punishment can be inflicted without a law authorizing it; and such law must clearly cover the case. Ogden City v. McLaughlin, 5 U. 387, 389, 16 P. 721.

There are in this state no crimes or offenses, except such as are created by statute or ordinance, and a court is powerless to impose a penalty not prescribed by a statute or an ordinance. Accordingly, statute or ordinance failing to attach penalty to doing of act made a crime or offense is inoperative. Roe v. Lundstrom, 89 U. 520, 525, 57 P.2d 1128, following Moorehouse v. Hammond, 60 U. 593, 209 P. 883.

103–1–12. Crimes Divided Into Felonies and Misdemeanors.

Crimes are divided into:

(1) Felonies; and,
(2) Misdemeanors. (C. L. 17, § 7902.)

Comparable provisions.
Cal. Penal Code, § 16, Idaho Code, § 17–110, Mont. Rev. Codes, § 10722 (identical).

Iowa Code 1939, § 12689 (dividing public offenses into felonies and misdemeanors).

103–1–13. "Felony," "Misdemeanor" Defined.

A felony is a crime which is or may be punishable with death, or by imprisonment in the state prison. Every other crime is a misdemeanor. (C. L. 17, § 7903.)

History.
This section is identical with Comp. Laws 1876, p. 568, § 1845, except that words "state prison" formerly read "penitentiary." It is absolutely identical with R. S. 1898, § 4063; Comp. Laws 1907, § 4063.

Comparable provisions.
Cal. Penal Code, § 17, Idaho Code, § 17–111, Mont. Rev. Codes, § 10723 (include same definitions).

1. Determination of grade of offense.
Under this section the offense is a felony, whether it is so characterized or

not, provided it is punishable by imprisonment in the state prison. United States v. Jones, 5 U. 552, 18 P. 233.

2. Offenses against juveniles.

On petition for habeas corpus, where it appeared that petitioner was adjudged in contempt of court for failing to answer question whether defendant, in prosecution for having carnal knowledge of petitioner, had had sexual intercourse with petitioner on dates other than date of the offense being tried, held the objection or grounds of relevancy to the question should have been sustained and petitioner's plea of privilege should have been allowed, for although petitioner was a minor, she would have subjected herself to degradation had she testified in the affirmative, and although she was below the age to consent to the charge against the defendant, she was susceptible of being proceeded against in the juvenile court. In re Sadleir, 97 U. 291, 85 P.2d 810.

A. L. R. notes.

Character as felony or misdemeanor of offense for which a fine is provided as affected by provision for imprisonment until fine is satisfied, 127 A. L. R. 1280.

103–1–14. Acts Prohibited or Declared Unlawful Deemed Misdemeanors.

Where the performance of any act is prohibited by any statute, or declared to be unlawful, and no penalty for the violation of such statute is imposed by any statute, the doing of such act is a misdemeanor. (C. L. 17, § 8014.)

Comparable provisions.

Iowa Code 1939, § 12893 (substantially identical).

A. L. R. notes.

Character as felony or misdemeanor of offense for which a fine is provided as affected by provision for imprisonment until fine is satisfied, 127 A. L. R. 1286.

103–1–15. Punishments for Felony.

Except in cases where a different punishment is prescribed by law, every offense declared to be a felony is punishable by imprisonment in the state prison not exceeding five years. In all cases where a corporation is convicted of an offense for the commission of which a natural person would be punishable as for a felony and there is no other punishment prescribed by law, such corporation is punishable by a fine of not less than $500 and not more than $10,000. (C. L. 17, § 7904.)

Comparable provisions.

Cal. Penal Code, § 18 (substantially identical with first sentence herein).

Mont. Rev. Codes, § 10724 (includes provision substantially identical to first sentence herein).

Cross-references.

Criminal action against corporation, 105–52.

103–1–16. Punishments for Misdemeanor.

Except in cases where a different punishment is prescribed by law, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months or by a fine in any sum less than $300, or by both. In all cases where a corporation is convicted of an offense for the commission of which a natural person would be punishable as for a misdemeanor and there is no other punishment prescribed by law, such corporation is punishable by a fine not exceeding $1,000. (C. L. 17, § 7905.)

History.

This section is practically identical with R. S. 1898, § 4065; Comp. Laws 1907, § 4065. It does not differ materially from Comp. Laws 1876, § 1847, in so far as the first sentence thereof is concerned.

Because of the errors made in the compilation of 1888 with respect to the punishment for gaming, the legislature

restored this section, which was originally Laws 1878, Ch. 4, p. 5. See People v. Reggel, 8 U. 21, 28 P. 955.

Comparable provisions.

Cal. Penal Code, § 19, Mont. Rev. Codes, § 10725 (same as first sentence herein, except as reading "* * * by fine not exceeding five hundred dollars, or by both").

1. Violation of game laws.

In view of provisions of this section fixing maximum penalty for misdemeanors, 30–0–47, fixing minimum but no maximum penalty for shooting game out of season, is valid, minimum fixed therein being less than maximum provided herein. Rasmussen v. Zundel, 67 U. 456, 248 P. 135.

103–1–17. Felonious Misconduct in Office Forfeits Office and Disqualifies.

The conviction of any state, county, city, town or precinct officer of a felony involving misconduct in office involves as a consequence, in addition to the punishment prescribed by law, a forfeiture of his office, and disqualifies him ever afterwards from holding any public office in this state. (C. L. 17, § 7906.)

History.

This section is identical with R. S. 1898, § 4066; Comp. Laws 1907, § 4066.

Cross-references.

Disqualification by crime, 103–26–35, 103–26–61; power of removal not affected, 103–1–6, 103–1–11, 103–1–17; removal by judicial proceedings, Const. Art. VI, § 21, 105–7.

1. Operation and effect of section.

Under this section, if an officer were found guilty of the felony denounced in 103–26–7, this would cause his removal without any further action or proceeding. Law v. Smith, 34 U. 394, 414, 98 P. 300.

103–1–18. "Habitual Criminal" Defined—Punishment.

Whoever has been previously twice convicted of crime, sentenced and committed to prison, in this or any other state, or once in this and once at least in any other state, for terms of not less than three years each, shall, upon conviction of a felony committed in this state, other than murder in the first or second degree, be deemed to be an habitual criminal, and shall be punished by imprisonment in the state prison for not less than fifteen years; *provided*, that if the person so convicted shall show to the satisfaction of the court before which such conviction is had that he was released from imprisonment upon either of such sentences upon a pardon granted on the ground that he was innocent, such conviction and sentence shall not be considered as such under this section. (C. L. 17, § 7907.)

History.

This section is practically identical with R. S. 1898, § 4067; Comp. Laws 1907, § 4067.

1. Persistent violation of Liquor Control Act.

In prosecution for persistent violation of former Liquor Prohibition Law, wherein unlawful possession was relied upon as last offense, prosecutor not entitled to amend information at close of evidence, under 105–17–3, so as to add charge of unlawful manufacture, since such was not offense for which defendant was examined and committed by magistrate. State v. Caputo, 69 U. 266, 254 P. 141.

In prosecution for persistent violation of former Liquor Prohibition Law, defendant could not interpose defense that he was unfamiliar with language and unaware of nature of prior charge to which he had pleaded guilty. State v. Starvos, 69 U. 181, 253 P. 204.

As to procedure where persistent violation of Liquor Control Act is charged, see 46–0–231.

2. Proof of former conviction.

Certified copy of judgment of conviction against one of same name is not conclusive of prior conviction in absence of proof it was same person, and former conviction is question of fact for determination of jury under Const. Art. I,

§ 12, and 105-1-8, subd. (6), and 105-32-4. State v. Bruno, 69 U. 444, 256 P. 109 (decided under former Liquor Prohibition Law).

103-1-19. Union of Act and Intent Necessary.

In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence. (C. L. 17, § 7908.)

History.

This section is identical with Comp. Laws 1876, § 1848; Comp. Laws 1888, § 4383; R. S. 1898, § 4068; Comp. Laws 1907, § 4068.

This section has long appeared in the Penal Code under the head "Preliminary Provisions." State v. Blue, 17 U. 175, 180, 53 P. 978.

Comparable provisions.

Cal. Penal Code, § 20, Idaho Code, § 17-114, Mont. Rev. Codes, § 10726 (identical).

1. Operation and effect of section.

Where a person violates a statute making an act criminal, and no reference is made in the statute to a criminal intent, this general provision contained in this section must control, and it is error to withhold the question of intent from the jury. The statute at most simply shifts the burden of proof, and does not dispense with the criminal intent. State v. Blue, 17 U. 175, 180, 53 P. 978.

2. Larceny.

The mere fact that property is destroyed maliciously and with intent to deprive owner permanently of its use does not constitute larceny where there is no mental intent to steal. State v. Allen, 56 U. 37, 189 P. 84.

In prosecution for grand larceny of steer, trial court's refusal to permit defendant to testify as to his intent and belief in possessing and claiming animal was erroneous in view of this section. State v. Sawyer, 54 U. 275, 182 P. 206.

3. Murder.

Intent is essential element in crime of first degree murder, and it is reversible error to refuse to allow defendant to testify in regard thereto. State v. Stenback, 78 U. 350, 365, 2 P.2d 1050, 79 A. L. R. 878.

4. Public officers.

Under this section a public officer is not punishable for an act committed innocently, without any criminal intent. State v. Blue, 17 U. 175, 180, 53 P. 978, applying Comp. Laws 1888, § 4383.

5. Proof of other crimes.

In forgery prosecution, in which defendant denied indorsing check, admission in evidence of other checks, allegedly to prove intent, indorsements upon which accomplice testified were made at same time indorsement involved in prosecution was made, held, prejudicial error as tending to prove other and distinct offenses. State v. Leek, 85 U. 531, 39 P.2d 1091.

Decisions from other jurisdictions.

— California.

When the court charged the jury on the subject of negligence, in prosecution of crime of assault with intent to commit murder, the instruction should have been so framed as to advise the jury as to the kind of negligence characterized as "criminal" by section 20 of the Penal Code; instruction defining "negligence" according to language of section 7 of the Penal Code did not properly define to the jury the term "criminal negligence," for the definition of "negligence" as contained in section 7 of the Penal Code is only of an act which fixes civil liability, being the definition of the kind of act which fixes responsibility upon, for instance, drivers of automobiles, where no criminal element whatever is involved. People v. Driggs, 111 Cal. App. 42, 295 P. 51.

— Idaho.

The term "criminal negligence," as used in section 17-114 of the Idaho Code, does not mean merely the failure to exercise ordinary care, or that degree of care which an ordinarily prudent person would exercise under like circumstances; it means gross negligence; it is such negligence as amounts to a reckless disregard of consequences and of the rights of others. State v. McMahan, 57 Idaho 240, 65 P.2d 156.

103-1-20. Intent, How Manifested—"Person of Unsound Mind" Defined.

The intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots, nor lunatics, nor affected with insanity. (C. L. 17, § 7909.)

History.
This section is identical with Comp. Laws 1876, § 1849; 2 Comp. Laws 1888, § 4384; R. S. 1898, § 4069; Comp. Laws 1907, § 4069.

Comparable provisions.
Cal. Penal Code, § 21 (identical).
Idaho Code, § 17–115 (substantially identical).
Mont. Rev. Codes, § 10727 (identical).

1. Determination of sanity or insanity.
Question of sanity or insanity of anyone accused of commission of crime is question of fact primarily for jury to determine. State v. Hadley, 65 U. 109, 234 P. 940.
Further as to insanity and lunacy as defense to crime, see 103–1–40.

2. Presumptions and burden of proof.
Anyone charged with an offense is presumed to be sane, and it is incumbent upon defendant to rebut that presumption before defense of insanity can be submitted to jury. State v. Hadley, 65 U. 109, 234 P. 940. The presumption of sanity is a legal presumption. State v. Mewhinney, 43 U. 135, 134 P. 632, L. R. A. 1916 D 590, Ann. Cas. 1916 C 537.
When testimony has been introduced to overcome presumption of sanity, burden shifts and it is incumbent upon state to prove beyond reasonable doubt that defendant was sane at time of commission of offense. State v. Hadley, 65 U. 109, 234 P. 940.

3. Proof of intent.
As a matter of general law intent and malice may be proven both by direct and by circumstantial evidence. State v. Dewey, 41 U. 538, 127 P. 275.

103–1–21. Effect of Intoxication.

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive or intent with which he committed the act. (C. L. 17, § 7910.)

History.
This section is identical with Comp. Laws 1876, § 1850; 2 Comp. Laws 1888, § 4385; R. S. 1898, § 4070; Comp. Laws 1907, § 4070.

Comparable provisions.
Cal. Penal Code, § 22 (identical).
Idaho Code, § 17–116 (identical).
Mont. Rev. Codes, § 10728 (includes similar provision).

1. Effect of intoxication in criminal cases.
The law in this jurisdiction, as to the effect of intoxication in those crimes which require the actual existence of a particular purpose, motive, or intent to constitute a particular species or degree of crime, is well settled both by decisions of supreme court of the United States and of our supreme court. State v. Stenback, 78 U. 350, 358, 2 P.2d 1050, 79 A. L. R. 878, collecting prior cases in opinion.
This section is not limited in its application to the effect that drunkenness may have upon intent, but it also applies to purpose and motive. Thus the legislature has provided that intoxication is a proper subject of inquiry as to purpose, motive and intent. Accordingly, instruction in homicide case, in which drunkenness at time of commission of crime is interposed as defense, must not only inform the jury with regard to its effect upon intent, but must also instruct with regard to ability of accused to deliberate and premeditate. State v. Stenback, 78 U. 350, 2 P.2d 1050, 79 A. L. R. 878.

2. Instructions.
Where in a prosecution for homicide the evidence showed that the accused was an epileptic, it is error to give an instruction merely in the language of this section. Jury should be told what effect accused's mental condition might have on degree of homicide. State v. Anselmo, 46 U. 137, 148 P. 1071. This case is explained in State v. Cerar, 60 U. 208, 215, 207 P. 597.
This section, in effect, declares that accused may show that he was in such a state of intoxication at time crime was committed as to be incapable of forming the necessary intent. If a charge abridges and deprives defendant of full benefit of this provision, it is reversible error; as for example, where court in homicide case charges that evidence of drunkenness is admissible only on question of premeditation, followed by instructions that in cases of premeditated murder drunkenness is

immaterial. State v. Dewey, 41 U. 538, 127 P. 275. This case is explained in State v. Cerar, 60 U. 208, 215, 207 P. 597.

If the evidence in a homicide case tends to show that the mind of the accused was affected by the excessive use of intoxicating liquor at the time of the alleged crime, this is sufficient to entitle him to a proper instruction on the law applicable to intoxication. State v. Stenback, 78 U. 350, 360, 2 P.2d 1050, 79 A. L. R. 878.

Form of correct instruction is given in State v. Stenback, 78 U. 350, 356, 2 P.2d 1050, 79 A. L. R. 878, and it has the stamp of approval of the United States supreme court.

3. Question for jury.

On trial of indictment for murder, in which defense is that defendant was under influence of intoxicating liquor and marijuana, so that he was incapable of forming intent to kill, it is for jury to determine from the evidence whether defendant was in fact so intoxicated by liquor or his faculties benumbed by the use of marijuana that he was incapable of forming or in fact had no premeditated motive or design to kill deceased. State v. Diaz, 76 U. 463, 473, 290 P. 727.

In prosecution for murder in first degree, where evidence was introduced at trial tending to show that defendant was intoxicated at time of alleged homicide, whether accused was in such condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, became material subject of consideration for jury. Hopt v. Utah, 104 U. S. 631, 26 L. Ed. 873.

103-1-22. Acts Punishable in Different Ways, Punishment Limited to One—Jeopardy.

An act or omission which is made punishable in different ways by different provisions of this code may be punished under any one of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other. (C. L. 17, § 8520.)

History.

This section is substantially identical with R. S. 1898, § 4488; Comp. Laws 1907, § 4488.

Cross-references.

A person shall not twice be put in jeopardy for the same offense, Const. Art. I, § 12, 105-1-10, 105-8-8, 105-8-9, 105-25-8, 105-25-11 to 105-25-13.

1. Scope and operation of section.

This section cannot be invoked where it would produce incongruous as well as inequitable results. Therefore it cannot be considered as intended to authorize enforcement of two criminal statutes, making the same offense both a felony and a misdemeanor. State v. Carmen, 44 U. 353, 140 P. 670.

2. Automobile accidents.

Conviction of motorist for reckless driving held not bar to subsequent prosecution for involuntary manslaughter. State v. Empey, 65 U. 609, 239 P. 25, 44 A. L. R. 558.

103-1-23. Acts Punishable Both by Local and Foreign Law.

An act or omission declared punishable by this code is not less so because it is also punishable under the laws of another state, government or country, unless the contrary is expressly declared.

(C. L. 17, § 8521.)

103-1-24. Id. Acquittal or Conviction Abroad, a Defense.

Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another state, government or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense.

(C. L. 17, § 8522.)

Cross-references.

Similar provisions, 105-8-8, 105-8-9; conviction, acquittal, or once in jeopardy a bar, 105-25-13.

103–1–25. An Act May Be Both a Crime and a Contempt.

A criminal act is not less punishable as a crime because it is also declared to be punishable as a contempt. (C. L. 17, § 8523.)

Cross-references.
Contempt generally, 104–45.

103–1–26. Id. Mitigation.

When it appears, at the time of passing sentence upon a person convicted upon indictment or information, that such person has already paid a fine or suffered an imprisonment for the act of which he stands convicted, under an order adjudging it a contempt, the court authorized to pass sentence may mitigate the punishment to be imposed, in its discretion. (C. L. 17, § 8524.)

103–1–27. Unlawful Sending of Letter—When Offense Complete.

In the various cases in which the sending of a letter is made criminal by law the offense is deemed complete from the time when such letter is deposited in any post office, or any other place, or delivered to any person, with intent that it shall be forwarded. (C. L. 17, § 8525.)

Cross-references.
Sending threatening letter, 103–17–6, 103–60–3.

103–1–28. Failure to Act Not Punishable, if Act Performed by Another.

No person is punishable for an omission to perform an act where such act has been performed by another person acting in his behalf and competent by law to perform it. (C. L. 17, § 8526.)

103–1–29. "Attempts" Defined.

Any act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit a crime. Any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt, unless the court, in its discretion, discharges the jury and directs such person to be tried for such crime. (C. L. 17, § 8527.)

History.
This section is practically identical with R. S. 1898, § 4495; Comp. Laws 1907, § 4495.

Comparable provisions.
Cal. Penal Code, § 663, Idaho Code, § 17–305 (substantially identical with second sentence herein).
Mont. Rev. Codes, § 11590 (substantially identical).

Cross-references.
Description in indictment of person upon whom injury attempted, 105–21–22; attempts to kill, 103–28–13, 103–28–14; assault with intent to commit felonies, 103–7–7 to 103–7–10.

1. Attempts to commit crime in general.

An attempt to commit crime consists of three elements: (a) the intent to commit the crime; (b) the performance of some act towards the commission of the crime; and (c) failure to consummate its commission. The failure to consummate the crime is an essential element where the charge is an attempt to commit a named crime. State v. Prince, 75 U. 205, 214, 284 P. 108.

2. Attempt to commit extortion.

In a prosecution for extortion, jury may be instructed that defendant might be found guilty of attempted extortion, and a verbal threat is "any act done"

towards commission of crime within meaning of this section. State v. Prince, 75 U. 205, 215, 284 P. 108.

3. Attempt to commit rape.

This section applies to an assault upon a female 15 years of age with intent to have carnal knowledge, under 103-51-19. State v. Benson, 46 U. 74, 148 P. 445.

Assault always precedes completed offense of rape. State v. Blythe, 20 U. 378, 58 P. 1108.

Under this section information charging that accused unlawfully and feloniously did attempt to carnally know and have sexual intercourse with a certain female over the age of 13 and under 18, she being an unmarried female, sufficiently charged public offense, as against attack made after verdict. State v. Evans, 27 U. 12, 73 P. 1047.

Evidence in action for attempt to commit statutory rape, held insufficient to show an overt act tending towards the commission of the crime, even though alleged victim could not have consented to the act because of her age. State v. Mortensen, 95 U. 541, 83 P.2d 261. (Hanson and Larson, JJ., dissenting.)

On prosecution for rape of six-year-old girl, held that charge of rape necessarily included charge of assault with intent to commit rape. State v. Blythe, 20 U. 378, 58 P. 1108.

In prosecution for assault with intent to commit rape, under 103-7-7, refusal of court to instruct jury that defendant could be convicted of simple assault was reversible error. State v. Hyams, 64 U. 285, 230 P. 349.

On prosecution for rape of six-year-old girl, held that, under evidence, trial court did not err in charging jury that defendant might be convicted of assault with intent to commit rape. State v. Blythe, 20 U. 378, 58 P. 1108.

Where defendant, charged with rape of six-year-old girl, was convicted of assault with intent to commit rape, held that, even though from evidence it might appear that rape was actually completed, jury had power to convict defendant of lesser offense, however illogical conviction of such offense might seem, and that jury's finding that defendant was guilty of lesser offense could not be regarded as injurious, but only as advantageous, to defendant. State v. Blythe, 20 U. 378, 58 P. 1108.

Decisions from other jurisdictions. — Montana.

Conviction of attempt to commit rape was affirmed, the charge being based upon the provisions of section 11590 of the Revised Codes, the material part of which reads as follows: "An act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime." State v. Stevens, 104 Mont. 189, 65 P.2d 612.

A. L. R. notes.

What conduct amounts to overt act done towards commission of murder so as to sustain charge of attempt to murder, 98 A. L. R. 918; what constitutes attempt to commit robbery, 55 A. L. R. 714.

103-1-30. Id. Penalties.

Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempt, as follows:

(1) If the offense so attempted is punishable by imprisonment in the state prison for five years or more, or by imprisonment in a county jail, the person guilty of such attempt is punishable by imprisonment in the state prison or in a county jail, as the case may be, for a term not exceeding one-half the longest term of imprisonment prescribed upon a conviction of the offense so attempted; *provided*, that in case such longest term is for life, the imprisonment shall be for not more than twenty years.

(2) If the offense so attempted is punishable by imprisonment in the state prison for not more than five years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one year.

(3) If the offense so attempted is punishable by a fine, the offender convicted of such attempt is punishable by a fine not exceeding one-

half the largest fine which may be imposed upon a conviction of the offense so attempted.

(4) If the offense so attempted is punishable by imprisonment and by a fine, the offender convicted of such attempt may be punished by both imprisonment and fine not exceeding one-half the longest term of imprisonment and one-half the largest fine which may be imposed upon a conviction for the offense so attempted. (C. L. 17, § 8528.)

History.
This section is practically identical with Comp. Laws 1888, § 4744, except that there was no proviso to subdivision (1), and the word "penitentiary" was used instead of "state prison." The section is identical with R. S. 1898, § 4496; Comp. Laws 1907, § 4496.

1. Attempt to commit extortion.
The penalty provided by 103–17–8, and not the penalty provided by this section, is the one to be inflicted for unsuccessful attempt to commit the crime of extortion. State v. Prince, 75 U. 205, 216, 284 P. 108.

2. Attempt to commit murder.
Under former analogous statute, held that defendant who was convicted of attempt to commit murder might be sentenced to 12 years' imprisonment in state prison, although it was uncertain that he would have lived 24 years if he had committed murder and been sentenced to imprisonment for life. In re De Camp, 15 U. 158, 49 P. 823, applying section 4744 of Comp. Laws 1888.
Attempts to murder otherwise than by poisoning or assault were included in general description of attempted crimes defined in former analogous statute. In re De Camp, 15 U. 158, 49 P. 823.

103–1–31. Id. Failure of Attempt but Commission of Another Crime.

The next two preceding sections do not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed. (C. L. 17, § 8529.)

103–1–32. When Time of Imprisonment Commences—Conviction of Several Crimes.

When any person is convicted of two or more crimes, either before or after sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be sentenced, or at the termination of the second or other subsequent term of imprisonment, as the case may be. (C. L. 17, § 8530.)

History.
This section formerly read: "before sentence has been pronounced," but in other respects it is identical with R. S. 1898, § 4498; Comp. Laws 1907, § 4498; 2 Comp. Laws 1888, § 4746.

Cross-references.
Similar section, 105–36–14.

1. Effect of section.
This section is largely declaratory of pre-existing law. People v. Flynn, 7 U. 378, 382, 26 P. 1114, applying Comp. Laws 1888, § 4746, and quoting Bishop's Criminal Law.

2. Single and separate punishments.
Where there are several charges in different counts of an indictment against the same person for the same act or transaction, but one punishment can be imposed; but where the acts or transactions are different, and constitute different offenses, and belong to the same class, and may be properly joined, separate punishments may be imposed on each count. United States v. Groesbeck, 4 U. 487, 11 P. 542 (rehearing denied 11 P. 622 [not officially reported]), followed in United States v. Bromley, 4 U. 498, 11 P. 619.

103–1–33. Id. Temporary Release and Return.

The term of imprisonment fixed by the judgment in a criminal action commences to run only upon the actual delivery of the defendant at the place of imprisonment, and if thereafter during such term the defendant by any legal means is temporarily released from such imprisonment and subsequently returned thereto, the time during which he was at large must not be computed as part of such term. (C. L. 17, § 8531.)

Cross-references.
Delivery of defendant after judgment, 105–37–3, 105–37–4.

103–1–34. Sentence—When Minimum Term of Imprisonment Fixed and Maximum Not Fixed.

Whenever any person is declared punishable for a crime by imprisonment in the state prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court authorized to pronounce judgment upon such conviction shall sentence such offender to imprisonment for an indefinite term limited by the minimum term prescribed and the term of his natural life.
(C. L. 17, § 8532.)

Cross-references.
Indeterminate sentence, 105–36–20; court to determine and impose punishment, 103–1–8, 103–1–9.

103–1–35. Id. For Less than Life—Suspends Civil Rights and Forfeits Private Trusts and Public Offices.

A sentence of imprisonment in the state prison for any term less than for life suspends all civil rights of the person so sentenced during such imprisonment, and forfeits all private trusts and all public offices, authority or power. (C. L. 17, § 8533.)

History.
This section is substantially similar to 2 Comp. Laws 1888, § 4749. It is identical with R. S. 1898, § 4501; Comp. Laws 1907, § 4501.
There is a similar statute in California. People v. Flynn, 7 U. 378, 380, 26 P. 1114.

1. Consequences of conviction of a felony.
Under this section, no consequences follow a conviction of a felony, except those declared thereby. People v. Flynn, 7 U. 378, 26 P. 1114, applying Comp. Laws 1888, § 4749.

2. Trial while in penitentiary.
In spite of this section, a convict may be tried and sentenced for a criminal offense committed in trying to escape from the state prison, even though the trial and sentence were had before his term of imprisonment had expired. People v. Flynn, 7 U. 378, 26 P. 1114, applying Comp. Laws 1888, § 4749.

103–1–36. Id. For Life—Prisoner Deemed Civilly Dead.

A person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead. (C. L. 17, § 8534.)

History.
This section is practically identical with 2 Comp. Laws 1888, § 4750, and is identical with R. S. 1898, § 4502; Comp. Laws 1907, § 4502.

1. Effect of section.
This section is largely declaratory of pre-existing law. People v. Flynn, 7 U. 378, 382, 26 P. 1114, applying 2 Comp. Laws 1888, § 4750, and quoting Bishop's Criminal Law.

103–1–37. Id. Exceptions.

The provisions of the two next preceding sections must not be construed to render the persons therein mentioned incompetent as witnesses upon the trial of a civil or criminal action or proceeding, or incapable of making and acknowledging a sale or conveyance of property, or of making a last will and testament, or of maintaining a civil action, or of doing such other acts as are permitted by law.

(C. L. 17, § 8535.)

Cross-references.
Certain criminal ineligible to vote, Const. Art. IV, § 6; witnesses in prison, 104–49–16.

103–1–38. Person of Prisoner Under Protection of Law.

The person of a convict sentenced to imprisonment in the state prison is under the protection of the law, and any injury to his person, not authorized by law, is punishable in the same manner as if he were not convicted or sentenced. (C. L. 17, § 8536.)

Cross-references.
Inhumanity to prisoner, 103–26–53, 103–26–56; prisoners not to be treated with unnecessary rigor, Const. Art. I, § 9.

103–1–39. Property of Prisoner Not Forfeited—Exceptions.

No conviction of any person for crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law, and all forfeitures to this state in the nature of a deodand, or where any person shall flee from justice, are abolished. (C. L. 17, § 8537.)

Cross-references.
Bill of attainder forbidden, Const. Art. I, § 18.

ARTICLE 2

Persons Liable to Punishment

103–1–40. Who Are Capable of Committing Crime.

All persons are capable of committing crimes, except those belonging to the following classes:

(1) Children under the age of seven years.

(2) Children between the ages of seven years and fourteen years, in the absence of clear proof that at the time of committing the act charged against them they knew its wrongfulness.

(3) Idiots.

(4) Lunatics and insane persons.

(5) Persons who commit the act or make the omission charged under an ignorance or mistake of fact which disproves any criminal intent.

(6) Persons who commit the act charged without being conscious thereof.

(7) Persons who commit the act or make the omission charged through misfortune or by accident, when it appears that there is no evil design, intention or culpable negligence.

(8) Married women, unless the crime is punishable with death, acting under the threats, command or coercion of their husbands.

(9) Persons, unless the crime is punishable with death, who commit the act or make the omission charged under threats or menaces sufficient to show that they have reasonable cause to believe, and do believe, their lives will be endangered if they refuse. (C. L. 17, § 7915.)

History.

This section is practically identical with Comp. Laws 1876, § 1862; 2 Comp. Laws 1888, § 4387; R. S. 1898, § 4071; Comp. Laws 1907, § 4071.

Comparable provisions.

Cal. Penal Code, § 26, Idaho Code, § 17-201, Mont. Rev. Codes, § 10729 (substantially identical, except that in lieu of subds. 1 and 2 appears the following in the California and Idaho provisions: "Children under the age of fourteen years, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness"; the California and Montana provisions are worded in part as follows: "Married women [except for felonies] * * *").

Cross-references.

Inquiry into insanity of defendant, 105-37, 105-49.

1. Children.

This section does not refer to persons between the ages of 14 and 18 years. Sadleir v. Young, 97 U. 291, 300, 85 P.2d 810.

Child of 12 years of age may violate law and commit offense against person or property the same as an adult person, and defense of justification on part of defendant who shot boy attempting to burglarize his rabbit pens was available under 103-28-10, subd. (2). State v. Terrell, 55 U. 314, 186 P. 108, 25 A. L. R. 497.

2. Corporations.

The liability of corporations for crime is a matter of general law. American Fork City v. Charlier, 43 U. 231, 238, 134 P. 739.

3. Lunatics and insane persons.

4. — in general.

Insanity is effective in warding off or reducing punishment for crime only when it renders the person so afflicted irresponsible or partly irresponsible. A reasonable doubt in the minds of the jury as to the sanity of the accused entitles him to an acquittal. State v. Green, 78 U. 580, 597, 6 P.2d 177, opinion of Mr. Justice Hansen discussing the defense at length, and enumerating the "three manners" in which accused must be afflicted to be legally irresponsible.

Merely because accused's mind was unsound or affected with insanity is not sufficient to warrant his acquittal. Nor is loss of conscience or judgment sufficient. State v. Green, 78 U. 580, 600, 6 P.2d 177.

Irresistible impulse, to be a defense to crime, must arise solely from a mental disease. State v. Green, 78 U. 580, 601, 6 P.2d 177.

Evidence of insanity of collateral blood relatives of the person being investigated for insanity is a proper matter of inquiry. State v. Green, 78 U. 580, 604, 6 P.2d 177.

5. — determination of sanity of accused.

In this state the sanity of a person charged with crime may be determined at any stage of the proceeding against him in the manner provided by law. An insane person is incapable of committing crime. State v. Green, 88 U. 491, 496, 55 P.2d 1324. See 105-49.

6. — right and wrong test.

In this state the test of responsibility for a criminal act, when unsoundness of mind is set up as a defense, is the capacity of the defendant to distinguish between right and wrong at the time, and with respect to the act which is the subject of inquiry. People v. Calton, 5 U. 451, 460, 16 P. 902, rev'd on another point in 130 U. S. 83, 32 L. Ed. 870, 9 S. Ct. 435; State v. Mewhinney, 43 U. 135, 147, 134 P. 632, L. R. A. 1916 D 590, Ann. Cas. 1916 C 537.

In this state where on a trial for homicide defendant, in support of his plea of not guilty, relies upon the defense that he was insane at the time of the alleged homicide, the rule is that one who does not know the nature and quality of his act, or does not know that the act is wrong, is legally insane. State v. Green, 78 U. 580, 599, 6 P.2d 177.

7. — presumptions and burden of proof.

In the absence of evidence, sanity is presumed to exist without evidence of its existence, thus casting on defendant duty of going forward with the evidence. But when evidence tending to show that the accused was insane enters the case, the presumption of sanity disappears from the case, and the jury is no longer concerned with the presumption, but must determine the fact of

sanity or insanity solely from the evidence. State v. Green, 78 U. 580, 592, 6 P.2d 177; State v. Hadley, 65 U. 109, 234 P. 940.

When testimony has been introduced to overcome presumption of sanity, burden shifts and it is incumbent upon state to prove beyond reasonable doubt that defendant was sane at time of commission of offense. State v. Hadley, 65 U. 109, 234 P. 940.

8. — questions of law and fact.

It is the duty of the trial judge and not of the jury to determine when there is sufficient evidence to raise an issue as to the sanity or insanity of the accused. The trial judge should submit the issue to the jury if he thinks that there is some evidence tending to show accused's insanity at time of the alleged offense. State v. Green, 78 U. 580, 596, 6 P.2d 177. In this connection, see 105-49-3 et seq.

Question of sanity or insanity of anyone accused of commission of crime is question of fact primarily for jury to determine. State v. Hadley, 65 U. 109, 234 P. 940.

9. — instructions.

Instructions as to insane delusions or hallucinations will not be given in absence of supporting evidence. State v. Green, 78 U. 580, 601, 6 P.2d 177.

A. L. R. notes.

Constitutionality, construction and application of statutes relating to persons irresponsible as to sexual matters, 126 A. L. R. 535.

Constitutionality of statute relating to insanity as defense to crime, 74 A. L. R. 265.

Criminal responsibility of one co-operating in offense which he is incapable of committing personally, 131 A. L. R. 1322.

Criminal responsibility of one who acts as decoy to detect commission of crime, 120 A. L. R. 1506.

Irresistible impulse as an excuse for crime, 70 A. L. R. 659.

Reliance upon advice of counsel as affecting criminal responsibility, 133 A. L. R. 1055.

Remedy of one convicted of crime while insane, 121 A. L. R. 267.

Subnormal mentality as defense to crime, 44 A. L. R. 584.

103-1-41. Who Are Liable to Punishment.

The following persons are liable to punishment under the laws of this state:

(1) All who commit, in whole or in part, any crime within this state.

(2) All who commit any offense without this state which, if committed within this state, would be larceny, robbery or embezzlement under the laws of this state, and bring the property stolen or embezzled, or any part of it, or are found with it, or any part of it, within this state.

(3) All who, being out of this state, cause or aid, advise or encourage, another person to commit a crime within this state, and are afterwards found therein. (C. L. 17, § 7916.)

History.

This section was Comp. Laws 1876, § 1853; 2 Comp. Laws 1888, § 4388; R. S. 1898, § 4072; Comp. Laws 1907, § 4072, and is in many respects identical therewith.

Comparable provisions.

Cal. Penal Code, § 27 (substantially identical).

Idaho Code, § 17-202, Mont. Rev. Codes, § 10730 (subds. 1 and 3 are identical; subd. 2 is worded as follows: "2. All who commit larceny or robbery out of this state, and bring to, or are found with the property stolen, in this state").

ARTICLE 3

Parties to Crime

103-1-42. Principals and Accessories.

Parties to crimes are classified as:

(1) Principals; and,

(2) Accessories. (C. L. 17, § 7918.)

History.
This section is identical with Comp. Laws 1876, § 1854; 2 Comp. Laws 1888, § 4389; R. S. 1898, § 4073; Comp. Laws 1907, § 4073.

Comparable provisions.
Cal. Penal Code, § 30, Idaho Code, § 17-203, Mont. Rev. Codes, § 10731 (substantially identical).

Cross-references.
Compounding or concealing crimes, 103-26-58; principals and accessories, 105-21-39; principals outside state, 105-8-1; jurisdiction over principal and accessory, 105-8-6, 105-8-7.

103-1-43. Principals Defined.

All persons concerned in the commission of a crime, either felony or misdemeanor, whether they directly commit the act constituting the offense or aid and abet in its commission or, not being present, have advised and encouraged its commission, and all persons counseling, advising or encouraging children under the age of fourteen years, lunatics or idiots to commit any crime, and all persons who by fraud, contrivance or force occasion the drunkenness of another for the purpose of causing him to commit any crime, or who by threats, menaces, command or coercion compel another to commit any crime, are principals in any crime so committed. (C. L. 17, § 7919.)

History.
This section is practically identical with Comp. Laws 1876, § 1855; 2 Comp. Laws 1888, p. 563, § 4390; R. S. 1898, § 4074; Comp. Laws 1907, § 4074.

Comparable provisions.
Cal. Penal Code, § 31, Idaho Code, § 17-204, Mont. Rev. Codes, § 10732 (substantially identical).

1. Operation and effect of section.
Much of this section is merely declaratory of pre-existing law. See State v. King, 24 U. 482, 492, 68 P. 418, 91 Am. St. Rep. 808, following State v. Morgan, 22 U. 162, 170, 61 P. 527, 529.

2. Advising and encouraging.
To advise or encourage criminal act is in itself a crime. State v. McCornish, 59 U. 58, 201 P. 637.

3. Accessory after the fact.
An accessory after the fact under 103-1-44 could not be an accomplice under this section. People v. Chadwick, 7 U. 134, 25 P. 737.
An accessory after the fact cannot become a partaker of the guilt, as there is no union of criminal intent and act. People v. Chadwick, 7 U. 134, 138, 25 P. 737.

4. Abortion.
In abortion prosecution contention of defendant that prosecutrix, in voluntarily submitting to abortion, was accomplice, and hence, that he could not be convicted upon her testimony, was held without merit, since voluntarily committing abortion on one's self is distinct offense under 103-2-2, and not part of 103-2-1, and such person could not be convicted as accomplice under latter section. State v. Cragun, 86 U. 149, 38 P.2d 1071.

5. Larceny.
Under this section, where one steals property, takes it, and delivers it to another who receives the property, knowing it to have been stolen, the thief is within the definition of "principal" and hence an "accomplice." He is "concerned in the commission" of the crime charged against the defendant; he "aids and abets" in its commission. State v. Coroles, 74 U. 94, 100, 277 P. 203.

6. Corporations.
Where information charged president of corporation with distributing gasoline without license as required by 57-12-4, and proof showed that corporation was offender, such variance was fatal to conviction of president. State v. Pomeroy, 86 U. 91, 38 P.2d 751.

7. Instructions.
Before the language of this section may be contained in a charge, the pleadings and the evidence must sustain it. State v. Baum, 47 U. 7, 9, 151 P. 518.

A. L. R. notes.
Criminal responsibility of one who acts as sentinel during violation of intoxicating liquor law, 64 A. L. R. 427; criminal responsibility of one who furnishes instrumentality of a kind ordinarily used for legitimate purposes, with knowledge that it is to be used by another for

criminal purposes, 108 A. L. R. 331; responsibility of persons participating in jail delivery for homicide committed by one of their number, 15 A. L. R. 456.

103–1–44. Accessories Defined.

All persons who, after full knowledge that a felony has been committed, conceal it from a magistrate, or harbor and protect the person who committed it, are accessories. (L. 25, p. 201, § 7920.)

History.

This section is practically identical with Comp. Laws 1876, § 1856; 2 Comp. Laws 1888, p. 563, § 4391; R. S. 1898, § 4075; Comp. Laws 1907, § 4075.

Comparable provisions.

Cal. Penal Code, § 32 (person who, after felony has been committed, harbors, conceals or aids principal with intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that principal has committed such felony or has been charged therewith or convicted thereof, is accessory to such felony).

Idaho Code, § 17–205, Mont. Rev. Codes, § 10733 (similar; "* * * or harbor and [Idaho] or [Mont.] protect the person charged with or convicted thereof, are accessories").

Cross-references.

Compounding felony, 103–26–58; compromising offenses, 105–50; principals and accessories, 105–21–39.

1. Accessory after the fact.

One who is a principal cannot be an accessory after the fact. A person is an accessory after the fact only after he has full knowledge that a felony has been committed and then conceals that knowledge from a magistrate, or harbors and protects the person charged or connected therewith. People v. Chadwick, 7 U. 134, 138, 25 P. 737. See also 103–1–43.

2. Evidence on trial of accessory.

Where accessory is brought to trial after principal has been tried and convicted, record of conviction is prima facie proof of principal's guilt, and that crime charged has been committed, and is admissible to show those facts. State v. Justesen, 35 U. 105, 99 P. 456.

3. Witness upon prosecution.

Witness in burglary prosecution held not an accomplice as far as the corroboration of his testimony might go, although he might have been an accessory after the fact or the receiver of stolen property. State v. Bowman, 92 U. 540, 70 P.2d 458, 111 A. L. R. 1393.

103–1–45. Punishment of Accessories.

Except in cases where a different punishment is prescribed, an accessory is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding $5,000, or by both such fine and either of such imprisonments. (C. L. 17, § 7921.)

Comparable provisions.

Cal. Penal Code, § 33, Mont. Rev. Codes, § 10734 (similar; not exceeding two years in county jail; the following words are omitted: "or by both such fine and either of such imprisonments").

Cross-references.

Accessory may be tried and punished though principal not tried, or, if tried, acquitted, 105–21–40; intoxicating liquor offenses, 46–0–243.

CHAPTER 2

ABORTION

103–2–1. Defined—Penalty.
103–2–2. Woman Producing Miscarriage on Self—Penalty.

103–2–1. Defined—Penalty.

Every person who provides, supplies or administers to any pregnant woman, or procures any such woman to take, any medicine, drug or sub-

stance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than ten years.

(C. L. 17, § 8118.)

History.

This section is practically identical with Comp. Laws 1876, § 1972; 2 Comp. Laws 1888, § 4607; R. S. 1898, § 4226; Comp. Laws 1907, § 4226.

Comparable provisions.

Cal. Penal Code, § 274 (substantially identical, except as to being worded in part: "* * * nor more than five years"; word "pregnant" is omitted).

Idaho Code, § 17-1810, Mont. Rev. Codes, § 11023 (identical, except as reading in part: "* * * nor more than five years").

Iowa Code 1939, § 12973 (similar in purport).

Cross-references.

Conviction cannot be had on testimony of woman alone, 105 32 14.

1. Status of crime.

Contention in action on bail bond given by one charged with abortion, that no such crime was known to law of state, was without merit. State v. Davis, 27 U. 368, 75 P. 857.

2. Words and phrases defined.

As generally used and understood in common language, "procuring abortion" means substantially same as "procuring miscarriage," and former statutes, when construed together, recognized quoted phrases as having practically same meaning in characterizing crime. State v. Crook, 16 U. 212, 51 P. 1091.

Criminal act of destroying foetus at any time before birth is usually termed in law "procuring miscarriage." State v. Crook, 16 U. 212, 51 P. 1091.

3. Operation to save woman's life.

In prosecution for abortion, the fact that woman was unmarried and that defendant had illicit sexual intercourse with her, held insufficient to show that operation was not necessary to save woman's life. State v. Wells, 35 U. 400, 100 P. 681, 136 Am. St. Rep. 1059, 19 Ann. Cas. 631.

In abortion prosecution where state proved that abortion was not necessary to save life of prosecutrix, admission of evidence of other abortions committed upon other women was incompetent, irrelevant, and reversible error. State v. Cragun, 85 U. 149, 38 P.2d 1071. (Folland, J., dissenting.)

Where it is shown that woman was healthy and in normal condition, and medicine was administered to her, or operation performed upon her to produce miscarriage, evidence is sufficient to raise inference, and to find fact, that production of miscarriage was not necessary to save woman's life, or that it is sufficient where it is shown that there was nothing in condition of woman to indicate any necessity for procured miscarriage, and negative in the information need not be shown by direct or positive evidence, but may be shown by circumstantial evidence. State v. Wells, 35 U. 400, 410, 100 P. 681, 136 Am. St. Rep. 1059, 19 Ann. Cas. 631.

Of course the testimony of expert medical witnesses may be introduced upon question whether it was necessary to produce abortion to save life of deceased. State v. McCoy, 15 U. 136, 49 P. 420.

4. Pleading and proof.

5. — In general.

It is essential for state to allege and prove that production of miscarriage was not necessary to save woman's life, and burden of proving such fact is upon state. State v. Wells, 35 U. 400, 100 P. 681, 136 Am. St. Rep. 1059, 19 Ann. Cas. 631.

6. — complaint and information.

Charge in complaint and information that defendant did specified things with intent to procure "miscarriage" of pregnant woman, instead of with intent to procure "abortion," held within terms of former statute which was similar to this section. State v. Crook, 16 U. 212, 51 P. 1091.

Where, upon indictment for murder, allegations are made concerning abortion and miscarriage, as well as respecting drugs and instruments used to procure the miscarriage, such statements do not constitute a separate and distinct charge, but are merely statements showing means used in perpetration of murder. State v. Carrington, 15 U. 480, 484, 50 P. 626.

7. Accomplices and accessories.

Person on whom criminal operation is performed, either at her request or with her consent, is not accomplice. State v. McCurtain, 52 U. 63, 172 P. 481.

In prosecution for abortion, wherein it appeared that father of child with which

prosecutrix was pregnant testified respecting operation, held court erred in not instructing jury what, under statute, constitutes an accomplice, and that if they found that witness was an accomplice within purview of statute they should not convict defendants unless testimony was corroborated as required. State v. McCurtain, 52 U. 63, 172 P. 481.

In abortion prosecution, contention of defendant that prosecutrix, in voluntarily submitting to abortion, was accomplice, and hence, that he could not be convicted upon her testimony, was held without merit, since voluntarily committing abortion on one's self is distinct offense under 103–2–2, and not part of this section, and such person could not be convicted as accomplice under this section. State v. Cragun, 85 U. 149, 38 P.2d 1071.

8. Evidence.

For purpose of proving that operation was, in fact, criminal, and as showing intent of accused, state may show that similar operations were performed upon other pregnant women. State v. McCurtain, 52 U. 63, 172 P. 481.

In abortion prosecution, testimony of mother of prosecutrix that she accompanied prosecutrix to defendant's office and saw him use instrument for purpose of producing abortion was sufficient to corroborate testimony of prosecutrix. State v. Cragun, 85 U. 149, 38 P.2d 1071.

A. L. R. notes.

Criminal responsibility of one other than subject or actual perpetrator of abortion, 4 A. L. R. 351; pregnancy as element of offense of attempt to procure a miscarriage or of homicide predicated on such attempt, 10 A. L. R. 314; prosecution for abortion, admissibility of evidence of other abortions or attempted abortions by accused on same woman, 30 A. L. R. 106; right of action for injury to, or death of, woman who consents to illegal or immoral operation, 49 A. L. R. 960.

103–2–2. Woman Producing Miscarriage on Self—Penalty.

Every woman who solicits of any person any medicine, drug or substance whatever, and takes the same, or who submits to any operation or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than one nor more than five years. (C. L. 17, § 8119.)

History.

This section is practically identical with R. S. 1898, § 4227; Comp. Laws 1907, § 4227.

Comparable provisions.

Cal. Penal Code, § 275, Idaho Code, § 17–1811, Mont. Rev. Codes, § 11024 (identical).

Cross-references.

Corroboration necessary, 105–32–14.

1. Woman as accomplice.

In abortion prosecution, contention of defendant that prosecutrix, in voluntarily submitting to abortion, was accomplice, and hence, that he could not be convicted upon her testimony, was held without merit, since voluntarily committing abortion upon one's self is distinct offense under this section and not part of 103–2–1, and such person could not be convicted as accomplice under latter section. State v. Cragun, 85 U. 149, 38 P.2d 1071.

CHAPTER 3

ABUSE OF PROCESS

103–3–1. In Justices' Court—Action in Wrong Venue.
103–3–2. Id. Assuming Liability for Purpose of Conferring Jurisdiction.
103–3–3. Id. Wrongful Attachment—Liability.

103–3–1. In Justices' Court—Action in Wrong Venue.

Any party to any suit or proceeding, and any attorney or agent for such party, who knowingly commences, prosecutes or maintains any action, suit or proceeding in any justices' court, other than as provided by section 104–71–1, is guilty of a misdemeanor. (C. L. 17, § 8510.)

103–3–2. Id. Assuming Liability for Purpose of Conferring Jurisdiction.

Any person who binds himself, or voluntarily becomes liable jointly or jointly and severally with any other person, for the purpose of conferring jurisdiction of any cause upon any justice of the peace in any precinct or city that would be without jurisdiction except for such liability of such joint obligor, and any person who induces such person to assume such liability for the purpose of conferring jurisdiction upon such justice of the peace, is guilty of a misdemeanor. (C. L. 17, § 8511.)

103–3–3. Id. Wrongful Attachment—Liability.

It is hereby declared and made unlawful for any justice of the peace to issue any writ of attachment, and for any party, and any agent or attorney of such party, to advise, induce or procure the issuance thereof, in any action, suit or proceeding before the affidavit therefor is filed, or where the affidavit filed therefor does not conform substantially with the requirements of section 104–18–3. Any person violating any of the provisions of this section is guilty of a misdemeanor, and shall be liable to the person whose property, credits, money or earnings are so attached for double the value thereof, together with all costs paid by him, and all damages incurred in such attachment proceedings.

(C. L. 17, § 8512.)

1. Penalty.

If trial court renders no judgment for the penalty prayed for and prescribed by this section, the supreme court need not consider sufficiency of complaint to state a cause of action for such penalty. Hargrave v. Leigh, 73 U. 178, 273 P. 298, applying section 8512 of Comp. Laws 1917.

CHAPTER 4

ADVERTISING OFFENSES

103–4–1. In Sales to Be Made or Service Furnished—False Representations.
103–4–2. Id. Misnaming Actual Seller.
103–4–3. Id. Of Woolen Fabrics.
103–4–4. Id. Of "Seconds" or Blemished Merchandise.
103–4–5. Id. Of "Fire Sales," "Bankrupt Sales," etc.
103–4–6. Id. Of Coal.
103–4–7. Use of Name or Picture of Public Institution or Officer.
103–4–8. Use of Name or Picture of Individual.
103–4–9. Id. Civil Liability.
103–4–10. Use of Facsimile of Great Seal of State.

103–4–1. In Sales to Be Made or Service Furnished—False Representations.

Every person, whether acting on his own behalf or on behalf of another, who, with intent to sell or in any way dispose of real or personal

property, choses in action, merchandise, service or anything of any nature whatsoever offered by such person, directly or indirectly, to the public for sale, use or distribution, or with intent to increase the consumption thereof, or to induce any member of the public to enter into any obligation relating thereto, or to acquire title thereto, or any interest therein, publishes, disseminates, circulates, or causes to be published, disseminated or circulated, or who in any manner places, or causes to be placed, before the public in this state, by any newspaper, magazine, book, pamphlet, circular, letter, handbill, placard, poster or other publication, or by any billboard, sign, card, label or window sign, showcase or window display, or by any other advertising device, or by public outcry or proclamation, or by telephone or radio, or in any other manner whatever, an advertisement regarding such property or service so offered to the public, which advertisement shall contain any statement, representation or assertion concerning such property or service, or concerning any circumstance or matter of fact connected in any way, directly or indirectly, with a proposed sale, performance or disposition thereof, which statement, representation or assertion is false in any respect, or which is deceptive or misleading, and which is known, or by the exercise of reasonable care could be known to be false, deceptive or misleading, to the person publishing, disseminating, circulating or placing before the public such advertisement, is guilty of a misdemeanor.

(L. 29, p. 82, § 1.)

Cross-references.

Unlawful advertising as trespass, 103–57–2; unlawful use of flag, 103–26–82; advertising tobacco, 93–2; advertising in violation of Securities Commission Title, 82–1–28; advertising cures for venereal disease, 35–4–43; false advertising by medicial practitioners, 79–9–18.

A. L. R. notes.

Validity, construction, and application of statutes or ordinances directed against false or fraudulent statements in advertisements, 89 A. L. R. 1004.

103–4–2. Id. Misnaming Actual Seller.

It is unlawful for any person, whether acting on his own behalf or on behalf of another, who is engaged in the business of buying and selling or dealing in property, real or personal, or who is engaged in the business of performing or furnishing service of any kind to the public, to advertise, call attention to or give publicity to any sale to the public of any such property or any such service, thereby representing that such sale is being made or service furnished by a person not in fact making such sale or furnishing such service. Any person who violates the provisions of this section is guilty of a misdemeanor.

(L. 29, p. 82, § 2.)

103–4–3. Id. Of Woolen Fabrics.

It is unlawful for any person, whether acting on his own behalf or on behalf of another, to advertise, call attention to or give publicity to any sale to the public of any merchandise, thereby representing that such merchandise, wearing apparel or fabric is all wool or virgin wool, when such merchandise, wearing apparel or fabric is in fact composed partly or entirely of cotton or other vegetable substitute for wool, or is com-

posed wholly or in part of reworked wool or shoddy. Any person who violates the provisions of this section is guilty of a misdemeanor.
(L. 29, p. 82, § 3.)

103–4–4. Id. Of "Seconds" or Blemished Merchandise.

It is unlawful for any person, whether acting on his own behalf or on behalf of another, to advertise, call attention to or give publicity to any sale to the public of any merchandise which is secondhand or used merchandise, or which consists of articles or units or parts known as "seconds," or which is blemished merchandise, or which has been sold or offered for sale by the manufacturer thereof as not first class, unless there is conspicuously displayed directly in connection with the name and description of such merchandise and each specified article, unit or part thereof a direct and unequivocal statement, phrase or word which shall clearly indicate that such merchandise and each article, unit or part thereof so advertised is secondhand, used or defective, or consists of "seconds," or is blemished merchandise, or has been sold or offered for sale by the manufacturer thereof as not first class, as the fact shall be. Any person who violates the provisions of this section is guilty of a misdemeanor. (L. 29, p. 82, § 4.)

103–4–5. Id. Of "Fire Sales," "Bankrupt Sales," etc.

It is unlawful for any person, whether acting on his own behalf or on behalf of another, to advertise, call attention to or give publicity to any sale to the public of any merchandise, thereby representing that such sale is a sale of "damaged goods," or a "fire sale," "bankrupt sale," "wreck sale," "manufacturers' overflow sale," "manufacturers' outlet sale," and the like, when merchandise not a part of "damaged," "fire-damaged," "bankrupt," "wreckage," "manufacturers' overflow," "manufacturers' outlet" stock or other stock represented in the advertisement is offered or sold as part of such stock so advertised for sale. Any person who violates the provisions of this section is guilty of a misdemeanor. (L. 29, p. 82, § 5.)

103–4–6. Id. Of Coal.

No person shall sell or exchange, or offer or expose for sale or exchange, coal of any particular name or designation, or as the output of any particular mine under the name or designation of another coal or mine. Any person who violates any provision of this section is guilty of a misdemeanor. (C. L. 17, §§ 8354, 8355.)

103–4–7. Use of Name or Picture of Public Institution or Officer.

Any person who uses for the purpose of advertising any articles of merchandise the name or picture of any public institution of this state, and any person who uses for advertising purposes or purposes of trade the official title of any public officer of this state, without the consent, in writing, of such officer or of the managing officers or board of such public institution is guilty of a misdemeanor. (C. L. 17, § 8177.)

103–4–8. Use of Name or Picture of Individual.

Any person who uses for advertising purposes or for purposes of trade, or upon any postal card, the name, portrait or picture of any person, if such person is living, without first having obtained the written consent of such person, or, if a minor, of his parent or guardian, or, if such person is dead, without the written consent of his heirs or personal representatives, is guilty of a misdemeanor.

(C. L. 17, § 8178.)

103–4–9. Id. Civil Liability.

Any living person, or the heirs or personal representatives of any deceased person, whose name, portrait or picture is used within this state for advertising purposes or for purposes of trade, without the written consent first obtained as provided in the next preceding section may maintain an action against such person so using his name, picture or portrait to prevent and restrain the use thereof; and may in the same action recover damages for any injuries sustained by reason of such use, and, if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is declared to be unlawful, the jury or court, if tried without a jury, in its discretion, may award exemplary damages. (C. L. 17, § 8179.)

103–4–10. Use of Facsimile of Great Seal of State.

The use of a facsimile, photograph, impression or imitation of the great seal of the state of Utah for trade or advertising purposes is expressly prohibited. Any person violating any of the provisions of this section is guilty of a misdemeanor. (C. L. 17, §§ 5800, 5802.)

Cross-references.
Great seal described, 87–3–9.

CHAPTER 5

ANIMALS, CRUELTY TO, ETC.

103–5–1. Overworking, Underfeeding, Beating, etc.
103–5–2. Fighting or Baiting—Liability of Lessor of Premises and Spectators.
103–5–3. Working Unfit Animals—Cruelty in Transportation—Abandonment of Diseased and Maimed.
103–5–4. Arrest of Violators—Seizure and Impounding of Animals.
103–5–5. Search and Seizure—Destruction of Instruments of Torture.
103–5–6. Incorporated Societies for Prevention May Nominate Deputy Sheriff.
103–5–7. Definitions.
103–5–8. Docking Horse's Tail.
103–5–9. Id. Prima Facie Evidence.
103–5–10. Utah Humane Society—To Receive Fines.
103–5–11. Id. May Kill Animals Diseased or Disabled—Compensation to Owner.
103–5–12. Poisoning Animals.
103–5–13. Death Caused by Mischievous Animal — Owner Guilty of Felony.
103–5–14. Removing Hide from Animals Found Dead.
103–5–15. Maliciously Maiming Another's Animal.
103–5–16. Maliciously Killing Another's Animal, a Felony.

103–5–1. Overworking, Underfeeding, Beating, etc.

Every person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, cruelly beats, injures or mutilates, or cruelly kills any animal, or causes or procures the same to be done; and every person having charge or custody of any animal, either as owner or otherwise, who inflicts unnecessary cruelty upon the same, or willfully fails to provide such animal with proper food or drink, or shelter or protection from the weather, shall for every such offense be punished by imprisonment in the county jail not exceeding three months or by fine not exceeding $100, or by both such fine and imprisonment; *provided*, that nothing in this section requiring food, drink, shelter and protection from the weather to be furnished any animal shall be construed to apply to animals running at large upon the range. (C. L. 17, § 8416.)

Cross-references.
Prohibition by cities, 15–8–59; board of agriculture to enforce humane laws, 3–1–5.

103–5–2. Fighting or Baiting—Liability of Lessor of Premises and Spectators.

Any person who keeps or uses any bull, bear, dog, cock or other animal, fowl or bird for the purpose of fighting or baiting, and any person who is a party to or is present as a spectator at any such fighting or baiting, and any person who rents any building, shed, room, yard, ground or premises for the purpose of fighting or baiting any animal, fowl or bird as aforesaid, or knowingly suffers or permits the use of any building, shed, room, yard, ground or premises belonging to him or under his control for any of the purposes aforesaid, is guilty of a misdemeanor. (C. L. 17, § 8417.)

Comparable provisions.
Cal. Penal Code, § 597b (similar).
Idaho Code, § 17–4204, Mont. Rev. Codes, § 11514 (similar in purport).

103–5–3. Working Unfit Animals—Cruelty in Transportation—Abandonment of Diseased and Maimed.

Every owner, possessor or person having charge or custody of any animal, who cruelly drives or works the same when unfit for labor, or who carries, or causes to be carried, in or upon any vehicle or otherwise any live animal having the feet or legs tied together, or in any other cruel or inhuman manner; or who abandons any maimed, sick, infirm or disabled animal to die in any public place; or who carries or causes to be carried, any live animal in or upon any vehicle or otherwise without providing suitable racks, cars, crates or cages in which such animals may stand or lie down during the transportation, or while awaiting slaughter, is guilty of a misdemeanor, and shall be punished for every such offense in the manner provided in section 103–5–1. (C. L. 17, § 8418.)

103-5-4. Arrest of Violators—Seizure and Impounding of Animals.

Any person found violating any of the provisions of this chapter may be arrested and held without warrant in the same manner as in the case of persons found breaking the peace, and it shall be the duty of the sheriff, constable or other officer witnessing a violation of any of the provisions of this chapter, or upon request of any person who did witness such violation, to make such arrest; and it shall be the duty of the person making the arrest to seize all animals found in the keeping or custody of the person arrested, and which are then being used or held for use in violation of any of the provisions of this chapter, and the person making such seizure shall cause such animals to be at once delivered to a poundkeeper of the precinct, town or city in which the same may be, and it shall be the duty of such poundkeeper to receive such animals and to hold the same to be delivered to the owner or his agent upon the payment of all charges for their maintenance.

(C. L. 17, § 8419.)

Cross-references.

Arrest with or without warrant, 105-13.

103-5-5. Search and Seizure—Destruction of Instruments of Torture.

When complaint is made, on oath or affirmation, to any magistrate of competent jurisdiction that the complainant believes that any of the provisions of this chapter are being, or are about to be, violated in any particular building or place, such magistrate, if satisfied that there is reasonable cause for such belief, shall issue and deliver a search warrant to any sheriff, constable or police officer, authorizing him to search such building or place and to arrest any person engaged in violating any of the provisions of this chapter, as well as any person there present and aiding or abetting therein, and to bring such persons before some magistrate of competent jurisdiction to be dealt with according to law. Such officer shall at the same time seize and bring to such magistrate every article or instrument found in such building or place especially designed or adapted to torture or inflict wounds upon any animal, or to aid in the fighting or baiting of any animal; and unless, within ten days after the trial of the person or persons so arrested, the owner of such article or instrument shall show to the satisfaction of such magistrate that the same is not designed or adapted to the wounding or torture of animals, or, if so designed or adapted, is not intended to be used or employed for such purpose, the magistrate shall destroy such article or instrument. (C. L. 17, § 8420.)

1. General construction of section.

Section should be read in connection with provision of Constitution (Art. I, § 14) requiring probable cause to be shown to justify issuance of search warrant. Allen v. Lindbeck, 97 U. 471, 93 P.2d 920.

A. L. R. notes.

Federal Constitution as a limitation upon the powers of the states in respect of search and seizure, 19 A. L. R. 644.

103-5-6. Incorporated Societies for Prevention May Nominate Deputy Sheriff.

Any society incorporated in this state for the purpose of preventing cruelty to animals may designate one or more persons in each county of

the state to discover and prosecute all cases of the violation of the provisions of this chapter; and it shall be the duty of the sheriff of such county to appoint each person so designated a deputy sheriff, provided such person shall be of good moral character, and each person so appointed by the sheriff shall possess all the powers of a sheriff of the county in the enforcement of the provisions of this chapter. The sheriff, however, shall not be responsible for any acts of such person, but the society, if incorporated, and, if not, then the officers and members of the society, on the request of which such person was appointed, shall be responsible for his acts as a principal for the acts of an agent. The deputy so appointed shall receive no compensation from the county for such services. (C. L. 17, § 8421.)

103-5-7. Definitions.

In this chapter the word "animal" or "animals" shall be held to include all brute creatures, and the words "owner" and "person" and "whoever" shall be held to include corporations as well as individuals; and the knowledge and acts of agents of, and persons employed by, corporations in regard to animals transported, owned or used by, or in custody of, such corporations, shall be held to be the acts and knowledge of such corporations. (C. L. 17, § 8422.)

103-5-8. Docking Horse's Tail.

Whoever cuts the bone of the tail of any horse for the purpose of docking the tail, or whoever causes or knowingly permits it to be done upon premises of which he is the owner, lessee, proprietor or user, or whoever assists in the operation, shall be punished by fine of not less than $25 nor more than $100. (C. L. 17, § 8423.)

Comparable provisions.
Idaho Code, § 17-4214 (similar in purport).

103-5-9. Id. Prima Facie Evidence.

If a horse is found with its tail so cut and with the wound resulting from such cut unhealed on the premises or in the charge or custody of any person, such fact shall be prima facie evidence that such person has committed the offense charged in the last preceding section. (C. L. 17, §§ 8424, 8425.)

103-5-10. Utah Humane Society—To Receive Fines.

In all cases of prosecution for cruelties inflicted upon dumb animals the fines collected upon or resulting from the complaint or information of any officer or agent of the Utah Humane Society shall be paid to said society, less a sum equal to the expense of prosecution, which sum shall be determined by the court or trial justice. (C. L. 17, § 8426.)

103-5-11. Id. May Kill Animals Diseased or Disabled—Compensation to Owner.

Any officer or agent of the Utah Humane Society may take charge of any animal found abandoned that may appear to be diseased or disabled beyond recovery for any useful purpose; and thereupon shall, as quickly as may be, cause such animal to be appraised under oath by two

reputable citizens who shall view the same in his presence and determine its value, and if such appraised value does not exceed $5, such officer may at once cause said animal to be killed in a humane manner. Said society shall thereupon be indebted to the owner for the amount of its value, except when the appraisers determine that the death of the animal was rendered necessary by the owner's willful abandonment or cruelty; and said society shall pay to the appraisers a reasonable compensation for their services. (C. L. 17, § 8427.)

103–5–12. Poisoning Animals.

Every person who willfully, unlawfully and maliciously administers any poison to an animal, the property of another, or maliciously exposes any poisonous substance with intent that the same shall be taken or swallowed by any such animal, is punishable by imprisonment in the state prison not exceeding three years, or in the county jail not exceeding six months, or by fine not exceeding $300 or by both such fine and either of said imprisonments. (C. L. 17, § 8387.)

1. Showing of malice.

In prosecution for administering poison to a dog, evidence tending to show that the dog, two weeks prior to his killing, had bitten defendant's boy, did not authorize the court to say as a matter of law that the killing was not done maliciously and only for the purpose of preventing similar attacks. State v. Coleman, 29 U. 417, 82 P. 465.

Fact that owner of dog poisoned by defendant was unknown to defendant did not preclude a finding that the poison was administered maliciously. State v. Coleman, 29 U. 417, 82 P. 465.

103–5–13. Death Caused by Mischievous Animal—Owner Guilty of Felony.

If the owner of a mischievous animal, knowing its propensities, willfully suffers it to go at large, or keeps it without ordinary care, and such animal, while so at large, or while not kept with ordinary care, kills any human being who has taken all the precaution which the circumstances permitted, or which a reasonable person would ordinarily take in the same situation, such owner is guilty of a felony. (C. L. 17, § 8207.)

103–5–14. Removing Hide from Animals Found Dead.

Any person, other than the owner or his agent or employee or other person duly authorized, who removes the hide or pelt from the carcass of any neat animal or sheep found dead, is guilty of a misdemeanor. (C. L. 17, § 92.)

103–5–15. Maliciously Maiming Anothe. Animal.

Every person who maliciously maims or wounds any animal, the property of another, is guilty of a misdemeanor. (L. 23, p. 28, § 8388.)

History.

This section is in part identical with R. S. 1898, § 4428; Comp. Laws 1907, § 4428; 2 Comp. Laws 1888, § 4708.

1. Malice.

While malice against the owner is an ingredient of this crime, an instruction which states that if a man recklessly and wantonly should kill an animal, not caring who the owner is, malice can be inferred, correctly states the law. People v. Olsen, 6 U. 284, 22 P. 163, applying 2 Comp. Laws 1888, § 4708.

103-5-16. Maliciously Killing Another's Animal, a Felony.

Every person who maliciously kills a horse, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, sheep, goat, mule, jack or jenny, the property of another, is guilty of a felony, and shall be punished by imprisonment in the state prison for a term not less than one year nor more than ten years, and by a fine of not less than $50 nor more than $1,000, or by imprisonment only. (L. 23, p. 28, §§ 1, 2.)

CHAPTER 6

ARSON*

103-6-1. Defined—Penalty.
103-6-2. In Second Degree Defined—Penalty.
103-6-3. In Third Degree Defined—Penalty.
103-6-4. Firing Insured Personalty, a Felony.
103-6-5. Attempt to Commit—Penalty.

*History of act. This was Chapter 38 of Title 75, of R. S. 1898; and Comp. Laws 1907, Title 90, Ch. 38, p. 1317.

103-6-1. Defined—Penalty.

Any person who willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling house, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto, whether the property of himself or of another, is guilty of arson, and shall be sentenced to the state prison for not less than two nor more than twenty years. (L. 31, p. 161, § 1.)

Comparable provisions.

Cal. Penal Code, § 447a (substantially identical).

Idaho Code, 1940 Supp., § 17-3310 (similar).

Iowa Code 1939, § 12991.1 (substantially identical, "* * * sentenced to the penitentiary for not more than twenty years").

Mont. Rev. Codes, § 11337 (arson is the willful and malicious burning of a building with intent to destroy it).

A. L. R. notes.

Burning as element of offense of arson, 1 A. L. R. 1163; ownership of property as affecting criminal liability for burning thereof, 17 A. L. R. 1168; ratification or sanction by owner of property or interest therein as affecting criminal liability of person burning same, 54 A. L. R. 1236.

103-6-2. In Second Degree Defined—Penalty.

Any person who willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any barn, stable, garage or other building, whether the property of himself or of another, not a parcel of a dwelling house; or any shop, storehouse, warehouse, factory, mill or other building, whether the property of himself or of another; or any church, meetinghouse, courthouse, school, jail or other public building, or any public bridge, is guilty of arson in the second degree and shall be sentenced to the state prison for not less than one nor more than ten years. (L. 31, p. 161, § 2.)

Comparable provisions.
Cal. Penal Code, § 448a, Iowa Code, 1939, § 12991.2 (substantially identical, except that no specification is made of "arson in the second degree"; Iowa provision reads in part: "* * * be sentenced to the penitentiary for not more than ten years").
Idaho Code, 1940 Supp., § 17–3311 (similar).

A. L. R. notes.
Burning as element of offense of arson, 1 A. L. R. 1163; ownership of property as affecting criminal liability for burning thereof, 17 A. L. R. 1168; ratification or sanction by owner of property or interest therein as affecting criminal liability of person burning same, 54 A. L. R. 1236.

103–6–3. In Third Degree Defined—Penalty.

Any person who willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any barn, cock, crib, rick or stack of hay, corn, wheat, oats, barley or other grain or vegetable product of any kind; or any field of standing hay or grain of any kind; or any pile of coal, wood or other fuel; or any pile of planks, boards, posts, rails or other lumber; or any street car, railway car, ship, boat or other water craft, automobile or other motor vehicle; or any other personal property not herein specifically named, such property being of the value of not less than $25 and the property of another person, is guilty of arson in the third degree and shall be sentenced to the state prison for not less than one nor more than three years.
(L. 31, p. 161, § 3.)

Comparable provisions.
Cal. Penal Code, § 449a, Iowa Code 1939, § 12991.3 (substantially identical, except that no specification is made of "arson in the third degree"; Iowa provision does not specify $25 value, and reads in part: "* * * be sentenced to the penitentiary for not more than three years, or be fined not to exceed one thousand dollars").
Idaho Code, 1940 Supp., § 17–3312 (similar).

A. L. R. notes.
Burning as element of offense of arson, 1 A. L. R. 1163; ownership of property as affecting criminal liability for burning thereof, 17 A. L. R. 1168; ratification or sanction by owner of property or interest therein as affecting criminal liability of person burning same, 54 A. L. R. 1236.

103–6–4. Firing Insured Personalty, a Felony.

Any person who willfully and with intent to injure or defraud the insurer sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any goods, wares, merchandise or other chattels or personal property of any kind, whether the property of himself or of another, which shall at the time be insured by any person against loss or damage by fire, is guilty of a felony and shall be sentenced to the state prison for not less than one nor more than five years.
(L. 31, p. 161, § 4.)

Comparable provisions.
Cal. Penal Code, § 450a, Iowa Code 1939, § 12991.4 (substantially identical; Iowa provision reads, in part, "* * * be sentenced to the penitentiary for not more than five years").

Cross-references.
Defrauding insurance companies, 103–31.

1. Evidence.
In arson prosecution proof of corporate existence of insurance company by policy of insurance was insufficient, since such policy was not ancient document, and hence, proving itself, and proof was required to be made in accordance with 105–32–15. State v. Marasco, 81 U. 325, 17 P.2d 919.
Evidence held insufficient to connect accused with commission of the offense of arson. State v. Marasco, 81 U. 325, 17 P.2d 919.

103-6-5. Attempt to Commit—Penalty.

Any person who willfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any of the buildings or property mentioned in the foregoing sections, or who commits any act preliminary thereto, or in furtherance thereof, is guilty of an attempt to commit arson and shall be sentenced to the state prison for not less than one nor more than two years, or fined not to exceed $1,000.

The placing or distributing of any flammable, explosive or combustible material or substance, or any device, in any building or property mentioned in the foregoing sections in an arrangement or preparation with intent to eventually, willfully and maliciously set fire to or burn the same, or to procure the setting fire to or burning of the same shall for the purposes of this chapter constitute an attempt to burn such building or property. (L. 31, p. 161, § 5.)

Comparable provisions.
Cal. Penal Code, § 451a (substantially identical).

CHAPTER 7

ASSAULTS AND BATTERIES

103-7-1. Assault—Defined.
103-7-2. Id. Penalty.
103-7-3. Battery—Defined.
103-7-4. Id. Penalty.
103-7-5. By Chemicals.
103-7-6. With a Deadly Weapon.
103-7-7. With Intent to Commit Rape, etc.
103-7-8. With Intent to Commit Felony—Exceptions.
103-7-9. Upon a Child Under Fourteen.
103-7-10. With Narcotics and Anaesthetics.
103-7-11. By Convicts in State Prison—Penalty.
103-7-12. Id.

103-7-1. Assault—Defined.

An assault is an unlawful attempt coupled with a present ability to commit a violent injury on the person of another. (C. L. 17, § 8065.)

History.
This section was derived from Comp. Laws 1876, § 1948, and is identical therewith. It is also identical with R. S. 1898, § 4190; Comp. Laws 1907, § 4190.

Comparable provisions.
Cal. Penal Code, § 240, Idaho Code, § 17 1201 (identical).

Cross-references.
Felonious assaults, 103-28-14; power of city to prohibit assault and battery, 15-8-47.

1. Assault and battery.
An assault is an attempt coupled with the ability, and if the attempt succeeds, it becomes battery or some other crime. State v. Barkas, 91 U. 574, 65 P.2d 1130.

2. Indecent assault.
Crime of simple assault is included in the offense of indecent assault. State v. Waid, 92 U. 297, 67 P.2d 647. (Wolfe, J., questioned this result on the ground that a simple assault could be consented to by a child who could not consent to an indecent assault.)

3. Evidence.
Evidence of indecent conduct was sufficient to sustain conviction for indecent assault under 103-7-9 as against contention that there was no evidence of violence sufficient to constitute assault.

State v. Saunders, 82 U. 170, 22 P.2d 1043.

4. Instructions.

Instruction, in action for damages for assault and battery, is erroneous when, in defining "assault," it omits element of "unlawfulness" of attempt. Ganaway v. Salt Lake Dramatic Ass'n, 17 U. 37, 53 P. 830.

In a prosecution under subdivision (1) of 103–51–15, it is not error to charge that assault is an included offense, where the evidence would support a finding of the elements of this crime as here defined. State v. Smith, 90 U. 482, 494, 62 P.2d 1110.

5. Verdict.

If the verdict leaves it doubtful as to whether defendant was found guilty of an assault under this section, or of an assault with a deadly weapon as defined in 103–7–6, he is entitled to have the uncertainty resolved in his favor. State v. Kakarikos, 45 U. 470, 146 P. 750.

A. L. R. notes.

Acquittal on charge as to one as bar to charge as to the other, where the person is killed or assaulted by acts directed at another, 2 A. L. R. 606.

Assault and battery, acquittal or conviction of as bar to prosecution for rape, or assault with intent to commit rape, based on same transaction, 78 A. L. R. 1213.

Conviction or acquittal upon charge of murder of, or assault upon, one person as bar to prosecution for like offense against another person at the same time, 20 A. L. R. 341.

Danger or apparent danger of death or great bodily harm as condition of self-defense in prosecution for assault as distinguished from prosecution for homicide, 114 A. L. R. 634.

Elopement, homicide or assault in attempting to prevent, 8 A. L. R. 660.

Excessive or improper punishment inflicted on child by parent or one in loco parentis, as criminal homicide or assault, 64 A. L. R. 292.

Homicide or assault in connection with negligent operation of automobile or its use for unlawful purpose or in violation of law, 99 A. L. R. 756.

Homicide or assault in defense of habitation or property, 34 A. L. R. 1488.

103–7–2. Id. Penalty.

An assault is punishable by fine in any sum less than $300, or by imprisonment in the county jail not exceeding three months.

(C. L. 17, § 8066.)

History.

This section was derived from Comp. Laws 1876, § 1949, and is practically identical therewith. And it is identical with R. S. 1898, § 4191; Comp. Laws 1907, § 4191.

103–7–3. Battery—Defined.

A battery is any willful and unlawful use of force or violence upon the person of another.

(C. L. 17, § 8067.)

History.

This section came from Comp. Laws 1876, p. 592, § 1950, and is identical therewith. It is also identical with R. S. 1898, § 4192; Comp. Laws 1907, § 4192.

Comparable provisions.

Cal. Penal Code, § 242, Idaho Code, § 17–1203 (identical).

1. Civil liability for assault and battery.

Any wrongful touching of the person of another constitutes an assault and battery in a civil action; and in such an action, predicated on taking indecent liberties with a female, term "improper liberties with a female" need not be defined; charge that "if man takes improper liberties with a female, or touches, or fondles, or handles her person against her will and without her consent, he is guilty of assault," is sufficient. Geary v. Cain, 69 U. 340, 255 P. 416.

2. Form of indictment for battery.

An indictment alleging that defendant, with a pistol loaded with gunpowder and bullets, in and upon one ..... made an unlawful and felonious assault, and did shoot off one of the bullets at and against the person of the said ....., describes a battery as defined in this section. People v. Chalmers, 5 U. 201, 203, 14 P. 131, rehearing denied 5 U. 274, 15 P. 2. But see 105–21–47.

103–7–4. Id. Penalty.

A battery is punishable by a fine in any sum less than $300, or by imprisonment in the county jail not exceeding six months, or by both.

(C. L. 17, § 8068.)

History.

This section was derived from Comp. Laws 1876, § 1951, and is identical therewith. It is also identical with R. S. 1898, § 4193; Comp. Laws 1907, § 4193.

1. Fines.

Where, on conviction of battery, there is judgment of imprisonment and also judgment of fine, fine is not enforceable by imprisonment but is collectible only by execution as in civil case. Roberts v. Howells, 22 U. 389, 62 P. 892. (Baskin, J., dissenting.)

103–7–5. By Chemicals.

Every person who willfully and maliciously places or throws, or causes to be placed or thrown, upon the person of another any vitriol, corrosive acid or caustic chemical of any nature with intent to injure the flesh or disfigure the body of such person is punishable by imprisonment in the state prison not less than one nor more than ten years.

(C. L. 17, § 8069.)

History.

This section was derived from Comp. Laws 1876, § 1952, and is practically identical therewith. It is also identical with R. S. 1898, § 4194; Comp. Laws 1907, § 4194.

Comparable provisions.

Cal. Penal Code, § 244, Idaho Code, § 17–1205, Mont. Rev. Codes, § 10979 (substantially identical, except as reading in part, "* * * nor more than fourteen years").

103–7–6. With a Deadly Weapon.

Every person who, with intent to do bodily harm and without just cause or excuse, or when no considerable provocation appears, or when the circumstances show an abandoned or malignant heart, commits an assault upon the person of another with a deadly weapon, instrument or other thing is punishable by imprisonment in the state prison not exceeding five years, or by fine not exceeding $1,000, or by both.

(C. L. 17, § 8070.)

History.

This section was derived from Comp. Laws 1876, § 1953, and is identical therewith except that the word "penitentiary" was used instead of words "state prison," and the period of punishment was "two years" instead of "five years." This is also true with respect to Comp. Laws 1888, § 4488. The present section is absolutely identical with R. S. 1898, § 4195; Comp. Laws 1907, § 4195.

This section was taken from the laws of California. 1941 Cal. Penal Code, § 245. It is not very clear when this section became effective in the Territory of Utah. It is first found in Comp. Laws 1876 as § 1953, p. 503. It was carried forward into Comp. Laws 1888 (2 Comp. Laws 1888, § 4488), becoming § 4195 of R. S. 1898, and having same section number in Comp. Laws 1907. And see State v. Jukanovich, 45 U. 372, 146 P. 289.

Cross-references.

Having deadly weapon with intent to assault another, 103–21–5; exhibiting deadly weapon in angry and threatening manner, 103–21–3; assault with intent to murder, 103–28–14.

1. Elements and what constitutes.

Intent to do bodily harm is the very essence of the offense. State v. Potello, 42 U. 396, 132 P. 14.

Pointing a loaded revolver at another to frighten or wound him constitutes an assault, and shooting at another to wound him is done with intent to do bodily harm, unless done under conditions and circumstances which would justify the acts in the eyes of the law. State v. Barkas, 91 U. 574, 65 P.2d 1130.

2. "Deadly weapon."

A razor is probably a deadly weapon under this section. See State v. An-

selmo, 46 U. 137, 181, 148 P. 1071. (McCarty, J., concurring in part and dissenting in part.)

3. Indictment or information.

4. — in general.

It is better, if the instrument actually used is not known to the pleader, that he allege that the instrument used was a deadly weapon. That is, describe the instrument as a sharp or blunt or any other kind of an instrument, the exact nature or character of which is unknown to him. Merely to refer to the instrument as a "sharp instrument" does not necessarily mean a deadly weapon. State v. Jukanovich, 45 U. 372, 380, 146 P. 289.

Where allegations of indictment exclude possibility of existence of any just cause or excuse for assault, or possibility of existence of any provocation which law regards as considerable provocation, allegation that circumstances showed abandoned and malignant heart would have been superfluous. State v. McDonald, 14 U. 173, 46 P. 872.

5. — intent to murder.

The words "with malice aforethought" are not necessary in the indictment; charging intent to murder is sufficient. State v. McDonald, 14 U. 173, 46 P. 872.

Indictment for assault with intent to commit "murder" is not rendered insufficient to sustain conviction of assault with intent to do bodily harm by fact that it does not contain allegation that assault was committed "without just cause or excuse." State v. McDonald, 14 U. 173, 46 P. 872, overruling People v. Fairbanks, 7 U. 3, 24 P. 538.

6. — negativing exceptions.

The words in this section "without just cause or excuse" need not be negatived in the indictment. State v. McDonald, 14 U. 173, 46 P. 872, overruling People v. Fairbanks, 7 U. 3, 24 P. 538, and People v. Parman, 7 U. 7, 24 P. 539.

7. Issues, proof and variance.

The intent to do bodily harm is the very essence of this offense, and it must be proved as alleged. State v. Potello, 42 U. 396, 132 P. 14.

It is not necessary that bodily harm should actually be inflicted to prove charge of assault with intent to do bodily harm. State v. Barkas, 91 U. 574, 65 P.2d 1130.

8. Evidence.

The character of the weapon may be inferred from the wounds or other indicia, if shown by the evidence, though the name or precise character of the instrument cannot be proved. State v. Jukanovich, 45 U. 372, 146 P. 289.

Evidence held sufficient to sustain conviction. State v. Peterson, 83 U. 74, 27 P.2d 20.

Evidence held insufficient to prove corpus delicti. State v. Burusco, 61 U. 488, 214 P. 302.

In prosecution for assault with deadly weapon, with intent to commit bodily harm, defendant was not required to establish his claim of self-defense by preponderance of evidence, but was entitled to acquittal if on whole evidence jury entertained reasonable doubt as to whether or not he acted in self-defense. State v. Talarico, 57 U. 229, 193 P. 860.

9. Questions of law and fact.

Whether in a given case the injury or harm inflicted or threatened is great bodily harm or injury, or is only slight or moderate, is for the jury. State v. Kakarikos, 45 U. 470, 146 P. 750.

10. Instructions.

It is, of course, elementary that the instructions in prosecution for assault with a deadly weapon with intent to do bodily harm must be based upon some evidence introduced into the case. State v. Bususco, 61 U. 488, 214 P. 302.

An instruction is sufficient if using the words "without just cause or excuse," without adding thereto the words "or when no considerable provocation appeared." State v. McDonald, 14 U. 173, 46 P. 872.

Charge of assault with intent to do bodily harm also includes a simple assault. State v. Barkas, 91 U. 574, 65 P.2d 1130.

In prosecution for assault with intent to do bodily harm, it was error for trial court to refuse to submit possible verdict of simple assault to jury. State v. Barkas, 91 U. 574, 65 P.2d 1130.

11. Verdict.

A verdict finding accused "guilty of the crime of assault with a deadly weapon as charged in the information," was held to warrant a sentence under this section. State v. Kakarikos, 45 U. 470, 146 P. 750.

Even though information charging assault with intent to murder charged as an included offense a violation of this section, finding accused guilty of an assault with a deadly weapon, as charged in information, but not finding that assault was with intent to do bodily harm, will not support a conviction under this section, because verdict does not contain all the elements constituting that crime. State v. Jukanovich, 45 U. 372, 146 P. 289.

12. Harmless error.

In prosecution for assault with deadly weapon, with intent to commit bodily harm, refusal to give instruction on

self-defense held not to have constituted error prejudicial to substantial rights of defendant where no evidence supported self-defense. State v. Tularico, 57 U. 229, 193 P. 860.

A. L. R. notes.

Cane as a deadly weapon, 30 A. L. R. 815; firearm used as a bludgeon as a deadly weapon, 8 A. L. R. 1319; inference of intent to kill where killing is by blow without weapon, 24 A. L. R. 666; kicking as an aggravated assault, or an assault with a deadly weapon, 33 A. L. R. 1186.

103-7-7. With Intent to Commit Rape, etc.

Every person who assaults another with intent to commit rape, the infamous crime against nature, or mayhem is punishable by imprisonment in the state prison not less than one nor more than ten years.

(C. L. 17, § 8047.)

History.

This section is identical with R. S. 1898, § 4179; Comp. Laws 1907, § 4179, except that robbery was formerly among the crimes enumerated therein.

Cross-references.

Trials public, exceptions, 20-7-2; sodomy, 103-51-22.

1. Included offenses.

In prosecution under this section, refusal of court to instruct jury that defendant could be convicted of simple assault was reversible error, since attempt to commit offense charged is included in the offense under 103-1-29. State v. Hyams, 64 U. 285, 230 P. 349.

2. Intent to commit rape.

3. — in general.

Intent with which assault is made is of essence of offense of assault with intent to commit rape, and, in order to justify conviction of such offense, jury must be satisfied, not only that defendant had ability and intended to gratify his passions on person of woman assaulted, but also that he intended to do so at all events and not withstanding any resistance which she might make. State v. McCune, 16 U. 170, 51 P. 818.

On prosecution for assault with intent to commit rape, held that no more resistance on part of prosecutrix was required by law than prosecutrix' condition would have permitted her to make. State v. McCune, 16 U. 170, 51 P. 818.

On prosecution for assault with intent to commit rape, held that, in absence of threats of immediate and great bodily harm, accompanied by apparent power of execution, no acts of defendant towards or on person of prosecutrix constituted assault on her, if such acts were consented to by her at any time or if, by her silence or failure to object to them as they progressed, she gave defendant reasonably to understand that seriously she did not object to them at all. State v. McCune, 16 U. 170, 51 P. 818.

Where jury returned verdict that defendant was guilty of attempt to commit rape and court entered judgment that defendant was guilty of assault with intent to commit rape, judgment was reversed, since assault with intent to commit rape and attempt to commit rape were not same offenses. State v. Hyams, 64 U. 285, 230 P. 349.

4. — defenses.

Bad reputation of prosecutrix for chastity is not defense to charge of assault with intent to commit rape, if prosecutrix was forced against her will. State v. McCune, 16 U. 170, 51 P. 818.

5. — evidence.

Rule that, in case of rape, declarations of prosecutrix, made immediately or soon after attack, are admissible in evidence as part of res gestae, not to prove commission of offense but in corroboration of prosecutrix' testimony, applies with equal force on prosecution for assault with intent to commit rape. State v. Imlay, 22 U. 156, 61 P. 557.

If prosecutrix, on prosecution for assault with intent to commit rape, is of bad reputation for chastity, such fact is proper matter for consideration of jury on question of whether she would be likely or unlikely to resist assault of character charged. State v. McCune, 16 U. 170, 51 P. 818.

On prosecution for assault with intent to commit rape, on which defendant admitted that he took liberties with prosecutrix but claimed that he did so with her consent and that her statements in other respects were not true, held that evidence was sufficient to justify verdict of guilty. State v. McCune, 16 U. 170, 51 P. 818.

A. L. R. notes.

Assault and battery, acquittal or conviction of as bar to prosecution for rape,

or assault with intent to commit rape, based on same transaction, 78 A. L. R. 1213; assault with intent to ravish or rape consenting female under age of consent, 81 A. L. R. 599; criminal responsibility of husband as for rape, or assault to commit rape, on wife, 18 A. L. R. 1063; impotency as defense to charge of rape or assault with intent to commit rape, 26 A. L. R. 772.

103–7–8. With Intent to Commit Felony—Exceptions.

Every person who is guilty of an assault with intent to commit any felony, except an assault with intent to commit robbery or murder, and except assaults enumerated in the next preceding section, is punishable by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding one year, or by fine not exceeding $300, or by both such fine and either of such imprisonments.

(L. 23, p. 44, § 8048.)

Cross-references.
Attempts, 103–1–29, 103–1–30.

A. L. R. notes.
Offense of larceny, embezzlement, robbery or assault to commit robbery, as affected by defendant's intention to take or retain money or property in payment of, or as security for, claim, or to collect debt, or to recoup gambling losses, 116 A. L. R. 997.

103–7–9. Upon a Child Under Fourteen.

Every person who shall assault a child, whether male or female, under the age of fourteen years, and shall take indecent liberties with or on the person of such child, without committing, intending or attempting to commit the crime of rape, upon such child, with or without the child's consent, is guilty of a felony. (C. L. 17, § 8049.)

History.
This section was enacted into law March 5, 1909, Laws 1909, Ch. 26, p. 25, § 1.

1. Words and phrases defined.
The term "indecent liberties," as used in this section, is self-defining, and is convertible with "indecent assault." State v. Macmillan, 46 U. 19, 145 P. 833.

2. Elements of offense.
See supra, 103–7–7, annotation 3.

3. Included offenses.
Crime of simple assault is included in the offense of indecent assault. State v. Waid, 92 U. 297, 67 P.2d 647. (Wolfe, J., questioned this result on the ground that a simple assault could be consented to by a child who could not consent to an indecent assault.)

4. Indictment and information.
An indictment under this section is sufficient without alleging in what manner and under what circumstances accused took indecent liberties with person of prosecutrix. State v. Macmillan, 46 U. 19, 145 P. 833.

An information under this section in the language thereof is sufficient. And if it is alleged in words of statute that accused did willfully, etc., assault a female child, and did willfully, etc., take indecent liberties with said child, etc., this is sufficient, and words formerly in this section, "or the crime of assault with intent to commit rape," were mere surplusage. State v. Therkelson, 48 U. 629, 161 P. 59.

5. Evidence.
Evidence of indecent conduct was sufficient to sustain conviction for indecent assault under this section as against contention that there was no evidence of violence sufficient to constitute assault. State v. Saunders, 82 U. 170, 22 P.2d 1043.

6. Harmless and prejudicial error.
In prosecution for indecent assault, where defendant's counsel asked witness for defendant concerning defendant's general reputation in community as law-abiding man, with special reference to his personal morality prior to transaction alleged in information, and on objection by state, inquiry was restricted by court to particular trait in issue, or sexual morality, and witness testified that his reputation concerning sexual morality was good, it was held defendant was not prejudiced by court's ruling. State v. Thompson, 58 U. 291, 199 P. 161, 38 A. L. R. 697.

Instruction in prosecution for indecent assault upon minor child which permitted jury to find defendant guilty if they found that the offense was committed under substantially the conditions detailed by the state's witnesses, held prejudicial where defendant had interposed the defense of alibi. State v. Waid, 92 U. 297, 67 P.2d 647.

103–7–10. With Narcotics and Anaesthetics.

Every person guilty of administering to another chloroform, ether, laudanum, or other narcotic, anaesthetic or intoxicant, with intent thereby to enable or assist himself or any other person to commit a felony, is guilty of a felony. (C. L. 17, § 8050.)

Comparable provisions.
Idaho Code, § 17–1209 (substantially identical).

Cross-references.
Administering poison, 103–28–12; administering narcotics, etc., to accomplish rape, 103–51–15.

103–7–11. By Convicts in State Prison—Penalty.

Any convict sentenced to imprisonment in the state prison for a term less than life, who commits an assault upon any other convict, or upon the warden or any guard or other person whomsoever, with a deadly weapon or instrument, or by means of force, or by administering any poisonous or other substance which is likely to produce great bodily harm or injury, is guilty of a felony, and shall be punished by imprisonment in the state prison for not less than three nor more than twenty years. (C. L. 17, § 8051.)

Cross-references.
Warden to post, 85–9–14.

103–7–12. Id.

Every convict undergoing a life sentence in the state prison, who, with malice aforethought, commits an assault upon any other convict, or upon the warden or any guard or upon any other person whomsoever, with a deadly weapon or instrument of any kind, or by means of force, or by administering any poisonous or deleterious substance which will likely produce great bodily injury, is punishable with death. (C. L. 17, § 8052.)

Cross-references.
Warden to post, 85–9–14.

CHAPTER 8

BANKING—FRAUDULENT

103–8–1. Receiving Deposits When Insolvent.

Every officer, agent, teller or clerk of any bank who receives any deposits, knowing that such bank is insolvent, is guilty of a felony. (C. L. 17, § 8369.)

Comparable provisions.
Cal. Penal Code, § 562 (misdemeanor; applicable also to "individual banker" and to his agent, teller, or clerk).

Cross-references.
Legal reserve, 7–3–36 to 7–3–38.

CHAPTER 9

BURGLARY *

103-9-1. In First Degree—Defined.
103-9-2. Id. Penalty.
103-9-3. In Second Degree—Defined.
103-9-4. Id. Penalty.
103-9-5. In Third Degree—Defined.
103-9-6. Id. Penalty.
103-9-7. "Nighttime" Defined.
103-9-8. Possession of Burglarious Tools—Penalty.

* **History of act.** This chapter was Comp. Laws 1876, Title XIII, Ch. II; R. S. 1898, Title 75, Ch. 39; Comp. Laws 1907, Title 90, Ch. 39.

103-9-1. In First Degree—Defined.

Every person who, in the nighttime, forcibly breaks and enters, or without force enters an open door, window or other aperture of, any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, or any tent, vessel, water craft, railroad car, automobile, automobile trailer, aeroplane or aircraft with intent to commit larceny or any felony by the use of nitroglycerin, dynamite, gunpowder or any other explosive, is guilty of burglary in the first degree. When in a prosecution for burglary in the first degree the question as to whether or not nitroglycerin, dynamite, gunpowder or any other explosive was used or intended to be used by the defendant in the commission of the crime cannot be definitely arrived at by the jury, a verdict of guilty of burglary in the second degree, as defined in section 103-9-3, Revised Statutes of Utah, 1933, may be found; *provided*, the other elements of the crime of burglary in the second degree, as defined in said section 103-9-3, Revised Statutes of Utah, 1933, have been proved. (C. L. 17, § 8257.)

History.

Except for the provision with respect to the use of explosives, the first sentence of this section is identical with R. S. 1898, § 4334. The second sentence was added later. Comp. Laws 1907, § 4334. Section was amended by L. 39, ch. 117, eff. May 9, adding material matter after "car" in fifth line of text.

Cross-references.

Joining larceny, etc., count, 105-21-31; agreement to commit burglary as conspiracy, 103-11-3; jurisdiction where property taken to another county, 105-8-12.

1. Essential elements.

Essential element of crime of burglary is that offense be committed—acts be done—in nighttime. State v. Miller, 24 U. 312, 67 P. 790.

The intent to commit larceny is the gist of the crime. People v. Morton, 4 U. 407, 11 P. 512. The intent with which accused entered house is crux of the case. State v. Evans, 74 U. 389, 396, 279 P. 960.

A larceny, to constitute burglary, must be committed in the "nighttime," and affirmative proof that it was so committed must be adduced; but such proof need not be direct, but may be circumstantial. State v. Richards, 29 U. 310, 81 P. 142.

2. Indictment and information.

Under prior statute, in prosecution for burglary, information which charged that defendants unlawfully and feloniously broke into building at night with intent to steal and carry away goods, but which did not state value of goods, held sufficiently to state offense of burglary in first degree, since "larceny" as used in this section included both misdemeanor and felony, and words "or any other felony," as used in statute, were equivalent to words "or any felony other than that embraced within the larceny." State v. Hows, 31 U. 168, 87 P. 163.

3. Evidence.

4. — in general.

The elements of the crime may be proven by direct and by circumstantial

evidence. State v. Richards, 29 U. 310, 81 P. 142.

5. —commission in "nighttime."

Burglary is not proved by evidence that goods were stolen from store between 9:30 P.M. and 6:30 A.M., where sun rose at 4:38 A.M. State v. Miller, 24 U. 312, 67 P. 790. It must be shown that it was committed in the nighttime. State v. Richards, 29 U. 310, 81 P. 142.

Evidence that the place burglarized, which was a store, was locked up at dark, that the manager arose before sunrise, and spent nearly all the time between that time and the time when he opened the store (about an hour after sunrise), in plain view of the store, where he could have seen anyone leaving it, and that on arriving at the store he found the door broken open and the things taken, was sufficient to authorize the jury to find that the burglary was committed in the nighttime. State v. Richards, 29 U. 310, 81 P. 142.

Evidence sustained conviction of burglarizing chicken house in nighttime. State v. Hutchings, 30 U. 319, 84 P. 893.

A. L. R. notes.

Burglary without breaking, 23 A. L. R. 288.

Larceny, conviction or acquittal of as bar to prosecution for burglary, 19 A. L. R. 626.

Necessity and sufficiency of allegations in indictment or information for burglary as to value of property intended to be stolen which would make its theft a felony, 113 A. L. R. 1269.

Opening closed but unlocked door as breaking which will sustain charge of burglary or breaking and entering, 23 A. L. R. 112.

Vacancy or nonoccupancy of building as affecting its character as a "dwelling" as regards burglary, 85 A. L. R. 428.

103-9-2. Id. Penalty.

Burglary in the first degree is punishable by imprisonment in the state prison for a term not less than twenty-five years nor more than forty years. (C. L. 17, § 8258.)

103-9-3. In Second Degree—Defined.

Every person who, in the nighttime, forcibly breaks and enters, or without force enters an open door, window or other aperture of, any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, or any tent, vessel, water craft, railroad car, automobile, automobile trailer, aeroplane or aircraft with intent to commit larceny or any felony, is guilty of burglary in the second degree. When in a prosecution for burglary in the second degree the question as to whether the crime has been committed in the nighttime or in the day time cannot be definitely arrived at by the jury, a verdict of guilty of burglary in the third degree, as defined in section 103-9-5, Revised Statutes of Utah, 1933, may be found; *provided*, the other elements of the crime of burglary in the third degree, as defined in said section 103-9-5, Revised Statutes of Utah, 1933, have been proved. (C. L. 17, § 8259.)

History.

As amended by L. 39, ch. 118, eff. May 9, adding clause after "car" in fifth line of text.

1. Elements of crime.

In a prosecution for second degree burglary, the intent with which defendant entered the structure, as, for example, a home, is the crux of the case. State v. Evans, 74 U. 389, 396, 279 P. 950.

2. Structures subject to burglary.

Rabbit pens which were permanently constructed held within the kind of structures that may be burglarized. State v. Terrell, 55 U. 314, 186 P. 108, 25 A. L. R. 497.

3. Instructions.

If instructions do not properly reflect accused's theory, judgment of conviction will be reversed. State v. Evans, 74 U. 389, 396, 279 P. 950.

A. L. R. notes.
Burglary without breaking, 23 A. L. R. 288.
Larceny, conviction or acquittal of as bar to prosecution for burglary, 19 A. L. R. 626.
Necessity and sufficiency of allegations in indictment or information for burglary as to value of property intended to be stolen which would make its theft a felony, 113 A. L. R. 1269.
Opening closed but unlocked door as breaking which will sustain charge of burglary or breaking and entering, 23 A. L. R. 112.
Vacancy or nonoccupancy of building as affecting its character as a "dwelling" as regards burglary, 85 A. L. R. 428.

103–9–4. Id. Penalty.

Burglary in the second degree is punishable by imprisonment in the state prison for a term not less than one year nor more than twenty years. (C. L. 17, § 8260.)

History.
This section is identical with R. S. 1907, § 4335.

1. Punishment.
As jury has no authority to prescribe punishment for this crime, no error is committed in failing to inform them of the penalty provided by law. State v. Johnson, 79 U. 263, 9 P.2d 186.

103–9–5. In Third Degree—Defined.

Every person who, in the daytime, enters any dwelling house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, or any tent, vessel, water craft, railroad car, automobile, automobile trailer, aeroplane or aircraft, with intent to steal or to commit any felony whatever therein, is guilty of burglary in the third degree. (C. L. 17, § 8261.)

History.
This section is identical with Comp. Laws 1907, § 4336, except that words "automobile, automobile trailer, aeroplane or aircraft" were added when section was amended by L. 39, ch. 119, eff. May 9.

1. Evidence.
In prosecution for burglary in third degree, wherein defendant's conviction was dependent solely upon circumstantial evidence, held circumstances must be such as to exclude every reasonable hypothesis except that of defendant's guilt of offense charged; that every circumstance constituting necessary link in chain of evidence must be consistent with defendant's guilt and inconsistent with his innocence. State v. Crawford, 59 U. 39, 201 P. 1030.

In prosecution for burglary in third degree, the fact that defendant had attempted to escape from officers at time he was charged with crime of robbery, held not indicative of guilt of burglary for which accused was subsequently tried. State v. Crawford, 59 U. 39, 201 P. 1030.

In prosecution for burglary in third degree, finding of stolen articles in room occupied by defendant and another held insufficient to connect defendant with crime. State v. Crawford, 59 U. 39, 201 P. 1030.

In prosecution for burglary in third degree, wherein prosecution relied principally on possession of recently stolen property, held identity of property should be established beyond reasonable doubt, but not necessarily beyond possibility of doubt. State v. Crawford, 59 U. 39, 201 P. 1030.

In prosecution for second degree burglary, where conviction was for third degree burglary, evidence was held to sustain conviction. State v. Evans, 74 U. 389, 279 P. 950.

A. L. R. notes.
Burglary without breaking, 23 A. L. R. 288.
Larceny, conviction or acquittal of as bar to prosecution for burglary, 19 A. L. R. 626.
Necessity and sufficiency of allegations in indictment or information for burglary as to value of property intended to be stolen which would make its theft a felony, 113 A. L. R. 1269.

Opening closed but unlocked door as breaking which will sustain charge of burglary or breaking and entering, 23 A. L. R. 112.

Vacancy or nonoccupancy of building as affecting its character as a "dwelling" as regards burglary, 85 A. L. R. 428.

103–9–6. Id. Penalty.

Burglary in the third degree is punishable by imprisonment in the state prison for a term not less than six months nor more than three years. (C. L. 17, § 8262.)

103–9–7. "Nighttime" Defined.

The word "nighttime," as used in this chapter, means the period of time between sunset and sunrise. (C. L. 17, § 8263.)

History.
This section is practically identical with Comp. Laws 1876, § 2090; 2 Comp. Laws 1888, § 4625; R. S. 1898, § 4338; Comp. Laws 1907, § 4338.

Comparable provisions.
Cal. Penal Code, § 463, Mont. Rev. Codes, § 11350 (substantially identical).

1. **Commission in "nighttime."**
Essential element of crime of burglary is that offense be committed—acts be done—in nighttime. State v. Miller, 24 U. 312, 67 P. 790.

Burglary is not proved by evidence that goods were stolen from store between 9:30 P.M. and 5:30 A.M., where sun rose at 4:38 A.M. State v. Miller, 24 U. 312, 67 P. 790.

A larceny, to constitute burglary, must be committed in the nighttime, and affirmative proof that it was so committed must be adduced; but such proof need not be direct, but may be circumstantial. State v. Richards, 29 U. 310, 81 P. 142.

Further as to "nighttime," see 103–9–1.

103–9–8. Possession of Burglarious Tools—Penalty.

Every person having upon him or in his possession a picklock, crowbar, key, bit or other instrument or tool with intent feloniously to break into or enter any building; or who knowingly makes or alters, or attempts to make or alter, any key or other instrument so that the same will fit or open the lock of a building, without being requested so to do by some person having the right to open the same, or who makes, alters or repairs any instrument or thing, knowing or having reason to believe that it is intended to be used in committing a misdemeanor or felony, is guilty of a misdemeanor. Any of the structures mentioned in section 103–9–1 shall be deemed to be a building within the meaning of this section. (C. L. 17, § 8264.)

Comparable provisions.
Cal. Penal Code, § 466, Idaho Code, § 17–3406, Mont. Rev. Codes, § 11353 (substantially identical).

1. **Burglar's tools.**
In prosecution for burglary in third degree, wherein it appeared that marks and abrasions found on door of burglarized house might have been made with tools found in room occupied by defendant, held such tools were properly admissible in evidence, although it was not shown that tools admitted were adapted to commission of burglary. State v. Crawford, 59 U. 39, 201 P. 1030.

A. L. R. notes.
Construction and application of statute relating to burglars' tools, 103 A. L. R. 1313.

CHAPTER 10

CEMETERIES *

103-10-1. Disinterring Dead Bodies—A Felony.
103-10-2. Id. To Sell or Dissect, a Felony.
103-10-3. Violating Place of Sepulture—Penalty.

* **History of act.** This chapter was R. S. 1898, Title 75, Ch. 29; Comp. Laws 1907, Title 90, Ch. 29.

103-10-1. Disinterring Dead Bodies—A Felony.

Every person who mutilates, disinters, or removes from the place of sepulture, the dead body of a human being without authority of law is guilty of felony. But the provisions of this section do not apply to any person who removes the dead body of a relative or friend for reinterment, nor to any physician who shall make a post-mortem examination with the consent of relatives or friends of the deceased.

(C. L. 17, § 8124.)

Comparable provisions.
Mont. Rev. Codes, § 11032 (identical, except that it does not contain clause as to physician who makes post-mortem examination).

1. Performance of autopsy after burial.
Under this section, in action on accident policy defended on ground that death of insured was caused by heart disease alone, or in combination with accident, held right of insurer to autopsy, which was provided for in policy but refused by plaintiff, was properly covered by instructions to jury that it was not unlawful to perform autopsy on deceased after burial, and whether insured had exercised due diligence in requesting autopsy after notice of death of deceased was for jury. General Accident Fire & Life Assur. Corp. v. Savage, 35 F.2d 587.

A. L. R. notes.
Constitutionality, construction and application of criminal statutes specifically denouncing offenses affecting cemeteries, burial lots, tombstones and the like, 132 A. L. R. 557.

103-10-2. Id. To Sell or Dissect, a Felony.

Every person who removes any part of the dead body of a human being from any grave or other place where the same has been buried, or from any place where the same is deposited while awaiting burial, with intent to sell the same or to dissect it without authority of law, or from malice or wantonness, is punishable by imprisonment in the state prison not exceeding five years. (C. L. 17, § 8125.)

Comparable provisions.
Mont. Rev. Codes, § 11033 (similar).

Cross-references.
Unknown dead to university medical department, 75-4-30.

103-10-3. Violating Place of Sepulture—Penalty.

Every person who willfully and maliciously defaces, breaks, destroys or removes any tomb, monument or gravestone erected to any deceased person, or any memento or memorial, or any ornamental plant, tree or shrub appertaining to the place of burial of a human being, or who shall mark, deface, injure, destroy or remove any fence, post, rail or wall of any cemetery or graveyard, is guilty of a misdemeanor.

(C. L. 17, § 8126.)

Comparable provisions.
Iowa Code 1939, § 13102 (similar in purport).
Mont. Rev. Codes, § 11038 (identical).

A. L. R. notes.
Constitutionality, construction, and application of criminal statutes specifically denouncing offenses affecting cemeteries, burial lots, tombstones, and the like, 132 A. L. R. 557.

CHAPTER 11

CONSPIRACY

103-11-1. Criminal Conspiracy Defined.
103-11-2. Conspiracies Not Enumerated Not Punishable.
103-11-3. Some Act Besides Agreement Necessary.

103-11-1. Criminal Conspiracy Defined.

If two or more persons conspire:

(1) To commit a crime; or,

(2) Falsely and maliciously to indict or convict another for any crime, or to procure another to be charged or arrested for any crime; or,

(3) Falsely to move or maintain any suit, action or proceeding; or,

(4) To cheat and defraud any person of any property by any means which are in themselves criminal, or by any means which if executed would amount to a cheat, or to the obtaining of money or property by false pretenses; or,

(5) To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws;—they are punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding $1,000. (C. L. 17, § 8018.)

History.
This section is practically identical with R. S. 1898, § 4156; Comp. Laws 1907, § 4156; 2 Comp. Laws 1888, § 4449.

Comparable provisions.
Cal. Penal Code, § 182 (includes similar provisions).
Idaho Code, § 17-1027, Mont. Rev. Codes, § 10898 (substantially the same except that words "or convict" are omitted from subd. 2; from subd. 5 are omitted the words: "or to trade or commerce"; final paragraph concludes with words "or both").

Cross-references.
Conspiracy, pleading and proof, 105-32-11.

1. What constitutes.
In order to constitute criminal conspiracy it is not necessary that acts agreed to be done would be criminal, if done, but it is sufficient if acts agreed to be done although not criminal are wrongful. State v. Blake, 36 U. 605, 105 P. 910.

A conspiracy under subdivision (3) may be charged against a justice of the supreme court in an answer. In re Snow, 27 U. 265, 75 P. 741, applying R. S. 1898, § 4156. For example, answer which charged that justice of supreme court had conspired with plaintiff to bring action, which was not bona fide, for sole purpose of gratifying malicious instincts of justice, charged conspiracy rendering justice liable to removal from office under this section. In re Snow, 27 U. 265, 75 P. 741.

2. Liability for conspiracy.
Where several combine together to commit an unlawful act, each is responsible for acts of his associates or confederates committed in furtherance thereof or in prosecution of common design for which they combined. State v. Kukis, 65 U. 362, 237 P. 476. See State v. Morgan, 22 U. 162, 172, 61 P. 527.

3. Indictment or information.

Information which sufficiently charged that defendant and another conspired together to cheat and defraud plaintiff of property by any means which, if executed, would amount to cheat, or of obtaining property by false pretenses, stated criminal conspiracy. State v. Blake, 36 U. 605, 105 P. 910.

4. Defenses.

In prosecution of deputy sheriffs for conspiracy to extort money by demanding of those possessing wine illegally a wine tax or fine, acquittal in federal court in prosecution for illegal possession and transportation of intoxicating liquors, held not to warrant directed verdict on ground of former acquittal in prosecution for same offense. State v. McIntyre, 92 U. 177, 66 P.2d 879.

5. Evidence.

The admissibility of evidence to prove a conspiracy is a matter of the general law of evidence, and has no place in this annotation. See, however, State v. De Angeles, 72 U. 209, 269 P. 515; State v. Barretta, 47 U. 479, 155 P. 343; State v. Inlow, 44 U. 485, 141 P. 530; State v. Romeo, 42 U. 46, 128 P. 530; State v. Gillies, 40 U. 541, 123 P. 93, 43 L. R. A. (N. S.) 776.

Direct and positive evidence is not essential to prove a conspiracy, but circumstantial evidence is sufficient where it excludes every reasonable hypothesis except that of guilt, which must be proved beyond a reasonable doubt. State v. McIntyre, 92 U. 177, 66 P.2d 879.

In prosecution for conspiracy for inducing purchase of worthless mining stock by false representations, evidence held insufficient to prove falsity of representations as to financial condition of company or character and value of its property, or value of stock, so as to justify conviction. State v. Blake, 36 U. 605, 105 P. 910.

A. L. R. notes.

Conspiracy to commit adultery or other offense which can only be committed by the concerted action of the parties to it. 104 A. L. R. 1430.

103–11–2. Conspiracies Not Enumerated Not Punishable.

No conspiracies other than those enumerated in the next preceding section are punishable criminally. (C. L. 17, § 8019.)

History.

This section is identical with R. S. 1898, § 4157; Comp. Laws 1907, § 4157.

Comparable provisions.

Cal. Penal Code, § 183 (substantially identical).

Mont. Rev. Codes, § 10899 (identical).

103–11–3. Some Act Besides Agreement Necessary.

No agreement, except to commit a felony upon the person of another or to commit arson or burglary, amounts to a conspiracy, unless some act, besides such agreement, is done to effect the object thereof by one or more of the parties to such agreement. (C. L. 17, § 8020.)

History.

This section is identical with R. S. 1898, § 4158; Comp. Laws 1907, § 4158.

Comparable provisions.

Cal. Penal Code, § 184 (includes similar provision, other than as to exception mentioned herein; and also being worded in part, "* * * be done within this state * * *").

Mont. Rev. Codes, § 10900 (substantially identical).

Cross-references.

Quantum of proof, 105–32–11.

CHAPTER 12

CORPORATION FRAUDS *

103-12-1. In Stock Subscriptions.
103-12-2. In Organization — In Increasing Capital Stock.
103-12-3. Representing One to Be an Officer Who Is Not.
103-12-4. Certain Acts Prohibited—By Directors.
103-12-5. Id. By Directors, Officers or Agents.
103-12-6. False Reports.
103-12-7. Refusing Inspection of Books.
103-12-8. Presumptions—That Director Has Knowledge of Affairs.
103-12-9. Id. That Director Concurred in Vote, if Present.
103-12-10. Id. If Not Present.
103-12-11. Foreign Corporations — Chapter Applicable to.
103-12-12. "Director" Defined.

* **History of act.** This chapter was R. S. 1898, Title 75, Ch. 49, p. 929; Comp. Laws 1907, Title 90, Ch. 49, p. 1333.

103-12-1. In Stock Subscriptions.

Every person who signs the name of a fictitious person to any subscription for, or agreement to take, stock in any corporation existing or proposed, and every person who signs to any such subscription or agreement the name of any person, knowing that such person has not means or does not intend in good faith to comply with all the terms thereof, or under any understanding or agreement that the terms of such subscription or agreement are not to be complied with or enforced, is guilty of a misdemeanor. (C. L. 17, § 8365.)

Comparable provisions.
Cal. Penal Code, § 557, Idaho Code, § 17-4001, Mont. Rev. Codes, § 11437 (substantially identical).

Cross-references.
Formation of corporations, 18-2.

103-12-2. In Organization—In Increasing Capital Stock.

Every officer, agent or clerk of any corporation, or of any person proposing to organize a corporation, or to increase the capital stock of any corporation, who knowingly exhibits any false, forged or altered book, paper, voucher, security or other instrument of evidence to any public officer or board authorized by law to examine the organization of such corporation, or to investigate its affairs, or to allow an increase of its capital, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment in the state prison not less than one year nor more than ten years. (C. L. 17, § 8366.)

Comparable provisions.
Cal. Penal Code, § 558, Mont. Rev. Codes, § 11439 (substantially identical, except as being worded in part: "* * * not less than three nor more than ten years").

Cross-references.
Limitation on issuance and increase of capital stock, Const. Art. XII, § 5.

103-12-3. Representing One to Be an Officer Who Is Not.

Every person who, without being authorized so to do, subscribes the name of another to, or inserts the name of another in, any prospectus, circular or other advertisement or announcement of any corporation or

joint-stock association, existing or intended to be formed, with intent to permit the same to be published, and thereby to lead persons to believe that the person whose name is so subscribed is an officer, agent, member or promoter of such corporation or association, is guilty of a misdemeanor. (C. L. 17, § 8367.)

Comparable provisions.
Cal. Penal Code, § 559, Idaho Code, § 17–4003, Mont. Rev. Codes, § 11440 (identical).

103–12–4. Certain Acts Prohibited—By Directors.

Every director of any stock corporation who concurs in any vote or act of the directors of such corporation or any of them, by which it is intended either:

(1) To make any dividend except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law; or,

(2) To divide, withdraw or in any manner, except as provided by law, pay to the stockholders, or any of them, any part of the capital of the corporation; or,

(3) To discount or receive any note or other evidence of debt in payment of any installment actually called in and required to be paid, or with the intent to provide the means of making such payment; or,

(4) To receive or discount any note or other evidence of debt, with the intent to enable any stockholder to withdraw any part of the money paid in by him on his stock; or,

(5) To receive from any other stock corporation in exchange for the shares, notes, bonds or other evidences of debt of their own corporation shares of the capital stock of such other corporation, or notes, bonds or other evidences of debt issued by such corporation;—is guilty of a misdemeanor. (C. L. 17, § 8368.)

History.
This section is practically identical with R. S. 1898, § 4411; Comp. Laws 1907, § 4411.

Comparable provisions.
Idaho Code, § 17–4004, Mont. Rev. Codes, § 11441 (substantially identical).

Cross-references.
Payment of dividends, 18–2–16, subd. (4); railroads may purchase or exchange stock, 77–0–5, subd. (13).

1. Impairment of capital.
By subdivision (2) of this section, it was intention of legislature to prohibit corporation from paying out to stockholders any of its assets except profits in form of dividends. Pace v. Pace Bros. Co., 91 U. 149, 63 P.2d 590.

Words "except as provided by law," as used in subdivision (2) of this section, refer to statutory law and not to general law as it exists in the state, and do not allow courts to permit a corporation to buy its own stock. Pace v. Pace Bros. Co., 91 U. 132, 59 P.2d 1.

Word "capital" as used in subdivision (2) of this section means assets. Pace v. Pace Bros. Co., 91 U. 149, 63 P.2d 590.

Capital stock, as used in this section, means "the capital of corporation on which it transacts business, whether such capital consists of money, property, or other valuable commodities." Cooper v. Utah Light & Railway Co., 35 U. 570, 102 P. 202, 136 Am. St. Rep. 1075.

Transaction whereby one corporation sells and transfers all its property and franchises, except franchise to be corporation, to another corporation, upon agreement that proceeds or consideration of sale should be distributed to stockholders of selling corporation, and where proceeds are so distributed in accordance with such agreement entered into between two corporations, is, as to creditors of selling corporation, not only

fraudulent, but unlawful. Cooper v. Utah Light & Railway Co., 35 U. 570, 102 P. 202, 136 Am. St. Rep. 1076.

2. Purchase of own stock by company.

Subdivision (2) of this section was designed to prevent purchase by a corporation of its own stock. Pace v. Pace Bros. Co., 91 U. 132, 59 P.2d 1.

Purchase by corporation of its own stock was null and void by virtue of subdivision (2) of this section. Pace v. Pace Bros. Co., 91 U. 132, 59 P.2d 1.

In action on notes given by corporation to purchase stock from stockholder, contention of plaintiff that certain proportion of amount of notes was in payment of surplus which had accumulated to credit of stockholder could not be sustained, where it was not shown that surplus came from earnings. Pace v. Pace Bros. Co., 91 U. 149, 63 P.2d 590.

103-12-5. Id. By Directors, Officers or Agents.

Every director, officer or agent of any corporation or association who knowingly receives or possesses himself of any property of such corporation or association, otherwise than in payment of a just demand, and who, with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof in the books or accounts of such corporation or association; and every director, officer, agent or member of any corporation or association who embezzles, abstracts or willfully misapplies any of the money, funds or credits of the corporation or association; or who, without authority from the directors, issues or puts in circulation any of the notes of the corporation or association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false entry in any book, report or statement of the corporation or association; or who issues any fraudulent, fictitious or illegal stock in any such corporation or association, with intent in either case to injure or defraud the corporation or association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the corporation or association, or any agent appointed to examine the affairs of any such corporation or association; and every person who, with like intent, aids or abets any officer, clerk or agent in any violation of this section is guilty of a felony, and shall be imprisoned in the state prison for not less than one year nor more than ten years, and be fined in any sum less than $10,000. (C. L. 17, § 8370.)

History.

This section is practically identical with Comp. Laws 1907, § 4413, amending R. S. 1898, § 4413.

Comparable provisions.

Mont. Rev. Codes, § 11445 (similar in purport).

1. Indictment or information.

Information under this section charging that defendant deposited in his own account check of certain amount drawn against certain bank was sufficient, although there were no allegations as to date of check, name of payee, or name of maker. State v. Pritchett, 87 U. 109, 48 P.2d 451, setting aside opinion in 87 U. 104, 34 P.2d 704. (Hansen, C. J., and Hanson, J., dissenting.)

103-12-6. False Reports.

Every director, officer or agent of any corporation or joint-stock association who knowingly makes or concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condi-

tion, containing any material statement which is false is guilty of a misdemeanor. (C. L. 17, § 8371.)

Comparable provisions.
Idaho Code, § 17–4006 (identical, except as reading in part, "* * * who knowingly concurs in making * * *").

Cross-references.
False reports to bank commissioner, 7–1–20.

103–12–7. Refusing Inspection of Books.

Every officer or agent of any corporation, having or keeping an office within this state, who has in his custody or control any book, paper or document of such corporation, and who refuses to give to a stockholder or member of such corporation, lawfully demanding during office hours to inspect or take a copy of the same or of any part thereof, a reasonable opportunity so to do, is guilty of a misdemeanor. (C. L. 17, § 8372.)

History.
This section is practically identical with R. S. 1898, § 4415; Comp. Laws 1907, § 4415.

Comparable provisions.
Idaho Code, § 17–4007, Mont. Rev. Codes, § 11447 (substantially identical).

Cross-references.
Books subject to inspection of bona fide stockholders, 18–2–31.

1. Right of inspection.
Under common law, stockholder had right to inspect books and records of corporation at all seasonable times and for proper purpose. Kimball v. Dern, 39 U. 181, 116 P. 28, 35 L. R. A. (N. S.) 134, Ann. Cas. 1913 E 166.

The fact that right of stockholder to inspect corporate books is sought to be strictly enforced by penal statute emphasizes existence of right, rather than qualifies it. Clawson v. Clayton, 33 U. 266, 93 P. 729.

Party who is bona fide stockholder of record of corporation has right under statute to inspect books of such corporation regardless of his motive or purpose in making inspection. Kimball v. Dern, 39 U. 181, 116 P. 28, 35 L. R. A. (N. S.) 134, Ann. Cas. 1913 E 166.

2. Mandamus.
Ordinarily, mandamus will lie to enforce right of stockholder to inspect books and records of corporation. Kimball v. Dern, 39 U. 181, 116 P. 28, 35 L. R. A. (N. S.) 134, Ann. Cas. 1913 E 166.

103–12–8. Presumptions—That Director Has Knowledge of Affairs.

Every director of a corporation or joint-stock association is deemed to possess such a knowledge of the affairs of his corporation as to enable him to determine whether any act, proceeding or omission of its directors is a violation of this chapter. (C. L. 17, § 8375.)

Comparable provisions.
Cal. Penal Code, § 568, Idaho Code, § 17–4008, Mont. Rev. Codes, § 11450 (identical).

103–12–9. Id. That Director Concurred in Vote, if Present.

Every director of a corporation or joint-stock association who is present at a meeting of the directors at which any act, proceeding or omission of such directors in violation of this chapter occurs is deemed to have concurred therein, unless he at the time causes, or in writing requires, his dissent therefrom to be entered in the minutes of the directors. (C. L. 17, § 8376.)

Comparable provisions.
Idaho Code, § 17–4009, Mont. Rev. Codes, § 11451 (identical).

103–12–10. Id. If Not Present.

Every director of a corporation or joint-stock association, although not present at a meeting of the directors at which any act, proceeding or omission of such directors in violation of this chapter occurs, is deemed to have concurred therein, if the facts constituting such violation appear on the records or minutes of the proceedings of the board of directors, and he remains a director of the same company for six months thereafter, and does not within that time cause, or in writing require, his dissent from such illegality to be entered in the minutes of the directors. (C. L. 17, § 8377.)

Comparable provisions.
Idaho Code, § 17–4010 (identical).
Mont. Rev. Codes, § 11452 (substantially identical).

103–12–11. Foreign Corporations—Chapter Applicable to.

It is no defense to a prosecution for a violation of any of the provisions of this chapter that the corporation was one created by the laws of another state, government or country, if it was one carrying on business or keeping an office therefor within this state. (C. L. 17, § 8378.)

Comparable provisions.
Cal. Penal Code, § 571 (identical).
Idaho Code, § 17–4011 (substantially identical; "territory" is likewise mentioned).
Mont. Rev. Codes, § 11453 (substantially identical).

Cross-references.
Foreign corporations, Const. Art. XII, § 6, 18–8.

103–12–12. "Director" Defined.

The term "director," as used in this chapter, embraces any of the persons having by law the direction or management of the affairs of a corporation, by whatever name such persons are described in its charter or known by law. (C. L. 17, § 8379.)

Comparable provisions.
Cal. Penal Code, § 572, Idaho Code, § 17–4012, Mont. Rev. Codes, § 11458 (identical).

CHAPTER 13

DOMESTIC RELATIONS *

ARTICLE 1

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* History of act. This was chapter 105 of Laws 1911, p. 149.

ARTICLE 1

DESERTION OF FAMILY

103–13–1. Penalty—Disposition of Earnings—Release on Probation—Recognizance.

Any person who, without just cause, deserts or willfully neglects or refuses to provide for the support and maintenance of his wife in destitute or necessitous circumstances, and any person who, without just excuse, deserts or willfully neglects or refuses to provide for the support and maintenance of his or her minor child or children, under the age of sixteen years, in destitute or necessitous circumstances is guilty of a felony, and shall be punished by imprisonment in the state prison at hard labor for a period of not to exceed eighteen months; and if any person so convicted is placed at hard work on any state road, or shall work for the state, the state shall pay into the county treasury of the county in which such person was convicted, for the use and benefit of the wife or minor child or children so neglected, the sum of $1 per day, said money to be paid every two weeks during the period such person shall be kept at work. Said money shall be paid out of the general fund of the state, not otherwise appropriated; *provided*, that before the trial with the consent of the defendant, or after conviction, instead of imposing the punishment hereinbefore or hereinafter provided the court in its discretion, having regard to the circumstances, financial ability and earning capacity of the defendant, shall have power to make an order, which shall be subject to change by it from time to time as circumstances may require, directing the defendant to pay a certain sum weekly, for the space of one year, into the county treasury, to be used for the support of the dependents involved, as hereinafter provided, and to release the defendant from custody on probation for the space of one year, upon his entering into a recognizance with or without security in such sum as the court may direct. The condition of the recognizance shall be such, that if the defendant shall make personal appearance in court whenever ordered to do so within the year and shall further comply with the terms of the order and any subsequent modifications thereof, then the recognizance shall be void, otherwise in full force and effect. If the court is satisfied by information and due proof under oath that at any time during the year the defendant has violated the terms of such order, it may forthwith proceed with the trial of the defendant under the original charge, or sentence him under the original conviction, or enforce the original sentence, as the case may be. In the case of forfeiture of recognizance and the enforcement thereof by execution, the sum recovered may, in the discretion of the court, be paid in whole or in part into the county treasury, to be used for the support of the dependents involved, as hereinafter provided.

(L. 21, p. 393, § 8112.)

History.

This section was Laws 1911, Ch. 105, p. 149, § 1.

Comparable provisions.

States that have adopted the Uniform Desertion and Non-Support Act are as follows: Alabama, California, Colorado, Delaware, Illinois, Kansas, Massachusetts, Mississippi, Nevada, New Jersey, North Dakota, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

Uniform Desertion and Non-Support Act, § 1 (similar to first eight lines herein, concluding as follows: "* * * child or children under the age of sixteen years in destitute or necessitous circumstances, shall be guilty of a crime and, on conviction thereof, shall be punished by fine not exceeding $500, or imprisonment in the ....., not exceeding two years, or both, with or without hard labor, in the discretion of the court"; word "parent" is used in lieu of "person" so as to read in part, "* * * or any parent who shall, without lawful excuse, desert or wilfully neglect * * *"); Uniform Act, § 4 (similar to portion herein beginning, in line 15, with the words, "Before the trial" and terminating with "then such recognizance shall be void, otherwise of full force and effect"; also included in section 4 is the language: "* * * directing the defendant to pay a certain sum periodically for a term not exceeding two years, to the wife or to the guardian, curator or custodian of the said minor child or children, or to an organization or individual approved by the court as trustee * * *"); Uniform Act, § 5 (similar to portion beginning "If the court," as in line 31 herein, and concluding with the words, "* * * in the discretion of the court, be paid in whole or in part, to the wife, or to the guardian, curator, custodian or trustee of the said minor child or children"; period of two years is designated instead of one year as herein, reading in part, "* * * that at any time during said period of two years the defendant has violated the terms of such order * * *").

Cross-references.

Husband and wife as competent witnesses, 105-45-4; power of juvenile court, 14-7; support of poor by relatives, Title 91.

1. Grade of offense.

Formerly this offense was merely of the grade of a misdemeanor. State v. Bess, 44 U. 39, 137 P. 829, quoting Session Laws 1911, Ch. 105, § 1.

2. Duty of father.

It is duty of father to support his minor children if he is able to do so (Rockwood v. Rockwood, 65 U. 261, 236 P. 457), and it is criminal offense "wilfully to fail to support one's minor children under age of 16 years. Bolinger v. Utah Light & Traction Co., 57 U. 506, 196 P. 550. (Frick, J., dissenting)

3. Defenses.

Under this section it is no defense that destitution of children was relieved by charitable acts of third persons. State v. Bess, 44 U. 39, 137 P. 829.

4. Evidence.

Under this section it must be shown beyond a reasonable doubt that the children are in destitute and necessitous circumstances, and father must have willfully neglected and refused, without just cause, to provide for the children concerning whom complaint was made. If it appears that current and necessary expenses of himself and children exceeded his earnings, that he did not remain idle when he could have obtained employment, and did not waste any part of his earnings, he should be acquitted. State v. Bess, 44 U. 39, 137 P. 829.

A. L. R. notes.

Criminal liability of father for failure to support child who is living apart from him without his consent, 23 A. L. R. 864.

Criminal responsibility for abandonment or nonsupport of children who are being cared for by charitable institution, 24 A. L. R. 1075.

Criminal responsibility of father for nonsupport of child as affected by decree of divorce or separation requiring support by him, 22 A. L. R. 795.

Criminal responsibility of husband for abandonment or nonsupport of wife who refuses to live with him, 8 A. L. R. 1314.

Extent or character of support contemplated by statute making nonsupport of wife or child offense, 36 A. L. R. 866.

Power to make abandonment, desertion, or nonsupport of wife or family criminal offense, 48 A. L. R. 1193.

103-13-2. Evidence—Of Marriage—Of Paternity—Privilege—Burden of Proof.

No other evidence shall be required to prove the marriage of such husband and wife, or that such persons are the legal father and mother of such child or children, than is required to prove such fact in a civil action. In all prosecutions under this chapter any provisions of law prohibiting the disclosure of confidential relations between husband and wife shall not apply, and both husband and wife shall be competent wit-

nesses to testify to any and all relevant matters, including the fact of such marriage and the parentage of such child or children. Proof of the desertion of such wife, child or children in destitute or necessitous circumstances, or of neglect to furnish such wife, child or children necessary and proper food, clothing or shelter, is prima facie evidence that such desertion or neglect is willful. (L. 21, p. 393, § 8113.)

Comparable provisions.
Uniform Act, § 6 (similar, reading in part, "No other or greater evidence shall be required to prove the marriage * * * both husband and wife shall be competent witnesses to testify against each other * * * provided that neither shall be compelled to give evidence incriminating himself or herself. Proof of the desertion * * *").

Cross-references.
Similar provision, 14–2–5; civil actions, 14–2.

1. **Weight and sufficiency of evidence.**
Slight evidence is sufficient to support a judgment of conviction, which does not punish defendant for any past delinquency, but only requires him, an able-bodied man 30 years of age, to pay in the future $5 a week to his wife and child, who for more than a year had contributed only $15 towards their support. State v. Smith, 45 U. 381, 146 P. 286.

ARTICLE 2

SALE OF CHILDREN

103–13–3. A Felony.

Any person, while having custody, care, control or possession of any child, who sells, or disposes of, or attempts to sell or dispose of, any such child for and in consideration of the payment of money or other thing of value is guilty of a felony. (L. 19, p. 349, § 1.)

CHAPTER 14

DUELING *

103–14–1. Defined.
103–14–2. If Death Ensues, Deemed Murder in First Degree.
103–14–3. Ensuing Death or Wound Not Essential.
103–14–4. Challenges—Seconds.
103–14–5. Peace Officers Bound to Prevent—Penalty.
103–14–6. Witnesses Denied Claim of Privilege.

* **History of act.** This was Comp. Laws 1876, Title XXI, Ch. VII, p. 591; 2 Comp. Laws 1888, Ch. VII, p. 584; R. S. 1898, Title 75, Ch. 20, p. 896; Comp. Laws 1907, Title 90, Ch. 20, p. 1291.

103–14–1. Defined.

A duel is any combat with deadly weapons fought between two or more persons, by previous agreement or upon a previous quarrel. (C. L. 17, § 8055.)

Comparable provisions.
Cal. Penal Code, § 225, Idaho Code, § 17–1401, Mont. Rev. Codes, § 10981 (identical).

Cross-references.
Leaving state to engage in duel, jurisdiction, 105–8–2, 105–8–3.

103-14-2. If Death Ensues, Deemed Murder in First Degree.

Every person guilty of fighting any duel, from which death ensues within a year and a day, is guilty of murder in the first degree. (C. L. 17, § 8056.)

Cross-references.
Murder in first degree, 103-28-3.

103-14-3. Ensuing Death or Wound Not Essential.

Every person guilty of fighting any duel, although no death or wound ensues, is punishable by imprisonment in the state prison not exceeding one year. (C. L. 17, § 8057.)

103-14-4. Challenges—Seconds.

Every person guilty of sending or accepting a challenge to fight a duel, or who acts as a second therein, or who posts or publishes another for not fighting a duel, or for not sending or accepting a challenge to fight a duel, or who uses any reproachful or contemptuous language, verbal, written or printed, to or concerning another for not sending or accepting a challenge to fight a duel, or with intent to provoke a duel, is guilty of a misdemeanor. (C. L. 17, § 8058.)

103-14-5. Peace Officers Bound to Prevent—Penalty.

Every judge, justice of the peace, sheriff or other officer bound to preserve the public peace, who has knowledge of the intention on the part of any person to fight a duel, and who does not exert his official authority to arrest the person and prevent the duel is punishable by a fine not exceeding $500. (C. L. 17, § 8059.)

Comparable provisions.
Cal. Penal Code, § 230, Mont. Rev. Codes, § 10985 (fine of not exceeding $1000).

103-14-6. Witnesses Denied Claim of Privilege.

No person shall be excused from testifying or answering any question upon any investigation or trial for a violation of any of the provisions of this chapter upon the ground that his testimony might tend to convict him of a crime. But no evidence given upon any examination of a person so testifying shall be received against him in any criminal prosecution or proceeding. (C. L. 17, § 8060.)

Comparable provisions.
Cal. Penal Code, § 232, Idaho Code, § 17-1406, Mont. Rev. Codes, § 10987 (substantially identical).

CHAPTER 15

EMBEZZLEMENT *

103–15–1. Defined.
103–15–2. By Officer or Agent of Corporation.
103–15–3. By Carrier.
103–15–4. By Banker, Trustee, etc.
103–15–5. By Bailee, Tenant, Attorney in Fact.
103–15–6. By Bank Officer or Employee — Overdrawing Account.
103–15–7. By Clerk, Agent or Servant.
103–15–8. Distinct Act of Taking Unnecessary.
103–15–9. Of Evidence of Debt.
103–15–10. Claim of Title, a Defense.
103–15–11. Penalty — Punishable as Larceny.

* History of act. This chapter was Title XIII, Ch. VI, p. 627; 2 Comp. Laws 1888, Title XIII, Ch. VI, p. 624; R. S. 1898, Title 75, Ch. 44; Comp. Laws 1907, Title 90, Ch. 44, p. 1327.

103–15–1. Defined.

Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted. (C. L. 17, § 8306.)

History.
This section is identical with Comp. Laws 1876, § 2120; 2 Comp. Laws 1888, § 4655; R. S. 1898, § 4374; Comp. Laws 1907, § 4374.

Comparable provisions.
Cal. Penal Code, § 503, Idaho Code, § 17–3601 (identical).

Cross-references.
Embezzlement outside state, 103–1–41; attorneys refusing to pay over money, 6–0–41; motor vehicles for hire, 57–9; power of cities respecting embezzlement, 15–8–47; jurisdiction when property taken to another county, 105–8–12; description of money, 105–21–23.

1. Elements.
In order to convict one of the crime of embezzlement proof must go beyond mere fact of showing that accused obtained property of an[illegible] in some fiduciary capacity, and [illegible]e failed to account for it on demand, and the necessary criminal intent must be shown or it must be inferable from facts proven. State v. Horne, 62 U. 376, 220 P. 378.

While a withholding of a check by a fiduciary may constitute conversion, it does not constitute crime of embezzlement in absence of proof of felonious intent. State v. Horne, 62 U. 376, 220 P. 378.

While felonious intent in embezzlement prosecution may be inferred from circumstances surrounding receipt and withholding of property, such intent cannot be inferred where defendant claimed withholding of property to be in good faith and without felonious intent. State v. Horne, 62 U. 376, 220 P. 378.

2. Examples of acts constituting crime.
Where defendant employed to solicit advertising demanded and received money from customers in capacity of agent of his employer, for its use and benefit, and money was paid to him by customers in discharge of obligations owing by them to his employer under terms of contracts, he was held guilty of embezzlement, although he was not authorized to collect money due under contracts. State v. Gibson, 37 U. 330, 108 P. 349.

Operator of package liquor agency for state liquor commission held guilty of embezzlement of funds as against defense that the missing money was due for liquor sold on credit, and where defendant failed to request instruction as to verdict as to amount taken, defendant could not complain. State v. Dubois, 98 U. 434, 98 P.2d 354.

3. Evidence.
The admissibility, competency and relevancy of evidence in embezzlement cases, and its weight and sufficiency are matters of the general law of evidence, and have no place in this chapter. See, however, State v. Judd, 74 U. 398, 279 P. 953, and cases cited; State v. Olson, 75 U. 583, 287 P. 181; State v. Coyle, 41 U. 320, 126 P. 305; State v. Horne, 62 U. 376, 220 P. 378.

4. Instructions.
Instructions in prosecutions of public officials for embezzlement are set out in State v. Judd, 74 U. 398, 279 P. 953.

If instructions improperly define terms, and are prejudicially erroneous, judgment of conviction will be reversed. State v. Horne, 62 U. 376, 220 P. 378.

A. L. R. notes.
Appropriating money or proceeds of paper mistakenly delivered in excess of the amount due or intended, larceny or embezzlement by, 14 A. L. R. 894; distinction between larceny and embezzlement, 13 A. L. R. 319; embezzlement by partner, 17 A. L. R. 982; spouse, larceny or embezzlement by one spouse of other's property, 55 A. L. R. 658.

103–15–2. By Officer or Agent of Corporation.

Every officer, director, trustee, clerk, servant or agent of any association, society or corporation, public or private, who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust any property which he has in his possession or under his control by virtue of his trust, or secretes the same with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement.
(C. L. 17, § 8307.)

History.
This section is practically identical with R. S. 1898, § 4375; Comp. Laws 1907, § 4375.

Cross-references.
No limitation upon prosecution for embezzlement of public money, 105–9–1.

1. Applicability of section.
This section applies to an officer or agent characterized by the statute, who fraudulently appropriates property of the association or corporation, public or private. To fix criminal liability, however, a fiduciary relation must be shown. State v. Clayton, 80 U. 557, 565, 15 P.2d 1057; State v. Heal, 80 U. 586, 15 P.2d 1068.

This section does not apply to a state officer since the state is not a public corporation or a corporation of any kind; the act of a public officer appropriating money in their care to their own use is made a crime by 103–26–59, which statute creates another and distinct offense. State v. Siddoway, 61 U. 189, 211 P. 968.

A. L. R. notes.
Individual criminal responsibility of officer or employee for larceny or embezzlement, through corporate act, of property of third person, 33 A. L. R. 787; provision of Constitution or statute making directors or officers of corporation liable for money embezzled or misappropriated, 46 A. L. R. 1164.

103–15–3. By Carrier.

Every carrier or other person having under his control personal property for the purpose of transportation for hire, who fraudulently appropriates it to any use or purpose inconsistent with the safe-keeping of such property and its transportation according to his trust, is guilty of embezzlement, whether he has broken the package in which such property is contained, or has otherwise separated the items thereof, or not.
(C. L. 17, § 8308.)

Comparable provisions.
Cal. Penal Code, § 505, Idaho Code, § 17–3604 (identical).

103–15–4. By Banker, Trustee, etc.

Every trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator or collector, or person otherwise intrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement.
(C. L. 17, § 8309.)

Comparable provisions.
Cal. Penal Code, § 506 (includes identical provision; pertains also to contractors and to payment of laborers and materialmen).
Idaho Code, § 17–3605 (substantially identical).

1. Pleadings and proof.
It is not necessary to allege or prove from whom the defendant, as the agent of the bank, received the money which is the subject of the embezzlement. It is sufficient to show that out of the gross sum of money received by him as such he has embezzled a portion. A general shortage or deficiency in cash account of the bank would very materially tend to establish such a case. State v. Olson, 75 U. 583, 594, 287 P. 181.

A. L. R. notes.
Misappropriation of executor, administrator, guardian, or trustee as embezzlement, 75 A. L. R. 299; receivers, assignees in insolvency, or trustees in bankruptcy as within classes of persons described by statute denouncing offense of embezzlement, 113 A. L. R. 744; who are within statutes relating to embezzlement by trustees or other persons acting in "fiduciary capacity," 41 A. L. R. 474.

103–15–5. By Bailee, Tenant, Attorney in Fact.

Every person intrusted with any property as bailee, tenant or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same, or the proceeds thereof, to his own use, or secretes it with a fraudulent intent to convert it to his own use, is guilty of embezzlement. (C. L. 17, § 8310.)

Comparable provisions.
Cal. Penal Code, § 507, Idaho Code, § 17–3606 (substantially identical).

1. Indictment or information.
It is sufficient for the indictment to charge this offense in the language of this section. People v. Hill, 3 U. 334, 366, 3 P. 75.

A. L. R. notes.
Misappropriation by officer or employee of depository or bailee as sustaining a criminal charge against him of embezzlement of property of depositor or bailor, 45 A. L. R. 933.

103–15–6. By Bank Officer or Employee—Overdrawing Account.

Every officer, agent, teller or clerk of any savings bank who knowingly overdraws his account with such bank, and thereby wrongfully obtains the money, note or funds of such bank is guilty of embezzlement. (C. L. 17, § 8311.)

103–15–7. By Clerk, Agent or Servant.

Every clerk, agent or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent or servant, is guilty of embezzlement. (C. L. 17, § 8312.)

Comparable provisions.
Cal. Penal Code, § 508, Idaho Code, § 17–3607 (identical).

1. "Property of another."
Unless the money embezzled is the "property of another," the conviction cannot be sustained. Therefore where defendant, an attorney, entered into an arrangement with a firm of attorneys to attend to the making of collections received by the firm from collection agencies and others, and said defendant without any apparent authority indorsed checks made out to order of firm's clients and deposited them to his own account, he was not guilty under information charging him with appropriating firm's money, because it had no legal title in or claim upon such money. State v. Harcombe, 48 U. 89, 158 P. 1096.

103–15–8. Distinct Act of Taking Unnecessary.

A distinct act of taking is not necessary to constitute embezzlement. (C. L. 17, § 8313.)

Comparable provisions.
Cal. Penal Code, § 509, Idaho Code, § 17–3608 (identical).

103–15–9. Of Evidence of Debt.

Any evidence of debt, negotiable by delivery only and actually executed, is the subject of embezzlement, whether it has been delivered or issued as a valid instrument or not. (C. L. 17, § 8314.)

Comparable provisions.
Cal. Penal Code, § 510, Idaho Code, § 17–3609 (identical).

103–15–10. Claim of Title, a Defense.

Upon any indictment for embezzlement it is a sufficient defense that the property was appropriated openly and avowedly and under a claim of title made in good faith, even though such claim is untenable. (C. L. 17, § 8315.)

History.
This section is substantially identical with R. S. 1898, § 4383; Comp. Laws 1907, § 4383.

Comparable provisions.
Cal. Penal Code, § 511, Idaho Code, § 17–3610 (include identical provision, word "preferred" being used therein in lieu of "made"; and coupled with the following sentence: "But this provision does not excuse the unlawful retention of the property of another to offset or pay demands held against him").

1. Instructions.
Under this section, where accused's open appropriation under claim of title was conflicting, he is entitled to an instruction substantially in language of this statute. State v. Coyle, 41 U. 320, 126 P. 305, applying Comp. Laws 1907, § 4383.

A. L. R. notes.
Offense of larceny, embezzlement, robbery or assault to commit robbery, as affected by defendant's intention to take or retain money or property in payment of, or as security for, claim, or to collect debt, or to recoup gambling losses, 116 A. L. R. 997.

103–15–11. Penalty—Punishable as Larceny.

Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled, and where the property embezzled is an evidence of debt or right of action the sum due upon it, or secured to be paid by it, shall be taken as its value. (C. L. 17, § 8316.)

History.
This section is practically identical with R. S. 1898, § 4384; Comp. Laws 1907, § 4384.

Comparable provisions.
Cal. Penal Code, § 514, Idaho Code, § 17–3613 (include identical provision).

Cross-references.
Larceny, 103–36–1; penalty for larceny, 103–36–6, 103–36–7; count for embezzlement, 105–21–31.

1. Punishment.
Where defendant was employed to solicit advertising contracts, and within short time he had collected from different persons the sum of $235 due publishing company upon contracts solicited and procured by him, and unlawfully converted money to his own use, but it appeared that $48 was largest sum collected by him from any one person at any one time, it was held that taking of $235 was one embezzlement, and was grand larceny. State v. Gibson, 37 U. 330, 108 P. 349.

CHAPTER 16

EXPLOSIVES

103-16-1. Unlawful Handling in Cities and Towns.
103-16-2. To Be Marked Before Transportation or Storage.
103-16-3. Powder Houses.
103-16-4. Containers to Be Marked.
103-16-5. Id.
103-16-6. Id. Penalty.
103-16-7. Destruction of Structures by—Attempts, a Felony.
103-16-8. Id. Penalty.
103-16-9. Infernal Machine — Defined.
103-16-10. Id. Shipping—Penalty.
103-16-11. Id. Constructing or Possessing—Penalty.
103-16-12. Id. Shipping—Venue of Prosecution.

103–16–1. Unlawful Handling in Cities and Towns.

Every person who makes or keeps gunpowder, nitroglycerin or other highly explosive substance within any city or town, or who carries the same through the streets thereof, in any quantity or manner prohibited by law or by any ordinance of such city or town, is guilty of a misdemeanor. (C. L. 17, § 8190.)

Comparable provisions.
Idaho Code, § 17–2714 (identical).

Cross-references.
Explosives generally, 29A–2; power of cities respecting, 15–8–56; storage in mines, 55–2–8, 55–4–4; regulation by counties, 19–5–36; regulation of fireworks, 29A–1.

103–16–2. To Be Marked Before Transportation or Storage.

Every person who knowingly leaves with or delivers to another, or to any express or railway company or other common carrier, or to any warehouse or storehouse, any package containing nitroglycerin, dynamite, guncotton, gunpowder, or other highly explosive compound, or any benzine, gasoline, phosphorus, or other highly inflammable substance, or any vitriol, sulphuric, nitric, carbolic, muriatic, or other dangerous acid, chemical or compound, to be handled, stored, shipped or transported, without plainly marking and indicating on such package the name and nature of the contents thereof, is guilty of a misdemeanor, and is punishable by a fine not exceeding $300, or by imprisonment in the county jail not exceeding six months. (C. L. 17, § 8191.)

1. What constitutes violation.
Fact that agent of a shipper, riding in car to look after horses being carried, places some cartridges in oven of a stove in car, does not thereby make shipper liable as for a violation of this section. Shay v. Union Pac. R. Co., 47 U. 252, 153 P. 31.

103–16–3. Powder Houses.

Every person who builds, constructs or uses within 300 feet of any residence or traveled county road any powder house, magazine or building in which powder, dynamite or other explosive is kept in quantities exceeding 500 pounds is guilty of a misdemeanor; *provided*, that this section shall not apply to any such magazine maintained at any mine or stone quarry. (C. L. 17, §§ 8192, 8193.)

103–16–4. Containers to Be Marked.

It shall be unlawful to sell or offer for sale, or take or solicit orders of sale, or purchase or use, or have on hand or in store for the purpose of sale or use, any giant, hercules, atlas, venture or any other high explosive containing nitroglycerin, unless on each box or package and wrapper containing any such high explosive there shall be plainly stamped or printed the name and place of business of the person, partnership or corporation by whom or by which the same was manufactured, and the exact and true date of its manufacture, and the percentage of nitroglycerin or other high explosive contained therein. (C. L. 17, § 8194.)

103–16–5. Id.

It shall be unlawful for any person to have glycerin, and the name and date on such box or package containing giant, hercules, atlas, venture or any other high explosive containing nitroglycerin, and the name and date on such box or package shall be the same as on the wrapper containing such explosive. It shall further be unlawful to use any box, package or wrapper formerly used by any other person in the packing of such high explosive. (C. L. 17, § 8195.)

103–16–6. Id. Penalty.

If any person violates any of the provisions of sections 103–16–4 or 103–16–5, such person is guilty of a felony, and shall be punished by a fine of not more than $5,000, or imprisonment in the state prison not to exceed two years, or by both such fine and imprisonment, in the discretion of the court. (C. L. 17, § 8196.)

103–16–7. Destruction of Structures by—Attempts, a Felony.

Every person who places gunpowder, or any other explosive substance in, upon, under, against or near to any building, car, vessel or structure with intent to destroy, throw down or injure the whole or any part thereof, under such circumstances that if the intent should be accomplished, human life or safety would thereby be endangered, although no damage is actually done, is guilty of a felony. (C. L. 17, § 8197.)

103–16–8. Id. Penalty.

Every person who unlawfully and maliciously, by explosion of gunpowder or other explosive substance, destroys, throws down or injures the whole or any part of any building, car, vessel or other structure is guilty of a felony and shall be punished as follows:

(1) If the life or safety of a human being is endangered, by imprisonment in the state prison for not more than twenty years.

(2) In every other case, by imprisonment in the state prison for not more than ten years. (C. L. 17, § 8197.)

103–16–9. Infernal Machine—Defined.

An infernal machine is any box, package, contrivance or apparatus containing or arranged with an explosive or acid or poisonous or inflammable substance, chemical or compound, or knife, loaded pistol or gun,

or other dangerous or harmful weapon or thing, constructed, contrived or arranged so as to explode, ignite or throw forth its contents, or to strike with any of its parts, unexpectedly when moved, handled or opened, or after the lapse of time, or under conditions or in a manner calculated to endanger health, life, limb or property. (C. L. 17, § 8480.)

103–16–10. Id. Shipping—Penalty.

Every person who delivers or causes to be delivered to any express or railway company or other common carrier, or to any person, any infernal machine, knowing it to be such, without informing such common carrier or person of the nature thereof, or sends the same through the mail, or throws or places the same on or about the premises or property of another, or in any place where another may be injured thereby in his person or property, is guilty of a felony, and shall be punished by imprisonment in the state prison for a term not exceeding twenty-five years. (C. L. 17, § 8481.)

103–16–11. Id. Constructing or Possessing—Penalty.

Every person who knowingly constructs or contrives any infernal machine, or with intent to injure another in his person or property has any infernal machine in his possession, is guilty of a felony, and shall be punished by imprisonment in the state prison for a term not exceeding five years. (C. L. 17, § 8482.)

103–16–12. Id. Shipping—Venue of Prosecution.

Any person knowingly delivering any such infernal machine to any railway, express or stage company, or to any person or company whatever, for transmission to any person in another county may be prosecuted in the county in which he delivers the same or in the county to which the same is transmitted. (C. L. 17, § 8483.)

Cross-references.
Conviction or acquittal in another county a bar, 105–8–9.

CHAPTER 17

EXTORTION AND COERCION *

103–17–1.	Extortion—Defined.	103–17–7.	Id. By Threatening to Publish Libel.
103–17–2.	Id. "Fear" Defined.	103–17–8.	Id. By Unsuccessful Verbal Threat.
103–17–3.	Id. Penalty.	103–17–9.	Coercion — Exacting Money—Inducing to Join Organization.
103–17–4.	Id. Under Color of Official Right.	103–17–10.	Id. One Following Practice Deemed a Vagrant.
103–17–5.	Id. Obtaining Signature by.		
103–17–6.	Id. By Sending Threatening Letter.		

* **History of act.** This chapter was R. S. 1898, Title 75, Ch. 45, p. 926; Comp. Laws 1907, Title 90, Ch. 45, p. 1328.
Our statute on extortion is in much the same language as that of California. Cal. Penal Code (1941) §§ 518–527; and see State v. Prince, 75 U. 205, 209, 284 P. 108.

103-17-1. Extortion—Defined.

Extortion is the obtaining of property from another with his consent, induced by a wrongful use of force or fear, or under color of official right. (C. L. 17, § 8320.)

History.
This section is identical with R. S. 1898, § 4385; Comp. Laws 1907, § 4385. It is much like section 518 of Cal. Penal Code (1941) but is not wholly identical therewith. See under "Comparable provisions," infra.

Comparable provisions.
Cal. Penal Code, § 518 (identical, except that a clause is inserted, so as to read in part as follows: "* * * with his consent, or the obtaining of an official act of a public officer, induced * * *").

Idaho Code, § 17-3801 (identical).
Mont. Rev. Codes, § 11389 (substantially identical).

1. Elements.
The use of force or fear is an essential element of the crime, and in this respect extortion is analogous to robbery. If some other cause were the primary and controlling one in inducing the consent, then there would be no extortion. State v. Prince, 75 U. 205, 284 P. 108.

103-17-2. Id. "Fear" Defined.

Fear such as will constitute extortion may be induced by a threat, either:

(1) To do an unlawful injury to the person or property of the individual threatened, or to any relative of his or member of his family; or,

(2) To accuse him or any relative of his or member of his family of any crime; or,

(3) To expose or impute to him or them any deformity or disgrace; or,

(4) To expose any secret affecting him or them. (C. L. 17, § 8321.)

History.
This section is identical with Comp. Laws 1876, § 2131; R. S. 1898, § 4386; Comp. Laws 1907, § 4386.

Comparable provisions.
Cal. Penal Code, § 519 (substantially identical).
Idaho Code, § 17-3802, Mont. Rev. Codes, § 11390 (identical).

1. Fear.
If fear was the controlling factor in inducing the victim to consent to and to pay the money to defendant the crime is complete, even though there was also another and different motive, that of entrapping defendant at suggestion of prosecuting attorney. If fear remained as the controlling factor, it was unnecessary for it to be the sole motive. State v. Prince, 75 U. 205, 284 P. 108.

Fear may be shown by conduct, such as loss of sleep at night and the like. State v. Prince, 75 U. 205, 284 P. 108.

A. L. R. notes.
Extortion predicated upon statements or intimations regarding criminal liability, in connection with attempt to collect or settle a claim which defendant believed to be valid, 135 A. L. R. 728.

103-17-3. Id. Penalty.

Every person who extorts any money or other property from another, under circumstances not amounting to robbery, by means of force or any threat, such as is mentioned in the next preceding section, is punishable by imprisonment in the state prison for a term not exceeding three years. (C. L. 17, § 8322.)

History.
This section is identical with Comp. Laws 1876, § 2132; R. S. 1898, § 4387; Comp. Laws 1907, § 4387.

Comparable provisions.
Cal. Penal Code, § 520 (imprisonment for not less than one nor more than ten years).

Idaho Code, § 17-3803 (substantially identical, except as follows: "* * * not exceeding five years, or by fine not exceeding $5000, or by both").

Mont. Rev. Codes, § 11391 (substantially identical, except "* * * not exceeding five years").

Cross-references.

Robbery, 103–49.

1. Arraignment and plea.

Where original information does not state public offense and is amended so as to state public offense for first time, as amending information in larceny prosecution so as to allege ownership of property alleged to have been stolen, it is equivalent of a new information requiring arraignment of defendant and his plea thereto; and where defendant was not given time to plead to such information as required by 106-22-15, court committed reversible error. State v. Jensen, 83 U. 452, 30 P.2d 203.

103–17–4. Id. Under Color of Official Right.

Every person who commits any extortion under color of official right, in cases for which a different punishment is not prescribed in this code, is guilty of a misdemeanor. (C. L. 17, § 8323.)

Comparable provisions.

Cal. Penal Code, § 521, Idaho Code, § 17–3804 (identical).

Cross-references.

Bribery, 103–26 1 to 103–26–35; penalty for receiving illegal fees, 28–7–13 to 28–7–15.

103–17–5. Id. Obtaining Signature by.

Every person who by any extortionate means obtains from another his signature to any paper or instrument, whereby, if such signature were freely given, any property would be transferred or any debt, demand, charge or right of action created, is punishable in the same manner as if the actual delivery of such debt, demand, charge or right of action were obtained. (C. L. 17, § 8324.)

Comparable provisions.

Cal. Penal Code, § 522, Idaho Code, § 17–3805, Mont. Rev. Codes, § 11392 (identical).

103–17–6. Id. By Sending Threatening Letter.

Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in section 103–17–2, is punishable in the same manner as if such money or property were actually obtained by means of such threat. (C. L. 17, § 8325.)

History.

This section is practically identical with Comp. Laws 1876, § 2135; R. S. 1898, § 4390; Comp. Laws 1907, § 4390.

Comparable provisions.

Cal. Penal Code, § 523, Idaho Code, § 17–3806 (substantially identical).

Cross-references.

Sending threatening letter, 103–60–3; offense of sending letter deemed complete, when, 103–1–27.

1. Evidence.

Evidence that defendant verbally demanded money from complaining witness and that defendant's wife wrote threatening letter to him was insufficient to sustain conviction of husband. State v. Anderson, 63 U. 542, 227 P. 810.

Evidence that married woman wrote letter to complaining witness that husband had left her and demanding witness to make settlement for certain tragedy or she would cause trouble and scandal, held insufficient to sustain conviction. State v. Anderson, 63 U. 542, 227 P. 810.

103-17-7. Id. By Threatening to Publish Libel.

Every person who threatens another to publish a libel concerning him, or concerning any parent, husband, wife or child of such person, or member of his family; and every person who offers to prevent the publication of any libel upon another person, with intent to extort any money or other valuable consideration from any person, is guilty of a misdemeanor. (C. L. 17, § 8081.)

Comparable provisions.
Idaho Code, § 17-1509 (substantially identical).

103-17-8. Id. By Unsuccessful Verbal Threat.

Every person who unsuccessfully attempts, by means of any verbal threat such as is specified in section 103-17-2, to extort money or other property from another is guilty of a misdemeanor. (C. L. 17, § 8326.)

History.
This section is identical with Comp. Laws 1876, § 2136; R. S. 1898, § 4391; Comp. Laws 1907, § 4391.

Comparable provisions.
Idaho Code, § 17-3807 (substantially identical).

1. Operation and effect.
There is no conflict between this section and 103-1-29 and 103-1-30, except in this section the penalty provided is different from that provided in 103-1-30. The effect of this section is to make clear that a mere verbal threat is sufficient to meet the requirement that an act, coupled with intent, amounts to an attempt. Accordingly, except for the penalty, these several sections may be read together. State v. Prince, 75 U. 205, 284 P. 108.

103-17-9. Coercion—Exacting Money—Inducing to Join Organization.

It is unlawful for any person to exact, by threat or coercion, any money, tribute or support whatsoever from any person; or to induce him, by threats or coercion, to join any organization. Any person violating any of the provisions of this section is guilty of a misdemeanor. (C. L. 17, §§ 8329, 8330.)

Cross-references.
Workers may organize, 49-2-1.

103-17-10. Id. One Following Practice Deemed a Vagrant.

Any person who commonly practices or follows the occupation of exacting money, tribute or support from any person by means of threats or coercion, for any purpose whatsoever, shall be deemed a vagrant and punished accordingly. (C. L. 17, § 8330.)

Cross-references.
Vagrancy, 103-58.

CHAPTER 18

FALSE PERSONATION AND CHEATS *

103–18–1. Personating a Public Officer—Assuming Insignia of Office.
103–18–2. Marrying Under False Personation.
103–18–3. Other Acts of False Personation—Penalty.
103–18–4. Acquiring Property Under False Personation.
103–18–5. Fraudulent Conveyances.
103–18–6. Id. Penalty.
103–18–7. Id. To Prejudice of Judgment Creditor.
103–18–8. Obtaining Money by False Pretense.
103–18–9. Obtaining Credit by False Representation.
103–18–10. Husband and Wife—Husband Conveying as Unmarried Man.
103–18–11. Issuing Check Against Insufficient Funds.
103–18–12. Salting Mine.
103–18–13. Changing Ore Samples and Assay Reports.
103–18–14. Id.
103–18–15. Unlawful Wearing and Using Insignia.
103–18–16. Confidence Game, a Felony.
103–18–17. Id. Indictment or Information.

* **History of act.** This chapter was Comp. Laws 1876, Title XIII, Ch. VIII, p. 631; R. S. 1898, Title 75, p. 927; Comp. Laws 1907, Title 90, Ch. 46, p. 1329.

103–18–1. Personating a Public Officer—Assuming Insignia of Office.

Every person who falsely personates a public officer, civilian or military, or a policeman, or other peace officer of any character whatsoever, or who falsely personates a private individual having special authority by law to perform an act affecting the rights or interests of another, or who, without authority, shall assume any uniform or badge by which such an officer or person is lawfully distinguished, or who in any such assumed character does any act purporting to be official; and every person who falsely assumes or pretends to be a justice of the peace, sheriff, deputy sheriff, coroner or notary public and takes upon himself to act as such;—is punishable by imprisonment in the county jail not less than sixty days and not to exceed one year, or by fine not less than $250 and not to exceed $1,000, or by both such imprisonment and fine.

(L. 21, p. 391, § 1.)

103–18–2. Marrying Under False Personation.

Every person who falsely personates another, and in such assumed character marries, or pretends to marry, or to sustain the marriage relation toward another, with or without the connivance of such other, is guilty of a felony. (C. L. 17, § 8340.)

Comparable provisions.
Cal. Penal Code, § 528, Idaho Code, § 17–3808, Mont. Rev. Codes, § 11406 (substantially identical).

103–18–3. Other Acts of False Personation—Penalty.

Every person who falsely personates another, and in such assumed character either:

(1) Becomes bail or surety for any party in any proceeding whatever before any court or officer authorized to take bail or surety; or,

(2) Verifies, publishes, acknowledges or proves in the name of another person any written instrument, with intent that the same may be recorded, delivered and used as true; or,

(3) Does any other act whereby, if it were done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture or penalty, or whereby any benefit might accrue to the party personating, or to any other person;—is punishable by imprisonment in the county jail not exceeding one year or by fine not exceeding $1,000, or by both.
(C. L. 17, § 8341.)

Comparable provisions.
Cal. Penal Code, § 529, Idaho Code, § 17-3810 (identical, except as to concluding language: "* * * not exceeding two years, or by a fine not exceeding $5000"; in the opening paragraph of the California provision is inserted the clause, "in either his private or official capacity").

Mont. Rev. Codes, § 11407 (substantially identical, except as to following concluding language: "4. Confesses a judgment, is punishable by imprisonment in the state prison not exceeding five years, or by a fine not exceeding five thousand dollars, or both").

103-18-4. Acquiring Property Under False Personation.

Every person who falsely personates another, and in such assumed character receives any money or property, knowing that it is intended to be delivered to the individual so personated, with intent to convert the same to his own use or to that of another person, or to deprive the true owner thereof, is punishable in the same manner and to the same extent as for larceny of the money or property so received.
(C. L. 17, § 8342.)

Comparable provisions.
Cal. Penal Code, § 530 (identical, except that there is inserted a clause as follows: "in either his private or official capacity").

Idaho Code, § 17-3811, Mont. Rev. Codes, § 11409 (identical).

Cross-references.
Larceny, 103-36.

103-18-5. Fraudulent Conveyances.

Every person who is a party to any fraudulent conveyance of any lands, tenements or hereditaments, goods or chattels, or any right or interest issuing out of the same, or to any bond, suit, judgment or execution, contract or conveyance, had, made or contrived, with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others of their just debts, damages or demands, is guilty of a misdemeanor.
(C. L. 17, § 8343.)

Comparable provisions.
Cal. Penal Code, § 531, Idaho Code, § 17-3901 (include identical provision).

Cross-references.
Fraudulent conveyances, 33-1; wrongful disposition of mortgaged property by mortgagor, 13-0-14; conveyance to hinder or defraud, 33-1-7, 33-1-8, 81-2-9, 81-2-10.

103-18-6. Id. Penalty.

Every debtor who fraudulently removes his property or effects out of this state, or fraudulently sells, conveys, assigns or conceals his property with intent to defraud, hinder or delay his creditors of their

rights, claims or demands, is punishable by imprisonment in the county jail not exceeding one year or by fine not exceeding $1,000, or by both.
(C. L. 17, § 8006.)

Cross-references.
Sales of personalty without delivery, 81–2–9, 81–2–10; arrest of absconding debtor, 104–15.

103–18–7. Id. To Prejudice of Judgment Creditor.

Every person against whom any action is pending, or against whom a judgment has been rendered, for the recovery of any personal property, who fraudulently conceals, sells or disposes of such property, with intent to hinder, delay or defraud the person bringing such action or recovering such judgment, or with such intent removes such property beyond the limits of the county in which it may be at the time of the commencement of such action or the rendering of such judgment, is punishable as provided in the next preceding section.
(C. L. 17, § 8007.)

103–18–8. Obtaining Money by False Pretense.

Every person who knowingly and designedly, by false or fraudulent representations or pretenses, obtains from any other person any chose in action, money, goods, wares, chattels, effects or other valuable thing, with intent to cheat or defraud any person of the same, if the value of the property so obtained does not exceed $50, is punishable as in cases of petit larceny, and when the property so obtained is of the value of more than $50, the person so offending is punishable as in cases of grand larceny.
(C. L. 17, § 8344.)

History.
This section is practically identical with R. S. 1898, § 4397; Comp. Laws 1907, § 4397. It was Comp. Laws 1876, § 2142, and is practically a copy of the California statute upon the same subject. See Cal. Penal Code (1941) § 532, and State v. Seymour, 49 U. 285, 288, 161 P. 789.

Comparable provisions.
Cal. Penal Code, § 484 (pertains, inter alia, to offense of knowingly and designedly, by any false or fraudulent representation or pretense, defrauding another person of money, labor or real or personal property, the offender being "guilty of theft"); § 532 (prescribing punishment to "same extent as for larceny of the money or property so obtained" where offender knowingly and designedly, by false or fraudulent representation or pretense, defrauds any other person of money, labor or property, whether real or personal).
Mont. Rev. Codes, § 11410 (similar in purport; pertains, inter alia, to offense of defrauding another of money or property).

Cross-references.
Obtaining food, etc., under false pretenses, 103–29–1; penalty for larceny, 103–36–6, 103–36–7; false pretenses — proof, 105–32–17.

1. General construction of section.
This section must be construed liberally in favor of accused persons, and nothing not within its words can be held within its meaning. State v. Casperson, 71 U. 68, 262 P. 294.

2. Elements of offense.
Under this section the following elements and proof of them must concur, viz.: (1) There must have been false or fraudulent representations or pretenses; (2) the representations must have been made knowingly and designedly; (3) there must have been a concurring intent to cheat or defraud the person to whom the false or fraudulent representations or pretenses were made; (4) something of value must have been obtained because of the false or fraudulent representations or pretenses, and (5) the party to whom the false or fraudolent representations or pretenses

were made must have parted with something of value in reliance upon the false or fraudulent representations or pretenses, believing them to be true. State v. Timmerman, 88 U. 481, 487, 55 P.2d 1320, 56 P.2d 1354.

The element of this crime is that the representation was false and untrue, and that defendant knew it. State v. Jenson, 74 U. 527, 532, 280 P. 1046.

In order to constitute offense within this section there must be intent to cheat or defraud, an actual fraud must be committed, there must be fraudulent representation or false pretense for purpose of perpetrating fraud in obtaining property of another, and fraudulent representation or false pretense must be cause which induced owner to part with his property. State v. Howd, 55 U. 527, 188 P. 628; State v. Morris, 85 U. 210, 38 P.2d 1097 (Christensen, J., dissenting). The essential elements of this crime as stated in State v. Howd, supra, are re-affirmed in State v. Fisher, 79 U. 115, 119, 8 P.2d 589.

An essential element of this crime is the commission of actual fraud. The pretense must be false in fact. If the victim gets what was pretended and what he bargained for, there is no fraud or prejudice. This rule has been applied to sale and assignment of conditional contract of sale of automobile to finance company. State v. Casperson, 71 U. 68, 262 P. 294.

One of the essential elements of the crime of obtaining money or property by false pretenses is that the victim did not get what was pretended and what he bargained for. One who gets what he bargains for cannot be said to be defrauded. Accordingly, a failure to receive what was bargained for being an essential element of the crime defined by this section, such fact must be alleged, otherwise the information is demurrable. State v. Fisher, 79 U. 115, 120, 8 P.2d 589.

One who telegraphs for money under false name from outside the state is guilty under this section when money for transmission to him is deposited with telegraph company within the state of Utah, notwithstanding he received money at telegraph office outside state, since telegraph company acted as his agent in accepting money. State v. Devot, 66 U 319, 242 P. 396, 43 A. L. R. 532.

In prosecution for obtaining cattle by false pretenses by making payment for cattle with checks which were subsequently dishonored for insufficient funds, representation by defendant that he would pay was purely promissory in character, and therefore could not be held as fraudulent representation or false pretense in legal meaning of acceptance of terms. State v. Howd, 55 U. 527, 188 P. 628.

3. Indictment or information.

Information, to charge this crime, must show a causal connection between the payment of the money or the parting with the title or possession of the property, and the false representations charged. In other words, the purpose of paying the money or transferring the property by injured party and that it was done because of the false representations, must be alleged. State v. Fisher, 79 U. 115, 118, 8 P.2d 589.

It is sufficient if it appears from indictment or information to whom property belonged; ownership need not be alleged directly and distinctly. State v. Timmerman, 88 U. 481, 488, 55 P.2d 1320, 56 P.2d 1354, quoting information in full.

Under this section, an information that does not allege the value of a $250 promissory note is insufficient, and this is not cured by verdict finding accused guilty as charged in the information. State v. Seymour, 49 U. 285, 163 P. 789.

Under this section an information alleging that stock subscriptions were obtained by falsely representing the corporation's condition, etc., is sufficient, although stock was delivered and its value might have been as represented. State v. Seymour, 49 U. 285, 163 P. 789.

Even before the enactment of Laws 1935, Ch. 118, it was held that an information charging that defendant obtained corporate stock certificates by falsely representing to corporation that he had authority to transfer stock, was sufficient. State v. Jenson, 74 U. 527, 280 P. 1046.

An information for violation of this section is sufficient which charges that defendant had obtained certificates of corporate stock of value of more than $50 by falsely representing to corporation that he had authority to transfer stock on company's books. State v. Jenson, 74 U. 527, 280 P. 1046.

Information and bill of particulars charging person with falsely obtaining credit by means of oral misrepresentations did not charge a crime under this section or under 103-18-9. State v. Hill, 100 U. 456, 116 P.2d 392.

For short forms, see 105-21-47.

4. Evidence.

In prosecution for obtaining cattle by false pretenses by making payment for such cattle with checks which were subsequently dishonored for insufficient funds, conviction would be reversed where it appeared that conviction was

had by reason of uncorroborated verbal testimony of complaining witness. State v. Howd, 55 U. 527, 188 P. 628.

Where evidence with reference to sale of security in automobile transaction did not show that victim had sustained a pecuniary or property loss by reason of transaction, conviction for obtaining money under false pretenses was not supported by evidence. State v. Morris, 85 U. 210, 38 P.2d 1097.

In prosecution for obtaining cattle by false pretenses by making payment for such cattle with checks which were subsequently dishonored for insufficient funds, evidence held insufficient to sustain conviction. State v. Howd, 55 U. 527, 188 P. 628.

Decisions from other jurisdictions.

— Montana.

The Montana statute, section 11410, defining offense of obtaining money or property by false pretenses does not by its terms limit its operation to persons of ordinary caution and prudence; the character of false or fraudulent representations or pretenses made a crime by the statute is a misrepresentation of an existing or past fact by one who knows it is not true; it is unnecessary for the information to allege the very words of the pretense or whether the pretense was spoken or written. State v. Foot, 100 Mont. 33, 48 P.2d 1113.

A. L. R. notes.

Conversation by telephone as false pretense, 8 A. L. R. 656.

Criminal offense of obtaining money under false pretenses, or attempting to do so, predicated upon receipt or claim of benefits under insurance policy, 135 A. L. R. 1157.

False statement as to matter of record as false pretense within criminal statute, 56 A. L. R. 1217.

Illegal or fraudulent intent of prosecuting witness or person defrauded as defense in prosecution based on false representations, 128 A. L. R. 1520.

Obtaining money for goods not intended to be delivered as false pretenses, 17 A. L. R. 199.

Offense of obtaining property by false pretenses predicated upon transaction involving conditional sale, 134 A. L. R. 874.

Presentation of and attempt to establish fraudulent claim against governmental agency, 21 A. L. R. 180.

103–18–9. Obtaining Credit by False Representation.

(1) Any person who knowingly makes or causes to be made, either directly or indirectly, or through any agency whatsoever, any false statement in writing respecting the financial condition or ability to pay of himself or any other person, firm or corporation in whom he is interested, or for whom he is acting, and thereby fraudulently procures in any form whatsoever either the delivery of personal property, the payment in cash, the making of a loan or credit, the extension of a credit, the discount of an account receivable or the making, acceptance, discount or indorsement of a bill of exchange or of a promissory note, either for the benefit of himself or such person, firm or corporation; or,

(2) Who, knowing that a false statement in writing has been made respecting the financial condition or ability to pay of himself or any other person, firm or corporation in which he is interested, or for whom he is acting, procures upon the faith thereof, either for the benefit of himself or such person, firm or corporation either or any of the things of benefit mentioned in the first subdivision in this section; or,

(3) Who, knowing that a statement in writing has been made respecting the financial condition or ability to pay of himself or such person, firm or corporation in which he is interested, or for whom he is acting, falsely represents on a later day, either orally or in writing, that such statement theretofore made, if then again made on said day, would be true, and procures upon the faith thereof, either for the benefit of himself or such person, firm or corporation either or any of the things of benefit mentioned in the first subdivision of this section;—is guilty of

a misdemeanor, and shall be punished by a fine of not more than $1,000 or by imprisonment in the county jail for not more than six months, or by both. (C. L. 17, § 8345.)

History.
This section was Comp. Laws 1907, § 4397x.

Comparable provisions.
Cal. Penal Code, § 532a (similar).

1. Scope and operation of section.
If subject matter of this section was formerly encompassed by 103-18-8, then by the enactment of this section the earlier statute was modified; if it was not, then this section covers a field not theretofore the subject of criminal legislation, and its terms bind that field. State v. Hill, 100 U. 456, 116 P.2d 392.

2. False representations.
Oral representation unaccompanied by any independent false representation of an existing fact or any false token is not ground for criminal action. State v. Hill, 100 U. 456, 116 P.2d 392.

103-18-10. Husband and Wife—Husband Conveying as Unmarried Man.

Every married man who falsely represents himself as unmarried and under such representation willfully conveys or mortgages real estate, situate in this state, without the assent or concurrence of his wife, when such consent or concurrence is necessary to relinquish her inchoate statutory interest therein, is guilty of felony. (C. L. 17, § 8346.)

Comparable provisions.
Cal. Penal Code, § 534 (similar; applicable to "every married person").

Cross-references.
Wife's consent to mortgage exempt chattels, 13-0-3; homesteads, Title 38; wife's statutory interest in husband's realty, 101-1-1, 101-4-3.

1. Transfers by married men.
In action by wife for divorce and to set aside alleged fraudulent conveyance of jointly owned real property from husband to his father, held husband had right to sell his interest in property which was not homestead property, subject only to his wife's one-third interest in case she continued to be his wife and survived him, where wife thereafter obtained divorce, as against contention that husband violated this section. Adamson v. Adamson, 55 U. 544, 188 P. 635.

103-18-11. Issuing Check Against Insufficient Funds.

Any person who for himself or as the agent or representative of another or as an officer of a corporation, willfully, with intent to defraud, makes or draws or utters or delivers any check, or draft or order upon any bank or depositary, or person, or firm, or corporation, for the payment of money, knowing at the time of such making, drawing, uttering or delivering that the maker or drawer or the corporation has not sufficient funds in, or credit with said bank or depositary, or person, or firm, or corporation, for the payment of such checks, draft or order, in full upon its presentation, although no express representation is made with reference thereto, is punishable by imprisonment in the county jail for not more than one year, or in the state prison for not more than 14 years.

The making, drawing, uttering or delivering of such check, draft or order as aforesaid shall be prima facie evidence of intent to defraud.

Where such check, draft or order is protested, on the ground of insufficiency of funds or credit, the notice of protest thereof shall be admissible as proof of presentation, nonpayment and protest and shall

be presumptive evidence of knowledge of insufficiency of funds or credit with such bank or depositary, or person, or firm, or corporation.

The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depositary, or person, or firm or corporation, for the payment of such check, draft or order. (L. 31, p. 50, § 8347.)

History.
As amended by L. 41, 2nd Spec. Sess., ch. 29, eff. Aug. 12, which contained a saving clause relative to partial invalidity thereof. Amendment made many material changes in text and inserted next to last paragraph.

1. Effect of agreement between drawer and payee.
Conviction under this section set aside where it appeared that receiver of the check understood the check was to be held for a time before it was to be cashed, that the drawer had sufficient credit, and the elements of fraud by drawer and reliance by payee were lacking. State v. Trogstad, 98 U. 565, 100 P.2d 564.

2. Evidence.
Evidence that defendant signed check by fictitious name and used it in payment for goods and for cash supported conviction under 103–24–7 making the passing of a fictitious check a felony, as against contention that all that was proved was a violation of this section. State v. Tinnin, 64 U. 587, 232 P. 543, 43 A. L. R. 46.

3. Malicious prosecution.
Corporation not liable for malicious prosecution instituted by local agent under this section without express authority. Sweatman v. Linton, 66 U. 208, 241 P. 309.

A. L. R. notes.
Construction, application and effect of criminal statute directed specifically against use of worthless, false, or bogus check or draft, 95 A. L. R. 486; worthless check or draft, false pretense or confidence game through means of, 35 A. L. R. 344.

103–18–12. Salting Mine.

Every person who, with intent to cheat, wrong or defraud, places in or upon any mine or mining claim any ores or specimens of ores not extracted therefrom, or exhibits any ore or certificate of assay of ore not extracted therefrom, for the purpose of selling any mine or mining claim or interest therein, or who obtains any money or property by any such false pretense or artifice, is guilty of a felony. (C. L. 17, § 8348.)

Comparable provisions.
Mont. Rev. Codes, § 11419 (substantially identical).

Cross-references.
Wrongful taking of ores, 55–1–12.

103–18–13. Changing Ore Samples and Assay Reports.

Every person who interferes with or in any manner changes samples of ores or bullion produced for sampling, or changes or alters samples or packages of ores or bullion which have been purchased for assaying, or who changes or alters any certificate of sampling or assaying, with intent to cheat, wrong or defraud, is guilty of a misdemeanor. (C. L. 17, § 8349.)

Comparable provisions.
Mont. Rev. Codes, § 11420 (felony).

103–18–14. Id.

All assayers, samplers and dealers in ores are required to keep records containing the amount of ore received by them, the assay value thereof, the amount paid therefor or advanced thereon, the mine or prospect from which said ore was extracted or the person from whom

procured, a general description of the person from whom purchased, together with his name and address and the date of the transaction. Every person who, with intent to cheat, wrong or defraud, knowingly makes or publishes a false sample of ore or bullion, or who makes or publishes or causes to be published a false assay of ore or bullion, or violates any provision of this section, is guilty of a misdemeanor.

(C. L. 17, § 8350.)

103-18-15. Unlawful Wearing and Using Insignia.

It is unlawful for any person to wear or use the Congressional Medal of Honor or Distinguished Service Cross or the Distinguished Service Medal, or any military medal awarded by the United States, or any medal presented by the state of Utah to the Utah volunteers or Indian war veterans, or any officially authorized substitute therefor, or the badge, insignia, rosette, button or emblem of the Grand Army of the Republic, or of the Military Order of the Loyal Legion of the United States, or of the Spanish War veterans, or of the Society of Cincinnati, or of the Sons of Veterans, or of the Women's Relief Corps, or of the Union Veterans' Legion, or of the Military and Naval Order of the Spanish-American War, or of the Military Order of Foreign Wars of the United States, or of the Military Order of the World War, or of the American Legion, or of the American Legion Auxiliary, or of the Service Star Legion, or of the Veterans of Foreign Wars, or of any organization of veterans of the World War, or the charm, badge, button, emblem or insignia of the Free and Accepted Masons, or of any branch thereof, or of the Benevolent and Protective Order of Elks of the United States of America, or of the Order of Knights of Pythias, or of the Independent Order of Odd Fellows, or of any society, order or organization of ten years' standing in this state, unless entitled to wear or use the same; or to use the name of such society, order or organization, the titles of its officers, or its insignia, ritual or ceremonies, unless thereunto authorized by such society, order or organization. Any person violating any of the provisions of this section is guilty of a misdemeanor.

(L. 25, p. 39, § 8506.)

Cross-references.
Forging and counterfeiting, 103-24-1.

103-18-16. Confidence Game, a Felony.

Every person who obtains or attempts to obtain from any other person any money or property by any means, instrument or device commonly called a confidence game shall be imprisoned in the state prison not more than ten years. (C. L. 17, § 8356.)

Comparable provisions.
Mont. Rev. Codes, § 11411 (similar).

103-18-17. Id. Indictment or Information.

In every indictment, information or complaint under the next preceding section it shall be deemed and held a sufficient description of the offense to charge that the accused did, on, etc., unlawfully and feloniously obtain or attempt to obtain (as the case may be) from.....

.....(here insert the name of the person or persons defrauded or attempted to be defrauded) his money (or property, in case it is not money) by means and by use of such confidence game. (C. L. 17, § 8057.)

CHAPTER 19

FALSE IMPRISONMENT *

103–19–1. Defined.
103–19–2. Penalty.

* **History of act.** The provisions of this chapter are identical with R. S. 1898, Title 75, Ch. 21, p. 897; Comp. Laws 1907, Title 90, Ch. 21.

Scope of annotation. The general principles governing civil actions for false imprisonment have no place in this chapter. See, however, Johnson v. Leigh, 74 U. 286, 279 P. 501; Richardson v. Capwell, 63 U. 616, 176 P. 205; Salisbury v. Poulson, 51 U. 552, 172 P. 315.

Related or included offenses. "The crime of false imprisonment is included within the crime of kidnapping. The former is an indictable misdemeanor, the latter a felony." State v. Olsen, 76 U. 181, 184, 289 P. 92.

103–19–1. Defined.

False imprisonment is the unlawful violation of the personal liberty of another. (C. L. 17, § 8062.)

Comparable provisions.
Cal. Penal Code, § 236, Idaho Code, § 17-1215 (identical).
Mont. Rev. Codes, § 10988 (includes identical definition).

1. **What constitutes.**
False imprisonment is unlawful arrest and detention of person of another, with or without warrant or other process, or unlawful restraint upon man's person, or control over freedom of his movements, by force or threats. Smith v. Clark, 37 U. 116, 106 P. 653, 26 L. R. A. (N. S.) 953, Ann. Cas. 1912 B 1366.

103–19–2. Penalty.

False imprisonment is punishable by a fine not exceeding $3,000 or by imprisonment in the county jail not more than one year, or by both. (C. L. 17, § 8063.)

Comparable provisions.
Idaho Code, § 17-1216 (substantially identical, except as to "* * * fine not exceeding $5000 * * *").

CHAPTER 20

FENCES

103–20–1. Permitting Barbed Wire to Become a Menace.
103–20–2. Shafts and Wells to Be Fenced.

103–20–1. Permitting Barbed Wire to Become a Menace.

It is unlawful for any person to leave any unbaled barbed wire loose upon any lane, street, road, highway, range or public place, or, in using

barbed wire for fencing purposes, to permit the same to become loose or unfastened and allow it to so remain as to endanger the public. Any person violating any of the provisions of this section is guilty of a misdemeanor, and shall be fined in a sum not exceeding $100.

(C. L. 17, § 8507.)

History.
This section was Laws 1907, p. 37.

103-20-2. Shafts and Wells to Be Fenced.

Any person who has sunk or shall sink a shaft or well on the public domain for any purpose shall inclose such shaft or well with a substantial curb or fence, which shall be at least four and a half feet high. Any person violating the provisions of this section is guilty of a misdemeanor. (C. L. 17, § 3939.)

History.
This section was R. S. 1898, Title 42, § 1538; Comp. Laws 1907, § 1538.

Cross-references.
Miscellaneous offenses respecting mines, 55-4; natural gas wells, Title 59.

CHAPTER 21

FIREARMS *

103-21-1. Selling or Giving to Child Under Fourteen.
103-21-2. Child in Possession of, Deemed Delinquent.
103-21-3. Threatening by—Use in a Quarrel.
103-21-4. Carrying Concealed Weapons.
103-21-5. Possession with Intent to Assault.
103-21-6. Selling or Giving Away Toy Pistol.
103-21-7. Firing from Vehicle or Near Highway.

* **History of act.** This chapter was Comp. Laws 1907, §§ 4487x12 and 4487x13.

103-21-1. Selling or Giving to Child Under Fourteen.

Any person who sells, gives away, or disposes of, or offers to sell, give away, or dispose of, any pistol, gun, target gun or other firearm to any person under the age of fourteen years is guilty of a misdemeanor.

(C. L. 17, § 8494.)

103-21-2. Child in Possession of, Deemed Delinquent.

Any person under the age of fourteen years who carries or has in his possession any pistol, gun, target gun or other firearm, unless he is accompanied by a parent or guardian, shall be deemed a delinquent child. (C. L. 17, § 8495.)

103-21-3. Threatening by—Use in a Quarrel.

Every person who, not in necessary self-defense, in the presence of two or more persons, draws or exhibits any deadly weapon in an angry and threatening manner, or who, in any manner, unlawfully uses the same in any fight or quarrel, is guilty of a misdemeanor.

(C. L. 17, § 8229.)

Comparable provisions.
Cal. Penal Code, § 417 (similar).

Cross-references.
Assault with deadly weapon, 103–7–6.

103–21–4. Carrying Concealed Weapons.

It shall be unlawful for any person, except a peace officer, without the written consent of a peace officer, to carry any slingshot, brass knuckles, revolver, dagger, stiletto or other deadly weapon concealed upon his person. Any person violating any provision of this section is guilty of a misdemeanor. (C. L. 17, § 8230.)

Cross-references.
Cities may prohibit carrying concealed weapons, 15–8–48.

A. L. R. notes.
Manner of carrying or place of concealment as affecting offense of carrying concealed weapon, 88 A. L. R. 807; offense of carrying weapon on person as affected by place where defendant was at the time, 73 A. L. R. 839; scope and effect of exception in statute forbidding carrying of weapons, as to person on his own premises, 31 A. L. R. 1128.

103–21–5. Possession with Intent to Assault.

Every person having upon his person any deadly weapon, with intent to assault another, is guilty of a misdemeanor. (C. L. 17, § 8265.)

Cross-references.
Assault and battery, 103–7.

1. Included offenses.
This offense would not be included in an information for assault with intent to murder, unless the elements of the crime are included in the information. State v. Jukanovich, 45 U. 372, 375, 146 P. 289.

103–21–6. Selling or Giving Away Toy Pistol.

Any person selling or giving away a toy pistol is guilty of a misdemeanor. (C. L. 17, § 8198.)

103–21–7. Firing from Vehicle or Near Highway.

It shall be unlawful for any person to discharge any kind of a firearm from an automobile or other vehicle, or to discharge a firearm within 50 feet of any public highway. Any person violating any of the provisions of this section is guilty of a misdemeanor and shall be fined in a sum not less than $25. (L. 23, p. 47, § 42.)

CHAPTER 22

FIRES

103–22–1. Exposing Trees, Grass or Crops to Danger by.
103–22–2. Firing Trees, Grass or Crops on Another's Land.
103–22–3. Obstructing Firemen in Discharge of Duties.

103–22–1. Exposing Trees, Grass or Crops to Danger by.

Any person who negligently or willfully exposes any growing trees, shrubs, brush, grass, undergrowth or cultivated crops on any lands, public or private, not his own property, to danger of destruction by fire is guilty of a misdemeanor. (L. 27, p. 77, § 5.)

103-22-2. Firing Trees, Grass or Crops on Another's Land.

Any person who negligently or willfully sets on fire, or causes or procures to be set on fire, any growing trees, shrubs, brush, grass, undergrowth or cultivated crops on any land, public or private, not his own property, is guilty of a misdemeanor. (L. 27, p. 77, § 6.)

103-22-3. Obstructing Firemen in Discharge of Duties.

Every person who at the burning of a building disobeys the lawful orders of any public officer or fireman, or offers any resistance to or interference with the lawful efforts of any fireman or company of firemen to extinguish the same, or engages in any disorderly conduct calculated to prevent the same from being extinguished, or who forbids, prevents or dissuades others from assisting to extinguish the same, is guilty of a misdemeanor. (C. L. 17, § 8470.)

CHAPTER 23

FORCIBLE ENTRY OR DETAINER *

103-23-1. A Misdemeanor.
103-23-2. Retaking Possession After Removal Under Process.

* History of act. This chapter is identical with R. S. 1898, Title 75, §§ 4313 to 4314; Comp. Laws 1907, Title 90, §§ 4314 to 4315.

103-23-1. A Misdemeanor.

Every person using, or procuring, encouraging or assisting another to use, any force or violence in entering upon or detaining any lands or other possessions of another, except in the cases and in the manner allowed by law, is guilty of a misdemeanor. (C. L. 17, § 8231.)

Comparable provisions.
Cal. Penal Code, § 418, Idaho Code, § 17-3011, Mont. Rev. Codes, § 11300 (identical).

Cross-references.
Civil provisions respecting forcible entry and detainer, 104-60.

103-23-2. Retaking Possession After Removal Under Process.

Every person who has been removed from any lands by process of law, or who has removed from any lands pursuant to the lawful adjudication or direction of any court, tribunal or officer, and who afterwards unlawfully returns to settle, reside upon or take possession of such lands, is guilty of a misdemeanor. (C. L. 17, § 8232.)

Comparable provisions.
Cal. Penal Code, § 419, Idaho Code, § 17-3012 (identical).
Mont. Rev. Codes, § 11301 (substantially identical).

Cross-references.
Person as guilty of contempt, 104-45-2.

CHAPTER 24

FORGING AND COUNTERFEITING *

103–24–1. "Forgery" Defined.
103–24–2. False Entries in Record Books.
103–24–3. Of Seals—Of State or Public Officers.
103–24–4. Penalty for Forgery.
103–24–5. Of Telegraph and Telephone Messages.
103–24–6. Of Negotiable Instruments.
103–24–7. Id.
103–24–8. Counterfeiting—Defined.
103–24–9. Id. Penalty.
103–24–10. Id. Possession of Coins or Precious Metals.
103–24–11. Id. Possession of Dies, Plates or Apparatus.
103–24–12. Issuing Paper or Tokens for Use as Money, a Misdemeanor.

L. 1935, ch. 111; eff. May 11.

103–24–13. Spurious Coins—Using for Fraudulent Operation of Vending Machines or Other Receptacles—Penalty.
103–24–14. Id. Manufacture, Sale, or Giving Away—Penalty.

* History of act. This was Comp. Laws 1876, Title XIII, Ch. IV, p. 621; 2 Comp. Laws 1888, Title XIII, Ch. IV; R. S. 1898, Title 75, Ch. 42, p. 919; Comp. Laws 1907, Title 90, Ch. 42.

103–24–1. "Forgery" Defined.

Every person who, with intent to defraud another, falsely makes, alters, forges or counterfeits any charter, letters patent, deed, lease, indenture, will, testament, codicil, annuity, bond, covenant, bank bill or note, money order, check, draft, bill of exchange, contract, promissory note, due bill for the payment of money or property, receipt for money or property, passage ticket, power of attorney; or any certificate of any share, right or interest in the stock of any corporation or association; or any auditor's warrant for the payment of money at the treasury; or any state, county, city or town order of warrant; or request for the payment of money, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing or acquittance, release or receipt for money or goods; or any acquittance, release or discharge for any debt, account, suit, action, demand or other thing of value, real or personal; or any transfer or assurance of money, certificates of shares of stock, goods, chattels or other property whatever; or any letter of attorney or other power to receive money, or to receive or transfer certificates of shares of stock or annuities; or to let, lease, dispose of, alien or convey any goods, chattels, lands or tenements, or other estate, real or personal; or any acceptance or indorsement of any bill of exchange, promissory note, draft, order or assignment of any bond, promissory note for money or other property; or any letter of service, clearance card or union labor card; or time check, or other evidence of indebtedness; or any card of any lodge of any benevolent, charitable or fraternal order, or any post of the Grand Army of the Republic or commandery of the Loyal Legion; or counterfeits or forges the seal or handwriting of another, or any official certificate; or utters, publishes or passes, or attempts to pass, as true or genuine any of the above-named false, altered, forged or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged or counterfeited, with intent to prejudice, damage or defraud any person;

or who, with intent to defraud, alters, corrupts or falsifies any record of any will, codicil, conveyance or other instrument, the record of which is by law evidence; or any record of any judgment of a court, or the return of any officer to any process of any court;—is guilty of forgery.

(C. L. 17, § 8270.)

History.

This section is practically identical with Comp. Laws 1876, § 2093; R. S. 1898, § 4343; Comp. Laws 1907, § 4343; 2 Comp. Laws 1888, § 4628.

Comparable provisions.

Cal. Penal Code, § 470, Idaho Code, § 17-3701, Mont. Rev. Codes, § 11355 (similar).

Cross-references.

Falsifying evidence, 103-26-36 et seq.; wrongful use of insignia, 103-18-15; joinder of counts, 105-21-31; expert testimony, 105-32-13; allegation where instrument withheld or destroyed, 105-21-36; proof of incorporation of bank or company, 105-32-13.

1. How perpetrated.

2. —in general.

Under this section crime of forgery may consist of the making of the forged instrument or of the passing of an instrument known to be false, or of both making and passing such instrument. State v. Gorham, 93 U. 274, 72 P.2d 656.

To convict one of uttering and passing forged draft it is not essential that he should have personally affixed forged name to draft. State v. Gorham, 93 U. 274, 72 P.2d 656.

In determining whether indorsement of a draft constitutes a forgery, Bishop's Criminal Law is persuasive authority. Heavy v. Commercial Nat. Bank, 27 U. 222, 75 P. 727, 101 Am. St. Rep. 966.

3. —uttering.

Offering a forged check to a clerk in a store with knowledge of its falsity and with intent to defraud constitutes uttering. State v. Green, 89 U. 437, 454, 57 P.2d 750.

4. —passing forged instrument.

Even though proof fails to show that defendant personally forged instrument, it may be sufficient to show passing of instrument known by him to be false or forged, and this would constitute crime of forgery. State v. Gorham, 93 U. 274, 72 P.2d 656.

5. —falsity of signature.

To establish falsity of signature it must be made to appear not only that person whose name was signed to instrument did not sign it, but also that his name was signed without authority. State v. Jones, 81 U. 503, 20 P.2d 614. It is not forgery for one person to write another's name with authority. State v. Jones, 81 U. 503, 20 P.2d 614.

It makes no difference, as far as conviction of forgery is concerned, whether name on questioned document is that of real or fictitious person. State v. Gorham, 93 U. 274, 72 P.2d 656.

Where person whose name appeared on check testified that he did not sign check, but did not testify that he did not authorize another to sign his name, conviction of defendant of forgery in that he passed forged check was reversed. State v. Jones, 81 U. 503, 20 P.2d 614.

6. Indictment or information.

7. —in general.

This topic will be found in another title. See Title 105.

8. —duplicity.

Information in forgery prosecution charging the making and passing of a forged check was not duplicitous and subject to motion to strike on such ground, since, where several acts are enumerated alternatively in a statute, the doing of each one being prohibited under penalty, they may be charged conjunctively as one offense, when not repugnant to each other, and especially when each of the acts charged is committed with respect to the same instrument. State v. Jones, 81 U. 503, 20 P.2d 614.

9. —issues, proof and variance.

Where check showed indorsement, and information did not set out such indorsement, there was no material variance. State v. Jones, 81 U. 503, 20 P.2d 614.

Where information contains one count for forgery and another for uttering, attempt to utter may be shown, for "it is immaterial that the attempt to utter was unsuccessful; it is the fact of uttering or attempting to utter that has evidentiary value." State v. Green, 89 U. 437, 453, 57 P.2d 750.

10. Defenses.

Of course insanity, if sufficiently established, would constitute a defense. State v. Brown, 36 U. 46, 102 P. 641, 24 L. R. A. (N. S.) 545.

Fact that forged check was postdated cannot help defendant, where he at-

tempted to pass it. State v. Green, 89 U. 437, 453, 57 P.2d 750.

11. Evidence.

12. — in general.

Of course the general rules of evidence obtain in prosecutions for this offense. Therefore consult standard works on the subject.

13. — experts.

In forgery prosecution, testimony of handwriting expert with surrounding circumstances, held sufficient corroboration of testimony of accomplice to warrant submission of case to jury. State v. Leek, 85 U. 531, 39 P.2d 1091.

14. — proof of other crimes.

In forgery prosecution in which defendant denied indorsing check, admission in evidence of other checks, allegedly to prove intent, indorsements upon which accomplice testified were made at same time indorsement involved in prosecution was made, held, prejudicial error as tending to prove other and distinct offenses. State v. Leek, 85 U. 531, 39 P.2d 1091.

15. — weight and sufficiency.

Before defendant could be convicted of passing forged check, state must prove beyond reasonable doubt that check was forged. State v. Jones, 81 U. 503, 20 P.2d 614.

In forgery prosecution, evidence was sufficient to warrant defendant's conviction. State v. Lanos, 63 U. 151, 223 P. 1065. Evidence held sufficient to warrant verdict of guilty of crime of forgery by uttering and passing draft, known to be false and forged, as genuine, with intent to defraud. State v. Gorham, 93 U. 274, 72 P.2d 656. (Larson, J., dissenting.)

In prosecution for forgery of draft, evidence held insufficient to sustain conviction. State v. Gorham, 87 U. 86, 48 P.2d 447.

In prosecution for forgery by passing forged draft, evidence was sufficient to support finding that no one of the name which was affixed to draft consented to its being affixed thereto. State v. Gorham, 93 U. 274, 72 P.2d 656.

16. Verdict.

Verdict of guilty of uttering forged instrument was not against law expressed in instruction on crime of forging instrument that defendant should not be convicted unless jury should find that defendant wrote the instrument and was not authorized to do so by person whose name was appended thereto. State v. Gorham, 93 U. 274, 72 P.2d 656.

Finding of guilty of crime of uttering forged instrument is not a finding of guilty of forging an instrument, and does not require a finding of guilty of the latter crime to support it. State v. Gorham, 93 U. 274, 72 P.2d 656.

17. Negotiable instruments.

It is intended that where a fictitious bill, note, check, or other instrument for the payment of money is involved, the prosecution should be under 103-24-7, and not under this section, notwithstanding that crime would still be called "forgery." State v. Gorham, 93 U. 274, 72 P.2d 656.

A. L. R. notes.

Alteration of instrument to conform to intention of parties as forgery, 93 A. L. R. 864.

Altering receipt, canceled check, or other voucher as forgery, 26 A. L. R. 1058.

Filling in terms other than authorized in paper executed with blanks, as forgery, 87 A. L. R. 1169.

Genuine making of instrument for purpose of defrauding as constituting forgery, 51 A. L. R. 568.

Procuring signature by fraud as forgery, 56 A. L. R. 582.

Several individuals, forgery of names of to the same instrument as more than one offense, 33 A. L. R. 562.

103-24-2. False Entries in Record Books.

Every person who, with intent to defraud another, makes, forges or alters any entry in any book of record, or any instrument purporting to be any record or return specified in the preceding section, is guilty of forgery. (C. L. 17, § 8271.)

Comparable provisions.

Cal. Penal Code, § 471, Idaho Code, § 17-3702, Mont. Rev. Codes, § 11356 (identical).

Cross-references.

Falsifying public accounts, 103-26-59; mutilating or destroying public records, 103-26-11, 103-26-70, 103-26-71.

103-24-3. Of Seals—Of State or Public Officers.

Every person who, with intent to defraud another, forges or counterfeits the seal of this state, the seal of any public officer authorized by

law, the seal of any court of record, or the seal of any corporation, or any other public seal authorized or recognized by the laws of this state or of any state, government or country, or who falsely makes, forges or counterfeits any impression purporting to be an impression of any such seal, or who has in his possession any such counterfeited seal or impression thereof, knowing it to be counterfeited, and willfully conceals the same, is guilty of forgery. (C. L. 17, § 8272.)

Comparable provisions.
Cal. Penal Code, § 472, Idaho Code, § 17-3703, Mont. Rev. Codes, § 11357 (substantially identical).

103-24-4. Penalty for Forgery.

Forgery is punishable by imprisonment in the state prison for a term not less than one nor more than twenty years. (C. L. 17, § 8273.)

Comparable provisions.
Idaho Code, § 17-3704, Mont. Rev. Codes, § 11358 ("* * * for not less than one nor more than fourteen years").

103-24-5. Of Telegraph and Telephone Messages.

Every person who knowingly and willfully sends by telegraph or telephone to any person a false or forged message purporting to be from such telegraph or telephone office, or from any other person, or who willfully delivers or causes to be delivered to any person any such message falsely purporting to have been received by telegraph or telephone, or who furnishes, or conspires to furnish, or causes to be furnished, to any agent, operator or employee to be sent or delivered by telegraph or telephone any such message, knowing the same to be false or forged, with the intent to deceive, injure or defraud another, is punishable by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year, or by fine not exceeding $1,000, or by both such fine and imprisonment. (C. L. 17, § 8274.)

Comparable provisions.
Cal. Penal Code, § 474, Mont. Rev. Codes, § 11359 (substantially identical, except as to being worded in part, "* * * fine not exceeding five thousand dollars * * *").

Cross-references.
Sending checks, etc., by telegraph or telephone, Title 92; sending summons, writs, etc., 104-43-9; altering or disclosing contents of telegraphic or telephonic message, 103-46-6 et seq.

103-24-6. Of Negotiable Instruments.

Every person who has in his possession, or receives from another person, any forged promissory note or bank bill for the payment of money or property, with the intention to pass the same, or permit, cause or procure the same to be uttered or passed, with the intention to defraud any person, knowing the same to be forged or counterfeited, or has or keeps in his possession any blank or unfinished note or bank bill made in the form or similitude of any promissory note or bill for payment of money or property, made to be issued by any bank, with intention to fill up or complete such blank and unfinished note or bill, or to permit or cause or procure the same to be filled up or completed in order to utter or pass the same, or to permit or cause or procure the same to be uttered

or passed, or to defraud any person, is punishable by imprisonment in the state prison for not less than one nor more than ten years.

(C. L. 17, § 8275.)

Comparable provisions.
Cal. Penal Code, § 475, Idaho Code, § 17–3705, Mont. Rev. Codes, § 11360 (substantially identical except as to being worded in part: "* * * for not less than one nor more than fourteen years").

103–24–7. Id.

Every person who makes, passes, utters or publishes, with intention to defraud any other person, or who, with like intention, attempts to pass, utter or publish, or who has in his possession, with like intent to utter, pass or publish, any fictitious bill, note or check, purporting to be the bill, note, check or other instrument in writing for the payment of money or property of some bank, corporation, partnership or individual when in fact there is no such bank, corporation, partnership or individual in existence, knowing the bill, note, check or instrument in writing to be fictitious, is punishable by imprisonment in the state prison for not less than one nor more than ten years.

(C. L. 17, § 8276.)

History.
This section is practically identical with R. S. 1898, § 4349; Comp. Laws 1907, § 4349.

Comparable provisions.
Cal. Penal Code, § 476, Mont. Rev. Codes, § 11361 (similar).

1. Prosecution.
It is intended that where a fictitious bill, note, check, or other instrument for the payment of money is involved, the prosecution should be under this section and not under 103–24–1, notwithstanding that crime would still be called "forgery." State v. Gorham, 93 U. 274, 72 P.2d 656.

2. Passing bad checks.
Evidence that defendant signed check by fictitious name and used it in payment for goods and for cash supported conviction under this section, as against contention that all that was proved was a violation of 103–18–11 making issuance of check against insufficient funds a misdemeanor. State v. Tinnin, 64 U. 587, 232 P. 543, 43 A. L. R. 46.

3. Evidence.
Evidence held sufficient to warrant verdict of guilty of crime of forgery by uttering and passing draft, known to be false and forged, as genuine, with intent to defraud. State v. Gorham, 93 U. 274, 72 P.2d 656. (Larson, J., dissenting.)

In prosecution for forgery by passing forged draft, evidence was sufficient to support finding that no one of the name which was affixed to draft consented to its being affixed thereto. State v. Gorham, 93 U. 274, 72 P.2d 656.

103–24–8. Counterfeiting—Defined.

Every person who counterfeits any of the species of gold or silver coin current, or any kind or species of gold dust, gold or silver bullion, or bars, lumps, pieces or nuggets, or who sells, passes or gives in payment such counterfeited coin, dust, bullion, bars, lumps, pieces or nuggets, or permits, causes or procures the same to be sold, uttered or passed, with intention to defraud any person, knowing the same to be counterfeited, is guilty of counterfeiting. (C. L. 17, § 8277.)

Comparable provisions.
Cal. Penal Code, § 477, Idaho Code, § 17–3707, Mont. Rev. Codes, § 11362 (substantially identical).

Cross-references.
Counterfeiting fish and game licenses, 30–0–71; tobacco and oleomargarine stamps, 93–1–9.

103-24-9. Id. Penalty.

Counterfeiting is punishable by imprisonment in the state prison for not less than one nor more than ten years. (C. L. 17, § 8278.)

103-24-10. Id. Possession of Coins or Precious Metals.

Every person who has in his possession, or receives from any other person, any counterfeit gold or silver coin of the species current, or any counterfeit gold dust, gold or silver bullion or bars, lumps, pieces or nuggets, with the intent to sell, utter, put off or pass the same, or permits, causes or procures the same to be sold, uttered or passed, with intent to defraud any person, knowing the same to be counterfeit, is punishable by imprisonment in the state prison for a term not less than one nor more than ten years. (C. L. 17, § 8279.)

Comparable provisions.
Cal. Penal Code, § 479, Idaho Code, § 17-3709, Mont. Rev. Codes, § 11364 (substantially identical, except as being worded in part: "* * * not less than one nor more than fourteen years").

103-24-11. Id. Possession of Dies, Plates or Apparatus.

Every person who makes, or knowingly has in his possession, any die, plate or any apparatus, paper, metal, machine or other thing whatever, made use of in counterfeiting coin current or in counterfeiting gold dust, gold or silver bars, bullion, lumps, pieces or nuggets, or in counterfeiting bank notes or bills, is punishable by imprisonment in the state prison for a term not less than one nor more than ten years; and all such dies, plates, apparatus, paper, metal or machines intended for the purpose aforesaid must be destroyed. (C. L. 17, § 8280.)

Comparable provisions.
Cal. Penal Code, § 480, Idaho Code, § 17-3710, Mont. Rev. Codes, § 11365 (substantially identical, except as being worded in part: "* * * not less than one nor more than fourteen years * * *").

103-24-12. Issuing Paper or Tokens for Use as Money, a Misdemeanor.

Any person who issues or circulates any note, check, memorandum, token or other obligation for use as money in lieu of lawful money or other lawful medium of exchange is guilty of a misdemeanor, and shall be punished for each offense by fine not exceeding $1,000, to be paid into the state treasury, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.
(C. L. 17, § 8281.)

Cross-references.
Indictment and information, 105-21-20; proof of corporate capacity, 105-32-13.

L. 1935, ch. 111; eff. May 14.

AN ACT to provide penalties for using, manufacturing, selling or giving away tokens, slugs, or spurious coins for the fraudulent operation of vending machines, coin-box telephones or other receptacles, designed to receive lawful coins of the United States of America, in the sale, use or enjoyment of property or service.

Be it enacted by the Legislature of the State of Utah:

103-24-13. Spurious Coins—Using for Fraudulent Operation of Vending Machines or Other Receptacles—Penalty.

Any person, who, willfully or knowingly, by means of any token, slug, false or counterfeited coin, or by any other means, method, trick or device whatsoever not lawfully authorized by the owner, lessee, or licensee of any vending machine, coin-box telephone or other receptacle designed to receive or be operated by lawful coin of the United States of America in furtherance of or connection with the sale, use or enjoyment of property or service, knowingly shall operate or cause to be operated, or shall attempt to operate or attempt to cause to be operated, any vending machine, coin-box telephone or other receptacle designated to receive or be operated by lawful coin of the United States of America, or whoever shall take, obtain, accept or receive, from or by means of any such machine, coin-box telephone or other receptacle, any article of value or service or the use or enjoyment of any telephone, telegraph or other facility or service, without depositing in, delivering to and payment into such machine, coin-box telephone or receptacle the amount of lawful coin of the United States of America required therefor by the owner, lessee or licensee of such machine, coin-box telephone or other receptacle, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $200, or by imprisonment in the county jail for a term not exceeding sixty days, or by both such fine and imprisonment. (Sec. 1.)

103-24-14. Id. Manufacture, Sale, or Giving Away—Penalty.

Any person who, with intent to cheat or defraud the owner, lessee, licensee or other person entitled to the contents of any vending machine, coin-box telephone or other receptacle designed to receive or be operated by lawful coin of the United States of America in furtherance of or connection with the sale, use or enjoyment of property or service or the use or enjoyment of any telephone, telegraph or other facilities or service, or whoever, knowingly or having cause to believe that the same is intended for fraudulent or unlawful use on the part of the purchaser, donee or user thereof, shall manufacture for sale, sell or give away any token, slug, false or counterfeited coin or any device or substance whatsoever intended or calculated to be placed, deposited or used in any such vending machine, coin-box telephone or other receptacle, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $500, or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment. (Sec. 2.)

CHAPTER 25

GAMING

103–25–1. A Felony—Seizure and Destruction of Paraphernalia.
103–25–2. Owner or Proprietor of Premises Guilty of Misdemeanor.
103–25–3. Winning by Fraud Punishable as for Larceny.
103–25–4. Witnesses — Disobeying Subpoena, a Misdemeanor.
103–25–5. Id. Denied Claim of Privilege.
103–25–6. Officers Neglecting to Prosecute—Penalty.
103–25–7. Operating Slot Machines.
103–25–8. Lottery—Defined.
103–25–9. Id. Penalty.
103–25–10. Id. Vending Tickets or Chances.
103–25–11. Id. Aiding in or Assisting.
103–25–12. Id. Maintaining Office for Sale.
103–25–13. Id. Insuring Tickets.
103–25–14. Id. Premiums Forfeited to State — Recovery — Attachment.
103–25–15. Id. Lessor of Premises Guilty of Misdemeanor.
103–25–16. (Repealed.)
103–25–17. (Repealed.)

L. 1933, 2nd Spec. Sess., ch. 19; eff. July 27.

103–25–18. Gaming, Pool Selling, Option Selling, Bookmaking, a Misdemeanor — Premises and Paraphernalia Used Declared Nuisances.
103–25–19. Abatement.
103–25–20. Effective Date.

103–25–1. A Felony—Seizure and Destruction of Paraphernalia.

Every person who deals or carries on, opens or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noir, rondo, or any game played with cards, dice or any other device, for money, checks, credit or any other representative of value is guilty of a felony, and it shall be the duty of all sheriffs, constables, police and other peace officers whenever it shall come to the knowledge of such officer that any person has in his possession any cards, tables, checks, balls, wheels, slot machines or gambling devices of any nature or kind whatsoever used or kept for the purpose of playing for money, or for tokens redeemable in money, at any of the games mentioned in this chapter, or that any cards, tables, checks, balls, wheels, slot machines or gambling devices used or kept for the purposes aforesaid may be found in any place, to seize and take such cards, tables, checks, balls, wheels, slot machines or other gambling devices, and convey the same before a magistrate of the county in which such devices shall be found; and it shall be the duty of such magistrate to inquire of such witnesses as he shall summon or as may appear before him in that behalf touching the nature of such gambling devices, and, if such magistrate shall determine that the same are used or kept for the purpose of being used at any game or games of chance described in this chapter, it shall be his duty to destroy the same. (C. L. 17, § 8162.)

History.

This section was formerly 2 Comp. Laws 1888, § 4541; R. S. 1898, § 4261; and Comp. Laws 1907, § 4261, but at that time it was merely a misdemeanor.

Comparable provisions.

Cal. Penal Code, § 330 (misdemeanor).

Cross-references.

Constitutional provision, Const. Art. VI, § 28; betting on boxing or wrestling match, 9–0–1; on elections, 25–13–30.

1. Scope and operation of section.

It was games of chance that the legislature intended to prohibit by the en-

actment of this section; not games of skill such as games of chess, checkers, billiards, bowling and other games in which skill is the predominating element. D'Orio v. Startup Candy Co., 71 U. 410, 266 P. 1037, 60 A. L. R. 338.

2. Particular gambling devices and games of chance.

This section prohibits the use of a slot machine by a merchant to stimulate trade. The court held that rule of ejusdem generis would not be applied to words in statute: "or any game played with cards, dice, or any other device." Salt Lake City v. Doran, 42 U. 401, 131 P. 636.

Under this section, punch board yielding checker problem is a game of skill and not a game of chance, for checker playing is game of skill, and mere fact that one of the players is more skilful than another does not alter nature of game. D'Orio v. Startup Candy Co., 71 U. 410, 266 P. 1037, 60 A. L. R. 338.

3. Horse racing.

Horse Racing Act (Laws 1925, Ch. 77), permitting pari-mutuel betting at track, was not violative of Const. Art. VI, § 28, prohibiting authorization of lotteries or games of chance. Utah State Fair Ass'n v. Green, 68 U. 251, 249 P. 1016.

State law (Laws 1925, Ch. 77), permitting horse racing and pari-mutuel betting at track was constitutional and, therefore, superseded or repealed by implication city ordinances contrary thereto. Utah State Fair Ass'n v. Green, 68 U. 251, 249 P. 1016.

4. When offense complete.

Under this section the offense is complete if the game is played, carried on, or conducted in any house, street, or alley, or other place, public or private; and it is sufficient that it be played only once or for any indefinite length of time, if played for money, credit or other representative or thing of value. State v. Poulis, 45 U. 340, 145 P. 1044.

This section refers to the game itself, and each act of this kind constitutes an offense. Formerly, however, a violation of the provisions of this section was merely a misdemeanor. People v. Sullivan, 9 U. 195, 33 P. 701, applying 2 Comp. Laws 1888, § 4541.

5. Necessity for seizure of property.

Under this section the seizure and destruction of gambling devices are in no sense essentials of the offense of gambling. The main object of statute is to denounce and forbid gambling and to fix penalties. Section may be enforced wholly independent of seizure or destruction of property used or kept for gambling. Bruce v. Sharp, 41 U. 660, 127 P. 343, applying identical section from Comp. Laws 1907 as amended.

6. Carrying the burden by the state.

All that is necessary for the state to prove under this section, aside from the jurisdictional and technical matters, to secure a conviction, is that accused, either as owner or an employee of another, whether for hire or not, has carried on or conducted any game played with cards, which game was played for money, credit, or for some other representative or thing of value. It is not necessary to prove that accused is conducting or has conducted a gambling house, or that he is habitually engaged in gambling. State v. Poulis, 45 U. 340, 145 P. 1044.

7. Prohibition.

Prohibition would not lie to enjoin justice of the peace from exercising jurisdiction over slot machines seized by sheriff, who filed affidavit on information and belief that the machines were being operated in violation of law, whereupon justice issued writ of attachment which sheriff executed, and justice might order owner to appear and show cause why the machines should not be destroyed and the money therein forfeited. Parry v. Crosby, 100 U. 496, 116 P.2d 411. (Larson, J., and Moffat, C. J., dissenting.)

A. L. R. notes.

Constitutionality, construction, and application of statutes exempting schemes for benefit of public, religious, or charitable purposes from statutes or constitutional provisions against lotteries or gambling, 103 A. L. R. 875.

Constitutionality of statutes forbidding or regulating dissemination of betting odds or other gambling information, 47 A. L. R. 1135.

Constitutionality of statutes providing for destruction of gambling devices, 81 A. L. R. 730.

Contracts of present sale of personal property with options as gambling contracts, 1 A. L. R. 1548.

Federal Constitution as a limitation upon the powers of the states in respect of search and seizure, 19 A. L. R. 644.

Offense of larceny, embezzlement, robbery or assault to commit robbery, as affected by defendant's intention to take or retain money or property in payment of, or as security for, claim, or to collect debt, or to recoup gambling losses, 110 A. L. R. 997.

Pari-mutuel and similar betting methods on race as game of chance or gambling, 52 A. L. R. 74.

Racing as a game within statute, 45 A. L. R. 998.
Rights and remedies in respect of money in gambling machine or other receptacle, used in connection with gambling, seized by public authorities, 79 A. L. R. 1007.
What are games of chance, games of skill, and mixed games of chance and skill, 135 A. L. R. 104.

103–25–2. Owner or Proprietor of Premises Guilty of Misdemeanor.

Every person who knowingly permits any of the games mentioned in the preceding section to be played, conducted or dealt in any house owned or rented by such person, in whole or in part, and any person who plays at or against any of said prohibited games, is guilty of a misdemeanor. (C. L. 17, § 8163.)

Comparable provisions.
Cal. Penal Code, § 331, Idaho Code, § 17–2302 (similar as to owner or renter).

A. L. R. notes.
Connection with place where gaming is carried on which will render one guilty as keeper thereof, 15 A. L. R. 1202.

103–25–3. Winning by Fraud Punishable as for Larceny.

Every person who, by any practice, cheat or device, or false pretense whatsoever, while playing at any game of chance or having any share in wagers played for, or while betting on sides or hands of such play, wins or acquires to himself or another any sum of money or valuable thing, must be punished as in case of larceny of property of like value. (C. L. 17, § 8164.)

Comparable provisions.
Idaho Code, § 17–2303 (misdemeanor).

Cross-references.
Penalty for larceny, 103–36–6, 103–36–7.

103–25–4. Witnesses—Disobeying Subpoena, a Misdemeanor.

Every person duly summoned as a witness for the prosecution on any proceedings had under this chapter who neglects or refuses to attend as required is guilty of a misdemeanor. (C. L. 17, § 8165.)

Comparable provisions.
Cal. Penal Code, § 333, Idaho Code, § 17–2306 (identical).

103–25–5. Id. Denied Claim of Privilege.

No person otherwise competent as a witness is disqualified from testifying as such concerning the offense of gaming on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he is compelled to testify. (C. L. 17, § 8166.)

History.
This section is practically identical with R. S. 1898, § 4265; Comp. Laws 1907, § 4265, and with 2 Comp. Laws 1888, p. 601, § 4545.

Comparable provisions.
Cal. Penal Code, § 334, Idaho Code, § 17–2307 (substantially identical; word "compelled" is omitted).

1. Operation and effect of section.
This section does not protect a witness who appears before grand jury to testify in prosecution instituted by himself against another, and in trying to establish his complaint makes a voluntary statement connecting himself with the offense of gaming. People v. Reggel, 8 U. 21, 26, 28 P. 955.

103-25-6. Officers Neglecting to Prosecute—Penalty.

Every prosecuting attorney, sheriff, constable and police officer must inform against and diligently prosecute persons whom they have reasonable cause to believe to be offenders against the provisions of this chapter, and every such officer refusing or neglecting so to do is guilty of a misdemeanor. (C. L. 17, § 8167.)

Comparable provisions.
Cal. Penal Code, § 335, Idaho Code, § 17-2308 (substantially identical).

103-25-7. Operating Slot Machines.

Every person who keeps or operates, either as owner, agent or employee, or allows to be kept, used, operated or conducted, in his place of business or elsewhere the device or instrument commonly known as a "slot machine," or any other similar device or instrument for gambling or exhibiting bawdy pictures is guilty of a misdemeanor.
(C. L. 17, § 8492.)

History.
This was Comp. Laws 1907, § 4487x10.

1. Statutes and ordinances forbidding slot machines.
Formerly it was held that slot machines constituted gambling, and city ordinances forbidding their use, have been upheld. Salt Lake City v. Doran, 42 U. 401, 131 P. 636.

A. L. R. notes.
Coin-operated or slot machines as lottery, 101 A. L. R. 1126; slot machine within prohibitory statute or ordinance as limited to gambling device, 132 A. L. R. 1004.

103-25-8. Lottery—Defined.

A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle or gift enterprise, or by whatever name the same may be known. (C. L. 17, § 8153.)

History.
This section is practically identical with R. S. 1898, § 4263; Comp. Laws 1907, § 4253.

Comparable provisions.
Cal. Penal Code, § 319, Idaho Code, § 17-2401, Mont. Rev. Codes, § 11149 (substantially identical).

Cross-references.
Legislature not to authorize lottery, Const. Art. VI, § 28.

1. Words and phrases defined.
Such terms in this section as "lottery," "gift enterprise" and the like are defined by standard textbooks. D'Orio v. Startup Candy Co., 71 U. 410, 266 P. 1037, 60 A. L. R. 338.

2. What constitutes a "lottery."
Under this section, the giving of an automobile to one holding a winning ticket of admission to a celebration or fair, the winning ticket to be determined by lot or chance, is a "lottery," and court will leave the parties where it finds them, and will aid neither. Blair v. Lowham, 73 U. 599, 276 P. 292.

Under this section, punch board yielding checker problem is a game of skill and not of chance. D'Orio v. Startup Candy Co., 71 U. 410, 266 P. 1037, 60 A. L. R. 338.

Decisions from other jurisdictions.
— Montana.
The "legal requisites" necessary to charge the offense of operating a lottery under Montana statutes are as follows: offering of prize, awarding of the prize by chance, giving of consideration for opportunity to win the prize; and the sound test of what is a lottery was well stated in People ex rel. Ellison v. Lavin, 179 N. Y. 164, 71 N. E. 753, 66 L. R.

A. 601, 1 Ann. Cas. 165, in the following manner: "The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game." State v. Hahn, 105 Mont. 270, 72 P.2d 459.

A. L. R. notes.
Constitutionality, construction, and application of statutes exempting schemes for benefit of public, religious, or charitable purposes from statutes or constitutional provisions against lotteries or gambling, 103 A. L. R. 875; "numbers (or number) game" or "policy game" as a lottery, 105 A. L. R. 305; scheme by which award depends upon votes as a lottery, 41 A. L. R. 1484; scheme for advertising or stimulating legitimate business as a lottery, 113 A. L. R. 1121.

103-25-9. Id. Penalty.

Every person who contrives, prepares, sets up, proposes or draws any lottery is guilty of a misdemeanor. (C. L. 17, § 8154.)

History.
This section is identical with R. S. 1898, § 4254; Comp. Laws 1907, § 4254.

Comparable provisions.
Cal. Penal Code, § 320, Idaho Code, § 17-2403, Mont. Rev. Codes, § 11150 (identical).

1. Validity of agreements.
Agreements in violation of lottery law are unenforceable. Blair v. Lowham, 73 U. 599, 276 P. 292.

103-25-10. Id. Vending Tickets or Chances.

Every person who sells or gives, or in any manner whatever furnishes or transfers, to or for any other person any ticket, chance, share or interest, or any paper, certificate or instrument purporting or understood to be or to represent any ticket, chance, share or interest in any lottery and depending upon the event thereof is guilty of a misdemeanor. (C. L. 17, § 8155.)

History.
This section is practically identical with R. S. 1898, § 4255; Comp. Laws 1907, § 4255.

Comparable provisions.
Cal. Penal Code, § 321, Idaho Code, § 17-2404, Mont. Rev. Codes, § 11151 (substantially identical).

Cross-references.
Signing and issuance of lottery ticket, evidence, 105-32-16.

1. Violation of section.
It is a violation of this section for parties to agree to pool their lottery tickets, and if any ticket issued to any member of the party in question should win, they would share equally. Blair v. Lowham, 73 U. 599, 276 P. 292.

2. Validity of agreements.
Courts will not sit to compel an accounting between parties to a transaction in violation of this section. They are in pari delicto. Mexican International Banking Co. v. Lichtenstein, 10 U. 338, 37 P. 574, applying provision in California Code practically identical with this one. This case was followed in Blair v. Lowham, 73 U. 599, 603, 276 P. 292.

103-25-11. Id. Aiding in or Assisting.

Every person who aids or assists, either by printing, writing, advertising, publishing or otherwise, in setting up, managing or drawing any lottery, or in selling or disposing of any ticket, chance or share therein, is guilty of a misdemeanor. (C. L. 17, § 8156.)

History.
This section is identical with R. S. 1898, § 4256; Comp. Laws 1907, § 4256.

Comparable provisions.
Cal. Penal Code, § 322, Idaho Code, § 17-2405, Mont. Rev. Codes, § 11152 (identical).

1. Validity of agreements.
Under this and other sections of Lottery Law, agreements in violation thereof are unenforceable. Blair v. Lowham, 73 U. 599, 276 P. 292.

103–25–12. Id. Maintaining Office for Sale.

Every person who opens, sets up or keeps, by himself or by any other person, any office or other place for the sale of, or for registering the number of, any ticket in any lottery, or who, by printing, writing or otherwise, advertises or publishes the setting up, opening or using of any such office, is guilty of a misdemeanor. (C. L. 17, § 8157.)

History.
This section is identical with R. S. 1898, § 4257; Comp. Laws 1907, § 4257.

Comparable provisions.
Cal. Penal Code, § 323, Idaho Code, § 17–2406, Mont. Rev. Codes, § 11153 (substantially identical).

103–25–13. Id. Insuring Tickets.

Every person who insures or receives any consideration for insuring for or against the drawing of any ticket in any lottery whatever, whether drawn or to be drawn within the state or elsewhere, or who receives any valuable consideration upon any agreement to repay any sum, or deliver the same or any other property, if any lottery ticket or number of any ticket in any lottery shall prove fortunate or unfortunate, or shall be drawn or not be drawn, at any particular time or in any particular order, or who promises or agrees to pay any sum of money, or to deliver any goods, things in action or property, or to forbear to do anything for the benefit of any person with or without consideration, upon any event or contingency dependent on the drawing of any ticket in any lottery, or who publishes any notice or proposal of any of the purposes aforesaid, is guilty of a misdemeanor.

(C. L. 17, § 8158.)

History.
This section was R. S. 1898, § 4258; Comp. Laws 1907, § 4258, and is practically identical therewith.

Comparable provisions.
Cal. Penal Code, § 324, Idaho Code, § 17–2407, Mont. Rev. Codes, § 11154 (substantially identical).

103–25–14. Id. Premiums Forfeited to State—Recovery—Attachment.

All money and property offered for sale or distribution in violation of any of the provisions of this chapter are forfeited to the state, and may be recovered by information filed or by an action brought by the attorney-general or by any county attorney in the name of the state. Upon the filing of the information or complaint the clerk of the court, or, if the action is brought in a justices' court, the justice, must issue an attachment against the property mentioned in the complaint or information, which attachment has the same force and effect against such property and is issued in the same manner as attachments issued from courts in civil cases. (C. L. 17, § 8159.)

History.
This section is practically identical with R. S. 1898, § 4259; Comp. Laws 1907, § 4259.

Comparable provisions.
Cal. Penal Code, § 325, Mont. Rev. Codes, § 11155 (substantially identical).

Cross-references.
Attachment, 104–18.

103–25–15. Id. Lessor of Premises Guilty of Misdemeanor.

Every person who lets or permits to be used any building or vessel, or any portion thereof, knowing that it is to be used for setting up, man-

aging or drawing any lottery, or for the purpose of selling or disposing of lottery tickets, is guilty of a misdemeanor. (C. L. 17, § 8160.)

History.
This section is identical with R. S. 1898, § 4260; Comp. Laws 1907, § 4260.

Comparable provisions.
Cal. Penal Code, § 326, Idaho Code, § 17-2408, Mont. Rev. Codes, § 11156 (identical).

103-25-16. (Repealed by L. 33, 2nd Spec. Sess., ch. 18, § 1, eff. July 27, which repealed L. 33, ch. 83, which had previously amended this section. For new provision, see 103-25-18.)

103-25-17. (L. 33, 2nd Spec. Sess., ch. 18, § 1, eff. July 27, repealed L. 33, ch. 83, which added this section. For new provision, see 103-25-19.)

L. 1933, 2nd Spec. Sess., ch. 19; eff. July 27.

AN ACT relating to gaming, pool selling, option selling and bookmaking, and making pool selling, gaming, option selling and bookmaking a misdemeanor, and making gaming, pool selling, option selling and bookmaking a nuisance; and providing for the suppression and abatement of gaming, pool selling, option selling and bookmaking by means of injunction in accordance with the provisions of Title 64, Revised Statutes of Utah, 1933, relating to the abatement of nuisances.

Be it enacted by the Legislature of the State of Utah:

103-25-18. Gaming, Pool Selling, Option Selling, Bookmaking, a Misdemeanor—Premises and Paraphernalia Used Declared Nuisances.

Whoever engages in pool selling, gaming, option selling or bookmaking, with or without writing, or option selling upon any animal or device in any competitive activity at any time or place; or whoever sells or makes bets upon any person or animal engaged in any race or test of strength, speed or endurance; and whoever keeps or occupies any place for the purposes of recording, reporting or registering bets or wagers of any kind, or in any manner, or of selling pools or options; and whoever records, reports, registers, solicits or receives bets, options or wagers of any kind or in any manner or who sells pools or makes books or handles or keeps account of such transactions, with or without writing, upon the result of any trial or contest of chance, skill, speed or power of endurance of man or animal or upon the result of any lot, chance, casualty, unknown or contingent event whatsoever, and whoever solicits, receives, registers, reports, records or forwards or purports or pretends to solicit, receive, register, report, record, or forward in any manner whatsoever any money, thing or consideration of value, bet, wager or option, as aforesaid, or for the purpose of being bet, optioned or wagered as aforesaid by or for any other person, or who sells, buys or enters into pooling or option upon such result or pretended result and whoever, being the owner, lessee or occupant of any room, shed, tenement, tent, booth, building, float or vessel or any part thereof or of any grounds, knowingly uses or permits the same to be used or occupied for any of the foregoing acts or purposes, or therein

or thereon keeps, exhibits or employs any device or apparatus for the purposes of recording, reporting, registering, transmitting, communicating, handling, keeping account of or transferring such bets, options or wagers or the selling of such pools, or becomes the custodian, stakeholder or depositary for gain, hire or reward of any money, property or thing of value, staked, bet, wagered or pledged, or to be staked, bet, wagered or pledged on any such result above referred to is guilty of a misdemeanor and such acts are hereby forbidden.

Whoever shall erect, establish, maintain, use, control, own or rent any room, shed, tenement, tent, booth, building, float or vessel, or any part thereof, or any device, paraphernalia or facilities for the unlawful activities or purposes hereinabove specified is guilty of maintaining a nuisance, and the room, shed, tenement, tent, booth, building, float or vessel, and the devices, facilities, paraphernalia and apparatus held or used for and on behalf of any such unlawful practices, activities or purposes are declared a nuisance.

Whenever any nuisance exists or is maintained as herein defined, the county attorney of the county wherein the nuisance shall be maintained shall abate said nuisance or the maintenance thereof. (Sec. 1.)

Former law.

Formerly bookmaking and pool selling was a felony. Batley v. Ritchie, 73 U. 320, 273 P. 969, applying former Redd Racing Act, and ordinance of Salt Lake City.

Cross-references.

Constitutional provision, Const. Art. VI, § 28; character of proof, 105-32-16.

103-25-19. Abatement.

The provisions of Title 64, Revised Statutes of Utah, 1933, governing the abatement of nuisances insofar as the same are applicable, shall govern the form, practice and procedure of any proceeding under this act. (Sec. 2.)

103-25-20. Effective Date.

This act shall take effect upon approval.

Approved July 27, 1933. (Sec. 3.)

CHAPTER 26

GOVERNMENT

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ARTICLE 1

CRIMES AGAINST THE EXECUTIVE POWER

History.
This article was R. S. 1898, Title 75, Ch. 4, p. 879; Comp. Laws 1907, Title 90, Ch. 4, p. 1271.

103-26-1. Exercising Public Office Without Qualifying.

Every person who exercises any of the functions of a public office without having taken and filed the oath of office, or without having executed and filed the required bond, is guilty of a misdemeanor.
(C. L. 17, § 7923.)

History.
This section is identical with R. S. 1898, § 4077; Comp. Laws 1907, § 4077.

Comparable provisions.
Cal. Penal Code, § 65, Mont. Rev. Codes, § 10821 (substantially identical).

1. Drainage officers.
Applying this section, it was held that mandamus may issue against de facto drainage district officers who have not made oath and filed a bond required by statute to compel them to perform duties they had already voluntarily assumed to do. Colorado Development Co. v. Creer, 96 U. 1, 14, 80 P.2d 914.

103-26-2. Id. Acts of De Facto Officers Not Affected.

The next preceding section shall not be construed to affect the validity of acts done by a person exercising the functions of a public office in fact where other persons than himself are interested in maintaining the validity of such acts. (C. L. 17, § 7924.)

History.
This section is practically identical with R. S. 1898, § 4078; Comp. Laws 1907, § 4078.

Comparable provisions.
Cal. Penal Code, § 66, Mont. Rev. Codes, § 10822 (substantially identical).

1. Drainage officers.
Applying this section, it was held that mandamus may issue against de facto drainage district officers who have not made oath and filed a bond required by statute to compel them to perform duties they had already voluntarily assumed to do. Colorado Development Co. v. Creer, 96 U. 1, 14, 80 P.2d 914.

103-26-3. Bribing Officers—Felony.

Every person who gives or offers any bribe to any executive officer, or to any peace officer or to any person authorized to enforce the law in this state, with intent to influence him in respect to any act, decision, vote, opinion or other proceeding as such officer, or person authorized to enforce the law, is guilty of a felony. (C. L. 17, § 7925.)

History.
As amended by L. 41, ch. 100, eff. May 13, rewriting text of entire section.

Comparable provisions.
Cal. Penal Code, § 67, Mont. Rev. Codes, § 10823 (pertain to giving or offering bribe to executive officer).

Cross-references.
Construction of "bribe," 103-1-3; extortion, 103-17-4.

A. L. R. notes.
Criminal offense of bribery as affected by lack of authority of officer, 122 A. L. R. 951; criminal offense of bribery as affected by lack of legal qualification of person assuming or alleged to be an officer, 115 A. L. R. 1263.

103-26-4. Id. Executive Officer Asking for or Receiving.

Every executive officer, or person elected or appointed to an executive office, who asks, receives or agrees to receive any bribe, upon any agreement or understanding that his vote, opinion or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby is guilty of felony.
(C. L. 17, § 7926.)

Comparable provisions.
Idaho Code, § 17-502 (identical, and coupled with following concluding words: "and forfeits his office").
Mont. Rev. Codes, § 10824 (identical, except as to concluding language: "* * * shall be influenced thereby, is punishable by imprisonment in the state prison not less than one nor more than fourteen years; and, in addition thereto, forfeits his office, and is forever disqualified from holding any office in this state").

Decisions from other jurisdictions.
— Idaho.
An officer who is neither a judicial nor legislative officer necessarily belongs to the executive department of the government and is an executive or administrative officer, whether it be state, county or precinct office; executive officers are charged with the detail of carrying the laws into effect and securing their due observance; a police officer is an executive officer within the meaning of section 17-502. State v. Emory, 55 Idaho 649, 46 P.2d 67.

103-26-5. Interfering with or Resisting Executive Officer.

Every person who attempts by means of any threat or violence to deter or prevent any executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer in the performance of his duty, is punishable by fine not exceeding $1,000 and imprisonment in the county jail not exceeding one year. (C. L. 17, § 7927.)

Comparable provisions.
Cal. Penal Code, § 69, Mont. Rev. Codes, § 10825 (identical, except as to specifying fine not exceeding $5,000 and imprisonment in county jail not exceeding five years).
Idaho Code, § 17-503 (identical, except as to following concluding language: "* * * by fine not exceeding $5,000 or imprisonment in the state prison not exceeding five years, or both").

Cross-references.
Resisting or obstructing officer, 103-26-54, 103-26-64.

103-26-6. Extortion by Public Officers.

Every executive or ministerial officer who asks or receives any emolument, gratuity or reward, or any promise thereof, excepting such as may be authorized by law, for doing any official act is guilty of a misdemeanor. (C. L. 17, § 7928.)

Comparable provisions.
Idaho Code, § 17-504 (identical as to executive officer).
Mont. Rev. Codes, § 10826 (substantially identical, except as reading in part: "* * * who knowingly asks * * *").

Cross-references.
Gratuity to judicial officer, 103-26-30.

103-26-7. Presenting Unlawful Claim.

Every person who, with intent to defraud, presents for allowance or for payment to any state board or officer, or to any county, city, town or district board or officer, authorized to allow or pay the same, if genuine, any false or fraudulent claim, bill, account, voucher or writing is guilty of a felony. (C. L. 17, § 7929.)

History.
This section is identical with R. S. 1898, § 4083; Comp. Laws 1907, § 4083.

Comparable provisions.
Cal. Penal Code, § 72, Mont. Rev. Codes, § 10828 (substantially identical).

Cross-references.
Claims against counties, 19-11-10, 19-11-11.

1. Words and phrases defined.
The term "genuine," as used in statute, refers to real claim as contradistinguished from mere counterfeit, and it does not mean that claim referred to must be counterfeit or an imitation of some valid claim to bring it within statute. Law v. Smith, 34 U. 394, 98 P. 300.

2. Determination of violation of section.
This statute is violated if claim is one which upon its face purports to be charge against particular political division for which officer or board mentioned in statute acts in allowing or paying it, and mere fact that claim is unauthorized by law and board or officer cannot legally allow or pay it is not decisive; so long as claim, if valid, is one that could or should be allowed or paid by city, county, state, or district against which it is preferred, it is within statute, although claim itself may be for matter which law does not authorize or even forbids. Law v. Smith, 34 U. 394, 98 P. 300.

Where sheriff presented for allowance and payment false claim against county for expense in performing certain duties after he had presented claim to state which had been allowed and paid, it was held that he could be convicted for violation of this section; it was for jury to determine whether act of sheriff involved conscious wrongdoing. Law v. Smith, 34 U. 394, 98 P. 300.

3. When crime complete.
A prohibition directed to the auditing board or officer against allowing a claim, when form of presenting evidence of its dueness is not in proper form, does not affect existence of claim within meaning of this section, and crime is complete when a false claim is presented, knowing that it is false; the crime is complete when the paper purporting to represent or evidencing the claim which never was earned is passed through window to auditing body with knowledge by presentor that it was never earned and never could be due. State v. Third Judicial District Court in and for Salt Lake County, 87 U. 416, 49 P.2d 950.

4. Grounds for removal of officers.
Where county commissioner made excessive claim for expenses to board of county commissioners, he could not be removed from office under 105-7-2 because of presenting false or fraudulent claim under this section, since presenting merely excessive claim without intent to defraud would not constitute felony or amount to malfeasance in office. Burke v. Knox, 59 U. 596, 206 P. 711.

In order to authorize removal from office sheriff who presented for allowance and payment false claim against county for expense in performing certain duties after such claim had been allowed by state, it was necessary to show his wrongful intent. Law v. Smith, 34 U. 394, 415, 98 P. 300, applying Comp. Laws 1907, § 4083.

5. Prosecution under former law.
It was held that the prosecution for presenting false claim for bounty could be maintained under this section, as against contention that offense fell within former 3-4-12, now repealed. State v. Swan, 31 U. 336, 88 P. 12.

103-26-8. Buying Appointment to Office.

Every person who gives or offers any gratuity or reward in consideration that he or any other person shall be appointed to any public office, or shall be permitted to exercise or discharge the duties thereof, is guilty of a misdemeanor. (C. L. 17, § 7930.)

Comparable provisions.
Mont. Rev. Codes, § 10829 (identical).

103-26-9. Selling Appointment to Office.

Every public officer who, for any gratuity or reward, appoints another person to a public office, or permits another person to exercise or discharge any of the duties of his office, is punishable by a fine not exceeding $1,000. (C. L. 17, § 7931.)

Comparable provisions.
Mont. Rev. Codes, § 10830 (fine of not exceeding $5,000; forfeits office, and forever disqualified from holding office in Montana).

103-26-10. Exercising Functions of Office When Not Entitled.

Every person who willfully and knowingly intrudes himself into any public office to which he has not been elected or appointed, and every person who having been an executive officer willfully exercises any of the functions of his office after his term has expired and a successor has been elected or appointed and has qualified is guilty of a misdemeanor. (C. L. 17, § 7932.)

Comparable provisions.
Cal. Penal Code, § 75, Idaho Code, § 17-509, Mont. Rev. Codes, 10831 (identical).

103-26-11. Withholding Seal and Records from Successor.

Every officer whose office is abolished by law, or who, after the expiration of the time for which he may be appointed or elected, or after he has resigned or has been legally removed from office, willfully and unlawfully withholds or detains from his successor or other person entitled thereto the official seal or any records, papers, documents or other writing appertaining or belonging to his office, or mutilates, destroys or takes away the same, is guilty of a felony. (C. L. 17, § 7933.)

Comparable provisions.
Cal. Penal Code, § 76 (similar).
Idaho Code, § 17-510 (substantially identical; seal is not mentioned).
Mont. Rev. Codes, § 10832 (substantially identical, except as to being denominated a misdemeanor; fine not exceeding $2,000, or imprisonment not exceeding one year, or both).

Cross-references.
Mutilating or destroying public records, 103-26-11, 103-26-70, 103-26-71.

103-26-12. Withholding Books, etc., from Successor.

Every officer whose office is abolished by law, or who, after the expiration of the time for which he may be appointed or elected, or after he has resigned or has been legally removed from office, who willfully

or unlawfully withholds or detains from his successor or other person entitled thereto any volume of the laws or of supreme court reports or of other like books belonging to the office, or mutilates, destroys or takes away the same, is guilty of a misdemeanor. (C. L. 17, § 7934.)

ARTICLE 2

CRIMES AGAINST THE LEGISLATIVE POWER

History.
This article was R. S. 1898, Title 75, Ch. 5, p. 881; Comp. Laws 1907, Title 90, Ch. 5, p. 1273.

103–26–13. Preventing Meeting of Legislature.

Every person who willfully, and by force or fraud, prevents the legislature, or either of the houses composing it, or any of the members thereof, from meeting or organizing, is guilty of a felony. (C. L. 17, § 7936.)

Comparable provisions.
Cal. Penal Code, § 81, Mont. Rev. Codes, § 10834 (substantially identical).

103–26–14. Disturbing Legislature While in Session.

Every person who willfully disturbs the legislature, or either of the houses composing it, while in session, or who commits any disorderly conduct in the immediate view and presence of either house, tending to interrupt its proceedings or impair the respect due its authority, is guilty of a misdemeanor. (C. L. 17, § 7937.)

Comparable provisions.
Cal. Penal Code, § 82, Mont. Rev. Codes, § 10835 (substantially identical).

103–26–15. Altering Draft of Bill After Introduction.

Every person who fraudulently alters the draft of any bill or resolution, which has been presented to either of the houses composing the legislature to be passed or adopted, with intent to procure it to be passed or adopted by either house, or certified by the presiding officer of either house, in language different from that intended by such house is guilty of a felony. (C. L. 17, § 7938.)

Comparable provisions.
Cal. Penal Code, § 83, Idaho Code, § 17–601, Mont. Rev. Codes, § 10836 (identical; Montana uses term "legislative assembly").

103–26–16. Altering Engrossed Copy of Bill or Resolution.

Every person who fraudulently alters the engrossed copy or enrollment of any bill or resolution which has been passed or adopted by the legislature, with intent to procure it to be approved by the governor or certified by the secretary of state, or printed or published by the printer of statutes, in language different from that in which it was passed or adopted by the legislature is guilty of a felony. (C. L. 17, § 7939.)

Comparable provisions.
Cal. Penal Code, § 84, Idaho Code, § 17-602, Mont. Rev. Codes, § 10837 (substantially identical).

103-26-17. Bribes—Giving or Offering to Member.

Every person who gives or offers a bribe to any member of the legislature or to another person for him, or attempts by menace, deceit, suppression of truth or any corrupt means to influence a member in giving or withholding his vote, or in not attending the house or any committee of which he is a member, is guilty of a felony. (C. L. 17, § 7940.)

Comparable provisions.
Cal. Penal Code, § 85, Mont. Rev. Codes, §10838 (substantially the same; imprisonment in state prison for not less than one nor more than ten years).
Idaho Code, § 17-603 (substantially the same).

A. L. R. notes.
Criminal offense of bribery as affected by lack of authority of officer, 122 A. L. R. 951; criminal offense of bribery as affected by lack of legal qualification of person assuming or alleged to be an officer, 115 A. L. R. 1263.

Cross-references.
"Bribe" defined, 103-1-3.

103-26-18. Id. Member Asking for or Receiving.

Every member of either of the houses composing the legislature who asks, receives or agrees to receive any bribe upon any understanding that his official vote, opinion, judgment or action shall be influenced thereby, or shall be given on a particular side of any question or matter upon which he may be required to act in his official capacity, or gives or offers or promises to give any official vote in consideration that another member of the legislature shall give any such vote, either upon the same or another question, is guilty of a felony. (C. L. 17, § 7941.)

Comparable provisions.
Cal. Penal Code, § 86 (substantially identical, specifying punishment by imprisonment for not less than one nor more than 14 years; forfeiture of office, disfranchisement, and disqualification forever from holding office of public trust).
Idaho Code, § 17-604 (substantially identical).

103-26-19. Member Promising to Trade Vote or Influence.

Every person elected to either house of the legislature who offers or promises to give or trade his vote or influence in favor of or against any measure or proposition pending or proposed to be introduced into the legislature, in consideration or upon condition that any other person elected to the same legislature will give or trade, or will promise or assent to give or trade, his vote or influence in favor of or against any other measure or proposition pending or proposed to be introduced into such legislature is guilty of a felony. (C. L. 17, § 7942.)

Comparable provisions.
Mont. Rev. Codes, § 10840 (guilty of solicitation of bribery; imprisonment, one to ten years).

103-26-20. Member Trading Vote or Influence.

Every member of the legislature who gives his vote or influence for or against any measure or proposition pending or proposed to be introduced in such legislature, or offers, promises or assents to trade or give such vote or influence upon condition that any other member will trade or give, or will promise or assent to trade or give, his vote or influence in favor of or against any other measure or proposition pending or proposed to be introduced in such legislature, or in consideration that any

other member has given his vote or influence for or against any other measure or proposition in such legislature, is guilty of a felony.
(C. L. 17, § 7943.)

Comparable provisions.
Mont. Rev. Codes, § 10841 (guilty of bribery; imprisonment, one to ten years).

103–26–21. Corruptly Soliciting Official Action of any Public Officer.

Every person who corruptly solicits, directly or indirectly, the official action of any member of the legislature or of any public officer of the state, or of any political division thereof, is guilty of a felony.
(C. L. 17, § 7944.)

Comparable provisions.
Mont. Rev. Codes, § 10843 (guilty of occupation and practice of solicitation of bribery; imprisonment, one to ten years).

103–26–22. Member Failing to Disclose Private Interest in Legislation.

Every member of the legislature who has a personal or private interest in any measure or bill proposed or pending before the legislature of which he is a member, and does not disclose the fact to the house of which he is a member, and votes thereon, is guilty of a misdemeanor.
(C. L. 17, § 7945.)

Comparable provisions.
Mont. Rev. Codes, § 10844 (identical).

103–26–23. Voting in Consideration or on Condition of Governor's Action.

Every person elected to either house of the legislature who gives, or offers or promises to give, his official vote or influence in favor of or against any measure or proposition pending or proposed to be introduced into, or that has already passed or been passed by, either house of the legislature, in consideration or on condition that the governor shall approve or disapprove, veto or sign, or agree to approve or disapprove, veto or sign, any such measure or proposition, or any measure, proposition, bill or act or proposed law that has already been passed by the legislature, or either house thereof, or in consideration or upon condition that the governor shall nominate for appointment or appoint or remove any person to or from any office or position under the laws of this state, is guilty of a felony. (C. L. 17, § 7946.)

103–26–24. Id. By Senator, to Affect Governor's Appointments.

Every person elected to the senate of this state who shall offer or agree to give his official vote or influence for or against the confirmation of any person nominated or to be nominated for appointment or appointed or to be appointed, to any office in this state, in consideration or upon condition that the governor shall nominate for appointment or appoint or refuse to appoint or nominate for appointment any person to or for any office or position in this state is guilty of a felony.
(C. L. 17, § 7947.)

103-26-25. Witnesses Before Legislature—Failing to Attend and Testify.

Every person who, being summoned to attend as a witness before either house of the legislature or any committee thereof, refuses or neglects, without lawful excuse, to attend pursuant to such summons, and every person who, being present before either house of the legislature or any committee thereof, willfully refuses to be sworn or to answer any material and proper question, or to produce, upon reasonable notice, any material and proper books, papers or documents in his possession or under his control, is guilty of a misdemeanor. (C. L. 17, § 7948.)

Comparable provisions.
Cal. Penal Code, § 87, Idaho Code, § 17-605, Mont. Rev. Codes, § 10845 (identical).

103-26-26. Lobbying for Hire.

Every person who obtains, or seeks to obtain, money or other thing of value from another person upon a pretense, claim or representation that he can or will improperly influence in any manner the action of any member of any legislative body in regard to any vote or legislative matter is guilty of a felony. (C. L. 17, § 7949.)

Comparable provisions.
Cal. Penal Code, § 89, Mont. Rev. Codes, § 10846 (include identical provision).

103-26-27. Witnesses Denied Claim of Privilege in Prosecutions Under Chapter.

Upon the trial no person otherwise competent as a witness shall be excused from testifying as such concerning any offense charged under this chapter on the ground that such testimony may criminate himself or subject him to public infamy, but such testimony shall not afterwards be used against him in any judicial proceeding, except for perjury in giving such testimony. (C. L. 17, § 7950.)

Comparable provisions.
Cal. Penal Code, § 89, Mont. Rev. Codes, § 10846 (include identical provision).

ARTICLE 3

CRIMES AGAINST PUBLIC JUSTICE

History.
This article was under a chapter heading "Corruption of Judicial Officers" in R. S. 1898, Title 75, Ch. 6, p. 883; Comp Laws 1907, Title 90, Ch. 6, p. 1276.

103-26-28. Bribes—Offering or Giving to Judicial Officer, Juror, etc.

Every person who gives or offers to give a bribe to, or who attempts corruptly to influence, any judicial officer, juror, referee, arbitrator, umpire, appraiser or other person who may be authorized by law to hear and determine any question or controversy, with intent to influence his

vote, opinion or decision upon any matter or question which is or may be brought before him for decision, is guilty of a felony.

(C. L. 17, § 7954.)

Comparable provisions.
Cal. Penal Code, § 92, Mont. Rev. Codes, § 10853 (imprisonment, one to ten years).
Idaho Code, § 17–701 (similar).

Cross-references.
"Bribe" defined, 103–1–3.

A. L. R. notes.
Criminal offense of bribery as affected by lack of authority of officer, 122 A. L. R. 951; criminal offense of bribery as affected by lack of legal qualification of person assuming or alleged to be an officer, 115 A. L. R. 1263.

103–26–29. Id. Judicial Officer, Juror, etc., Asking for or Receiving.

Every judicial officer, juror, referee, arbitrator, umpire, appraiser or other person authorized by law to hear or determine any question or controversy, who asks or receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion or decision upon any matter or question which is or may be brought before him for decision shall be influenced thereby, is guilty of a felony.

(C. L. 17, § 7955.)

Comparable provisions.
Cal. Penal Code, § 93, Idaho Code, § 17–702, Mont. Rev. Codes, § 10854 (substantially identical; California and Montana provisions specify imprisonment of not less than one nor more than ten years).

103–26–30. Extortion by Judicial Officers.

Every judicial officer who asks or receives any emolument, gratuity or reward, or any promise thereof, except such as may be authorized by law, for doing any official act is guilty of a misdemeanor.

(C. L. 17, § 7956.)

Comparable provisions.
Cal. Penal Code, § 94 (includes identical provision).
Idaho Code, § 17–703 (identical); Mont. Rev. Codes, § 10855 (felony).

103–26–31. Corrupting Jurors, Arbitrators, Referees, etc.

Every person who corruptly attempts to influence a juror, or any person summoned or drawn as a juror or chosen as an arbitrator or umpire or appointed a referee, in respect to his verdict in, or decision of, any cause or proceeding pending or about to be brought before him, either:

(1) By means of any communication, oral or written, had with him, except in the regular course of proceedings; or,

(2) By means of any book, paper or instrument exhibited otherwise than in the regular course of proceedings; or,

(3) By means of any threat, intimidation, persuasion or entreaty; or,

(4) By means of any promise or assurance of any pecuniary or other advantage;—is guilty of a misdemeanor. (C. L. 17, § 7957.)

Comparable provisions.
Cal. Penal Code, § 95, Mont. Rev. Codes, § 10856 (substantially identical, except as specifying fine, not exceeding $5,000, or imprisonment not exceeding five years).
Idaho Code, § 17–704 (substantially identical, except as to wording, "* * * is guilty of a felony").

A. L. R. notes.
Communicating with grand jury or member thereof as a criminal offense, 112 A. L. R. 319.

103-26-32. Jurors, Arbitrators, Referees, etc., Yielding to Corruption.

Every juror or person drawn or summoned as a juror, or chosen arbitrator or umpire, or appointed referee, who:

(1) Makes any promise or agreement to give a verdict or decision for or against any party; or,

(2) Willfully and corruptly permits any communication to be made to him, or receives any book, paper, instrument or information relating to any cause or matter pending before him, except according to the regular course of the proceedings;—is punishable by fine not exceeding $1,000, or by imprisonment in the state prison not exceeding one year. (C. L. 17, § 7958.)

Comparable provisions.

Cal. Penal Code, § 96, Mont. Rev. Codes, § 10857 (substantially identical, except as specifying fine not exceeding $5,000, or imprisonment not exceeding five years).

Idaho Code, § 17-705 (substantially the same except as to wording, "* * * is guilty of a felony").

103-26-33. Fraud in the Drawing of Jurors.

Every person authorized by law to assist at the drawing of any jurors to attend any court, who willfully puts or consents to the putting upon any list of jurors, as having been drawn, any name which shall not have been drawn for that purpose in the manner prescribed by law; or who omits to place on such list any name that shall have been drawn in the manner prescribed by law; or who signs or certifies any list of jurors as having been drawn which was not drawn according to law; or who is guilty of any other unfair, partial or improper conduct in the preparation or drawing of any list of jurors;—is guilty of a misdemeanor. (C. L. 17, § 7959.)

Cross-references.

Drawing of jurors, 48-0-20 et seq.

103-26-34. Justice of Peace or Constable Purchasing Judgment.

Every justice of the peace or constable of the same precinct who purchases, or is interested in the purchase of, any judgment or part thereof on the docket of, or on any docket in possession of, such justice is guilty of a misdemeanor. (C. L. 17, § 7960.)

Comparable provisions.

Idaho Code, § 17-706 (identical); Cal. Penal Code, § 97; Mont. Rev. Codes, § 10860 (identical, except that term "township" is used in lieu of "precinct").

103-26-35. Conviction of Officer Forfeits Office.

Every officer convicted of any crime defined in this chapter, in addition to the punishment prescribed, forfeits his office. (C. L. 17, § 7961.)

Comparable provisions.

Cal. Penal Code, § 98, Mont. Rev. Codes, § 10861 (substantially identical, and coupled with following clause: "and is forever disqualified from holding any office in this state").

Idaho Code, § 17-707 (identical).

Cross-references.

Disqualification by crime, 103-1-17, 103-26-61.

103–26–36. Offering False Documentary Evidence.

Every person who, upon any trial, proceeding, inquiry or investigation whatever authorized or permitted by law, offers in evidence as genuine or true any book, paper, document, record or other instrument in writing, knowing the same to have been forged or fraudulently altered or antedated, is guilty of a felony. (C. L. 17, § 7991.)

Comparable provisions.
Cal. Penal Code, § 132, Mont. Rev. Codes, § 10891 (identical).

Cross-references.
Forgery, 103–24; mutilating or falsifying public records, 103–26–11, 103–26–70, 103–26–71.

103–26–37. Deceiving Witnesses.

Every person who practices any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token or writing, to any witness or any person about to be called as a witness, upon any trial, proceeding, inquiry or investigation whatever authorized by law, with intent to affect the testimony of such witness is guilty of a misdemeanor. (C. L. 17, § 7992.)

Comparable provisions.
Cal. Penal Code, § 133, Mont. Rev. Codes, § 10892 (identical).

103–26–38. Preparing False Evidence.

Every person who prepares any false or antedated book, paper, record, instrument in writing or other matter or thing with intent to produce or allow it to be produced for any fraudulent or deceitful purpose as genuine or true, upon any trial, proceeding or inquiry whatever authorized by law, is guilty of a misdemeanor. (C. L. 17, § 7993.)

Comparable provisions.
Cal. Penal Code, § 134, Mont. Rev. Codes, § 10893 (substantially identical, except as to specifying "felony").

103–26–39. Destroying or Concealing Evidence.

Every person who, knowing that any book, paper, instrument in writing or other matter or thing is about to be produced in evidence, upon any trial, inquiry or investigation whatever authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor. (C. L. 17, § 7994.)

Comparable provisions.
Cal. Penal Code, § 135, Mont. Rev. Codes, § 10894 (substantially identical).

103–26–40. Preventing or Dissuading Witness from Attending.

Every person who willfully prevents or dissuades any person who is or may become a witness from attending upon any trial, proceeding or inquiry authorized by law is guilty of a misdemeanor. (C. L. 17, § 7995.)

Comparable provisions.
Cal. Penal Code, § 136, Mont. Rev. Codes, § 10895 (identical).

103–26–41. Bribing Witnesses.

Every person who gives or offers or promises to give to any witness or person about to be called as a witness any bribe, upon any understanding or agreement that the testimony of such witness or person about to be called as a witness shall be thereby influenced, or who attempts by any other means fraudulently to induce any witness or person about to be called as a witness to give false or to withhold true testimony, is guilty of a felony. (C. L. 17, § 7996.)

Comparable provisions.
Cal. Penal Code, § 137, Mont. Rev. Codes, § 10896 (substantially identical).

Cross-references.
"Bribe" defined, 103–1–3; corruption of jurors, 103–26–31.

A. L. R. notes.
Falsity of contemplated testimony as condition of offense of bribery of, attempt to bribe, or acceptance of bribe or gift by, prospective witness, 110 A. L. R. 582.

103–26–42. Id. Witness Asking for or Receiving Bribe.

Every person who is a witness, or is about to be called as such, who receives or offers to receive any bribe, upon any understanding that his testimony shall be influenced thereby or that he will absent himself from the trial or proceeding upon which his testimony is required, is guilty of a misdemeanor. (C. L. 17, § 7997.)

Comparable provisions.
Cal. Penal Code, § 138, Mont. Rev. Codes, § 10897 (identical, except as to "felony" specification).

103–26–43. Common Barratry—Defined.

Common barratry is the practice of exciting groundless judicial proceedings, and is punishable by imprisonment in the county jail not exceeding six months or by a fine in any sum less than $300, or by both. (C. L. 17, § 8008.)

Comparable provisions.
Cal. Penal Code, § 158 (includes identical definition; not exceeding six months imprisonment and fine not exceeding $500).

Cross-references.
Duty of attorney, 6–0–25; champerty and maintenance, 6–0–26; wrongfully bringing suit in justice court, 103–3–1.

103–26–44. Id. Proof Required for Conviction.

No person can be convicted of common barratry except upon proof that he has excited suits or proceedings at law in at least three instances and with a corrupt and malicious intent to vex and annoy. (C. L. 17, § 8009.)

Comparable provisions.
Cal. Penal Code, § 159 (identical, except as being worded in part: "* * * corrupt or malicious intent * * *").

103–26–45. Grand Juror Acting After Challenge Against Him Allowed.

Every grand juror who, with knowledge that a challenge interposed against him by a defendant has been allowed, is present at, or takes part in, or attempts to take part in, the consideration of the charge against

the defendant who interposed the challenge, or the deliberations of the grand jury thereon, is guilty of a misdemeanor. (C. L. 17, § 8010.)

Cross-references.
Punishable as contempt, 105–18–10.

103–26–46. Disclosure of Indictment Before Defendant's Arrest.

Every grand juror, prosecuting attorney, clerk, judge or other officer who, except by issuing or in executing a warrant of arrest, willfully discloses the fact of a presentment of an indictment having been made for a felony, until the defendant has been arrested, is guilty of a misdemeanor. (C. L. 17, § 8011.)

Comparable provisions.
Cal. Penal Code, § 168 (substantially identical).

Cross-references.
Similar section, 105–21–48; grand jury proceedings to be kept secret, 105–19–10.

103–26–47. Disclosing Proceedings Had Before Grand Jury.

Every grand juror who, except when required by a court, willfully discloses any evidence adduced before the grand jury, or anything which he himself or any other member of the grand jury may have said, or in what manner he or any other grand juror may have voted on a matter before them, is guilty of a misdemeanor. (C. L. 17, § 8012.)

Comparable provisions.
Cal. Penal Code, § 169 (identical).

Cross-references.
Proceedings to be kept secret, 105–19–10; disclosure of evidence on order of court, 105–19–10; not to be questioned as to vote, 105–19–11.

1. Scope and operation of section.
This section does not forbid the disclosure when required by the court, as where grand juror is called to testify before petit jury, to a confession made by defendant when testifying voluntarily before the grand jury. United States v. Kirkwood, 5 U. 123, 126, 13 P. 234.

103–26–48. Failure of Public Officer to Perform Duty—Omnibus Penalty.

Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision has been made for the punishment of such delinquency is punishable as a misdemeanor. (C. L. 17, § 8013.)

103–26–49. Justices of Peace and Constables Not to Be Interested in Actions.

No justice of the peace or constable shall be interested in any suit or action in any court of any justice of the peace, as attorney, agent, collector or otherwise, except when a plaintiff or defendant in an action. Every justice of the peace or constable who shall violate any of the provisions of this section is guilty of a misdemeanor, and in addition to the penalty prescribed shall forfeit his office. (C. L. 17, § 8015.)

History.
This section is practically identical with R. S. 1898, § 4155; Comp. Laws 1907, § 4155.

Cross-references.
Officers not to practice law, 6–0–38, 20–6–2, 104–72–4.

1. Operation and effect of section.
"This provision of the statute clearly prohibits a justice of the peace from becoming interested in any action, in a justice's court, as an attorney unless he is a party to the action, and hence prevents him from practicing as an attorney in such a court; but there is no

prohibition in the provision as to any other court, and, therefore, the statute having mentioned specifically the court in which he shall not practice, he may act as an attorney in every other court in which his license entitles him to practice. In such case the maxim, 'Expressio unius est exclusio alterius,' applies." Nichols v. Oregon Short Line R. Co., 28 U. 319, 78 P. 866. (Construction and application of similar provision of former statute.)

103–26–50. Officer Refusing to Arrest or Receive Party Charged with Crime.

Every sheriff, keeper of a jail, constable or other peace officer who willfully refuses to receive or arrest any person charged with a criminal offense is punishable by a fine not exceeding $1,000 and imprisonment in the county jail not exceeding one year. (C. L. 17, § 7998.)

103–26–51. Delaying to Take Person Arrested Before Magistrate.

Every public officer or other person, having arrested any person upon a criminal charge, who willfully delays taking such person before a magistrate having jurisdiction to take his examination is guilty of a misdemeanor. (C. L. 17, § 7999.)

Cross-references.
Defendant to be taken before magistrate without delay, 105–12–14, 105 13–17.

103–26–52. Acting Without Regular Process or Authority.

Every public officer, or person pretending to be a public officer, who, under the pretense or color of any process or other legal authority, arrests any person or detains him against his will, or seizes or levies upon any property, or dispossesses any person of any lands or tenements, without a regular process or other lawful authority therefor, is guilty of a misdemeanor. (C. L. 17, § 8000.)

103–26–53. Inhumanity to Prisoners.

Every officer who is guilty of willful inhumanity or oppression toward any prisoner under his care or in his custody is punishable by fine not exceeding $1,000 or by imprisonment in the county jail not exceeding one year. (C. L. 17, § 8001.)

Comparable provisions.
Cal. Penal Code, § 2653 (similar in purport).

Cross-references.
Inhumanity to prisoner, 103–1–38; arrested person not be treated with unnecessary rigor, Const. Art. I, § 9.

103–26–54. Resisting or Obstructing Officers in Discharge of Duty.

Every person who willfully resists, delays or obstructs any public officer in discharging, or attempting to discharge, any duty of his office, when no other punishment is prescribed, is punishable by fine not exceeding $1,000 or by imprisonment in the county jail not exceeding one year, or by both. (C. L. 17, § 8002.)

History.
This section is substantially identical with R. S. 1898, § 4142; Comp. Laws 1907, § 4142.

Cross-references.
Interfering with or resisting officer, 103–26–5, 103–26–64.

1. **Indictment or information.**
Under an indictment for resisting an officer in the discharge of his duty, the specific duty attempted to be discharged and to which resistance is offered should be alleged in the information, and proof offered must support allegations of information. State v. Beckendorf, 79 U. 360, 364, 10 P.2d 1073.

2. **Instructions.**
Proper instructions on trial of information for resistance to lawful arrest are set out in State v. Beckendorf, 79 U. 360, 368, 10 P.2d 1073.

A. L. R. notes.
Dispute over custody as affecting charge of obstructing or resisting arrest, 3 A. L. R. 1290; what constitutes offense of obstructing or resisting officer, 48 A. L. R. 746.

103–26–55. Injuring, Destroying or Retaking Goods in Custody of Officer.

Every person who willfully injures or destroys, or takes or attempts to take, or assists any person in taking or attempting to take, from the custody of any officer or person any personal property, which such officer or person has in charge under any process of law, is guilty of a misdemeanor. (C. L. 17, § 7965.)

103–26–56. Assaults by Officer Under Color of Authority.

Every public officer who, under color of authority, without lawful necessity, assaults or beats any person is punishable by a fine not exceeding $1,000 or by imprisonment in the county jail not exceeding one year. (C. L. 17, § 8003.)

103–26–57. Refusing to Assist Officer in Making Arrest.

Every male person over eighteen years of age who neglects or refuses to join the posse comitatus or power of the county, by neglecting or refusing to aid and assist in taking or arresting any person against whom there may be issued any process, or by neglecting to aid and assist in retaking any person who after being arrested or confined may have escaped from such arrest or imprisonment, or by neglecting or refusing to aid and assist in preventing any breach of the peace or the commission of any criminal offense, being thereto lawfully required by any sheriff, deputy sheriff, constable, judge or justice of the peace or other officer concerned in the administration of justice is punishable by a fine of not exceeding $100. (C. L. 17, § 8004.)

Cross-references.
Officer may command assistance, 105–5–1.

103–26–58. Compounding or Concealing Crime.

Every person who, having knowledge of the actual commission of a crime, takes money or property of another or any gratuity or reward, or any engagement or promise thereof, upon any agreement or understanding to compound or conceal such crime, or to abstain from any prosecution thereof, or to withhold any evidence thereof, except in the cases provided for by law in which crimes may be compromised by leave of court, is punishable as follows:

(1) By imprisonment in the state prison not exceeding five years or in a county jail not exceeding one year, where the crime is punishable by death or imprisonment in the state prison for life.

(2) By imprisonment in the state prison not exceeding three years or in the county jail not exceeding six months, where the crime is punishable by imprisonment in the state prison for any other term than for life.

(3) By imprisonment in the county jail not exceeding six months or by fine not exceeding $100, where the crime is a misdemeanor.

(C. L. 17, § 8005.)

Comparable provisions.
Cal. Penal Code, § 153 (substantially identical except as to subd. 3, which reads in part: "* * * or by fine not exceeding five hundred dollars * * *").

Cross-references.
Compromising public offenses, 105-50; parties to crime, 103-1-42 et seq.; one concealing crime as accessory, 103-1-44.

ARTICLE 4

CRIMES AGAINST PUBLIC PROPERTY

History.
This article was R. S. 1898, Title 75, Ch. 37, p. 915; Comp. Laws 1907, Title 90, Ch. 37, p. 1315.

103-26-59. Misusing Public Moneys—Falsifying Accounts.

Every officer of this state, or of any county, city, town, precinct or district of this state, and every other person charged with the receipt, safekeeping, transfer or disbursement of public moneys, who either:

(1) Without authority of law appropriates the same or any portion thereof to his own use, or to the use of another; or,

(2) Loans the same or any portion thereof without authority of law; or,

(3) Fails to keep the same in his possession until disbursed or paid out by authority of law; or,

(4) Unlawfully deposits the same or any portion thereof in any bank or with any other person; or,

(5) Knowingly keeps any false account, or makes any false entry or erasure in any account of or relating to the same; or,

(6) Fraudulently alters, falsifies, conceals, destroys or obliterates any such account; or,

(7) Willfully refuses or omits to pay over, on demand, any public moneys in his hands, upon the presentation of a draft, order or warrant drawn upon such moneys by competent authority; or,

(8) Willfully omits to transfer the same, when such transfer is required by law; or,

(9) Willfully omits or refuses to pay over, to any officer or person authorized by law to receive the same, any money received by him under any duty imposed by law so to pay over the same;—is guilty of a felony.

(C. L. 17, § 8235.)

History.
This section is practically identical with 2 Comp. Laws 1888, § 4603; R. S. 1898, § 4315; Comp. Laws 1907, § 4315.

Comparable provisions.
Cal. Penal Code, § 424 (similar; imprisonment for not less than one nor more than ten years; and disqualified from holding any office in California).

Cross-references.
Deposits of public funds, 74-1; mutilating or destroying public records, 103-24-2, 103-26-11, 103-26-70, 103-26-71; larceny or mutilation of public records, 103-26-70; forgery, definition, 103-24-1; limitation of prosecution, 105-9-1.

I. Operation and effect of section.
This section creates a distinct offense not embraced in the general statute

(103-15-2) on the subject of embezzlement. State v. Siddoway, 61 U. 189, 211 P. 968.

This section will probably have to be construed in connection with Title 74. See Pixton v. Perry, 72 U. 129, 269 P. 144, discussing repealed provision of former Banking Act.

2. Words and phrases defined.

Deputy treasurer is officer or "other person charged with receipt, safekeeping or transfer" of public money within meaning of this section. McMillin v. Emery, 59 U. 553, 205 P. 898.

3. Elements of offense.

Criminal intent is element of offense under this provision. State v. Blue, 17 U. 175, 53 P. 978.

4. Indictment or information.

An indictment under subdivision (9) which alleges a failure and refusal at all times to perform the act sufficiently charges a failure to perform at the place required; nor is it necessary to allege that accused had not settled with county clerk, and an averment that defendant as such collector "feloniously and willfully refused to pay to the county treasurer of Beaver County, then and there being, and a public officer thereof," sufficiently alleges that there was a duly qualified county treasurer, and that payment into the treasury had not been made. People v. Rogerson, 4 U. 231, 7 P. 255, 410.

5. Evidence.

Evidence warranted conviction of county treasurer for embezzlement of funds received for taxes. State v. Christiansen, 98 U. 278, 94 P.2d 472.

Conviction of county clerk of unlawful appropriation of public money to his own use, held, sustained by the evidence. State v. Carlstrom, 94 U. 159, 76 P.2d 565.

6. Instructions.

In prosecution of state fish and game warden for appropriating state money to his own use, and instruction in which court read this entire statute was erroneous, but since it did not prejudice rights of defendant, such error was disregarded. State v. Siddoway, 61 U. 189, 211 P. 968.

A. L. R. notes.

Statute relating to offense of misappropriating or embezzling public money or property as applicable to one not in possession, 128 A. L. R. 1373; what constitutes public funds or public money within embezzlement statute, 123 A. L. R. 478.

103–26–60. Public Moneys—Failure to Safely Keep and Pay Over.

Every officer charged with the receipt, safekeeping or disbursement of public moneys who neglects or fails to keep and pay over the same, in the manner prescribed by law, is guilty of a felony.

(C. L. 17, § 8236.)

Comparable provisions.

Cal. Penal Code, § 425 (identical).

103–26–61. Id. Making Profit Out of or Misusing.

The making of profit out of public moneys, or using the same for any purpose not authorized by law, by any public officer, is a felony, and any such officer, in addition to the punishment provided by law, shall be disqualified to hold public office. (C. L. 17, § 8237.)

History.

This section is substantially identical with R. S. 1898, § 4317; Comp. Laws 1907, § 4317.

Cross-references.

Constitutional provision, Const. Art. XIII, § 8; disqualification to hold office by misconduct in office, 103–1–17, 103–26–35.

1. Banking transactions by public officer.

Under this section authority of public officer to lend public funds or to deposit them with a bank is restricted. Pixton v. Perry, 72 U. 129, 134, 269 P. 144.

103–26–62. Id. Defined.

The term "public moneys," as used in the three preceding sections, includes all bonds and evidences of indebtedness and all money belong-

ing to the state, or to any town, city, county, precinct or district therein, and all money, bonds and evidences of indebtedness received or held by state, county, district, city, town or precinct officers in their official capacity. (C. L. 17, § 8238.)

Comparable provisions.
Cal. Penal Code, § 426 (substantially identical).

103-26-63. Failing to Pay Over Fines and Forfeitures.

Every public officer who receives any fine, forfeiture or fee and refuses or neglects to pay over the same within the time prescribed by law is guilty of a misdemeanor. (C. L. 17, § 8239.)

Cross-references.
Charging or receiving illegal fees, 28-7-15; failure to keep fee book, etc., 28-7-13.

103-26-64. Revenue and Taxation—Obstructing Collection.

Every person who willfully obstructs or hinders any public officer from collecting any revenue, taxes or other sums of money in which the people of this state are interested, and which such officer is by law empowered to collect, is guilty of a misdemeanor. (C. L. 17, § 8240.)

Comparable provisions.
Cal. Penal Code, § 428 (identical).

Cross-references.
Interfering with or obstructing officer, 103-26-5, 103-26-54.

103-26-65. Id. Information to Assessor—Refusing to Give or Giving False.

Every person who unlawfully refuses, upon demand, to give to any county assessor or deputy county assessor a list of his property subject to taxation, or to swear to such list, or who gives a false name, or fraudulently refuses to give his true name when demanded by such assessor in the discharge of his official duties, is guilty of a misdemeanor. (C. L. 17, § 8241.)

103-26-66. Id. Receipts for Payment—Giving or Using False—Failing to Give.

Every person who uses or gives any receipt, except that prescribed by law, as evidence of the payment for any tax or license of any kind, or who receives payment for such tax or license without delivering the receipt prescribed by law, is guilty of a misdemeanor. (C. L. 17, § 8242.)

Comparable provisions.
Cal. Penal Code, § 431 (similar).

103-26-67. Id. Refusing Collector List of Employees—Denying Access to Place of Employment.

Every person who, when requested by the assessor or collector of taxes or license fees, refuses to give to such assessor or collector the name and residence of each man in his employ, or to give such assessor or collector access to the building or place where such men are employed, is guilty of a misdemeanor. (C. L. 17, § 8243.)

103–26–68. Doing Business Without License.

Every person who commences or carries on any business, trade, profession or calling, for the transaction or carrying on of which a license is required by any law, or by any county, city or town ordinance, without taking out the license required by law or ordinance is guilty of a misdemeanor. (C. L. 17, § 8244.)

103–26–69. Trafficking in Warrants.

No state, county, city, town or district officer shall, either directly or indirectly, contract for or purchase any warrant or order issued by the state, county, city, town or district of which he is an officer, at any discount whatever upon the sum due on such warrant or order, and, if any state, county, city, town or district officer shall so contract for or purchase any such order or warrant, he is guilty of a misdemeanor.
(C. L. 17, § 8245.)

103–26–70. Stealing or Mutilating Public Records—By Custodian.

Every officer having the custody of any record, map or book, or of any paper or proceedings of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, willfully destroying, mutilating, defacing, altering, falsifying, removing or secreting the whole or any part thereof, or who permits any other person so to do, is guilty of a felony. (C. L. 17, § 7976.)

Cross-references.
Mutilating or destroying records, 103–26–59; withholding records, 103–26–11; falsifying evidence, 103–26–36 et seq.; forgery, 103–24; no limitation on prosecution, 105–9–1.

103–26–71. Id. By One Not Custodian.

Every person, not an officer such as is referred to in the preceding section, who is guilty of any of the acts specified in that section is punishable by imprisonment in the state prison not exceeding three years or in a county jail not exceeding one year, or by a fine not exceeding $100, or by both such fine and either of such imprisonments.
(C. L. 17, § 7977.)

103–26–72. Recording False or Forged Instruments.

Every person who knowingly procures or offers any false or forged instrument to be filed, registered or recorded in any public office, which instrument, if genuine, might be filed or registered or recorded under any law of this state or of the United States, is guilty of a felony.
(C. L. 17, § 7978.)

103–26–73. Injuring or Removing Monuments of Official Surveys.

Every person who willfully injures, defaces or removes any signal, monument, building, or appurtenance thereto, placed, erected or used by persons engaged in the United States or state survey is guilty of a misdemeanor. (C. L. 17, § 8396.)

Cross-references.
Removing or defacing other monuments, 55–1–11, 103–57–4, 103–57–7; malicious injury of mining notices, etc., 55–1–11.

103-26-74. Toll Road, Bridges and Ferries—Taking Toll or Maintaining Without Authority.

Any person who demands or receives compensation for the use of any bridge or ferry, or who sets up or keeps any road, bridge or ferry, or constructed ford, for the purpose of receiving remuneration for the use of the same without authority of law; and any person who refuses to pay on demand the compensation or fee authorized to be collected for use of a licensed toll road, bridge, ferry or constructed ford after having used the same, is guilty of a misdemeanor. (C. L. 17, § 8471.)

Cross-references.
Owner of ferry to obtain franchise from county, 19-5-41.

103-26-75. Tampering with Official Notice or Proclamation Duly Posted.

Every person who intentionally defaces, obliterates, tears down or destroys any copy or transcript or extract from or of any law of the United States or of this state, or any proclamation, advertisement or notice, set up at any place in this state by authority of any law of the United States or of this state, or by order of any court or of any public officer, before the expiration of the time for which the same was to remain set up, is punishable by a fine of not less than $20 nor more than $100, or by imprisonment in the county jail not more than one month. (C. L. 17, § 8399.)

103-26-76. Injuring or Destroying Jails.

Every person who willfully and intentionally breaks down, pulls down or otherwise destroys or injures any public jail or other place of confinement is guilty of a felony. (C. L. 17, § 8393.)

103-26-77. Injuring Highways or Bridges.

Every person who maliciously digs up, removes, displaces, breaks or otherwise injures or destroys any public highway, or any private way laid out by authority of law, or any bridge upon such highway or private way, is punishable by imprisonment in the state prison not exceeding three years, or in the county jail not exceeding six months. (C. L. 17, § 8384.)

Cross-references.
Damages for injuring highways, 36-1-20x; defacing road signs, 36-2-5.

103-26-78. Injuring or Removing Road Signs.

Every person who maliciously removes or injures any milepost or milestone or guidepost or any inscription on such, erected upon any highway, is guilty of a misdemeanor. (C. L. 17, § 8398.)

Cross-references.
Defacing road signs, 30-0-69, 36-2-5.

103-26-79, 103-26-80. (Repealed by L. 41, 2nd Spec. Sess., ch. 1, § 4, eff. Aug. 12. For new provision, see 19-7-17.)

ARTICLE 5

DESECRATION OF FLAG, ETC.

History.
This article was sections 4487x4 to 4487x6 of Comp. Laws 1907.

103–26–81. Penalty.

Any person who in any manner, for exhibition or display, places or causes to be placed any word, figure, mark, picture, design, drawing or any advertisement of any nature upon any flag, standard, color or ensign of the United States of America, or who exposes or causes to be exposed to public view any such flag, standard, ensign or color upon which is printed, painted or otherwise placed, or to which is attached, appended, affixed or annexed any word, figure, mark, picture, design or drawing, or any advertisement of any nature, or who exposes to public view, manufactures, sells, exposes for sale, gives away, or has in possession for sale or to give away, or for use for any purpose, any article or substance being an article of merchandise or a receptacle of merchandise, upon which has been printed, painted, attached or otherwise placed a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, make or distinguish the article or substance on which it is so placed, or who publicly mutilates, defaces, defiles, or tramples upon or casts contempt upon, either by word or act, any such flag, standard, color or ensign is guilty of a misdemeanor, and shall be punished by a fine not exceeding $100 or by imprisonment for not more than thirty days, or both, in the discretion of the court. (C. L. 17, § 8484.)

Comparable provisions.
Cal. Milit. and Vet. Code, § 614 (pertains to flags of United States and California).
Idaho Code, § 17–4608 (includes substantially identical provision applicable to flag, standard, color or ensign of the United States, and to state flag of Idaho and ensign thereof; also provides for forfeiture of $50 for each offense, to be recovered with costs in civil suit).
Mont. Rev. Codes, § 11561 (imprisonment in county jail not exceeding one year, or in state penitentiary not exceeding five years, and, in addition, fine not exceeding $1000).

103–26–82. "Flag" Defined.

The words "flag," "standard," "color," "ensign," as used in the next preceding section shall include any flag, standard, color, ensign, or any picture or representation of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be either such flag, standard, color or ensign of the United States of America, or a picture, or a representation of either thereof, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation, may believe to represent the flag, color, standard or ensign of the United States of America. (C. L. 17, § 8485.)

Comparable provisions.
Idaho Code, § 17–4608 (includes substantially identical provision); Mont. Rev. Codes, § 11562 (substantially identical).

103-26-83. Exceptions from Chapter.

The two preceding sections shall not apply to any act permitted by the statutes of the United States of America, or by the United States army and navy regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant or commission of appointment to office, ornamental picture, or stationery for use in correspondence, on any of which shall be printed, painted or placed said flag, disconnected from any advertisement.

(C. L. 17, § 8486.)

Comparable provisions.
Mont. Rev. Codes, § 11563 (substantially identical).

103-26-84. Displaying Flag or Emblem of Disloyalty or Anarchy.

Whoever in this state hoists, carries or displays any flag or other emblem or banner with intent to proclaim or engender disloyalty to the government of the United States, or a belief in anarchy, is guilty of a felony, and shall be punished by imprisonment in the state prison for a term not less than one year nor more than ten years, and may also be fined in any sum not exceeding $1,000. (L. 19, p. 350, § 1.)

Comparable provisions.
Cal. Milit. and Vet. Code, § 616 (similar in purport).
Idaho Code, § 17-4609 (similar).

CHAPTER 27

HEALTH

103-27-1. Exposing Public to Contagious or Infectious Disease.

Every person who willfully exposes himself or another afflicted with any contagious or infectious disease in any public place or thoroughfare, except in his necessary removal in a manner the least dangerous to the public health is guilty of a misdemeanor. (C. L. 17, § 8205.)

Comparable provisions.
Idaho Code, § 17-2705 (identical).

Cross-references.
Spreading contagion, 35-4-32, 35-4-33; contagious diseases, 35-4; health nuisances, 103-41.

CHAPTER 28

HOMICIDE AND ATTEMPT

103-28-1.	Murder Defined.	103-28-7.	Death Must Result Within a Year and a Day.
103-28-2.	Malice Defined.		
103-28-3.	Degrees of Murder.	103-28-8.	Excusable Homicide.
103-28-4.	Penalty for Murder.	103-28-9.	Justifiable Homicide — By Public Officers.
103-28-5.	Manslaughter Defined.		
103-28-6.	Penalty for Manslaughter.	103-28-10.	Id. By Other Persons.

103–28–11. Id. Bare Fear Does Not Justify.
103–28–12. Excusable or Justifiable Homicide Not Punishable.
103–28–13. Attempts to Kill by Poison.
103–28–14. Assault with Intent to Murder.

103–28–1. Murder Defined.

Murder is the unlawful killing of a human being with malice aforethought. (C. L. 17, § 8023.)

History.

This section came from Comp. Laws 1876, Title VIII, § 1917, and is identical therewith. It is also identical with 2 Comp. Laws 1888, § 4452, R. S. 1898, § 4159; Comp. Laws 1907, § 4159.

In other words, this section has been a part of our Penal Code since territorial days, and has remained unchanged since that time. People v. Davis, 8 U. 412, 32 P. 670, aff'd 151 U. S. 262, 38 L. Ed. 153, 14 S. Ct. 328.

Comparable provisions.

Cal. Penal Code, § 187, Idaho Code, § 17–1101, Mont. Rev. Codes, § 10953 (identical).

Iowa Code 1939, § 12910 (killing of human being with malice aforethought, either express or implied, is murder).

Cross-references.

Murderer may not inherit from victim, 101–3–22.

1. Implications from definition.

Definition excludes idea of any just cause or excuse for killing, or any provocation, however great, to justify it. State v. McDonald, 14 U. 173, 46 P. 872.

2. Elements of crime.

Since under this section the elements which constitute the crime of murder are (1) that the being killed was a human being, (2) that the killing was unlawful, and (3) that the killing was done with malice aforethought, if all of these elements appear in the indictment, it is sufficient. People v. Davis, 8 U. 412, 32 P. 670, aff'd 151 U. S. 262, 38 L. Ed. 153, 14 S. Ct. 328, setting out indictment held to be sufficient.

3. Malice aforethought.

See infra, 103–28–2.

4. Indictment or information.

Indictment may use equivalent words; identical words of statute are not required. Brannigan v. People, 3 U. 488, 493, 24 P. 767. The indictment or information is dealt with at length in another title. See Title 105.

The word "intent" need not be used in an indictment for first degree murder if the words "malice aforethought" are used. People v. Davis, 8 U. 412, 419, 32 P. 670, aff'd 151 U. S. 262, 38 L. Ed. 153, 14 S. Ct. 328.

Decisions from other jurisdictions.

— California.

The law refuses to recognize as a defense the "irresistible, uncontrollable impulse" and "moral insanity" doctrines. People v. Donegan, 32 Cal. App.2d 716, 90 P.2d 856.

— Iowa

Where accused is charged with murder of two persons and separate indictments are found against him and upon trial of one indictment he is found not guilty and upon trial of other indictment he contends that five successive shots fired by him resulting in deaths were actually one act, and that, under Federal and State Constitutions, he could not be tried twice for same offense, held, that they were different acts and separate crimes. State v. Melia, 231 Iowa 332, 1 N. W.2d 230.

A. L. R. notes.

Absence of evidence supporting charge of lesser degree of homicide as affecting duty of court to instruct as to, or right of jury to convict of, lesser degree, 102 A. L. R. 1019.

Acquittal on charge as to one as bar to charge as to the other, where the person is killed or assaulted by acts directed at another, 2 A. L. R. 606.

Conviction or acquittal upon charge of murder of, or assault upon, one person as bar to prosecution for like offense against another person at the same time, 20 A. L. R. 341.

Discharge of firearm without intent to inflict injury as proximate cause of homicide resulting therefrom, 55 A. L. R. 921.

Elopement, homicide or assault in attempting to prevent, 8 A. L. R. 600.

Excessive or improper punishment inflicted on child by parent or one in loco parentis, as criminal homicide or assault, 64 A. L. R. 292.

Homicide by juvenile as within jurisdiction of juvenile court, 110 A. L. R. 1084.

Homicide or assault in connection with negligent operation of automobile or its use for unlawful purpose or in violation of law, 99 A. L. R. 756.

Improper treatment of disease as homicide, 9 A. L. R. 211.
Inference of intent to kill where killing is by blow without weapon, 24 A. L. R. 666.
Necessity and materiality of statement of place of death in indictment or affidavit charging homicide, 26 A. L. R. 1342.
Negligent homicide by overturning boat, 3 A. L. R. 1104.
Responsibility of persons participating in jail delivery for homicide committed by one of their number, 15 A. L. R. 456.
Set gun or similar device on defendant's own property, killing by as homicide, 37 A. L. R. 1101.
Voluntary intoxication as defense to homicide, 23 A. L. R. 438.
What amounts to participation in homicide on part of one not actual perpetrator who was present without preconcert or conspiracy, 12 A. L. R. 275.

103-28-2. Malice Defined.

Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. (C. L. 17, § 8024.)

History.
This section is identical with Comp. Laws 1876, § 1918, except that the disjunctive is used in the last sentence. But it is absolutely identical with R. S. 1898, § 4160; Comp. Laws 1907, § 4160.

Comparable provisions.
Cal. Penal Code, § 188, Idaho Code, § 17-1102, Mont. Rev. Codes, § 10954 (substantially identical).

Cross-references.
"Malice" defined, 103-1-3; union of act and intent, 103-1-19, 103-1-20.

1. Express or implied malice.
This distinction between express and implied malice is well recognized. In either case, however, the wicked intention of the mind must be present. People v. Davis, 8 U. 412, 32 P. 670, aff'd 151 U. S. 262, 38 L. Ed. 153, 14 S. Ct. 328. "It is express where there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned or malignant heart." People v. Davis, 8 U. 412, 415, 32 P. 670, aff'd 151 U. S. 262, 38 L. Ed. 153, 14 S. Ct. 328.

There being an intention to kill, and no provocation to justify or excuse it, the killing must have been malicious, unless the passion was so great that the intent resulted from it, and the intention was without thought, and the act of killing proceeded from passion alone, or so nearly alone that the passion could be said to be the controlling source or author. People v. Calton, 5 U. 451, 457, 16 P. 902, rev'd on another point in 130 U. S. 83, 32 L. Ed. 870, 9 S. Ct. 435.

2. Malice aforethought.
The legislature in this and the preceding section declared in effect that malice aforethought, when express, shall mean a deliberate intention unlawfully to take the life of a human being, and is implied when the unlawful killing is without any considerable provocation, or when the circumstances of the killing show an abandoned or malignant heart. People v. Halliday, 5 U. 467, 17 P. 118.

3. Premeditation.
If the action of the mind is so impeded and hindered by passion, intoxication, or other sufficient cause that it cannot, during the time intervening, sufficiently think and deliberate upon the act and its consequences as to be able to form a distinct and perfect intention in the light of thought and reason, the premeditation is not sufficient to characterize the crime as murder in the first degree. People v. Calton, 5 U. 451, 458, 16 P. 902, rev'd on another point in 130 U. S. 83, 32 L. Ed. 870, 9 S. Ct. 435.

4. "Abandoned and malignant heart."
Evidence of rape or criminal assault on deceased's wife and daughters after shooting deceased, admissible to show "willful intent" and "an abandoned and malignant heart" in prosecution for first degree murder. State v. McGowan, 66 U. 223, 241 P. 314.

5. Evidence.
The general rules governing the law of evidence in criminal cases obtain with respect to proof of malice and intent. They may be shown by either direct or circumstantial evidence. State v. Dewey, 41 U. 538, 127 P. 275. These rules are discussed at considerable length in State v. Mewhinney, 43 U. 135, 134 P. 632,

L. R. A. 1916 D 590, Ann. Cas. 1916 C 537.

6. Instructions.

It is sufficient if the court substantially follows the language of this section in defining malice. State v. Inlow, 44 U. 485, 141 P. 530, Ann. Cas. 1917 A 741; People v. Biddlecome, 3 U. 208, 215, 2 P. 194.

It is proper for the court to define malice, in instructing the jury on the trial of an indictment for homicide, in the terms of 103-1-3. It does not vary or change the technical term "malice aforethought" as used in defining murder. People v. Callaghan, 4 U. 49, 57, 6 P. 49.

Defendant convicted of voluntary manslaughter could not complain of court's refusal to instruct that there was no evidence to warrant conviction of murder in first or second degree. State v. Turner, 95 U. 129, 79 P.2d 46.

103-28-3. Degrees of Murder.

Every murder perpetrated by poison, lying in wait or any other kind of willful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than the one who is killed; or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life;—is murder in the first degree. Any other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree. (C. L. 17, § 8025.)

History.

This section is identical with Comp. Laws 1876, § 1919; 2 Comp. Laws 1888, § 4464; R. S. 1898, § 4161; Comp. Laws 1907, § 4161.

Comparable provisions.

Cal. Penal Code, § 189, Idaho Code, 1940 Supp., § 17-1103 (all murder perpetrated by means of poison, lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or committed in perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping [California provision, however, not specifying kidnapping] or mayhem, is murder of first degree; all other kinds of murder are of second degree).

Mont. Rev. Codes, § 10955 (similar).

Cross-references.

The indictment will be found annotated under Title 105, as well as other matters of procedure.

Homicide in a duel as murder in first degree, 103-14-2; no limitation on prosecution for murder, 105-9-1; in capital case, right of trial by jury inviolate, Const. Art. I, § 10; burden of proof on trial for murder, 105-32-12; local jurisdiction of public offenses, 105-8; when doubt as to degree, conviction to be of lowest, 105-32-5; intoxication as a defense, 103-1-21.

Analysis of Note.

I. General Consideration, 1-9.

II. Practice and Procedure, 10-13.

I. GENERAL CONSIDERATION.

1. Scope and operation of section.

This section seems to be merely a restatement of the common law. People v. Davis, 8 U. 412, 416, 32 P. 670, aff'd 151 U. S. 262, 38 L. Ed. 153, 14 S. Ct. 328.

The section describes two classes of murder and distinguishes one as murder in the first degree and the other as murder in the second degree. And again it distinguishes certain kinds of homicide as murder in the first degree, by the act, the intent, the object, and the circumstances, or by one or more of these. People v. Calton, 5 U. 451, 458, 16 P. 902, rev'd on another point in 130 U. S. 83, 32 L. Ed. 870, 9 S. Ct. 435.

2. Words and phrases defined.

"Premeditated" means thought of beforehand, for any length of time, however short. There may be no appreciable space of time between the intent to kill and the act of killing; they may be as instantaneous as the successive thoughts of the mind. People v. Callaghan, 4 U. 49, 56, 6 P. 49, adopting language of supreme court of California.

It is reversible error to charge the jury that premeditated means thought of beforehand, for any length of time, however short, and that there need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as the successive thoughts of the mind. The court said that "no attempt should

be made to fix any definite space of time which is necessary to constitute the premeditation required by our statute." State v. Anselmo, 46 U. 137, 148 P. 1071.

3. First degree murder.

4. —in general.

To constitute first degree murder, it is not enough to show an unlawful, intentional, and malicious killing. Premeditation and deliberation must also be present, and court must define these terms in its instructions, for the reason that jury, without understanding meaning of these terms, cannot intelligently distinguish murder in the first degree from murder in the second degree. State v. Stenback, 78 U. 350, 364, 2 P.2d 1050, 79 A. L. R. 878.

The intention to take the life of the deceased is as essential an element of the crime of murder in the first degree as is the killing itself, and accused may testify as to intention or motive with which the act was done. State v. Stenback, 78 U. 350, 365, 2 P.2d 1050, 79 A. L. R. 878.

5. —killing in perpetration of certain felonies.

Under this section if the murder was committed in the perpetration of any of the felonies herein enumerated, it is first degree murder, even though the killing was accidental, because premeditation and deliberation are not essential in such case. State v. Mewhinney, 43 U. 135, 158, 134 P. 632, L. R. A. 1916 D 590, Ann. Cas. 1916 C 537.

Under this section, murder committed in an attempt to perpetrate a robbery constitutes murder in the first degree, and legally can constitute nothing else. State v. Mewhinney, 43 U. 135, 152, 134 P. 632, L. R. A. 1916 D 590, Ann. Cas. 1916 C 537. And see State v. Shockley, 29 U. 25, 80 P. 865, 110 Am. St. Rep. 639.

In prosecution for murder, held, accused, upon allegations in information of unlawful, willful, deliberate and premeditated killing by shooting, may be convicted of murder in first degree upon proof that shooting and unlawful killing were done, whether intentionally or unintentionally, in perpetration of, or attempt to perpetrate, robbery. State v. Thorne, 39 U. 208, 117 P. 58.

6. Elements of crime.

First degree murder embraces all elements and essentials of second degree, and consists of additional elements. State v. Kukis, 65 U. 362, 237 P. 476.

Whenever the murder is perpetrated with the specific intent to take the life of a human being unlawfully, the killing is deliberate and premeditated. People v. Halliday, 5 U. 467, 17 P. 118. But it is believed that a man cannot form a specific intent to kill a particular individual without such thought as amounts to deliberation and premeditation. People v. Halliday, 5 U. 467, 17 P. 118. Willful, deliberate, and malicious intent may be formed instant criminal act is done. State v. Morgan, 22 U. 162, 61 P. 527.

In prosecution for murder in first degree, where evidence was introduced at trial tending to show that defendant was intoxicated at time of alleged homicide, whether accused was in such condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, became material subject of consideration for jury. Hopt v. Utah, 104 U. S. 631, 26 L. Ed. 873.

7. Corpus delicti.

Corpus delicti as applied to homicide cases means the fact of death and the criminal agency of another person as the cause thereof. State v. Cobo, 90 U. 89, 92, 60 P.2d 952.

8. Issues, proof and variance.

Information, alleging that defendant "willfully, deliberately, maliciously, and with premeditated malice did kill and murder" named person is sufficient to charge murder in first degree and to let in evidence that murder was committed in perpetration of robbery. State v. King, 24 U. 482, 68 P. 418, 91 Am. St. Rep. 808.

9. Defenses.

In prosecution for murder of 82-year-old man by 26-year-old defendant in which defendant pleaded self-defense, evidence supported verdict of first degree murder. State v. Draper, 83 U. 115, 27 P.2d 39.

In murder prosecution, instructions which charged jury that defendant should be acquitted, if they had reasonable doubt as to defendant's sanity, were proper. State v. Green, 86 U. 192, 40 P.2d 961. As to insanity as a defense, see 103-1-40 and references there given.

II. PRACTICE AND PROCEDURE.

10. Evidence.

In prosecution for murder, evidence that defendant was among strikers and was shooting toward train carrying workers to mine, sustained his conviction for second degree murder. State v. Kukis, 65 U. 362, 237 P. 476.

Evidence held sufficient to sustain conviction for murder in first degree. State v. Maslich, 59 U. 75, 202 P. 6.

Evidence held sufficient to sustain conviction for murder in first degree com-

mitted in perpetration of robbery. State v. Morris, 40 U. 431, 122 P. 380.

Evidence held insufficient to sustain conviction for murder in second degree by shooting officer attempting to arrest defendant's relative. State v. Martinez, 56 U. 351, 191 P. 214.

In prosecution for first degree murder, evidence of rape or criminal assault on deceased's wife and daughters after shooting deceased, admissible. State v. McGowan, 66 U. 223, 241 P. 314.

11. Questions of law and fact.

The time required for premeditation and deliberation is not a question of law, but a question of fact to be determined by the jury. The law does not and cannot justly fix such time. Therefore the court should not by its instructions indicate to the jury the length of time that is required for deliberation or premeditation any more than it should indicate its views as to any other fact which is in issue. State v. Stenback, 78 U. 350, 364, 2 P.2d 1050, 79 A. L. R. 878.

12. Instructions.

Approved instructions are set out in State v. Dye, 44 U. 190, 138 P. 1193.

A trial court should, in every case where there is any direct or inferential evidence with respect to the different degrees of murder, charge the jury with regard to all the degrees, and this rule should be followed where there may be any doubt with regard to whether the higher degree is established or not. This is contemplated by this section. State v. Mewhinney, 43 U. 135, 154, 134 P. 632, L. R. A. 1916 D 590, Ann. Cas. 1916 C 537.

In prosecution for murder committed during robbery, instruction defining first degree murder, in language of statute, as a murder perpetrated by poison, or committed in perpetration of, or an attempt to perpetrate, arson, burglary, or robbery, was not erroneous, though state by its information and by its evidence claimed that defendant committed murder in first degree by willfully and deliberately shooting and killing deceased, since different kinds of first degree murder enumerated in this section are so connectedly set forth that it is difficult to state the one in the language of statute without also stating others. State v. Morris, 40 U. 431, 122 P. 380.

Where, after defining murder in first degree, court instructed jury that murder in second degree was unlawful killing of human being with malice aforethought, but without deliberation, it was held that in absence of request for more complete definition of murder in second degree, charge of court on that subject could not be held to be either insufficient or incomplete. State v. Harris, 58 U. 331, 199 P. 145.

If the evidence does not justify the jury under their oaths to find other than first degree murder, the court need not submit the question of second degree murder at all, although it might do so without committing error against the accused. It would, however, be highly improper for the trial court to do so. State v. Mewhinney, 43 U. 135, 152, 134 P. 632, L. R. A. 1916 D 590, Ann. Cas. 1916 C 537; State v. Thorne, 41 U. 414, 126 P. 286, Ann. Cas. 1915 D 90.

An approved instruction defining murder in the second degree is set out in State v. Harris, 58 U. 331, 199 P. 145.

Where the evidence warrants it, the court should instruct upon the defense of self-defense. State v. Harris, 58 U. 331, 199 P. 145.

Nonprejudicial error in failing to instruct as to punishment appropriate to each degree of homicide, will not warrant a reversal. State v. Dye, 44 U. 190, 138 P. 1193, reviewing some of the foregoing cases. Dye case followed in State v. Inlow, 44 U. 485, 141 P. 530, Ann. Cas. 1917 A 741.

13. Verdict.

Where killing takes place in perpetration of robbery, verdict of jury must be either murder in first degree or not guilty. State v. Oblizalo, 60 U. 47, 205 P. 739.

Information, which charged that homicide was committed unlawfully, willfully, intentionally, feloniously, and with malice aforethought, held sufficient to support verdict of, and sentence for, murder in first degree, with result that defendant was entitled to be tried by jury of twelve persons and could not, over his objection, legally be tried by jury of only eight persons. State v. Campbell, 29 U. 103, 66 P. 771.

Decisions from other jurisdictions.

— California.

Although it is not indispensable that motive be proven as an element necessary to justify a conviction of one charged with crime, the presence or absence of motive is a circumstance going to the question of the guilt or innocence of the defendant; and conviction of murder in first degree was affirmed, the evidence being such as to warrant an inference that defendant might have been actuated in taking the life of deceased, either by a desire to end his relations with her, which had become distasteful to him, or for the purpose of robbing her of her money. People v. McQuate, 2 Cal.2d 227, 39 P.2d 408.

A. L. R. notes.

Companion of defendant committing homicide while attempting to escape from scene of crime as murder in first degree, 22 A. L. R. 850; death resulting from arson as within contemplation of statute which makes homicide in perpetration of felony murder in first degree, 87 A. L. R. 414; drunkenness as affecting existence of elements essential to murder in second degree, 8 A. L. R. 1052; homicide by companion of defendant while attempting to escape from scene of crime as murder in first degree, 108 A. L. R. 847.

103-28-4. Penalty for Murder.

Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the state prison for life, in the discretion of the court. Every person guilty for [of] murder in the second degree shall be imprisoned at hard labor in the state prison for a term which shall be not less than ten years and which may be for life. (C. L. 17, § 8026.)

History.

This section is identical with Comp. Laws 1876, p. 586, § 1920, and with 2 Comp. Laws 1888, § 4455, except for use of word "penitentiary" instead of "state prison," and except as to punishment for second degree murder, which was formerly at hard labor for not less than five, nor more than fifteen, years. It is practically identical with R. S. 1898, § 4162, and with Comp. Laws 1907, § 4162.

Comparable provisions.

Idaho Code, § 17-1104 (person guilty of murder in first degree shall suffer death or be punished by imprisonment in state prison for life, and jury may decide which punishment shall be inflicted; person guilty of murder in second degree is punishable by imprisonment in state prison not less than ten years, and imprisonment may extend to life).

Mont. Rev. Codes, § 10957 (person guilty of murder in first degree, death, or in discretion of jury or of court, imprisonment for term of his natural life; second degree murder, imprisonment not less than ten years).

1. Jury's recommendation to life imprisonment.

2. — in general.

In murder prosecution, whether it would have been better for jury to have recommended life imprisonment in their verdict, was not question that supreme court had power to determine. State v. Cerar, 60 U. 208, 207 P. 597.

In prosecution for murder, court erred in directing jury to consider and determine question of recommendation in same manner as any other question submitted to them, in stating to them objects and purpose of law in punishing person guilty of crime, and to consider them in determining question of recommendation, and in admonishing jury that determination should be result of their deliberate consideration of all facts and circumstances in evidence, and objects and purpose of punishment as stated to them, since court undertook to guide and direct jury in determination and exercise of discretion which law conferred on them in terms unlimited and unprescribed. State v. Thorne, 39 U. 208, 117 P. 58.

3. — instructions.

This section imposes a duty upon the court to state to the jury the provisions of this section with regard to a recommendation of life imprisonment, and to inform them that the making or withholding of the recommendation is a matter entirely within their discretion, thus leaving them free to dispose of the question without being controlled or in any way influenced by the court. The discretion of the jury in making or withholding the recommendation is absolute. State v. Romeo, 42 U. 46, 66, 128 P. 530.

Under this section, trial courts discharge their full duty when they direct the attention of the jury thereto, and instruct them that it is their province to make or withhold a recommendation of imprisonment for life in case they find accused guilty of first degree murder. State v. Mewhinney, 43 U. 135, 156, 134 P. 632, L. R. A. 1916 D 590, Ann. Cas. 1916 C 537.

Ordinarily, failure to instruct jury that they may recommend life imprisonment constitutes reversible error. State v. Zuro Yamashita, 61 U. 170, 211 P. 360. In other words, it is reversible error to fail to inform the jury as to their right, under this section, to recommend imprisonment for life at hard labor in the state prison in place of the death

penalty. Calton v. People, 130 U. S. 83, 32 L. Ed. 870, 9 S. Ct. 435, rev'g 5 U. 451, 16 P. 902, and adopting dissenting opinion of Mr. Justice Henderson of the supreme court of Utah. But where jury makes no recommendation for life imprisonment, accused is not prejudiced by court's failure to instruct as to punishment appropriate to each degree of homicide. State v. Dye, 44 U. 190, 138 P. 1193.

Under this section it is harmless error for court, in instructing the jury, to use the words, "And if there are circumstances in the case which, to the minds of the jury, would justify a recommendation," etc. State v. Romeo, 42 U. 46, 66, 128 P. 530.

4. — court's discretion.

Trial court's disregard of jury's recommendation of life imprisonment for person convicted of first degree murder and sentence of death was not abuse of discretion, where fair and impartial trial was had. State v. Markham, 100 U. 226, 112 P.2d 496. Unless district court abuses discretion in disregarding jury's recommendation of life imprisonment and in applying death penalty, supreme court will not interfere. State v. Markham, 100 U. 226, 112 P.2d 496.

5. — jury's discretion.

Upon a conviction of first degree murder, this section gives the jury the discretion to recommend the defendant to life imprisonment. In the absence of such a recommendation, the court upon such a conviction is required to impose the death penalty. But even with the recommendation, it is still within the court's discretion to impose the death penalty or life imprisonment at hard labor. State v. Romeo, 42 U. 46, 66, 128 P. 530.

Under this section the question of recommendation is for the jury, and they should not be directed or admonished with regard to what should control or influence them in reaching a conclusion on the question of recommendation, the court's authority being merely to follow or disregard any recommendation, for court is not bound to follow recommendation of jury, even though one be made. State v. Thorne, 41 U. 414, 126 P. 286, Ann. Cas. 1915 D 90, following 39 U. 208, 117 P. 58.

6. — rehearing.

A rehearing will not be granted in a capital case, notwithstanding the absence of any mitigating fact or circumstance in the case, on ground that there is a bare possibility that on a retrial jury might make a recommendation that defendant be confined in state prison for life, where no proper exception was taken to court's instruction on this point, and assignment of error was abandoned. State v. Riley, 41 U. 225, 240, 126 P. 294.

7. Indeterminate sentences.

Under this section, a sentence "for an indeterminate term between ten years and life," upon conviction for second degree murder, is fatally defective. The court must impose a fixed and definite term of imprisonment within prescribed limits. Lee Lim v. Davis, 75 U. 245, 284 P. 323, 76 A. L. R. 460.

If the sentence for second degree murder is void under this section, because indeterminate from ten years to life, and is set aside, and the prisoner released, he may be re-arrested and resentenced, notwithstanding 105-36-1, even though three years and four months have elapsed since the void sentence was pronounced. State v. Lee Lim, 79 U. 68, 7 P.2d 825.

8. Death sentence.

9. — duty to inflict.

Death sentence is mandatory for first degree murder, unless jury recommends different penalty, when it becomes discretionary. State v. Markham, 100 U. 226, 112 P.2d 496.

10. — execution of death sentence.

Under this section court would be authorized to say how the death sentence is to be carried out, and therefore may sentence the condemned murderer to be "publicly shot." People v. Wilkinson, 2 U. 158, aff'd 99 U. S. 130, 25 L. Ed. 345.

In view of provisions of 105-37-5, a death sentence to be executed within 14 days is invalid, notwithstanding prior unsuccessful appeal and denial of commutation by board of pardons. Seyboldt v. District Court of Salt Lake County, 66 U. 15, 239 P. 476.

11. Evidence.

In murder prosecution, evidence held to justify jury in finding defendant guilty of first degree murder. State v. Cerar, 60 U. 208, 207 P. 597.

103-28-5. Manslaughter Defined.

Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

(1) Voluntary, upon a sudden quarrel or in the heat of passion.

(2) Involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection. (C. L. 17, § 8027.)

History.

This section is practically identical with Comp. Laws 1876, § 1021; R. S. 1898, § 4163; Comp. Laws 1907, § 4163. It was copied from California. State v. Cobo, 90 U. 89, 96, 60 P.2d 952.

Comparable provisions.

Cal. Penal Code, § 192, Mont. Rev. Codes, § 10959 (substantially identical).

Idaho Code, § 17-1106 (substantially identical except as to the following varying language: "2. Involuntary—in the perpetration of or attempt to perpetrate any unlawful act, other than arson, rape, robbery, burglary or mayhem * * *").

Cross-references.

Burden of proof, 105-32-12; instruction, 105-38-1.

1. Status of section.

This statutory definition is but declaratory of the common law. State v. Cobo, 90 U. 89, 96, 60 P.2d 952.

2. Voluntary manslaughter.

3. — in general.

If defendant killed deceased in the heat of passion and without malice, he may be guilty of manslaughter, provided, of course, he was legally responsible at time of killing. State v. Green, 78 U. 580, 602, 6 P.2d 177.

4. — elements of offense.

To reduce homicide to manslaughter on the ground solely that it was committed in the heat of passion, the provocation must have been considerable; in other words, such as was calculated to give rise to irresistible passion in the mind of a reasonable man. No slight or trivial provocation, such as is not calculated to engender uncontrollable passion in any ordinary man, will suffice. People v. Calton, 5 U. 451, 459, 16 P. 902, rev'd on another point in 130 U. S. 83, 32 L. Ed. 870, 9 S. Ct. 436.

Intent to kill is necessary to constitute voluntary manslaughter. An unintentional killing, resulting from an unlawful assault and battery which in and of itself is not of a character to cause death, is involuntary manslaughter under this section. State v. Cobo, 90 U. 89, 97, 60 P.2d 952.

5. — evidence.

In prosecution of striker for murder of person acting in capacity of fireman on train carrying strikebreakers and armed guards to mine when train was assaulted by band of strikers, evidence supported conviction of defendant for voluntary manslaughter. State v. Pagialakis, 65 U. 552, 238 P. 256.

6. Involuntary manslaughter.

7. — in general.

Any single unlawful act not amounting to a felony, if properly pleaded and proved that such unlawful act brought about the death of a human being, would sufficiently meet the terms of the second part of this section. State v. Rasmussen, 92 U. 357, 68 P.2d 176.

8. — indictment or information.

Under 105-21-8 and 105-21-47 it would seem to be sufficient for information charging crime of involuntary manslaughter, to use language of this section, or merely to charge that A. B. unlawfully killed C. D. It is no longer necessary to charge the particular acts relied on as constituting the offense. See State v. Gesas, 49 U. 181, 162 P. 366, in which accused was operating a motor vehicle, but case was decided under former section of Code of Criminal Procedure, since repealed.

Information sufficiently charged manslaughter by automobile which alleged that accused "then and there, without due caution and circumspection, recklessly, willfully, and unlawfully, at said time and place, did drive said automobile in a reckless manner," specifying the acts constituting reckless, willful, and unlawful driving or operation of said automobile. State v. Assenberg, 66 U. 573, 244 P. 1027.

In prosecution for involuntary manslaughter, wherein it appeared that homicide was result of automobile accident, information, which in addition to alleging that automobile was driven negligently, recklessly, wantonly, willfully, and unlawfully, charged that automobile was so driven by defendant "without observing the course the said automobile was taking to see if the said course was obstructed or about to be obstructed by any persons or other obstacles, so as to endanger the life and limb of persons being then and there upon said public highway as aforesaid, to wit, at a rate of speed in excess of 25 miles an hour," held sufficient. State v. Lake, 57 U. 619, 196 P. 1015.

9. — pleas and defenses.

Conviction of motorist for reckless driving held not bar to subsequent prosecution for involuntary manslaughter. State v. Empey, 65 U. 609, 239 P. 25, 44 A. L. R. 558. And acquittal under former 57–7–102 for failure to report automobile accident was not bar to prosecution for manslaughter. State v. Cheeseman, 63 U. 138, 223 P. 762.

10. — questions of law and fact.

In prosecution for involuntary manslaughter, wherein it appeared that homicide was result of automobile accident, whether defendant kept proper lookout and observed course his automobile was taking so as to avoid collision, held for jury. State v. Lake, 57 U. 619, 196 P. 1015.

In prosecution for involuntary manslaughter, wherein it appeared that homicide was result of automobile accident, whether defendant's car was running at dangerous or excessive rate of speed was question exclusively for jury. State v. Lake, 57 U. 619, 196 P. 1015.

11. — instructions.

Conviction of involuntary manslaughter by hit-and-run driver sustained notwithstanding instructions permitted jury to find defendant guilty even though the members of the jury did not agree on any one specification of unlawful driving. State v. Rasmussen, 92 U. 357, 68 P.2d 176.

12. — verdict.

In prosecution of hit-and-run driver for involuntary manslaughter of two youths who were changing tire when hit, evidence, including defendant's testimony that he had a "subconscious" feeling that he had hit something, held to warrant submission of case to jury and to sustain its verdict. State v. Rasmussen, 92 U. 357, 68 P.2d 176.

Decisions from other jurisdictions.

— Idaho.

Section 17–1106 of the Idaho Code, defining involuntary manslaughter, and particularly that part of it which makes felonious the commission of a lawful act which might produce death, without due caution and circumspection, must be read and construed together with section 17–114 which provides: "In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence." State v. McMahan, 57 Idaho 240, 65 P.2d 156.

A. L. R. notes.

Accessory before fact in manslaughter, 44 A. L. R. 576.

103–28–6. Penalty for Manslaughter.

Voluntary manslaughter is punishable by imprisonment in the state prison for a term not less than one nor more than ten years. Involuntary manslaughter is punishable by imprisonment in the county jail not exceeding one year. (C. L. 17, § 8028.)

History.

Formerly the punishment for voluntary manslaughter was five years, the punishment for involuntary manslaughter being the same as at the present time. Comp. Laws 1876, § 1922. But R. S. 1898, § 4164 and Comp. Laws 1907, § 4164 are identical with present section.

1. Punishment for voluntary manslaughter.

Sentence of definite term of ten years for conviction of manslaughter, though erroneous, held not invalid in view of former statute (Comp. Laws 1917, § 9063) providing that if person should be sentenced for definite term, sentence should not be void. State v. Gardner, 62 U. 62, 217 P. 976, appeal dismissed 62 U. 156, 217 P. 1111.

2. Punishment for involuntary manslaughter.

It will be seen that this section, in the case of involuntary manslaughter, vests the largest discretion in the court. It extends from a maximum imprisonment in the county jail down to the least appreciable space of time, no maximum being designated. No doubt the legislature, in committing this discretion to the court, recognized the fact that there might be extreme cases where a party might be legally guilty of a crime, and yet the circumstances be such that the penalty should be purely nominal. People v. Blackburn, 6 U. 347, 23 P. 759.

Sentence under this section for not exceeding one year was construed as sentence for a year. State v. Empey, 65 U. 609, 239 P. 25, 44 A. L. R. 558.

103–28–7. Death Must Result Within a Year and a Day.

To make the killing either murder or manslaughter, it is requisite that the person die within a year and a day after the stroke is received

or the cause of death administered; in the computation of which the whole of the day on which the act was done shall be reckoned the first.
(C. L. 17, § 8029.)

Comparable provisions.
Cal. Penal Code, § 194, Idaho Code, § 17-1108, Mont. Rev. Codes, § 10961 (substantially identical).

103-28-8. Excusable Homicide.

Homicide is excusable in either of the following cases:

(1) When committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution and without any unlawful intent.

(2) When committed by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation or upon a sudden combat, when no undue advantage is taken nor any dangerous weapon used and when the killing is not done in a cruel or unusual manner.
(C. L. 17, § 8030.)

History.
This section is practically identical with R. S. 1898, § 4166; Comp. Laws 1907, § 4166.

Comparable provisions.
Cal. Penal Code, § 195, Idaho Code, § 17-1109, Mont. Rev. Codes, § 10963 (inserted in subd. 1 is the following: "* * * in lawfully correcting a child or servant * * *"; otherwise substantially identical).

1. Instructions.
It is not permissible or required to instruct the law of this section unless the evidence justifies it. State v. Dewey, 41 U. 538, 559, 127 P. 275, applying this section.

103-28-9. Justifiable Homicide—By Public Officers.

Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance in either of the following cases:

(1) In obedience to any judgment of a competent court.

(2) When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty.

(3) When necessarily committed in retaking felons who have been rescued or who have escaped, or when necessarily committed in arresting persons charged with felony and who are fleeing from justice or resisting such arrest.
(C. L. 17, § 8031.)

History.
This section is substantially identical with Comp. Laws 1876, § 1925.

Comparable provisions.
Cal. Penal Code, § 196, Idaho Code, § 17-1110, Mont. Rev. Codes, § 10964 (substantially identical).

Cross-references.
Escape, rescue, and retaking, 103-48-1, 103-48-6, 105-14; burden of proving homicide justifiable, 105-32-12; lawful resistance, 105-2-1.

A. L. R. notes.
Peace officers, criminal responsibility of, for killing or wounding one whom they wished to investigate or identify, 18 A. L. R. 1368, 61 A. L. R. 321.

103-28-10. Id. By Other Persons.

Homicide is also justifiable when committed by any person in either of the following cases:

(1) When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person.

(2) When committed in defense of habitation, property or person against one who manifestly intends or endeavors, by violence or surprise, to commit a felony; or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein.

(3) When committed in the lawful defense of such person, or of a wife, husband, parent, child, master, mistress or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury and there is imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mutual [sic] combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed.

(4) When committed in a sudden heat of passion caused by the attempt of the deceased to commit a rape upon or to defile the wife, daughter, sister, mother or other female relative or dependent of the accused, or when the defilement has actually been committed.

(5) When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace. (C. L. 17, § 8032.)

History.

Except for some changes made in subdivision (4), this section is substantially identical with Comp. Laws 1876, § 1926. And it is practically identical in all of its subdivisions with R. S. 1898, § 4168; Comp. Laws 1907, § 4168.

Comparable provisions.

Cal. Penal Code, § 197; Idaho Code, § 17-1111, Mont. Rev. Codes, § 10965 (substantially identical, except that subd. 4 herein is omitted).

Cross-references.

Lawful resistance, 105-2.

1. **When homicide justifiable in general.**

Under the common-law doctrine, rule was that there must have been actual necessity for homicide, but under statutes and decisions of courts of several states this rule has been modified, and it is now generally held that homicide is justifiable if there exists in mind of slayer reasonable belief that necessity exists. State v. Terrell, 55 U. 314, 186 P. 108, 25 A. L. R. 497.

Slayer need only act upon appearances and it is sufficient if he acts in good faith and has reasonable grounds to believe, and does believe, that under circumstances his legal rights are being feloniously invaded and necessity exists for force used by him in prevention of crime. State v. Terrell, 55 U. 314, 186 P. 108, 25 A. L. R. 497.

2. **Subdivision (2).**

3. **— extent of right.**

Homicide or an assault with deadly weapon cannot be justified unless in necessary defense of habitation, property, or person, and if necessity fails, the right to invoke the statute fails; the necessity need not be real, but need be only reasonably apparent, and resistance offered in good faith, upon reasonable grounds of belief that invasion of some right accorded by statute is being made by offender, and then only such force may be employed as may be reasonably required to successfully repel the invader as provided in 103-28-11, 105-2-2. State v. Terrell, 55 U. 314, 186 P. 108, 25 A. L. R. 497.

4. **— shooting burglar.**

Child of 12 years of age may violate law and commit offense against person or property the same as an adult person, and defense of justification on part of defendant who shot boy attempting to burglarize his rabbit pens was available. State v. Terrell, 55 U. 314, 186 P. 108, 25 A. L. R. 497.

In prosecution for assault with deadly weapon with intent to do bodily harm,

wherein it appeared that defendant had shot boy attempting to burglarize his rabbit pens, held defendant was entitled to invoke this statute, in making contention that his act in shooting boy was justifiable. State v. Terrell, 55 U. 314, 186 P. 108, 25 A. L. R. 497.

In prosecution for assault with deadly weapon with intent to do bodily harm, wherein it appeared that defendant had shot boy attempting to burglarize his rabbit pens, whether or not there was reasonable necessity under this section for defendant to use means employed by him to prevent taking of his property remained question to be determined, from testimony, by jury. State v. Terrell, 55 U. 314, 186 P. 108, 25 A. L. R. 497.

In prosecution for assault with deadly weapon with intent to do bodily harm, wherein it appeared that defendant had shot boy attempting to burglarize his rabbit pens, refusal of court to instruct jury, "If you believe from the evidence that at the time the complaining witness * * * was shot, he was committing burglary and engaged in stealing the defendant's rabbits, then the court instructs you that under the law the defendant was justified in shooting the person so engaged in burglary," with proper qualification that would enable jury to determine whether defendant was justified in resorting to extreme measure of shooting witness in order to prevent burglary, held prejudicial error. State v. Terrell, 55 U. 314, 186 P. 108, 25 A. L. R. 497.

In prosecution for assault with deadly weapon with intent to do bodily harm, wherein it appeared that defendant had shot boy attempting to burglarize his rabbit pens, instruction that one may kill to save life or limb, or prevent great crime, but one is not justified in killing to restrain or prevent commission of misdemeanor, held erroneous, where trial court failed to tell jury whether crime of burglary constituted great crime, a felony or a misdemeanor, or whether burglary was punishable by imprisonment in state prison, and further instructed jury that larceny was secret crime not attended with force, and killing of one person by another, or attempt to kill to prevent larceny of small amount was not justified. State v. Terrell, 55 U. 314, 186 P. 108, 25 A. L. R. 497.

5. Self-defense.

6. — in general.

In prosecution for assault with intent to murder, it is not essential in all cases that alleged assailant should be in fact armed in order to justify one who is accused of shooting to act or shoot in self-defense, but accused must act as reasonable man and not shoot another without at least good apparent cause for doing so. State v. Molitz, 40 U. 443, 122 P. 86.

In prosecution for murder, wherein it appeared that when deceased first saw defendant in act of committing robbery he remonstrated with him, and after arming himself returned to where defendant was just completing robbery, and defendant shot and killed him, held, defendant could not claim self-defense and rely on provisions of this section. State v. White, 40 U. 342, 121 P. 579.

In prosecution of striker for murder of person acting in capacity of fireman on train carrying strikebreakers and armed guards to mine in which striker defended on ground of self-defense, evidence that month prior to killing, band of strikers with drawn guns searched train for suspected strikebreakers, was admissible as tending to show which party was probable aggressor. State v. Pagialakis, 65 U. 552, 238 P. 256.

In prosecution for homicide, evidence held sufficient to show that defendant was entitled to full instructions on self-defense, right of defendant to stand his ground, defense of relative or member of family and defense of habitation. State v. Harris, 58 U. 331, 199 P. 145.

When defendant offers proof of self-defense he is entitled to acquittal if he has produced sufficient evidence of his justification to create in minds of jury reasonable doubt of his guilt of offense charged. State v. Harris, 58 U. 331, 199 P. 145.

7. — instructions.

Upon a prosecution for first degree murder, accused is entitled to concrete instructions, even though abstract ones have been given. State v. Dewey, 41 U. 538, 127 P. 275, quoting instructions in opinion, and applying section 4168 of Comp. Laws 1907. And see State v. Kakarikos, 45 U. 470, 485, 146 P. 750.

The court should properly instruct as to quantum of evidence accused must introduce in order to establish his plea of self-defense. State v. Vacos, 40 U. 169, 120 P. 497, quoting instruction, held unobjectionable.

If the court gives a correct statement of the law of self-defense, it is not error to refuse the instruction offered by defendant. People v. Callaghan, 4 U. 49, 57, 6 P. 49, setting out approved instruction.

In prosecution of striker for murder of person acting in capacity of fireman on train carrying strikebreakers and armed guards to mine, instruction that if band of strikers ran toward train to picket it in peaceable manner and guards fired at said persons, strikers

had legal right to return such fire, and if in so doing they killed deceased, they were justified in so doing, was properly refused because it omitted very essence of right of self-defense. State v. Pagialakis, 65 U. 552, 238 P. 256.

8. Duty to retreat.

Conviction of voluntary manslaughter affirmed where there was evidence that defendant was the aggressor in the altercation and there was insufficient showing of provocation. State v. Turner, 95 U. 129, 147, 79 P.2d 46. (Moffat, J., dissenting.)

9. Killing to prevent defilement.

This section is applicable only where the killing is committed in sudden heat of passion caused by an attempt to defile the wife or other female relative of the accused, and does not shield one who, because of mere rumors or appearances, deliberately seeks out another and takes his life. State v. Botha, 27 U. 289, 75 P. 731.

The word "defile" in subdivision (4) includes an unnatural act of sexual perversion, such as "cunnilingus"; it is reversible to limit defilement to an act of sexual intercourse. State v. Besares, 75 U. 141, 283 P. 738.

Under subdivisions (3) and (4) a husband may kill another man found committing adultery with his wife, and the killing will be justifiable homicide. State v. Williams, 49 U. 320, 328, 163 P. 1104. Subdivision (4) justifies "a homicide committed by the husband in a sudden heat of passion, caused by the attempt of the man slain to defile his wife, or caused by her defilement." But the killing must be without deliberation after knowledge of the fact. "The law will not permit the husband to say that he slew the defiler of his wife in a sudden heat of passion after deliberating upon the defilement 24 hours." People v. Halliday, 5 U. 467, 473, 17 P. 118.

A. L. R. notes.

Admissibility on issue of self-defense (or defense of another), on prosecution for homicide or assault, of evidence of specific acts of violence by deceased, or person assaulted, against others than defendant, 121 A. L. R. 380.

Duty to retreat as condition of self-defense when one is attacked at his office or place of business or employment, 47 A. L. R. 418.

Duty to retreat to wall as affected by illegal character of premises on which homicide occurs, 2 A. L. R. 518.

Homicide or assault in defense of habitation or property, 34 A. L. R. 1488.

Humanitarian motives, homicide as affected by, 25 A. L. R. 1007.

Self-defense, right of, as affected by defendant's violation of law only casually related to the encounter, 10 A. L. R. 861.

Self-defense, right of, as affected by the fact that the defendant was in company with the assailant's spouse, 18 A. L. R. 1068.

Self-defense by one who has rightfully entered on premises of his assailant, 53 A. L. R. 486.

Wife's confession of adultery as affecting degree of homicide in killing her paramour, 10 A. L. R. 470.

103–28–11. Id. Bare Fear Does Not Justify.

A bare fear of the commission of any of the offenses mentioned in subdivisions (2) and (3) of the next preceding section, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fear of a reasonable person, and the party killing must have acted wholly under the influence of such fear. (C. L. 17, § 8033.)

History.

This section is practically identical with R. S. 1898, § 4169; Comp. Laws 1907, § 4169.

Comparable provisions.

Cal. Penal Code, § 198, Idaho Code, § 17–112, Mont. Rev. Codes, § 10966 (substantially identical).

1. Applicability of section.

The question as to the necessity for the killing is for the jury, but defendant need not retreat before killing. State v. Turner, 95 U. 129, 139, 79 P.2d 46. (Moffat, J., dissenting.)

103–28–12. Excusable or Justifiable Homicide Not Punishable.

When the homicide appears to be justifiable or excusable, the person charged must, upon his trial, be fully acquitted and discharged. (C. L. 17, § 8034.)

Comparable provisions.
Cal. Penal Code, § 199, Idaho Code, § 17-1113, Mont. Rev. Codes, § 10967 (substantially identical).

Cross-references.
Burden of proving homicide justifiable or excusable, 105-32-12.

103-28-13. Attempts to Kill by Poison.

Every person who, with intent to kill, administers, or causes or procures to be administered, to another any poison or other noxious or destructive substance or liquid, but by which death is not caused, is punishable by imprisonment in the state prison not less than five nor more than twenty years. (C. L. 17, § 8045.)

Comparable provisions.
Cal. Penal Code, § 216 (identical, except as being worded in part: "* * * in the state prison for not less than ten years").

Idaho Code, § 17-1114 (identical except as to following concluding language: "* * * not less than ten years, and the imprisonment may be extended to life").

Cross-references.
Mingling poison with food or drink, 103-40-6; attempt, penalty and definition, 103-1-29, 103-1-30.

103-28-14. Assault with Intent to Murder.

Every person who assaults another with intent to commit murder is punishable by imprisonment in the state prison for a term of from five years to life. (L. 23, p. 43, § 8046.)

History.
This was formerly 2 Comp. Laws 1888, § 4471. It became R. S. 1898, § 4178; Comp. Laws 1907, § 4178.

Comparable provisions.
Cal. Penal Code, § 217, Idaho Code, § 17-1115 (identical, except as being worded in part: "* * * not less than one nor more than fourteen years").

Cross-references.
Felonious assaults, 103-7; burden of proof of circumstances in mitigation, 105-32-12.

1. Elements of offense.
In order to convict one under this section, there must exist in mind of accused a specific intent to take the life of person assaulted, and such intent may be proved by circumstantial, as well as direct, evidence, and it may be inferred from acts and conduct of the accused, the nature of the weapon used by him and manner in which it was used, taken together with all other circumstances in the case. State v. Minousis, 64 U. 206, 228 P. 574.

Under this section not only is the intent in the mind of the accused a necessary ingredient of the offense, but it must be proved as charged. Accordingly, if indictment charges that defendant assaulted A with a pistol and shot at A with intent to kill him, but the evidence produced at the trial shows that defendant shot at B intending to kill him, but accidentally hit A, a conviction under this section will be set aside. People v. Robinson, 6 U. 101, 21 P. 403.

2. Included offenses.
An indictment for an offense under this section does not necessarily include a violation of 103-7-6. An indictment under this section need not describe the instrument with which assault was made as a deadly weapon. State v. Jukanovich, 45 U. 372, 146 P. 289, applying Comp. Laws 1907, § 4178. And see State v. Kakarikos, 45 U. 470, 146 P. 750.

3. Indictment or information.
An indictment under this section may be in the form prescribed by 105-21-47. State v. McDonald, 14 U. 173, 46 P. 872, setting out the more elaborate form used prior to the 1935 amendments of the Code of Criminal Procedure, and applying 2 Comp. Laws 1888, §§ 4930, 4938, 5255, containing old rules.

An information under this section does not include a charge under 103-7-6, unless it contains all of the elements constituting that crime. State v. Jukanovich, 45 U. 372, 146 P. 289.

Indictment for assault with intent to commit "murder" is not insufficient because of its failure to allege that assault was committed "with malice aforethought." State v. McDonald, 14 U. 173, 46 P. 872.

A. L. R. notes.
What conduct amounts to overt act done towards commission of murder so as to sustain charge of attempt to murder, 98 A. L. R. 918.

CHAPTER 29

HOTELS AND RESORTS

103–29–1. Defrauding Hotels and Boarding Houses.
103–29–2. Innkeepers Wrongfully Refusing Entertainment.
103–29–3. Doors of Public Buildings to Open Outward.
103–29–4. Keeping Disorderly House.
103–29–5. Spectators at Theaters, etc., to Remove Headwear.

103–29–1. Defrauding Hotels and Boarding Houses.

Any person who puts up at any hotel, inn, boarding or lodging house, and procures any food, entertainment or accommodation without paying therefor, or who obtains credit at any hotel, inn, boarding or lodging house, for such food, entertainment or accommodation, by means of any false show of baggage or effects brought thereto; or who absconds or surreptitiously removes, or causes to be removed, any baggage or effects from any hotel, inn, boarding or lodging house, while there is a lien existing thereon for the proper charges due from him for fare, board or lodging furnished therein, shall be punished by a fine not exceeding $100 or by imprisonment in the county jail not exceeding three months. (C. L. 17, § 8444.)

Comparable provisions.
Cal. Penal Code, § 537 (offense characterized as misdemeanor).
Mont. Rev. Codes, § 11579 (misdemeanor; imprisonment not exceeding three months, or fine not exceeding $100 and costs, or both fine and imprisonment).

Cross-references.
Obtaining credit by false representation, 103–18–9.

A. L. R. notes.
Relation of innkeeper and guest as affected by payment for accommodation by week, month or the like, 12 A. L. R. 261; what constitutes a boarding house, 19 A. L. R. 538; what constitutes an hotel or inn, 53 A. L. R. 988.

103–29–2. Innkeepers Wrongfully Refusing Entertainment.

Every person and every agent or officer of any corporation carrying on business as an innkeeper who refuses, without just cause or excuse, to receive and entertain any guest is guilty of a misdemeanor. (C. L. 17, § 8445.)

Comparable provisions.
Cal. Penal Code, § 365, Mont. Rev. Codes, § 11218 (identical provisions, but made applicable also, by their terms, to common carrier of passengers).

A. L. R. notes.
What constitutes an hotel or inn, 53 A. L. R. 988.

103–29–3. Doors of Public Buildings to Open Outward.

All public buildings which may or shall be used for churches, schoolhouses, operas, theaters, lecture rooms, public meetings or town halls, or which may or shall be used for any purpose whereby a collection of people may be assembled together for religious worship, amusement, instruction or other purpose, shall be so built and constructed that all doors leading from the main hall, or place where said collection of people may be assembled, or from the principal room, which may be

used for any of the purposes aforesaid shall be so constructed and swung that they shall open outward, and that all means of egress for the public from the main hall or principal room and from the buildings shall be through doors which shall open outward from the main hall or building. Any person who fails or refuses to comply with the provisions of this section shall be fined in any sum not less than $100 nor more than $1,000. (C. L. 17, §§ 8210, 8212.)

103-29-4. Keeping Disorderly House.

Every person who keeps any disorderly house or any house of public resort, by which the peace, comfort or decency of the immediate neighborhood is habitually disturbed, or who keeps any inn in a disorderly manner, is guilty of a misdemeanor. (C. L. 17, § 8149.)

History.
This section is practically identical with R. S. 1898, § 4252; Comp. Laws 1907, § 4252.

Comparable provisions.
Cal. Penal Code, § 316, Idaho Code, § 17-2104, Mont. Rev. Codes, § 11141 (similar; inserted is phrase, "* * * or any house for the purpose of assignation or prostitution * * *"; in California and Montana provisions there is also inserted a clause pertaining to person who lets apartment or tenement knowing that it is to be used for purpose of assignation or prostitution).

Cross-references.
Disturbing the peace, 103-50-9.

1. Jurisdiction.
When Utah was a territory there was some controversy as to whether justices of the peace could be given jurisdiction of offenses against the provisions of this section. People v. Douglass, 5 U. 283, 294, 14 P. 801, overruling People v. Spiers, 4 U. 385, 10 P. 609, 11 P. 509. Of course there can no longer be any question of their jurisdiction over such an offense. See 20-5-4 and 103-1-16.

103-29-5. Spectators at Theaters, etc., to Remove Headwear.

Any person attending a theater, opera house or an indoor place of amusement as a spectator shall remove headwear tending to obstruct the view of any other person. Any person violating the provisions of this section shall be subject to a fine of not less than $1 nor more than $10 for each offense. (C. L. 17, § 8479.)

CHAPTER 30

INSANE PERSONS

103-30-1. Cruel Treatment or Neglect of.

Every person guilty of any unnecessarily harsh, cruel or unkind treatment of, or any neglect of duty towards, any idiot, lunatic or insane person is guilty of a misdemeanor. (C. L. 17, § 8176.)

History.
This section is practically identical with R. S. 1898, § 4273; Comp. Laws 1907, § 4273.

Comparable provisions.
Cal. Penal Code, § 361, Idaho Code, § 17-2003, Mont. Rev. Codes, § 11214 (identical, except that word "unnecessarily" is omitted).

Cross-references.
Wrongful introduction into State Hospital, 85-7-46.

CHAPTER 31

INSURANCE

103–31–1. Firing Insured Property to Defraud Insurer.
103–31–2. Presenting False and Fraudulent Claim to Insurance.

103–31–1. Firing Insured Property to Defraud Insurer.

Every person who willfully burns, or in any manner injures or destroys, any property which is at the time insured against loss or damage by fire or by any other casualty, with intent to defraud or prejudice the insurer, whether the same is the property of or in possession of such person or of any other, is punishable by imprisonment in the state prison not less than one nor more than ten years.

(C. L. 17, § 8360.)

Comparable provisions.
Cal. Penal Code, § 548, Mont. Rev. Codes, § 11426 (substantially identical; the California provision pertains also to one who secretes, abandons or disposes of any such property).

Cross-references.
Arson, 103–6; firing insured property, 103–6–4.

103–31–2. Presenting False and Fraudulent Claim to Insurance.

Every person who presents, or causes to be presented, any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss, or who prepares, makes or subscribes any account, certificate of survey, affidavit or proof of loss, or other book, paper or writing, with intent to present or use the same, or to allow it to be presented or used, in support of any such claim is punishable by imprisonment in the state prison not exceeding three years or by a fine not exceeding $1,000, or by both.

(C. L. 17, § 8361.)

Comparable provisions.
Idaho Code, § 40–1111 (similar; reading in part: "Any person who, knowing it to be such, presents " " "), Mont. Rev. Codes, § 11427 (substantially identical).

CHAPTER 32

INTOXICATING LIQUORS

103–32–1. Sales, etc., to Indians, a Felony.

Every person who sells, exchanges, gives, barters or disposes of any intoxicating drink to any Indian of the whole or half blood, or to any person living or cohabiting with an Indian woman, is guilty of a felony, and shall be punished by imprisonment in the state prison for a period of not more than three years or by a fine of not more than $300, or by both. (C. L. 17, § 8208.)

History.
This section is practically identical with R. S. 1898, § 4298; Comp. Laws 1907, § 4298.

Comparable provisions.
Cal. Penal Code, § 397 (misdemeanor is comprised in offense of selling or furnishing, or causing to be sold or furnished, intoxicating liquors to any habitual drunkard, or to Indian of whole blood).
Idaho Code, § 17–2724 (selling or furnishing, or causing to be sold or furnished, intoxicating liquors to any Indian, is misdemeanor).

Cross-references.
Intoxicating liquors, Title 46.

1. **Status of section.**
This section was held to be repealed by Laws 1911, Ch. 106, § 30, making the sale, etc., of intoxicating liquors to an Indian merely a misdemeanor. State v. Justice, 44 U. 484, 141 P. 109, following State v. Carmen, 44 U. 353, 140 P. 670.

CHAPTER 33

KIDNAPING *

103–33–1. Degrees of Kidnaping—Penalty.
103–33–2. Consent of Kidnaped Person—When and When Not a Defense.

*History of act. This chapter was R. S. 1898, Title 75, Ch. 16, p. 894; Comp. Laws 1907, Title 90, Ch. 16, p. 1289.

103–33–1. Degrees of Kidnaping—Penalty.

(a) Every person who wilfully:

(1) Seizes, confines, inveigles or kidnaps another with intent to keep him without the authority of the law, to be secretly imprisoned and confined within the state or to be sent out of the state or in any way held to service or detained against his will, or

(2) Leads, takes, entices away or detains a minor with intent to keep or confine it from its parents or guardians or other person having lawful guide or control thereof, or with intent to steal any article about and on the person of the minor is guilty of kidnaping in the second degree.

(b) Every person who wilfully:

(1) Seizes, confines, inveigles, abducts, entices or by force or fraud, unlawfully takes or carries away another or brings another within the state or procures or advises, aids or abets such an abduction, enticing, taking, or conveying away for the purpose of extorting or obtaining money or reward for the return or disposition of the person, is guilty of kidnaping in the first degree.

Every person guilty of kidnaping in the second degree shall be imprisoned at hard labor in the state prison for a term which shall not be less than one year and which may be for life. Every person guilty of kidnaping in the first degree shall suffer death or upon recommendation of the jury, may be imprisoned at hard labor in the state prison for life in the discretion of the court. (C. L. 17, § 8040.)

History.
As amended by L. 33, ch. 84, eff. June 26, rewriting subdivision (a) and adding subdivision (b).

This section has, in many respects, been changed from its prototype in R. S. 1898, § 4173; Comp. Laws 1907, § 4173. Subdivision (1) is, however,

practically identical with said earlier sections, except that formerly the disjunctive was used, the phrase being "confined or imprisoned."

Comparable provisions.

Cal. Penal Code, § 207, Mont. Rev. Codes, § 10970.1 (pertaining to kidnaping).

Idaho Code, 1940 Supp., § 17–1303 (defining "kidnaping"); § 17–1304 (specifying punishment for kidnaping in first degree; and for kidnaping in second degree).

Iowa Code 1939, § 12981 (pertaining to kidnaping).

Cross-references.

Jurisdiction of indictment for kidnaping, 105–8–11.

1. Operation and effect of section.

In this state the crime of kidnaping has obviously been extended beyond its common-law definition. State v. Olsen, 76 U. 181, 184, 289 P. 92.

"The crime of false imprisonment is included within the crime of kidnaping. The former is an indictable misdemeanor [103–19–2], the latter a felony." State v. Olsen, 76 U. 181, 184, 289 P. 92.

2. Issues and proof.

Under subdivision (1) of this section it is necessary to allege and prove that the act of seizing, confining, inveigling or kidnaping was committed with the intent that such person be "secretly" kept or detained. In this respect kidnaping is distinguishable from false imprisonment. State v. Olsen, 76 U. 181, 289 P. 92.

A. L. R. notes.

Forcing another to transport one as constituting offense of kidnaping or of abduction, 62 A. L. R. 200; kidnaping or other criminal offense by taking or removal of child by, or under authority of, parent, or one in loco parentis, 77 A. L. R. 317; offense of abduction or kidnaping as affected by defendant's belief in legality of his act, 114 A. L. R. 870; secrecy, or intent of secrecy, as a necessary element of kidnaping, 68 A. L. R. 719.

103–33–2. Consent of Kidnaped Person—When and When Not a Defense.

Upon a trial for a violation of the offense mentioned in the next preceding section, the consent of the person kidnaped or confined is not a defense, unless it appears that such person was above the age of twelve years and that the consent was not extorted by threats or duress. (C. L. 17, § 8041.)

CHAPTER 34

LABELS, MARKS AND BRANDS

103–34–1. Advertising Foreign Goods as Local.
103–34–2. False Stamping of Gold or Gold Alloy.
103–34–3. False Stamping of Silver Articles.
103–34–4. Id. Amount of Pure Silver in "Sterling."
103–34–5. Id. Amount of Pure Silver in "Coin Silver."
103–34–6. Id.
103–34–7. Defacing Marks on Lumber, etc.
103–34–8. Branding Another's Domestic Animal or Altering Mark or Brand.
103–34–9. Omitting to Label or Mislabeling Drugs.

103–34–1. Advertising Foreign Goods as Local.

It is unlawful for any person to sell, offer for sale, brand, advertise, circulate or display any goods, wares or merchandise, of any kind or character whatsoever, as having been made, produced or manufactured within this state, when in truth and in fact the same were not so made, produced or manufactured. Any person violating any of the provisions

of this section shall be punished by a fine of not more than $250 or by imprisonment in the county jail for a period of not exceeding sixty days. (L. 21, p. 312, §§ 1, 2.)

Cross-references.
Trade marks, names and devices, Title 95; false weights and measures, 3–13–25.

103–34–2. False Stamping of Gold or Gold Alloy.

Any person who makes or sells, or offers to sell or dispose of, or has in his possession with intent to sell or dispose of, any article of merchandise constructed in whole or in part of gold, or of any alloy of gold, and having stamped, branded, engraved or imprinted thereon any mark indicating, or designed or intended to indicate, that the gold or alloy of gold in such article is of greater degree or karat of fineness by more than one karat than the actual quantity or fineness of such gold or alloy, is guilty of a misdemeanor. (C. L. 17, § 8497.)

103–34–3. False Stamping of Silver Articles.

Any person who makes or sells, or offers to sell or dispose of, or has in his possession with intent to sell or dispose of, any article of merchandise marked, stamped or branded with the words "sterling" or "sterling silver" or any other word or words, figure or figures, or combination of letters or figures, or abbreviation, in any manner simulating the words "sterling" or "sterling silver," or whose component parts are made of the same metal soldered together, which article is marked, stamped or branded with the words "sterling" or "sterling silver," or any other word or words, figure or figures, or abbreviation, in any manner simulating the words "sterling" or "sterling silver," or encased or inclosed in any box, package, cover or wrapper, or other thing in, by or with which the said article is packed, inclosed or otherwise prepared for sale or disposition, having thereon any engraving or printed label, stamp, imprint, mark or trade-mark, indicating or denoting by such engraving, printing, stamping, marking or branding that such article is silver, sterling or solid silver, unless nine hundred and twenty-five one-thousandths of the component parts of the metal of which such article of merchandise is manufactured is pure silver, is guilty of a misdemeanor. (C. L. 17, § 8498.)

103–34–4. Id. Amount of Pure Silver in "Sterling."

Any person who makes or sells, or offers to sell or dispose of, or has in his possession with intent to sell or dispose of, any article of merchandise composed of leather, shell, ivory, celluloid, pearl, glass, porcelain, pottery, steel or wood to which is applied or attached a metal mounting marked, stamped or branded with the words "sterling" or "sterling silver," or any other word or words, figure or figures, or combination of letters or figures, or abbreviation, in any manner simulating the words "sterling" or "sterling silver," or any article of merchandise composed of works or movements and a case or covering applied or attached thereto, wholly or partially concealing said works or movements, marked, stamped or branded "sterling" or "sterling silver," or any other word or words, figure or figures, or combination of letters

or figures, or abbreviation, in any manner simulating the words "sterling" or "sterling silver," unless said applied or attached metal mounting, case or covering shall contain not less than nine hundred and twenty-five one-thousandths parts of pure silver, is guilty of a misdemeanor. (C. L. 17, § 8499.)

103–34–5. Id. Amount of Pure Silver in "Coin Silver."

Any person who marks or sells or offers to sell or dispose of, or has in his possession with intent to sell or dispose of, any article of merchandise whose component parts are made of the same metal soldered together, which article is marked, stamped or branded with the words "coin" or "coin silver," or encased or inclosed in any box, package, cover or wrapper, or other thing in, by or with which the said article is packed, inclosed or otherwise prepared for sale or disposition, having therein any engraving or printed label, stamp, imprint, mark or trademark indicating or denoting by such engraving, printing, stamping, marking or branding that such article is coin or coin silver, unless nine hundred one-thousandths parts of the component parts of the metal of which the said article is manufactured is pure silver, is guilty of a misdemeanor. (C. L. 17, § 8500.)

103–34–6. Id.

Any person who makes or sells, or offers to sell or dispose of, or has in his possession with intent to sell or dispose of, any article of merchandise composed of leather, shell, ivory, celluloid, pearl, glass, porcelain, pottery, steel or wood to which is applied or attached a metal mounting marked, stamped or branded with the words "coin" or "coin silver," or any article of merchandise composed of works or movements and a case or covering applied or attached thereto, wholly or partially concealing said works or movements, marked, stamped or branded "coin" or "coin silver," unless said applied or attached metal mounting, case or covering contains not less than nine hundred one-thousandths parts of pure silver, is guilty of a misdemeanor. (C. L. 17, § 8501.)

103–34–7. Defacing Marks on Lumber, etc.

Every person who cuts out, alters or defaces any mark made upon any log, lumber or wood, or puts a false mark thereon, with intent to prevent the owner from discovering its identity, is guilty of a misdemeanor. (C. L. 17, § 8447.)

Comparable provisions.
Cal. Penal Code, § 356, Mont. Rev. Codes, § 11210 (identical).

103–34–8. Branding Another's Domestic Animal or Altering Mark or Brand.

Every person who marks or brands, or who alters or defaces the mark or brand on any horse, mare, gelding, colt, jack, jenny, mule, bull, ox, steer, cow, calf, sheep, goat, hog, shoat or pig belonging to another, with intent thereby to steal the same, or to prevent identification thereof by the true owner, shall be punished as in cases of grand larceny. (C. L. 17, § 8448.)

History.
This was R. S. 1898, § 4474, and was identical therewith except as to the punishment, which was changed in 1905 to read as at present. See Comp. Laws 1907, § 4474.

Comparable provisions.
Cal. Agricultural Code, § 377 (similar; imprisonment for not less than one nor more than five years).
Idaho Code, § 24-1601 (substantially the same, except that it concludes as follows: "* * * or to prevent identification thereof by the true owner, is punishable by fine not less than $100.00 nor more than $300.00, and by imprisonment in the county jail not less than sixty days nor more than six months"); Mont. Rev. Codes § 11211 (substantially identical; fine not to exceed $500, or imprisonment not to exceed five years, or both).

Cross-references.
Marks and brands—livestock, 3-5-113 et seq.; larceny, 103-36.

1. Scope and operation of section.
Section does not mean to set out four separate offenses, but meant to particularize as to several slightly different ways in which one offense might be committed. State v. McNaughtan, 92 U. 114, 66 P.2d 137.

2. Elements of offense.
Without a criminal intent the crime is not committed. If the accused's explanation and all the circumstances show that he was an honest possessor of the domestic animals, and had no criminal intent in placing his mark upon them, and no evidence was given to the jury to show its falsity, he was entitled to an acquittal. People v. Swasey, 6 U. 93 21 P. 400.
"While it is true that a person may brand or alter or deface a brand with intent to prevent identification for spite or for some other reason than intent to steal, it is certainly true that, where a person brands or alters or defaces a brand with intent to steal, he certainly does it for the purpose of preventing identification. The former includes the latter and the restriction in this section which contained the alternative, 'or to prevent identification thereof,' etc., was merely another way, in this case, of saying 'with intent to steal.' * * * And a marking or branding in such a case as this is so inextricably connected with altering or defacing a mark or brand that we would justifiably expose ourselves to the criticism of being overtechnical if we held that the words 'marking and branding' and 'altering or defacing marks or brands' were not in this, and perhaps in most cases, interchangeable." State v. McNaughtan, 92 U. 114, 121, 66 P.2d 137.

3. Evidence.
Evidence held sufficient to warrant verdict of guilty of larceny of sheep, the asportation being shown by evidence that defendant dragged the sheep under the fence towards the car which was to carry them off. State v. Priestley, 97 U. 158, 91 P.2d 447.
Evidence showing that brands on sheep of prosecuting witness had been changed as was indicated by fresh scabs on changing brand, and red painted brand covering former green painted brand, and that one lamb in question was still sucking ewe of prosecuting witness, held to sustain conviction under this section. State v. McNaughtan, 92 U. 114, 66 P.2d 137, aff'g on rehearing 92 U. 99, 58 P.2d 5.
Where alleged offense of branding animal with intent to steal it and accused's connection with offense rested wholly upon circumstantial evidence, which, as matter of law, was reasonably consistent with innocence of accused, evidence was insufficient to support conviction. State v. Burch, 100 U. 414, 115 P.2d 911.
In a prosecution for altering and defacing a wool brand on sheep with intent to steal them and prevent their identification by the owner, evidence held insufficient to show that accused and his partner were not the owners of the sheep. State v. Blank, 43 U. 211, 134 P. 735.
On a trial for altering and defacing a wool brand on sheep, where the evidence showed affirmatively that one of the defendants took no part whatever in the branding, evidence that he purchased the paint for the other defendant was not sufficient to justify the court in submitting the question of his guilt to the jury. State v. Blank, 43 U. 211, 134 P. 735.

4. Question of law and fact.
In prosecution under this section for changing brands on sheep with intent to steal, that prosecuting witness owned the sheep in question, held for jury. State v. McNaughtan, 92 U. 114, 66 P.2d 137.

5. Appellate review.
Jury's finding as to place of commission of crime of altering brands of sheep with intent to steal would not be disturbed in spite of defendant's uncontradicted evidence that it was in another county, where the physical evidence as to where the sheep had been ranging supported the jury's finding. State v. McNaughtan, 92 U. 114, 66 P.2d 137.

103–34–9. Omitting to Label or Mislabeling Drugs.

Every apothecary, druggist or person carrying on business as a dealer in drugs or medicines, and every person employed as clerk or salesman by any such person, who, in putting up drugs or medicines or making up any prescription or filling any order for drugs or medicines, willfully, negligently or ignorantly omits to label the same, or puts an untrue label, stamp or other designation of contents upon any box, bottle or other package containing any drug or medicine, or substitutes a different article for any article prescribed or ordered, or puts up a greater or less quantity of any article than that prescribed or ordered, or otherwise deviates from the terms of the prescription or order which he undertakes to follow, in consequence of which human life or health is endangered, is guilty of a misdemeanor, or, if death ensues, is guilty of a felony. (C. L. 17, § 8199.)

Comparable provisions.
Cal. Penal Code, § 380 (substantially identical).

Cross-references.
Poisons must bear label, 79–12–17, 79–12–23; sale of certain drugs prohibited, 79–12–25, 79–12–26.

CHAPTER 35

LABOR

103–35–1. Coercing Employee to Trade or Board at Particular Place.
103–35–2. Intimidating Labor.
103–35–3. Extortion—Practice Against Labor Prohibited.
103–35–4. Id. Employee Not to Be Party to.
103–35–5. Id. Employers to Post Copies of Laws.

103–35–1. Coercing Employee to Trade or Board at Particular Place.

Every person, body corporate, agent, manager or employer doing business in this state who, by coercion, intimidation, threats or undue influence, compels his employees to board at a particular boarding house, or to trade with or at a particular store, is guilty of a misdemeanor. (C. L. 17, § 8513.)

103–35–2. Intimidating Labor.

Any person who threatens to destroy property or to do bodily harm for the purpose of preventing any other person or persons from entering or remaining in the employ of any company, corporation or individual, is guilty of a misdemeanor. (C. L. 17, § 8493.)

History.
This section is practically identical with Comp. Laws 1907, § 4487x11.

103–35–3. Extortion—Practice Against Labor Prohibited.

Every person employed in or about any industrial plant, railroad, construction camp, foundry, factory, mine, smelter, mill or other industrial concern, or who acts as agent or interpreter for, or in connection with, the employment of any laborer or other person for any such concern, is prohibited from soliciting, accepting or receiving, or

causing to be solicited, accepted or received, any compensation or gift of money or any other consideration, directly or indirectly, for or on account of the employment or the continuance of the employment of any laborer or other person in or about any such concern, or for any service rendered or influence used in connection with the employment of any laborer or other person in or about any such concern. Any person violating this section or any provision hereof is guilty of a misdemeanor and shall be punished by imprisonment for not less than thirty days nor more than six months.

For the purposes of this section any person who has paid or has been solicited to pay any compensation, or who has made any gift of money or any other consideration, for or on account of his employment or the continuance of his employment or for any service performed in connection with his employment shall not be deemed an accomplice.

(L. 19, p. 350, § 8328.)

103–35–4. Id. Employee Not to Be Party to.

Every person employed or seeking employment by any industrial plant, railroad, construction camp, foundry, factory, mine, smelter, mill or other industrial concern is hereby prohibited from paying or giving, directly or indirectly, any consideration or gift to any person employed by or acting as interpreter for such concern for the purpose of securing employment by or continuing in the employment of such concern. Any person violating this section is guilty of a misdemeanor, and shall be punished by a fine of $25 or by imprisonment for thirty days, or by both such fine and imprisonment. (L. 19, p. 350, § 2.)

103–35–5. Id. Employers to Post Copies of Laws.

Every employer shall post and maintain notices, printed or written in plain type or script, in at least two conspicuous places where notices can be seen by his employees as they go to and from their work, setting forth the provisions of sections 103–35–3 and 103–35–4, in a language understood by the employees, such printed notices to be furnished by the industrial commission upon request of the employer. Failure to comply with the provisions of this section is a misdemeanor.

(L. 19, p. 350, § 3.)

Cross-references.
Labor, Title 49.

CHAPTER 36

LARCENY

103–36–1.	Defined.	103–36–9.	Of Passage Tickets.
103–36–2.	Of Lost Property by Finder.	103–36–10.	Of Written Instruments Ready for Delivery, but Undelivered.
103–36–3.	Degrees of Larceny.	103–36–11.	Of Things Severed from Realty.
103–36–4.	Grand Larceny Defined.	103–36–12.	Receiving Stolen Property.
103–36–5.	Petit Larceny Defined.	103–36–13.	Receiving Property Stolen in Another State.
103–36–6.	Penalty for Grand Larceny.		
103–36–7.	Penalty for Petit Larceny.		
103–36–8.	Of Evidence of Debt.		

103–36–14. Of Gas.
103–36–15. Of Electricity.
103–36–16. Of Water.
103–36–17. Of Property Salvaged from Fire.
103–36–18. Of Parts of Railroad Locomotives and Cars.
103–36–19. Id. Penalty for Receiving Such Stolen Property.

103–36–1. Defined.

Larceny is the felonious stealing, taking, carrying, leading or driving away the personal property of another. Possession of property recently stolen, when the person in possession fails to make a satisfactory explanation, shall be deemed prima facie evidence of guilt.

(C. L. 17, § 8285.)

History.

The first sentence of this section is identical with Comp. Laws 1876, p. 625, § 2104; 2 Comp. Laws 1888, § 4639; R. S. 1898, § 4355. The second sentence was added in 1936. See Comp. Laws 1907, § 4355.

This definition came from the Penal Code of California. State v. Allen, 56 U. 37, 43, 189 P. 84.

Comparable provisions.

Cal. Penal Code, § 484 (defining "theft").

Idaho Code, § 17–3501 (identical with first sentence herein).

Cross-references.

Larceny of motor vehicle, 57–3a–110; joinder of other counts, 105–21–31; larceny out of state, 103–1–41.

Analysis of Note.

I. LARCENY, 1–15.
II. RECENT POSSESSION OF STOLEN PROPERTY 16–22.

I. LARCENY.

1. Validity.

This statute is valid. State v. Converse, 40 U. 72, 119 P. 1030. This section is not invalid as an encroachment by legislature upon prerogatives of judiciary. State v. Potello, 40 U. 56, 119 P. 1023.

2. Elements of offense.

3. — in general.

The taking must be with the felonious intent to steal, and this element must be established by the circumstances of the taking or other proof. State v. Dubois, 64 U. 433, 231 P. 625.

It is necessary to find that intent to steal existed at the time of the taking. No subsequent felonious intent will suffice. People v. Miller, 4 U. 410, 11 P. 514; State v. Allen, 56 U. 37, 189 P. 84.

If defendant never had any dominion over, or possession of, the property alleged to be stolen, there is no larceny, because in such case there is no asportation. People v. Gillis, 6 U. 84, 21 P. 404.

The mere fact that property is destroyed maliciously and with intent to deprive owner permanently of its use does not constitute larceny. State v. Allen, 56 U. 37, 189 P. 84.

In order to constitute crime of larceny it is not necessary to prove that accused intended to derive some benefit either to himself or for some other person from theft. State v. Allen, 56 U. 37, 189 P. 84.

One who receives stolen property, though knowing it to be stolen, is not guilty of larceny. State v. Merritt, 67 U. 325, 247 P. 497.

In prosecution for larceny, even though defendant did not intend to keep all of owner's money, and intended to divide with those who were connected with him in card game, it would still be larceny of whole amount. State v. Donaldson, 35 U. 96, 99 P. 447, 20 L. R. A. (N. S.) 1164, 136 Am. St. Rep. 1041.

In prosecution for larceny, it was held that obtaining money under pretext of betting at cards, where everything was fixed so that prosecuting witness had no chance to win, and was only player who actually risked anything, was larceny within this section. State v. Donaldson, 35 U. 96, 99 P. 447; 20 L. R. A. (N. S.) 1164, 136 Am. St. Rep. 1041.

4. — taking, carrying, leading or driving away.

Where trick or artifice is used to induce owner to part with possession of his property, the offense may be larceny or the obtaining of goods by false pretenses, depending on whether owner intended to part with the right of property. People v. Berlin, 9 U. 383, 389, 35 P. 498, rev'd on rehearing 10 U. 39, 36 P. 199, because instructions were conflicting.

5. — personal property.

A phonographic report of testimony of witnesses examined on a trial, which was in the possession of court's official reporter when stolen, is "personal prop-

erty" within meaning of this section. People v. McGrath, 5 U. 525, 17 P. 116.

6. Indictment or information.

7. — sufficiency.

Information which did not allege ownership of property taken was fatally defective, since it was necessary, in order to charge crime of larceny, to allege that property belonged to some one other than the defendant. State v. Jensen, 83 U. 452, 30 P.2d 203.

In larceny prosecution, information charging that defendant did willfully, unlawfully and feloniously steal, take and carry away by means of trick, artifice and device a certain number of shares of stock, and setting out such trick or device, sufficiently charged larceny, as it plainly charged that property was obtained by means of falsehood and fraud, and with the felonious intention of defendant to convert it to his own use, the bank from whom such stock was taken intending to part with possession only. State v. Joseph, 63 U. 1, 221 P. 850.

8. — amendments.

Amendment of information after plea so as to allege ownership of property alleged to have been stolen in larceny prosecution was authorized by 105-17-3. State v. Jensen, 83 U. 452, 30 P.2d 203.

9. — pleas and defenses.

Where original information does not state public offense and is amended so as to state public offense for first time, as amending information in larceny prosecution so as to allege ownership of property alleged to have been stolen, it is equivalent of a new information requiring arraignment of defendant and his plea thereto; and where defendant was not given time to plead to such information as required by 105-22-15, court committed reversible error. State v. Jensen, 83 U. 452, 30 P.2d 203.

10. Questions of law and fact.

In prosecution for larceny, while law is to effect that jury may not arbitrarily ignore or disregard credible evidence, but must consider all evidence, they, nevertheless, need not blindly accept every explanation or statement that one who is accused of larceny may make in his own exculpation, and may refuse to give credence to such statements, or to those of his witnesses, if statements, in view of all facts and circumstances, seem unreasonable or not well founded in fact. State v. Hitesman, 68 U. 262, 198 P. 760.

If evidence is such that all reasonable minds should arrive at the conclusion that the taking was without felonious intent, then question of felonious intent is one of law, but if reasonable minds may differ, question is one of fact. State v. Dubois, 64 U. 433, 231 P. 625.

In prosecution for larceny of automobile, where property was found in possession of accused, whether defendant's explanations and statements respecting that possession were satisfactory, held for jury. State v. Hitesman, 68 U. 262, 198 P. 760.

11. Evidence.

12. — admissibility in general.

Of course circumstantial evidence is admissible. Accordingly, nonconsent of owner to asportation may be inferred. State v. Reese, 44 U. 256, 262, 140 P. 126.

In prosecution for larceny of a heifer, the heifer's ear and owner's tag attached thereto are admissible in evidence. State v. Frisby, 49 U. 227, 162 P. 616.

13. — accomplices and accessories.

In larceny prosecution testimony of accomplice was held to have been sufficiently corroborated by testimony of defendant so that evidence sustained conviction. State v. Gardner, 83 U. 145, 27 P.2d 51. (Straup, C. J., and Hanson, J., dissenting.) And see State v. Frisby, 49 U. 227, 162 P. 616.

14. — weight and sufficiency.

In a prosecution for larceny, the evidence must sufficiently establish the elements of the crime, such as the unlawful asportation of the property without the consent of the owner, the ownership thereof, etc. See State v. Reese, 44 U. 256, 140 P. 126.

In order to convict for grand larceny under this statute, it must be proved beyond reasonable doubt that taking was with felonious intent—that is, with intent to steal property in question—and that such intent must have existed at time of taking. State v. Allen, 56 U. 37, 189 P. 84.

In prosecution for larceny, jury were authorized to infer from facts and circumstances proved that defendant obtained $2,050, which he claimed to have won, either by fraud, trick, device, or artifice, with intention at time he obtained money to appropriate it to his own use, and to deprive owners permanently of money. State v. Donaldson, 35 U. 96, 99 P. 447, 20 L. R. A. (N. S.) 1164, 136 Am. St. Rep. 1041.

In prosecution of camp tender for larceny of sheep, evidence was insufficient to sustain conviction where only evidence was that sheep were in possession of defendant, since he was working for other defendant, and possession under this section must be exclusive. State v. Morris, 70 U. 570, 262 P. 107.

In prosecution for larceny of cow, held, evidence was insufficient to show cow was property of person alleged to be owner or to show felonious taking by defendant. State v. Morrell, 39 U. 498, 118 P. 215.

In prosecution for larceny of horses, evidence that defendant openly and repeatedly declared his purpose and intention in corralling and shooting horses which trespassed on and destroyed his property, held insufficient to justify finding that horses were killed with felonious intent to steal them. State v. Allen, 56 U. 37, 189 P. 84.

Where lambs claimed to have been stolen were found a month later in possession of defendant with altered brands, and defendant failed to offer satisfactory explanation, there was sufficient evidence to support verdict of larceny. State v. Kappas, 100 U. 274, 114 P.2d 205.

Evidence held sufficient to justify conviction for larceny of plumes. State v. Converse, 40 U. 72, 119 P. 1030.

Evidence held insufficient to sustain conviction for larceny. State v. Nelson, 39 U. 238, 117 P. 71.

15. Instructions.

The general rules respecting instructions in criminal cases apply in prosecutions for larceny. State v. Frisby, 49 U. 227, 162 P. 616.

The court should define the offense, and also charge the jury as to the felonious character of the taking and the intent. People v. Flynn, 7 U. 378, 26 P. 1114, setting out approved instruction.

Trial court held justified in submitting question of guilt to jury in prosecution of defendant for larceny of wool, although evidence that defendant stole the wool found in his possession was in conflict. State v. Bruno, 97 U. 33, 92 P.2d 1103. (Moffat, C. J., and Larson, J., dissenting.)

In prosecution for larceny of steer, giving of instruction in language of this section, standing alone, would be most harmful and warrant reversal of judgment except for fact that trial court had warned jury that mere possession and unsatisfactory explanation alone were insufficient to warrant conviction. State v. Sawyer, 54 U. 275, 182 P. 206.

II. RECENT POSSESSION OF STOLEN PROPERTY.

16. Words and phrases defined.

The term "prima facie" as used in this section means presumptive evidence, and does not mean that unless rebutted by other evidence, or discredited by circumstances, it becomes conclusive of fact of guilt. State v. Potello, 40 U. 56, 119 P. 1023.

17. Possession.

It seems to be an established doctrine, especially in this western country, that in larceny the recent possession of stolen property is not of itself sufficient to warrant a conviction, as where the possession is explained by the defendant in an apparently reasonable manner. People v. Swasey, 6 U. 93, 98, 21 P. 400.

The possession must not only be personal, exclusive, and unexplained, but must also be conscious, or a conscious assertion of possession by the accused. State v. Kinsey, 77 U. 348, 353, 295 P. 247. Possession under this section means a conscious, personal possession, amounting to an express or implied assertion of ownership. State v. Butterfield, 70 U. 529, 261 P. 804.

Possession of articles recently stolen, when coupled with circumstances of hiding or concealing them, or of disposing or attempting to dispose of them, or of making false or unreasonable or unsatisfactory explanations of the possession, may be sufficient to connect the possessor with the commission of the offense. But mere or bare possession, when not coupled with other culpatory or incriminating circumstances, does not alone suffice to justify a conviction. State v. Kinsey, 77 U. 348, 352, 295 P. 247, citing prior Utah cases.

18. Operation and effect of section.

This section is merely declaratory of pre-existing law. State v. Laris, 78 U. 183, 191, 2 P.2d 243.

It is important to observe that this section applies only where person having unexplained possession of stolen goods was the thief, the one who feloniously took and carried away the property. This section does not apply where person having unexplained possession of stolen property was not the one who committed the larceny. State v. Laris, 78 U. 183, 191, 2 P.2d 243.

Provision of this section that unexplained possession of recently stolen property is prima facie evidence of guilt in prosecution for larceny, does not relieve state of burden of convicting defendant upon all the evidence by proof beyond a reasonable doubt. State v. Merritt, 67 U. 325, 247 P. 497.

While this section permits the state to go to the jury upon proof of the larceny and of accused's possession and unsatisfactory explanation, it does not relieve state of burden of proving accused guilty beyond a reasonable doubt. Therefore it is improper to charge jury that possession of recently stolen property shall be deemed prima facie evidence of guilt when party in possession fails to make satisfactory explanation. State v. Barretta, 47 U. 479, 155 P. 343.

Under this section, recent possession of stolen property, when not satisfactorily explained, is also prima facie evidence of guilt of burglary or robbery, at least when larceny, burglary and robbery were committed in same transaction. State v. Donovan, 77 U. 343, 294 P. 1108.

19. Prima facie case.

To make a prima facie case under this section, in absence of direct evidence of the taking, the state must prove the larceny, recent possession by accused, and an unsatisfactory explanation. State v. Bowen, 45 U. 130, 143 P. 134.

Under this section the question of what makes out a prima facie case of larceny is for the court. State v. Barretta, 47 U. 474, 155 P. 343.

Under this section, where there is no direct evidence of the asportation by accused, nor any direct evidence to connect him with the taking of the property, mere proof of the larceny and recent possession of the stolen property in accused does not make a prima facie case; to make such a case, state must prove, not only the larceny and recent possession in the accused, but also that he failed to make a satisfactory explanation of his possession. State v. Mellor, 73 U. 104, 272 P. 635; State v. Potello, 40 U. 56, 119 P. 1023.

On a trial for larceny of a cow, proof of defendant's possession of the hide is sufficient, where state also proves that hide was taken from a cow in his possession, and that hide so found in his possession was taken from a cow in his possession. State v. Bowen, 45 U. 130, 143 P. 134.

In prosecution for larceny of horse, held state could not rely on defendant's recent possession of horse, where only evidence of larceny came from defendant's evidence, and that showed another, and not defendant, committed the larceny. State v. Potello, 40 U. 56, 119 P. 1023.

20. Questions of law and fact.

This is to be left to the jury under proper instructions from the court. It depends upon the facts and circumstances of each particular case. People v. Chadwick, 7 U. 134, 139, 25 P. 737, setting out approved instruction.

Possession may be so remote as to require the court to say, as a matter of law, that it is not sufficiently recent to raise the presumption. Standing by itself, a possession as remote as four months can hardly be said to be recent, but whether it is or not is for the jury under all of the facts and circumstances of the particular case. State v. Bowen, 45 U. 130, 143 P. 134.

What constitutes such recent possession as to raise the presumption that defendant did the taking, must depend upon nature of property and circumstances of particular case, and, therefore, is ordinarily question of fact for the jury. State v. Bowen, 45 U. 130, 143 P. 134.

The sufficiency of defendant's excuse or explanation is, of course, for the jury. State v. Williams, 49 U. 336, 341, 164 P. 253.

21. Evidence.

In prosecution for larceny of cattle, finding by jury that possession of cattle by defendant was felonious and that his explanation of such possession was not satisfactory, held supported by evidence. State v. Gurr, 40 U. 162, 120 P. 209, 39 L. R. A. (N. S.) 320.

22. Instructions.

Erroneous instructions which are nonprejudicial will not warrant reversal of judgment of conviction. State v. Donovan, 77 U. 343, 294 P. 1108, setting out instruction given.

A. L. R. notes.

Appropriating money or proceeds of paper mistakenly delivered in excess of the amount due or intended, larceny or embezzlement by, 14 A. L. R. 804.

Appropriation of property after obtaining possession by fraud as larceny, 26 A. L. R. 381.

Appropriation or removal without payment of property delivered in expectation of immediate cash payment, as criminal offense, 83 A. L. R. 441.

Asportation which will support charge of larceny, what amounts to, 19 A. L. R. 724.

Assisting in transportation or disposal of property known to have been stolen as rendering one guilty of larceny, 29 A. L. R. 1031.

Criminal liability of corporation for larceny, 59 A. L. R. 379.

Distinction between larceny and embezzlement, 13 A. L. R. 319.

Dogs as subject of larceny, 92 A. L. R. 212.

General owner of property in which another has special interest or right of possession, larceny by, 58 A. L. R. 330.

Individual criminal responsibility of officer or employee for larceny or embezzlement, through corporate act, of property of third person, 33 A. L. R. 787.

Intent to convert property to one's own use or to the use of third person as element of larceny, 12 A. L. R. 804.

Larceny, conviction or acquittal of as bar to prosecution for burglary, 19 A. L. R. 626.

Larceny as affected by distinction between custody and possession, 125 A. L. R. 367.
Larceny of real property or things savoring of real property, 131 A. L. R. 146.
Offense of larceny, embezzlement, robbery or assault to commit robbery, as affected by defendant's intention to take or retain money or property in payment of, or as security for, claim, or to collect debt, or to recoup gambling losses, 116 A. L. R. 997.
Outlawed liquors as subject of larceny or kindred offenses, 75 A. L. R. 1470.
Purchase of property on credit without intending to pay for it as larceny, 35 A. L. R. 1336.
Spouse, larceny or embezzlement by one spouse of other's property, 55 A. L. R. 558.
Unauthorized use of another's property by one lawfully in possession thereof as larceny, 62 A. L. R. 354.

103–36–2. Of Lost Property by Finder.

Every person who finds lost property under circumstances which give him knowledge of a means of inquiry as to the true owner, and who appropriates such property to his own use or to the use of another person not entitled thereto, without first making reasonable and just efforts to find the owner and restore the property to him, is guilty of larceny. (C. L. 17, § 8287.)

Comparable provisions.
Cal. Penal Code, § 485 (substantially identical; offender is "guilty of theft").
Idaho Code, § 17–3502 (substantially identical).

A. L. R. notes.
Finder of property, larceny by, 36 A. L. R. 372.

103–36–3. Degrees of Larceny.

Larceny is divided into two degrees, the first of which is termed grand larceny; the second, petit larceny. (C. L. 17, § 8288.)

Comparable provisions.
Cal. Penal Code, § 486 (identical as to "theft", "grand theft" and "petty theft").
Idaho Code, § 17–3503, Mont. Rev. Codes, § 11370 (identical).

A. L. R. notes.
Criterion of value for purpose of fixing degree of larceny of automobile license plates, 48 A. L. R. 1167.

103–36–4. Grand Larceny Defined.

Grand larceny is committed in either of the following cases:
(1) When the property taken is of value exceeding $50.
(2) When the property taken is from the person of another.
(3) When the property taken is a horse, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, sheep, goat, mule, jack or jenny.
(L. 23, p. 138, § 8289.)

History.
The first two subdivisions of this section are practically identical with R. S. 1898, § 4359. The third subdivision was added by a later amendment. Laws 1899, Ch. 30, p. 50; Comp. Laws 1907, § 4359.
Analogous territorial statute, see Comp. Laws 1888, § 4643, subdivision 3. That subdivision 3 of territorial statute, as amended in 1886, was not impliedly repealed by second 1886 act, see In re Gannett, 11 U. 283, 39 P. 496.

Comparable provisions.
Cal. Penal Code, § 487 (defining "grand theft").
Idaho Code, § 17–3504 (similar; "* * of a value exceeding sixty dollars"; also specifies fox or breed or cross thereof in captivity for breeding or fur production).
Mont. Rev. Codes, § 11368 (defining larceny); § 11371 (includes similar definitions of grand larceny or "larceny committed with a felonious intent").

1. Scope of section.
In this subdivision the word "horse" includes both "gelding" and "mare." People v. Butler, 2 U. 504.

2. Property subject to larceny.
Intoxicating liquor was held to be the subject of larceny notwithstanding

provisions of repealed Liquor Law of 1917, purporting to destroy property rights therein. State v. Evans, 74 U. 389, 279 P. 950. See post 103–36–16.

3. Elements of offense.
Felonious intent is an essential element under subdivision (3). State v. Allen, 56 U. 37, 43, 189 P. 84.

4. Value of property under subdivision (3).
While as a general rule there can be no larceny of property having no value, yet the legislature of this state, acting within the scope of their power, have made the stealing of a calf grand larceny, without reference to its value. State v. Bates, 25 U. 1, 8, 69 P. 70, applying Laws 1899, Ch. 30, p. 50.

5. Larceny or embezzlement.
Where defendant was employed to solicit advertising contracts and within short time he had collected from different persons the sum of $235 due publishing company upon contracts solicited and procured by him, and unlawfully converted money to his own use, but it appeared that $48 was largest sum collected by him from any one person at any one time, it was held that taking of $235 was one embezzlement, and was grand larceny. State v. Gibson, 37 U. 330, 108 P. 349.

6. Grand or petit larceny.
Stealing of steers and cows is always grand larceny, and never petit larceny, regardless of such animals' value. In re Gannett, 11 U. 283, 39 P. 496; In re Ogilvie, 11 U. 290, 39 P. 498.

7. Issues and proof.
On prosecution for stealing sheep, held that it was not necessary to prove that defendant and others with him actually intended to convert sheep to their own use; that it was sufficient to prove beyond reasonable doubt that they took sheep away against will of their owners with intention of permanently depriving latter of their property, and that fact that defendant and his companions killed large number of sheep, wounded others, and did not return rest was sufficient proof of such intention. State v. McKee, 17 U. 370, 53 P. 733. (Miner, J., dissenting.)

8. Stealing from person.
Where property is taken from person or immediate presence of victim, it cannot be less than grand larceny or robbery. State v. O'Day, 93 U. 387, 73 P.2d 965. And see State v. Davis, 28 U. 10, 76 P. 705, applying subdivision (2).

9. Evidence.
Of course, the evidence must sufficiently show that accused knew that he was branding somebody else's calf; that it was not his property. State v. Chynoweth, 41 U. 354, 126 P. 302. The evidence must be otherwise sufficient to sustain the conviction. State v. Frisby, 49 U. 227, 162 P. 616.

In prosecution for larceny of steer, trial court did not err in admitting evidence of pieces of ears of steer arranged upon board for purpose of showing how they were before being cut into pieces by defendant for purpose of obliterating the markings. State v. Church, 54 U. 533, 182 P. 218.

In prosecution for larceny of steer, evidence held sufficient to show felonious taking. State v. Church, 54 U. 533, 182 P. 218.

In prosecution for larceny of steer, identity of animal held sufficiently identified though defendant had obliterated brands, marks, and other means of identifying animal killed. State v. Church, 54 U. 533, 182 P. 218.

Decisions from other jurisdictions.
— Montana.
Where defendant was charged with grand larceny as defined in section 11368 of the Revised Codes (the information charging defendant with having money belonging to the state in his possession and custody and unlawfully appropriating the same to his own use with the intent to deprive the state of its property) and it appeared that the record was barren of any testimony that defendant appropriated the money in question to his own use with the intent to thus deprive the state of its property, judgment of conviction was reversed, it being held that the state was required to prove the facts of appropriation and intent, same being made necessary elements of the alleged offense by the statute. State v. McGuire, 107 Mont. 341, 88 P.2d 35.

A. L. R. notes.
Constitutionality of statute for prevention of larceny of livestock, 3 A. L. R. 81.

103–36–5. Petit Larceny Defined.

Larceny in other cases is petit larceny. (C. L. 17, § 8290.)

Comparable provisions.
Cal. Penal Code, § 488 ("theft in other cases is petty theft").
Idaho Code, § 17–3505. Mont. Rev. Codes, § 11372 (identical).

103–36–6. Penalty for Grand Larceny.

Grand larceny is punishable by imprisonment in the state prison for a term not less than one year nor more than ten years, and by a fine of not less than $50 nor more than $1,000, or by imprisonment only. (C. L. 17, § 8291.)

History.
The provision with respect to imprisonment is identical with R. S. 1898, § 4361; the provision for a fine was added later. Comp. Laws 1907, § 4361.

Comparable provisions.
Idaho Code, § 17–3506, Mont. Rev. Codes, § 11373 ("* * * for not less than one nor more than fourteen years"; fine is not mentioned).

103–36–7. Penalty for Petit Larceny.

Petit larceny is punishable by a fine in any sum less than $300 or by imprisonment in the county jail not exceeding six months, or by both. (C. L. 17, § 8292.)

History.
This section is identical with R. S. 1898, § 4362; Comp. Laws 1907, § 4362.

Comparable provisions.
Idaho Code, § 17–3507 (substantially identical).
Mont. Rev. Codes, § 11374 (fine, not exceeding $500, or imprisonment not exceeding six months, or both).

1. Jurisdiction of justice of the peace.
Under this section, after justice of peace sentences defendant to jail for petit larceny, and to pay fine, he is without authority to adjudge that defendant be further imprisoned in default of payment of fine imposed. In re Lewis, 10 U. 47, 41 P. 1077, applying identical section in 2 Comp. Laws 1888, § 4645.

103–36–8. Of Evidence of Debt.

If the thing stolen consists of any evidence of debt or other written instrument, the amount of money due thereupon or secured to be paid thereby and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, is the value of the thing stolen. (C. L. 17, § 8293.)

Comparable provisions.
Cal. Penal Code, § 492, Idaho Code, § 17–3508, Mont. Rev. Codes, § 11377 (identical).

103–36–9. Of Passage Tickets.

If the thing stolen is any ticket or other paper or writing entitling or purporting to entitle the holder or proprietor thereof to a passage upon any railroad or vessel or other public conveyance, the price at which tickets entitling a person to a like passage are usually sold by the proprietors of such conveyance is the value of such ticket, paper or writing. (C. L. 17, § 8294.)

Comparable provisions.
Cal. Penal Code, § 493, Idaho Code, § 17–3509, Mont. Rev. Codes, § 11378 (identical).

103–36–10. Of Written Instruments Ready for Delivery, but Undelivered.

All the provisions of this chapter apply where the property taken is an instrument for the payment of money, evidence of debt, public

security or passage ticket, completed and ready to be issued or delivered, although the same has never been issued or delivered by the makers thereof to any person as a purchaser or owner.

(C. L. 17, § 8295.)

Comparable provisions.
Cal. Penal Code, § 494, Idaho Code, § 17–3510, Mont. Rev. Codes, § 11379 (identical).

Cross-references.
Description of money, etc., 105–21–23.

103–36–11. Of Things Severed from Realty.

The provisions of this chapter apply where the thing taken is any fixture or part of the realty and is severed at the time of the taking, in the same manner as if the thing had been severed by another person at some previous time. (C. L. 17, § 8296.)

Comparable provisions.
Cal. Penal Code, § 495, Idaho Code, § 17–3511, Mont. Rev. Codes, § 11380 (identical).

A. L. R. notes.
Larceny of real property or things savoring of real property, 131 A. L. R. 146.

103–36–12. Receiving Stolen Property.

Every person who, for his own gain or to prevent the owner from again possessing his property, buys or receives any personal property exceeding $50 in value, knowing the same to have been stolen, is punishable by imprisonment in the state prison not exceeding five years; if the value of the property so bought or received is $50 or less in value, he is guilty of a misdemeanor. (C. L. 17, § 8297.)

History.
This section is identical with R. S. 1898, § 4367; Comp. Laws 1907, § 4367.

Comparable provisions.
Idaho Code, § 17–3512 (similar; value is not specified; "* * * punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding six months, or by fine not exceeding $1,000, or by both such fine and imprisonment").

1. Accomplices and accessories.
Witness in burglary prosecution held not an accomplice so far as the corroboration of his testimony might go, although he might have been an accessory after the fact or the receiver of stolen property. State v. Bowman, 92 U. 540, 70 P.2d 458, 111 A. L. R. 1393.

2. Evidence.
In prosecution under this section, evidence of other stolen property in possession of defendant, to prove guilty knowledge, was admissible. State v. Zeman, 63 U. 422, 226 P. 465.

3. Instructions.
In prosecution under this section, refusal to charge jury that defendant received the property with fraudulent intent of depriving the true owner of its immediate possession was not error, where information did not charge that the property was received to prevent owner from again possessing it. State v. Zeman, 63 U. 422, 226 P. 465.

A. L. R. notes.
Admissibility, in prosecution for receiving stolen property of evidence of transactions other than, but similar to, that upon which the prosecution is based, for purpose of showing guilty knowledge or intent, 105 A. L. R. 1288; possession of recently stolen goods by one charged with receiving them as evidence on question of guilty knowledge, 68 A. L. R. 187; thief as accomplice of one charged with receiving stolen property, or vice versa, within rule requiring corroboration, 111 A. L. R. 1398.

103–36–13. Receiving Property Stolen in Another State.

Every person who in another state or country, steals the property of another, or receives such property knowing it to have been stolen, and brings the same into this state, may be convicted and punished in the

same manner as if such larceny or receiving had been committed in this state. (C. L. 17, § 8298.)

Comparable provisions.
Idaho Code, § 17–3513, Mont. Rev. Codes, § 11381 (identical).

Cross-references.
Jurisdiction in such case, 105–8–16; where stolen property taken to another county, 105–8–12.

103–36–14. Of Gas.

Every person who, with intent to injure or defraud, makes or causes to be made any pipe, tube or other instrument, and connects the same, or causes it to be connected, with any main, service pipe or other pipe used for conducting or supplying any artificial or natural gas in such manner as to supply such gas to any burner or orifice by or at which such gas is consumed, around or without passing through the meter provided for the measuring and registering the quantity consumed, or in any other manner so as to evade payment therefor, and every person who, with like intent, injures or alters any gas meter or obstructs its action, is guilty of a misdemeanor. (C. L. 17, § 8300.)

Comparable provisions.
Cal. Penal Code, § 498 (similar).
Iowa Code 1939, § 13014 (pertaining to electricity, gas and water).
Mont. Rev. Codes, § 11385 (similar as to gas and electricity).

Cross-references.
Injury to gas main, 103–46–4.

A. L. R. notes.
Electrical energy, gas, water, heat, power, etc., as subject of larceny, 113 A. L. R. 1282.

103–36–15. Of Electricity.

Every person who, with intent to injure or defraud, makes or causes to be made any connection by wire or other instrument with any cable or wire used for conducting or supplying electricity for power, lighting, heating or other purpose to any burner or orifice by or at which such electricity is used or consumed for lighting, heating, power or any other purpose, around or without passing through the meter provided for measuring and registering the quantity used or consumed, or in any other manner so as to evade payment therefor, and every person who, with like intent, injures or alters any electric meter or obstructs its action, is guilty of a misdemeanor. (C. L. 17, § 8301.)

Comparable provisions.
Cal. Penal Code, § 499a (similar).

Cross-references.
Injury to electrical apparatus, etc., 103–46–4, 103–46–13 to 103–46–16.

A. L. R. notes.
Electrical energy, gas, water, heat, power, etc., as subject of larceny, 113 A. L. R. 1282.

103–36–16. Of Water.

Every person who, with intent to injure or defraud, connects or causes to be connected any pipe, tube or other instrument with any main, service pipe or other pipe, conduit or flume used for conducting water, for the purpose of taking water from such main, service pipe, conduit or flume without the knowledge of the owner thereof, and with intent to evade payment therefor, is guilty of a misdemeanor. (C. L. 17, § 8302.)

History.
This section is identical with R. S. 1898, § 4372; Comp. Laws 1907, § 4372.

Comparable provisions.
Cal. Penal Code, § 499, Idaho Code, § 17–3514 (substantially identical).
Mont. Rev. Codes, § 11386 (pertains to water, gas and electricity).

Cross-references.
Opening water valve closed by authority, 103–46–5; illegally using water, 103–59–2; interfering with flow of water in stream, etc., 103–59–1; injuring canal, dam, etc., 103–59–4.

1. Water as personal property.
Water in the pipes of a distributing system is personal property, and was at common law the subject of larceny. It is not appurtenant to any land. Bear Lake & River Water Works & Irrigation Co. v. Ogden City, 8 U. 494, 33 P. 135.

A. L. R. notes.
Electrical energy, gas, water, heat, power, etc., as subject of larceny, 113 A. L. R. 1282.

103–36–17. Of Property Salvaged from Fire.

Every person who saves from fire, or from a building endangered by fire, any property, and for two days thereafter corruptly neglects to notify the owner, or the chief police officer of the city or town or sheriff of the county in which such property is situated, is guilty of larceny.
(C. L. 17, § 8303.)

Comparable provisions.
Cal. Penal Code, § 500 (similar as to such offense committed "in the city and county of San Francisco"; imprisonment for not less than one nor more than ten years).

103–36–18. Of Parts of Railroad Locomotives and Cars.

Any person who unlawfully removes, takes, steals, changes, adds to, takes from, or in any manner interferes with any journal bearings or brasses, or any parts or attachments of any locomotive, tender or car, or any fixture or attachment belonging thereto, connected with or used in operating any locomotive, tender or car owned, leased or used by any railway or transportation company in this state, is guilty of a felony.
(C. L. 17, § 8304.)

103–36–19. Id. Penalty for Receiving Such Stolen Property.

Every person who buys or receives any of the property described in the next preceding section, knowing the same to have been stolen, is guilty of a felony. (C. L. 17, § 8305.)

CHAPTER 37

LEWDNESS *

103–37–1. Low Association, Indecent Exposures, Exhibitions, Books, Pictures, etc.
103–37–2. Id. Seizure Authorized.
103–37–3. Id. Summary Destruction of.
103–37–4. Id. Destruction After Trial.

*History of act. This chapter was R. S. 1898, Title 75, Ch. 31, p. 906; Comp. Laws 1907, Title 90, Ch. 31, p. 1303.

103–37–1. Low Association, Indecent Exposures, Exhibitions, Books, Pictures, etc.

Every person is guilty of a misdemeanor who willfully and lewdly, either:

(1) Associates, in a lewd and lascivious manner, with any person whether married or unmarried, shall be guilty of open and gross lewdness or lascivious behavior, or who shall designedly make any open, public, or indecent exposure of his or her person or the private parts thereof, or the person or private parts of another; or,

(2) Procures, counsels or assists any person to expose himself, or to take part in any artists' model exhibition, or to make any other exhibition of himself to public view, or to the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts; or,

(3) Imports, writes, composes, stereotypes, prints, designs, copies, draws, paints, or otherwise prepares, publishes, sells, offers for sale, displays, exhibits by machine or otherwise or distributes any writing, paper, book, picture, drawing, magazine, pamphlet, print, design, figure or other thing which is obscene, lewd, lascivious, filthy, indecent, disgusting, or impure, or which manifestly tends to corrupt the morals of youth; or who introduces into a family, school, or place of education or any other place, or buys, procures, receives, or has in his possession any such writing, paper, book, picture, drawing, magazine, pamphlet, print, design, figure, device, or other things, either for the purpose of selling, exhibiting, loaning, or circulation or with the intent to introduce the same into a family, school, or place of education, or any other place; or,

(4) Writes, composes or publishes any notice or advertisement of any such writing, paper, book, picture, drawing, magazine, pamphlet, print, design, figure, or device; or any notice or advertisement of any article, prescription or preparation for producing or facilitating a miscarriage; or,

(5) Sings any lewd or obscene song, ballad or other words in any public place, or in any place where there are persons present to be annoyed thereby. (C. L. 17, § 8144.)

History.
As amended by L. 41, ch. 101, eff. May 13, making material changes in text.

Comparable provisions.
Cal. Penal Code, § 311. Idaho Code, § 17–2101, Mont. Rev. Codes, § 11136 (similar as to exposure of person or private parts; identical with subd. 2 herein; identical with subd. 5 herein; pertain also to writings, designs, advertisements, etc.; subd. 5 of the California provision reads in part: "sings or speaks any lewd or obscene song * * *"; and the California provision likewise contains a qualification as to the applicability of subd. 5 to actors and actresses).

A. L. R. notes.
Indecent exposures as offense, 93 A. L. R. 996; publications of a scientific, educational or instructive character regarding sex relations as within statutes relating to obscene or immoral publications, 76 A. L. R. 1099; validity, construction, and application of statutes or ordinances relating to decency as regards wearing apparel or lack of it, 110 A. L. R. 1233; what amounts to an obscene play or book within prohibition statute, 81 A. L. R. 801.

103–37–2. Id. Seizure Authorized.

Every person who is authorized or enjoined to arrest any person for a violation of subdivision (3) of the next preceding section is equally

authorized and enjoined to seize any obscene or indecent writing, paper, book, picture, print, design, figure or device, found in possession or under the control of the person so arrested, and to deliver the same to the magistrate before whom the person so arrested is required to be taken. (C. L. 17, § 8145.)

Comparable provisions.
Cal. Penal Code, § 312, Idaho Code, § 17-2102, Mont. Rev. Codes, § 11137 (substantially identical).

A. L. R. notes.
Federal Constitution as a limitation upon the powers of the states in respect of search and seizure, 19 A. L. R. 644; what amounts to an obscene play or book within prohibition statute, 81 A. L. R. 801.

103–37–3. Id. Summary Destruction of.

The magistrate to whom any obscene or indecent writing, paper, book, picture, print, design, figure or device is delivered pursuant to the foregoing section must upon the examination of the accused, or if the examination is delayed or prevented without awaiting such examination, determine the character of such writing, paper, book, picture, print, design, figure or device, and, if he finds it to be obscene or indecent, he must deliver one copy to the prosecuting attorney of the county in which the accused is liable to complaint or trial, and must at once destroy all the other copies. (C. L. 17, § 8146.)

Comparable provisions.
Cal. Penal Code, § 313, Mont. Rev. Codes, § 11138 (substantially identical).

103–37–4. Id. Destruction After Trial.

Upon the final conviction of the accused such attorney must cause any writing, paper, book, picture, print, design, figure or device, in respect whereof the accused stands convicted and which remains in the possession or under the control of such attorney, to be destroyed. (C. L. 17, § 8147.)

Comparable provisions.
Cal. Penal Code, § 314, Mont. Rev. Codes, § 11139 (substantially identical).

A. L. R. notes.
Federal Constitution as a limitation upon the powers of the states in respect of search and seizure, 19 A. L. R. 644.

CHAPTER 38

LIBEL AND SLANDER *

103–38–1.	Libel Defined.	103–38–8.	Id. Communications Between Persons Interested Therein.
103–38–2.	Penalty.	103–38–9.	Slander — Imputing Unchastity to Female.
103–38–3.	When Malice Presumed.	103–38–10.	Id. Imputation Need Not Be False—Truth, a Defense.
103–38–4.	Need Not Be Seen or Read, if Exposed.	103–38–11.	Conveying False Information to Newspapers.
103–38–5.	Liability of Authors of Publications.		
103–38–6.	Privilege—Fair Report of Governmental Proceedings.		
103–38–7.	Id. Does Not Extend to Libelous Matter.		

*History of act. This chapter was R. S. 1898, Title 75, Ch. 23, p. 898; Comp. Laws 1907, Title 90, Ch. 23, p. 1293.

103–38–1. Libel Defined.

A libel is a malicious defamation, expressed either by printing or by signs or pictures or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural defects, of one who is alive, and thereby to expose him to public hatred, contempt or ridicule. (C. L. 17, § 8072.)

History.

This section is identical with Comp. Laws 1876, p. 593, § 1954; 2 Comp. Laws 1888, § 4489; R. S. 1898, § 4196; Comp. Laws 1907, § 4196.

Comparable provisions.

Cal. Penal Code, § 248, Idaho Code, § 17-1501, Mont. Rev. Codes, § 10989 (identical, except as being worded in part as follows "* * * either by writing, printing * * * natural or alleged defects of one who is alive * * *").

Iowa Code 1939, § 13256 (defining libel).

Cross-references.

Definition of libel, 62–2–2; privileged publications, 62–2–3; threat to publish libel, 103–17–7; civil actions for libel or slander, 104–13–9; libel by newspapers, 62–2.

1. Essential elements.

Malice is essential ingredient of criminal libel, and, therefore, on prosecution therefor, any evidence which tends to show want of malice is admissible. People v. Glassman, 12 U. 238, 42 P. 956.

2. Construction and acceptation of words.

Words, complained of on prosecution for criminal libel, are to be construed by court in plain and popular sense in which rest of world naturally would understand them. People v. Ritchie, 12 U. 180, 42 P. 209.

Circular, which was basis of conviction of criminal libel, held capable of being construed as alleging not only that person referred to in circular was guilty of maladministration of affairs of building and loan association, but also as alleging that, in order to conceal such maladministration, resort was had to fraudulent practices, such as "padding" of accounts. People v. Ritchie, 12 U. 180, 42 P. 209.

Falsely charging a judge of a court with grossly improper and immoral sexual relations is a criminal libel. People v. Greenwell, 5 U. 112, 13 P. 89.

Mere abusive language or vile epithets or scurrility is not of itself criminal libel. People v. Ritchie, 12 U. 180, 42 P. 209.

3. Criticism of candidates for office.

For purpose of law of criminal libel, person becoming candidate for public office is regarded in law as thereby putting his character in issue in respect to his qualifications and fitness for office sought by him, and, so far as his character relative to these matters is concerned, he is amenable to public, as well as private, criticism, made in good faith and based on probable or reasonable cause. People v. Glassman, 12 U. 238, 42 P. 956.

A. L. R. notes.

Character of libel or slander for which criminal prosecution will lie, 19 A. L. R. 1470; imputing to lawyer solicitation of business or fomenting of litigation as libelous, 112 A. L. R. 177.

103–38–2. Penalty.

Every person who willfully and with a malicious intent to injure another publishes or procures to be published any libel is punishable by fine not exceeding $1,000 or by imprisonment in the county jail not exceeding one year. (C. L. 17, § 8073.)

History.

This section is identical with Comp. Laws 1876, p. 593, § 1955; 2 Comp. Laws 1888, § 4490; R. S. 1898, § 4197; Comp. Laws 1907, § 4197.

Comparable provisions.

Cal. Penal Code, § 249, Mont. Rev. Codes, § 10990 (substantially identical, except as reading in part: "* * * not exceeding five thousand dollars * * *").

103–38–3. When Malice Presumed.

An injurious publication is presumed to have been malicious, if no justifiable motive for making it is shown. (C. L. 17, § 8074.)

History.
This section is identical with Comp. Laws 1876, p. 593, § 1956; 2 Comp. Laws 1888, § 4491; R. S. 1898, § 4198; Comp. Laws 1907, § 4198.

Comparable provisions.
Cal. Penal Code, § 250, Idaho Code, § 17–1503, Mont. Rev. Codes, § 10991 (identical).

Cross-references.
Malice not inferred from publication or communication, 62–2–4.

1. Newspaper article.
Where newspaper article, defamatory in character, is false, it is itself evidence of malicious intent. People v. Glassman, 12 U. 238, 42 P. 956.

103–38–4. Need Not Be Seen or Read, if Exposed.

To sustain a charge of publishing a libel it is not essential that the words or things complained of should have been read or seen by another. It is enough that the accused knowingly parted with the immediate custody of the libel under circumstances which exposed it to be read or seen by any other person than himself. (C. L. 17, § 8076.)

History.
This section is in part practically identical with Comp. Laws 1876, p. 594, § 1958. It is identical with R. S. 1898, § 4200; Comp. Laws 1907, § 4200.

Comparable provisions.
Cal. Penal Code, § 252, Idaho Code, § 17–1505, Mont. Rev. Codes, § 10993 (substantially identical).

103–38–5. Liability of Authors of Publications.

Each author, editor and proprietor of any newspaper or serial publication is chargeable with the publication of any words contained in any part of such book or number of such newspaper or serial.
(C. L. 17, § 8077.)

History.
This section is identical with Comp. Laws 1876, p. 594, § 1959; 2 Comp. Laws 1888, § 4494; R. S. 1898, § 4201; Comp. Laws 1907, § 4201.

Comparable provisions.
Cal. Penal Code, § 253, Idaho Code, § 17–1506, Mont. Rev. Codes, § 10994 (substantially identical).

1. Enforcement of section.
This section will be enforced to protect justices of the peace and other inferior courts from libelous publications which they are without jurisdiction to punish themselves, as for a contempt. People v. Carrington, 5 U. 531, 537, 17 P. 735, applying Comp. Laws 1876, pp. 593, 594, §§ 1954–1963.

103–38–6. Privilege—Fair Report of Governmental Proceedings.

No reporter, editor or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative or other public official proceedings, or of any statement, speech, argument or debate in course of the same, except upon proof of malice in making such report, which shall not be implied from the mere fact of publication. (C. L. 17, § 8078.)

History.
This section is identical with Comp. Laws 1876, p. 594, § 1960; 2 Comp. Laws 1888, § 4495; R. S. 1898, § 4202; Comp. Laws 1907, § 4202.

Comparable provisions.
Cal. Penal Code, § 254, Idaho Code, § 17–1507 (identical); Mont. Rev. Codes, § 10995 (substantially identical).

Cross-references.
Libel published in good faith, retraction, damages, 62–2; privileged publications, 62–2–3.

1. Scope and operation of section.
Statute is broad enough to include evidence of witnesses, adduced in judicial proceeding, since such evidence consists of statements made in course of

such proceeding, and, therefore, newspaper may publish "fair and true report" of evidence, with liability attaching as result of publication thereof only when such report of evidence is made maliciously for purpose of injury. People v. Glassman, 12 U. 238, 42 P. 956.

2. Evidence.

Where reporter, editor, or publishing company is defendant in prosecution for libel, based on newspaper article referring to evidence adduced in judicial proceeding, such defendant should be permitted to introduce evidence to which article referred for purpose of showing that article was fair and true report of evidence. People v. Glassman, 12 U. 238, 42 P. 956.

On prosecution for criminally libeling attorney, who was candidate for public office, by means of newspaper article which, among other things, referred to testimony of person who was defendant on previous trial for murder, held that, under circumstances, court stenographer, who took down testimony on such murder trial, should have been permitted to read from his notes, made thereon, for purpose of rebutting malice and to show that allegedly libelous article, in so far as it referred to murder defendant's testimony, was true and fair report thereof. People v. Glassman, 12 U. 238, 42 P. 956.

103–38–7. Id. Does Not Extend to Libelous Matter.

Libelous remarks or comments connected with matter privileged by the next preceding section receive no privilege by reason of their being so connected. (C. L. 17, § 8079.)

History.

This section is practically identical with Comp. Laws 1876, p. 594, § 1961; 2 Comp. Laws 1888, § 4496; R. S. 1898, § 4203; Comp. Laws 1907, § 4203.

Comparable provisions.

Cal. Penal Code, § 255, Idaho Code, § 17–1508, Mont. Rev. Codes, § 10996 (substantially identical).

103–38–8. Id. Communications Between Persons Interested Therein.

A communication made to person interested in the communication by one who is also interested, or who stands in such relation to the former as to afford a reasonable ground for supposing his motive innocent, is not presumed to be malicious, and is a privileged communication. (C. L. 17, § 8080.)

History.

This section is practically identical with Comp. Laws 1876, p. 594, § 1962; 2 Comp. Laws 1888, § 4497; R. S. 1898, § 4204, Comp. Laws 1907, § 4204.

Comparable provisions.

Cal. Penal Code, § 256, Mont. Rev. Codes, § 10997 (substantially identical).

1. Conditions precedent to claim of privilege.

Before a communication or publication may be regarded as conditionally privileged under this section, it must be made under circumstances furnishing a legal duty or excuse for making it, or some additional facts must be alleged showing it to have been made without legal excuse. Unsolicited communications by defendants unrelated to plaintiff cannot be regarded as privileged. Burton v. Mattson, 50 U. 133, 166 P. 979.

2. Illustrative cases.

A letter written by a member of the Latter Day Saints Church which, however, was not "souly or holy," or written for religious purposes, but rather to injure a business competitor, was not qualifiedly privileged under this section, more especially where complaint alleges that article was maliciously composed and published. Malouf v. Metropolitan Life Ins. Co., 75 U. 175, 192, 283 P. 1065.

On prosecution for criminally libeling, through medium of newspaper article, candidate for public office, held that article, although defamatory in that it criticized and challenged such candidate's qualifications and fitness for office sought by him, belonged to class of privileged communications which were protected, if made in good faith and on reasonable and probable cause and without malice. People v. Glassman, 12 U. 238, 42 P. 956.

103-38-9. Slander—Imputing Unchastity to Female.

If any person shall orally or otherwise, falsely and maliciously, or falsely and wantonly, impute to any female, married or unmarried, a want of chastity, he is guilty of criminal slander, and shall be punished by a fine of not less than $100 nor more than $1,000, or by imprisonment in the county jail not exceeding one year, or by both.

(C. L. 17, § 8082.)

History.
This section was R. S. 1898, § 4206, and is identical with Comp. Laws 1907, § 4206.

103-38-10. Id. Imputation Need Not Be False—Truth, a Defense.

In any prosecution under the next preceding section it shall not be necessary for the state to show that such imputation was false, but the defendant may in justification show the truth of the imputation, and the general reputation for chastity of the female alleged to have been slandered may be inquired into. (C. L. 17, § 8083.)

History.
This section is practically identical with R. S. 1898, § 4207; Comp. Laws 1907, § 4207.

103-38-11. Conveying False Information to Newspapers.

Any person who willfully states, conveys, delivers or transmits, by any means whatsoever, to the manager, editor, publisher or reporter of any newspaper, magazine, periodical or serial for publication therein, any false or libelous statement concerning any person, and thereby secures actual publication of the same, is guilty of a misdemeanor.

(C. L. 17, § 8084.)

Comparable provisions.
Mont. Rev. Codes, § 10999 (substantially the same; fine, not exceeding $500, or confined in county jail not exceeding six months, or both).

Cross-references.
Truth a defense, 105-32-30.

CHAPTER 39

MAYHEM

103-39-1. Defined.
103-39-2. Penalty.

103-39-1. Defined.

Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables or renders it useless, or who cuts out or disables the tongue, puts out an eye, or slits the nose, ear or lip, is guilty of mayhem. (C. L. 17, § 8037.)

History.
This section is identical with R. S. 1898, § 4171; Comp. Laws 1907, § 4171.

Comparable provisions.
Cal. Penal Code, § 203, Idaho Code, § 17-1301, Mont. Rev. Codes, § 10968

(substantially identical; "* * * or disables, disfigures or renders it useless * * *").

Iowa Code, 1939 § 12928 (prescribing punishment for maiming or disfiguring another person).

Cross-references.

Assault with intent to commit, 103-7-7.

1. Application of section.

In prosecution under this section for biting off end of sister-in-law's nose, instructions on defendant's intoxication, flight, and intent, held not erroneous. State v. Fairclough, 86 U. 326, 44 P.2d 692.

A. L. R. notes.

Mayhem as dependent on part of body injured and extent of injury, 58 A. L. R. 1320; mayhem by use of poison or acid, 58 A. L. R. 1328.

103-39-2. Penalty.

Mayhem is punishable by imprisonment in the state prison not exceeding ten years. (C. L. 17, § 8038.)

History.

This section is identical with R. S. 1898, § 4172; Comp. Laws 1907, § 4172.

Comparable provisions.

Cal. Penal Code, § 204, Mont. Rev. Codes, § 10969 (not exceeding 14 years).

CHAPTER 40

NARCOTICS AND POISONS

103-40-1. Operating Opium Den.
103-40-2. Id. Liability of Owner of Premises.
103-40-3. Id. Liability of Servants and Resorters Therein.
103-40-4. Sales of Tobacco or Narcotics to Minors.
103-40-5. Id. Purchase or Possession by Minors.
103-40-6. Poisoning Food or Drink.

103-40-1. Operating Opium Den.

Any person who establishes or keeps a house wherein opium is smoked or chewed by others than the members of his family, and any person who sells or gives to another, not a member of his family, in the house where his family lives, any opium to be smoked or chewed, whether in a house kept or used for such purposes or elsewhere, is guilty of a misdemeanor. (C. L. 17, § 8439.)

Comparable provisions.

Idaho Code, § 17-2901 (similar in purport).

Cross-references.

Cities may punish, 15-8-47.

103-40-2. Id. Liability of Owner of Premises.

Where a proprietor, landlord or agent rents any house, knowing that it is intended to be used for any of the purposes mentioned in the next preceding section, and it is so used, such proprietor, landlord or agent is guilty of a misdemeanor. (C. L. 17, § 8440.)

103-40-3. Id. Liability of Servants and Resorters Therein.

Any clerk, servant or employee in any such house who may aid in such use of opium, and every person resorting thereto who so uses opium by smoking or chewing it, is guilty of a misdemeanor. (C. L. 17, § 8441.)

103–40–4. Sales of Tobacco or Narcotics to Minors.

Any person who sells, gives or furnishes any cigar, cigarette or tobacco in any form, or any opium or other narcotic in any form, to any person under twenty-one years of age is guilty of a misdemeanor. The provisions of this section shall not apply to the use, sale, giving or furnishing of any narcotic upon the prescription of a physician.

(C. L. 17, § 8442.)

History.
This section was R. S. 1898, § 4469; Comp. Laws 1907, § 4469.

Cross-references.
Tobacco, Title 93; limitations on possession and sale of narcotics, 79–10a, 79–12.

103–40–5. Id. Purchase or Possession by Minors.

Any person under the age of twenty-one years who buys, accepts or has in his possession any cigar, cigarette or tobacco in any form, or any opium or any other narcotic in any form, is guilty of a misdemeanor, or shall be deemed a delinquent child, as the case may be.

(C. L. 17, § 8443.)

History.
This section was Comp. Laws 1907, § 4469x, but age was formerly "eighteen years."

Cross-references.
Unlawful use of tobacco by minors, 93–3.

103–40–6. Poisoning Food or Drink.

Every person who willfully mingles any poison with any food, drink or medicine with intent that the same shall be taken by any human being to his injury, and every person who willfully poisons any spring, well, stream or reservoir of water is punishable by imprisonment in the state prison for a term not less than one nor more than ten years.

(C. L. 17, § 8171.)

Comparable provisions.
Cal. Penal Code, § 347 (substantially identical).

Cross-references.
Administering poison with intent to kill, 103–28–13; administering a narcotic to commit felony, 103–7–10.

A. L. R. notes.
Pollution of waters generally, see A. L. R. annotations appended to 100–1–1.

CHAPTER 41

NUISANCES *

103–41–1. Defined.
103–41–2. Befouling Waters.
103–41–3. Public Nuisance Defined.
103–41–4. Id. Unequal Effects to Several Immaterial.
103–41–5. Id. Penalty.
103–41–6. Carcass of Dead Animal—Disposition of.
L. 1941, 2nd Spec. Sess., ch. 30; eff. June 18.
103–41–7. Governor May Direct Attorney General to Abate Nuisances.
103–41–8. Id. Action Shall Be Brought in Form Prescribed by Code of Civil Procedure.
103–41–9. Effective Date.

* History of act. This chapter was R. S. 1898, Title 75, Ch. 35, p. 910; Comp. Laws 1907, Title 90, Ch. 35, p. 1308.

103–41–1. Defined.

Whatever is dangerous to human life or health, and whatever renders soil, air, water or food impure or unwholesome, are declared to be nuisances and to be illegal, and every person, either owner, agent or occupant, having aided in creating or contributing to the same, or who may support, continue or retain any of them, is guilty of a misdemeanor. (C. L. 17, § 2735.)

History.

This section is identical with Comp. Laws 1907, § 1113x.

Cross-references.

Nuisances, Title 64; local boards of health to abate, 35–3–5; unlicensed bathing beaches, 35–4–25.

1. Civil liability for violation of section.

Violation of this section constitutes a misdemeanor, and, in addition to the right of an action by an individual, the board of health is also authorized to abate such a nuisance. Salt Lake City v. Young, 45 U. 349, 145 P. 1047, applying identical section in Comp. Laws 1907.

Under this section "the right to recover damages for injuries occasioned by fumes, gases, dust, smoke, foul air, etc., being cast upon one's property by another, in proper cases, is well established. But the rule of liability is not absolute and the law does not afford redress for every such discomfort or annoyance. Extreme rights in this regard cannot be enforced." Dahl v. Utah Oil Refining Co., 71 U. 1, 11, 262 P. 269.

A. L. R. notes.

Automobile gas filling or supply station, as nuisance, 51 A. L. R. 1224.

Creamery or milk distributing plant, as nuisance, 31 A. L. R. 187.

Dance hall or public dance as nuisance, 28 A. L. R. 1173.

Garage as nuisance, 50 A. L. R. 107.

Immunity from taxation or other special privilege or favor granted industries or industrial plants of certain kind as affecting character of such plant or industry as a nuisance, 122 A. L. R. 1018.

Storing of explosives in highway as nuisance, 11 A. L. R. 719.

103–41–2. Befouling Waters.

Any person who either:

(1) Constructs or maintains a corral, sheep pen, goat pen, stable, pigpen, chicken coop or other offensive yard or outhouse, where the waste or drainage therefrom shall flow directly into the waters of any stream, well or spring of water used for domestic purposes; or,

(2) Deposits, piles, unloads or leaves any manure heap, offensive rubbish or the carcass of any dead animal, where the waste or drainage therefrom will flow directly into the waters of any stream, well or spring of water used for domestic purposes; or,

(3) Dips or washes sheep in any stream, or constructs, maintains or uses any pool or dipping vat for dipping or washing sheep in such close proximity to any stream used by the inhabitants of any city or town for domestic purposes as to make the waters thereof impure or unwholesome; or,

(4) Constructs or maintains any corral, yard or vat to be used for the purpose of shearing or dipping sheep within twelve miles of any city or town, where the refuse or filth from such corral or yard would naturally find its way into any stream of water used by the inhabitants of any city or town for domestic purposes; or,

(5) Establishes and maintains any corral, camp or bedding place for the purpose of herding, holding or keeping any cattle, horses, sheep, goats or hogs within seven miles of any city or town, where the refuse or filth from such corral, camp or bedding place will naturally find its

way into any stream of water used by the inhabitants of any city or town for domestic purposes;—is guilty of a misdemeanor.

(L. 27, p. 2, § 8184.)

History.
This section differs in no material respects from R. S. 1898, § 4274; Comp. Laws 1907, § 4274.

1. Validity.
This section is a valid exercise of the state's police power. Salt Lake City v. Young, 45 U. 349, 145 P. 1047.

2. Specific applications of subdivisions.
A person who grazes his sheep upon the watershed which is protected by 15-8-15 violates this section. Bountiful City v. De Luca, 77 U. 107, 129, 292 P. 194, 72 A. L. R. 657.

Where defendant willfully and intentionally drives goats in and across a creek and intentionally permits them to drink directly out of it, where such a creek is a watershed protected under 15-8-15, judgment of conviction will be sustained. Bountiful City v. Granato, 77 U. 133, 292 P. 205.

Discharge into canal waters, used by three or more persons for irrigation and domestic purposes, of water which renders canal waters unfit for such purposes, creates public nuisance. North Point Consolidated Irrigation Co. v. Utah & Salt Lake Canal Co., 16 U. 246, 52 P. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607.

103-41-3. Public Nuisance Defined.

A public nuisance is a crime against the order and economy of the state, and consists in unlawfully doing any act, or omitting to perform any duty, which act or omission either:

(1) Annoys, injures or endangers the comfort, repose, health or safety of three or more persons; or,

(2) Offends public decency; or,

(3) Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake, stream, canal or basin, or any public park, square, street or highway; or,

(4) In any way renders three or more persons insecure in life or the use of property.

(C. L. 17, § 8185.)

History.
This section is practically identical with Comp. Laws 1876, § 2031; 2 Comp. Laws 1888, § 4566; R. S. 1898, § 4275; Comp. Laws 1907, § 4275.

Cross-references.
Abatement by attorney general, 103-41-7; obstruction of highways, 36-1-12 et seq.

1. Determination of existence of nuisance.
In determining question of nuisance, motive or intent with which act complained of was committed cannot be considered. People v. Burtleson, 14 U. 258, 47 P. 87.

2. Illustrative cases.
Discharge into canal waters, used by three or more persons for irrigation and domestic purposes, of water which renders canal waters unfit for such purposes, creates public nuisance. North Point Consolidated Irrigation Co. v. Utah & Salt Lake Canal Co., 16 U. 246, 52 P. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607.

3. Defenses or justification.
Where party so uses his property as to annoy, injure, or endanger comfort, repose, health, or safety of three or more persons, his acts are unlawful and he is liable to prosecution for them, even though, in committing such unlawful acts, he is in pursuit of lawful business and is conducting such business in a reasonable and careful manner. People v. Burtleson, 14 U. 258, 47 P. 87.

4. Prescriptive rights.
General rule is that there can be no prescriptive right to maintain public nuisance. North Point Consolidated Irrigation Co. v. Utah & Salt Lake Canal Co., 16 U. 246, 52 P. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607.

103–41–1. Id. Unequal Effects to Several Immaterial.

An act which affects three or more persons in any of the ways specified in the next preceding section is not less a nuisance because the extent of the annoyance or damage inflicted on individuals is unequal. (C. L. 17, § 8186.)

History.
This section is practically identical with Comp. Laws 1876, § 2032, and is identical with R. S. 1898, § 4276; Comp. Laws 1907, § 4276.

Comparable provisions.
Cal. Penal Code, § 371 (act which affects entire community or neighborhood, or any considerable number of persons, is not less a nuisance because extent of annoyance or damage inflicted upon individuals is unequal).

103–41–5. Id. Penalty.

Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who willfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor. (C. L. 17, § 8187.)

History.
This section is identical with R. S. 1898, § 4277; Comp. Laws 1907, § 4277.

Comparable provisions.
Cal. Penal Code, § 372 (identical).

1. Effect of Liquor Control Act.
Provision in Liquor Control Act, 46-0-237, making it an indictable misdemeanor to maintain a common nuisance where liquor was illegally sold, was not invalid as providing different penalty for common nuisance than this section. State v. Kallus, 97 U. 492, 94 P.2d 414.

103–41–6. Carcass of Dead Animal—Disposition of.

Every person who puts the carcass of any dead animal, or the offal from any slaughter pen, corral or butcher shop into any river, creek, pond, street, alley or public highway, or road in common use, or who attempts to destroy the same by fire, within one-fourth of a mile of any city or town, is guilty of a misdemeanor. (C. L. 17, § 8189.)

L. 1941, 2nd Spec. Sess., ch. 30; eff. June 18.

AN ACT giving the governor the power to declare certain acts to be public nuisances and making provision for the abatement of the same.

Be it enacted by the Legislature of the State of Utah:

103–41–7. Governor May Direct Attorney General to Abate Nuisances.

Whenever in the opinion of the governor any person is maintaining a public nuisance, as defined by Section 103–41–3, Revised Statutes of Utah, 1933, he may direct the attorney general to institute an action in the name of the state to abate such nuisance. (Sec. 1.)

103–41–8. Id. Action Shall Be Brought in Form Prescribed by Code of Civil Procedure.

On direction from the governor, as provided in the preceding section, the attorney general shall institute an action in the form prescribed by the code of civil procedure of the state of Utah to abate such nuisances. (Sec. 2.)

Cross-references.
Actions to abate nuisances, 104–56–1.

103-41-9. Effective Date.

This act shall take effect upon approval.

Approved June 18, 1941. (Sec. 3.)

CHAPTER 42

OILS—ILLUMINATING

103-42-1. Adulteration—Standard Required.

It shall be unlawful for any person to mix or adulterate any oils used for illuminating purposes with benzine, naphtha, gasoline or any other substance, or to sell or offer to sell the same; and all oils or fluids manufactured from petroleum or its products, to be used for illuminating purposes, sold or offered for sale shall stand a fire test of 110 degrees Fahrenheit before they shall flash or emit any inflammable vapor; *provided*, that in making such test the oil shall not be heated faster than two degrees per minute in an open Tagliabue cup. Any person who violates any provision of this section is guilty of a misdemeanor. (C. L. 17, § 8200.)

CHAPTER 43

PERJURY

103-43-1.	(Repealed.)	103-43-10.	Perjury in the First Degree.
103-43-1.10.	Defined.	103-43-11.	Perjury in the Second Degree.
103-43-2.	(Repealed.)	103-43-12.	Subornation of Perjury in the First Degree.
103-43-3.	Oath of Office.	103-43-13.	Subornation of Perjury in the Second Degree.
103-43-4.	Irregularity in Administering Oath No Defense.	103-43-14.	Presumptive Proof of False Statements.
103-43-5.	Incompetency of Witness No Defense.	103-43-15.	Information or Indictment — Proof — Second Degree.
103-43-6.	Ignorance of Materiality No Defense.	103-43-16.	Penalties.
103-43-7.	Deposition — When Deemed Complete.		
103-43-8.	(Repealed.)		
103-43-9.	(Repealed.)		

103-43-1. (Repealed by L. 37, ch. 134, § 1, eff. May 11, which contained a section 10 relative to crimes committed prior to the effective date thereof. See history note of 103-43-1.10. New provision, 103-43-1.10.)

103-43-1.10. Defined.

A person is guilty of perjury who

(1) Swears or affirms that he will truly testify, declare, depose or certify, or that any testimony, declaration, deposition, certificate, af-

fidavit or other writing by him subscribed is true, in, or in connection with, any action or special proceeding, hearing or inquiry, or on any occasion in which an oath is required by law or is necessary for the prosecution or defence of a private right or for the ends of public justice or may lawfully be administered, and who in such action or proceeding or on such hearing, inquiry or other occasion wilfully and knowingly testifies, declares, deposes or certifies falsely or states in his testimony, declaration, deposition, affidavit or certificate any matter to be true which he knows to be false.

(2) Swears or affirms that any deposition, certificate, affidavit or other writing by him subscribed, is true and which contains any matter which he knows to be false affecting the title to any real or personal property, and upon which reliance is placed.

(3) Having been appointed or designated to be an interpreter in any judicial action or proceeding knowingly and wilfully falsely interprets any evidence, matter or thing between a witness and the court or a justice thereof in the course of an action or special proceeding.

(L. 37, p. 248, § 2.)

History.

This section was Comp. Laws 1876, § 1884; R. S. 1898, § 4122; Comp. Laws 1907, § 4122.

The language of the present section was enacted by L. 37, ch. 134, eff. May 11, which contained a section 10 which read as follows: "Nothing contained in any provision of this act applies to a crime committed at any time before the day when this act takes effect. The provisions of law then applicable to persons committing crimes prior to the enactment of this statute shall continue to apply with the same force and effect as if they had not been amended or repealed."

Cross-references.

"Oath" defined, 88-2-12; false statements under liquor title, Title 46; before public utilities commission, 76-6-3; under Fraternal Insurance Act, 43-9-74; false claim for needy blind, 19-5-77; indictment and information, 105-21-37; privilege of witness does not extend to perjury prosecutions, 103-1-10.

1. Subornation of perjury.

Crime of subornation of perjury is separate and distinct offense from that of perjury. State v. Justesen, 35 U. 105, 99 P. 456.

2. What constitutes perjury.

It is perjury for a grand juror to swear falsely on his voir dire, while being examined as to his competency to serve as a grand juror, that he did not believe in polygamy. United States v. Brown, 6 U. 115, 21 P. 461, applying federal statutes.

3. Indictment, information and complaint.

Information for perjury which alleged certain successive statements made by defendant while testifying as witness, which were so related to one question which was subject matter of inquiry in action in which testimony was given, and were so linked and blended together in point of time, as to constitute one act or transaction, and but one offense, held sufficient as against demurrer, on ground that more than one offense was charged therein. State v. Anderson, 35 U. 496, 101 P. 385.

Complaint for perjury held sufficient under 105-11-1, as basis for preliminary examination. State v. Anderson, 35 U. 496, 101 P. 385.

4. Evidence.

In trial for perjury, record of case in which it is alleged perjury was committed is admissible in evidence for purpose of showing jurisdiction of court, regularity of proceedings, and materiality of alleged perjured testimony, and it is duty of court so to limit and restrict its use; but under no circumstances can record be considered by jury as proof of perjury. State v. Justesen, 35 U. 105, 99 P. 456.

5. Verdict.

Proof of falsity of any one of matters alleged in information for perjury will support general verdict of guilty although other assignments in information are not sustained by evidence. State v. Anderson, 35 U. 496, 101 P. 385.

A. L. R. notes.
Corroboration by circumstantial evidence of testimony of single witness in prosecution for perjury, 111 A. L. R. 825.
Criminal offense of perjury as affected by fact that affidavit or statement under oath upon which charge of perjury was predicated was requirement not of statute, but of boards or officials in administration of statute, 108 A. L. R. 1240.
False statement made under fear or compulsion as perjury, 4 A. L. R. 1319.
Necessity and sufficiency of proof, in prosecution for perjury during trial, that oath was administered, 132 A. L. R. 1311.
Offense of perjury as affected by questions relating to jurisdiction of court before which testimony was given, 82 A. L. R. 1127.
Perjury committed at trial, acquittal as bar to a prosecution of accused for, 37 A. L. R. 1290.
Rule against conviction of perjury upon contradictory statements as affected by defendant's admission in second statement, 25 A. L. R. 416.

103-43-2. (Repealed by L. 37, ch. 134, § 1, eff. May 11, which contained a section 10 relative to crimes committed prior to the effective date thereof. See history note of 103-43-1.10.)

103-43-3. Oath of Office.

So much of an oath of office as relates to the future performance of official duties is not such swearing or affirming as is intended to be included within the preceding sections. (C. L. 17, § 7982.)

History.
As amended by L. 37, ch. 135, eff. Mar. 17, rewriting text of entire section.
This section was Comp. Laws 1876, § 1886; R. S. 1898, § 4124; Comp. Laws 1907, § 4124.

Comparable provisions.
Cal. Penal Code, § 120, Mont. Rev. Codes, § 10880 (similar).

103-43-4. Irregularity in Administering Oath No Defense.

It is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner. (C. L. 17, § 7983.)

Comparable provisions.
Cal. Penal Code, § 121 (includes identical provision).
Mont. Rev. Codes, § 10883 (identical).

103-43-5. Incompetency of Witness No Defense.

It is no defense to a prosecution for perjury that the accused was not competent to give the testimony, deposition or certificate of which falsehood is alleged. It is sufficient that he did give such testimony or make such deposition or certificate. (C. L. 17, § 7984.)

Comparable provisions.
Cal. Penal Code, § 122, Mont. Rev. Codes, § 10884 (identical).

103-43-6. Ignorance of Materiality No Defense.

It is no defense to a prosecution for perjury in the first degree that the accused did not know the materiality of the false statement made by him; or that it did not, in fact, affect the action, proceeding, hearing, inquiry or private right in or for which or regarding which it was made. It is sufficient that it was material and might have been used to affect such action, proceeding, hearing, inquiry or private right. (C. L. 17, § 7985.)

History.
As amended by L. 37, ch. 135, eff. Mar. 17, making material changes in text.
This section is substantially identical with Comp. Laws 1876, § 1889; R. S. 1898, § 4127; Comp. Laws 1907, § 4127.

Comparable provisions.
Cal. Penal Code, § 123, Mont. Rev. Codes, § 10885 (substantially identical as to "perjury"; degree thereof not mentioned).

103–43–7. Deposition—When Deemed Complete.

The making of a deposition or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the accused to any other person with the intent that it be uttered or published as true. (C. L. 17, § 7986.)

Comparable provisions.
Cal. Penal Code, § 124, Mont. Rev. Codes, § 10886 (identical; California provision also includes "affidavit").

103–43–8. (Repealed by L. 37, ch. 134, § 1, eff. May 11, which contained a section 10 relative to crimes committed prior to the effective date thereof. See history note of 103–43–1.10. New provision, 103–43–16.)

103–43–9. (Repealed by L. 37, ch. 134, § 1, eff. May 11, which contained a section 10 relative to crimes committed prior to the effective date thereof. See history note of 103–43–1.10. New provisions, 103–43–12, 103–43–13.)

103–43–10. Perjury in the First Degree.

A person is guilty of perjury in the first degree who commits perjury as to any material matter in or in connection with any action or special proceeding, civil or criminal, or any hearing or inquiry involving the ends of public justice or on an occasion in which an oath or affirmation is required or may lawfully be administered.
(L. 37, p. 248, § 3.)

History.
Added by L. 37, ch. 134, eff. May 11, which contained a section 10 relative to crimes committed prior to the effective date thereof. See history note of 103–43–1.10.

1. "Material matter."
Evidence is deemed material to the issue, and perjury may be assigned upon it, if it tends to establish a material circumstance or link in the chain of evidence, or is circumstantially material, or tends in any way to characterize the matter at issue, or tends to aggravate or extenuate the damages. People v. Greenwell, 5 U. 112, 117, 13 P. 89.

103–43–11. Perjury in the Second Degree.

A person is guilty of perjury in the second degree who commits perjury under circumstances not amounting to perjury in the first degree.
(L. 37, p. 248, § 4.)

History.
Added by L. 37, ch. 134, eff. May 11, which contained a section 10 relative to crimes committed prior to the effective date thereof. See history note of 103–43–1.10.

103–43–12. Subornation of Perjury in the First Degree.

A person who wilfully procures or induces another to commit perjury in the first degree is guilty of subornation of perjury in the first degree. (L. 37, p. 248, § 5.)

History.
Added by L. 37, ch. 134, eff. May 11, which contained a section 10 relative to crimes committed prior to the effective date thereof. See history note of 103-43-1.10.

1. Status of crime.
Crime of subornation of perjury is separate and distinct offense from that of perjury. State v. Justesen, 35 U. 105, 99 P. 456.

2. Evidence.
In prosecution of attorney under former statute, evidence was sufficient to sustain conviction although only evidence was testimony of person alleged to have been suborned, since perjury and subornation of perjury are distinct offenses and such witness was not accomplice of defendant as to subornation charged. State v. Gleason, 86 U. 26, 40 P.2d 222. (Hansen, J., and Straup, C. J., dissenting.)

In prosecution for subornation of perjury, record of plea of guilty of perjury by person alleged to have been procured to commit perjury was inadmissible. State v. Justesen, 35 U. 105, 99 P. 456.

A. L. R. notes.
Rule as to corroborative evidence in prosecutions for subornation of perjury, 56 A. L. R. 407.

103-43-13. Subornation of Perjury in the Second Degree.

A person who wilfully procures or induces another to commit perjury in the second degree is guilty of subornation of perjury in the second degree. (L. 37, p. 248, § 6.)

History.
Added by L. 37, ch. 134, eff. May 11, which contained a section 10 relative to crimes committed prior to the effective date thereof. See history note of 103-43-1.10.

A. L. R. notes.
Rule as to corroborative evidence in prosecutions for subornation of perjury, 56 A. L. R. 407.

103-43-14. Presumptive Proof of False Statements.

In any prosecution for perjury the falsity of the testimony or statement set forth in the information or indictment shall be presumptively established by proof that the defendant has testified, declared, deposed or certified under oath to the contrary thereof on any occasion in which an oath is required by law, in any other written testimony, declaration, deposition, certificate, affidavit or other writing by him subscribed or in any testimony given in any action or special proceeding. (L. 37, p. 248, § 7.)

History.
Added by L. 37, ch. 134, eff. May 11, which contained a section 10 relative to crimes committed prior to the effective date thereof. See history note of 103-43-1.10.

103-43-15. Information or Indictment—Proof—Second Degree.

An information or indictment for perjury in the second degree may allege the making of contradictory testimony or statements under oath on occasions in which an oath is required by law, without specification of which thereof is true; and the perjury may be established by proof of the wilful giving or making of such contradictory testimony or statements, without proof as to which thereof is true. (L. 37, p. 248, § 8.)

History.
Added by L. 37, ch. 134, eff. May 11, which contained a section 10 relative to crimes committed prior to the effective date thereof. See history note of 103-43-1.10.

103-43-16. Penalties.

(1) Perjury in the first degree and subornation of perjury in the first degree are felonies and are punishable by imprisonment in the

state prison for a term not less than one nor more than five years, or by a fine of not more than five thousand dollars, or by both.

(2) Perjury in the second degree and subornation of perjury in the second degree are each misdemeanors and are punishable by imprisonment for not more than one year or by a fine of not more than five hundred dollars, or by both.

(3) If perjury is committed in order to procure the conviction of a person for any crime punishable by death, or imprisonment for ten years or more, the punishment may be imprisonment for life.

(L. 37, p. 248, § 9.)

History.
Added by L. 37, ch. 134, eff. May 11, which contained a section 10 relative to crimes committed prior to the effective date thereof. See history note of 103–43–1.10.

CHAPTER 44

PHYSICIANS

103–14–1. Intoxication, a Misdemeanor.

Every physician who, in a state of intoxication, does any act as such physician to another person by which the life or health of such other person is endangered is guilty of a misdemeanor. (C. L. 17, § 8170.)

Comparable provisions.
Mont. Rev. Codes, § 11193 (identical, except that words "or health" are omitted).

Cross-references.
Regulation by Department of Registration, 79-9.

CHAPTER 45

PRIZE FIGHTING

103–15–1. Participating in, a Felony.

Every person who engages in, instigates, encourages or promotes any ring or prize fight, or any other premeditated fight or contention, either as principal, aid, second, umpire, surgeon or otherwise, is punishable by imprisonment in the state prison not exceeding two years.

(L. 29, p. 21, § 8225.)

Comparable provisions.
Mont. Rev. Codes, § 11293 (identical, except as reading in part: "* * * premeditated fight or contention [without deadly weapons] either as principal * * *").

Cross-references.
Boxing contests, Title 9.

CHAPTER 46

PUBLIC UTILITIES

103-46-1. Street Cars — Vestibules Required.
103-46-2. Id.
103-46-3. Id. Penalty.
103-46-4. Injuring Conductors of Water, Gas or Electricity.
103-46-5. Opening Water Valve Closed by Authority.
103-46-6. Telegrams or Telephone Messages — Disclosing Contents.
103-46-7. Id. Altering.
103-46-8. Id. Fraudulently Learning Contents — Personating Addressee.
103-46-9. Id. Neglecting to Transmit — Transmitting Out of Order—Exceptions.
103-46-10. Id. Employees Learning and Profiting by Contents.
103-46-11. Id. Tapping Wires.
103-46-12. Id. Bribing Employees to Disclose Contents.
103-46-13. Electric Transmission Lines—Injuring or Obstructing Use.
103-46-14. Id.
103-46-15. Id. By Fire.
103-46-16. Id. Penalty.
103-46-17. Railroads and Carriers — Excessive Debt.
103-46-18. Id.
103-46-19. Id. Refusing to Carry Passengers.
103-46-20. Id. Demanding Excessive Fare.
103-46-21. Id. Malicious Injury to Track, etc.
103-46-22. Id. "Stealing a Ride."
103-46-23. Id. Abetting by Employees.
103-46-24. Id. Signaling at Crossings.
103-46-25. Id. Neglect of Duty by Employees — Omnibus Penalty.
103-46-26. Id. Intoxication of Operatives.
103-46-27. Id. Negligent Collision Causing Death.

103-46-1. Street Cars—Vestibules Required.

It shall be unlawful for any person owning or operating a street railway, or for any officer or agent thereof superintending or having charge or control of the management of such line of railway or of the cars thereof, operating electric, cable or other cars propelled by steam, cable or electricity, which require when in operation the constant services, care or attention of a person on any part of such car, to require or permit such service, attention or care of any of its employees, or any other person between the 1st day of November and the 1st day of the following April, without first having provided such cars with a proper and sufficient inclosure, constructed of wood, iron and glass, or similar suitable materials, sufficient to protect such employees from exposure to the inclemencies of the weather; *provided*, that such inclosure shall be so constructed as not to obstruct the vision of the person operating such car. (C. L. 17, § 8487.)

Cross-references.
Public utilities, Title 76.

103-46-2. Id.

It shall be unlawful for any such person so owning or operating a street railway using steam, electric or cable cars, or any superintending or managing officer or agent thereof, to cause or permit to be used upon such line of railway between said 1st day of November and said 1st day of April any car upon which service of any employee such as

specified in section 103–46–1, is required, unless said car is provided with the inclosure required by said section. (C. L. 17, § 8488.)

103–46–3. Id. Penalty.

Any person owning, operating, superintending or managing any such line of street railway, and any managing or superintending officer or agent thereof, who violates any provision of sections 103–46–1 and 103–46–2 is guilty of a misdemeanor, and shall be punished by a fine of not less than $50 nor more than $250. Each day any such person causes or permits any of such employees to operate such car in violation of the provisions of section 103–46–1, or causes or permits a car to be run or operated in violation of section 103–46–2, shall be deemed a separate offense; *provided*, that the provisions of said sections shall not apply to cars used and known as trailing cars, or cars used solely in construction or repair work, or cars known as open or summer cars. (C. L. 17, § 8489.)

103–46–4. Injuring Conductors of Water, Gas or Electricity.

Every person who willfully breaks, digs up, obstructs or injures any pipe or main for conducting gas or water, or any works erected for supplying buildings with gas, electricity or water, or any appurtenance or appendage therewith connected, is guilty of a misdemeanor. (C. L. 17, § 8408.)

Cross-references.
Larceny of gas, electricity, and water, 103–36–13 to 103–36–16.

103–46–5. Opening Water Valve Closed by Authority.

Every person who, with intent to defraud or injure, opens, or causes to be opened, or draws water from, any stopcock or faucet by which the flow of water is controlled, after having been notified that the same has been closed for specific cause by order of competent authority, is guilty of a misdemeanor. (C. L. 17, § 8409.)

103–46–6. Telegrams or Telephone Messages—Disclosing Contents.

Every person who willfully and corruptly discloses the contents of a telegraph or telephone message, or any part thereof, addressed to another person, without the permission of such person, is punishable by a fine not exceeding $1,000 or by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by both such fine and either of such imprisonments. (C. L. 17, § 8403.)

Cross-references.
Telephonic and telegraphic transactions, Title 92; false or forged messages, 103–24–5.

103–46–7. Id. Altering.

Every person who willfully alters the purport, effect or meaning of a telegraph or telephone message to the injury of another is punishable as provided in the next preceding section. (C. L. 17, § 8404.)

103–46–8. Id. Fraudulently Learning Contents — Personating Addressee.

Every person not connected with any telegraph or telephone office who, without the authority or consent of the person to whom the same may be directed, willfully opens any sealed envelope inclosing a telegraph or telephone message addressed to such other person, with the purpose of learning the contents of such message, or who fraudulently represents any other person and thereby procures to be delivered to himself any telegraph or telephone message, addressed to such other person, with the intent to use, destroy or detain the same from the person or persons entitled to receive such message, is punishable as provided in section 103–46–6. (C. L. 17, § 8405.)

103–46–9. Id. Neglecting to Transmit—Transmitting Out of Order—Exceptions.

Every agent, operator or employee of any telegraph or telephone office who willfully refuses or neglects to send any message received at such office for transmission, or willfully postpones the same out of its order, or willfully refuses or neglects to deliver any message received by telegraph or telephone, is guilty of a misdemeanor; *provided*, that nothing herein shall be construed to require any message to be received, transmitted or delivered unless the charges thereon have been paid or tendered, nor to require the sending, receiving or delivering of any message counseling, aiding in, abetting or encouraging treason against the government of the United States, or the resistance to lawful authority, or any message calculated to further any fraudulent plan or purpose, or to instigate or encourage the perpetration of any unlawful act, or to facilitate the escape of any criminal or person accused of crime; *provided further*, that communications to and from public officers on official business may have precedence over all other communications, and intelligence of general and public interest for publication may be transmitted out of its order.

(C. L. 17, §§ 8430, 8431.)

Cross-references.
Sending false or forged messages, 103–24–5.

103–46–10. Id. Employees Learning and Profiting by Contents.

Every agent, operator or employee of any telegraph or telephone office who in any way uses or appropriates any information derived by him from any private message passing through his hands and addressed to any other person, or in any other manner acquired by him by reason of his trust as such agent, operator or employee, or trades or speculates upon any such information so obtained, or in any manner turns, or attempts to turn, the same to his account, profit or advantage, is punishable by a fine not exceeding $1,000 or by imprisonment in the state prison not exceeding one year, or by both such fine and imprisonment.

(C. L. 17, § 8432.)

103–46–11. Id. Tapping Wires.

Every person who willfully and fraudulently, or clandestinely, taps or makes any unauthorized connection by any means whatever, with

any telegraph or telephone wire, line, cable or instrument under the control of any telegraph or telephone company within this state; or willfully and fraudulently, or clandestinely, reads or attempts to read, or learns the contents or meaning of any message, report or communication, by means of any machine, instrument or contrivance, or in any unauthorized manner, while such message, report or communication is in transit or passing over any telegraph or telephone wire, line or cable, or is being sent from or received at any place within this state; or uses, or attempts to use, in any manner or for any purpose, or communicates in any way, any information so obtained; or aids, agrees with, employs, or conspires with, any person to unlawfully do, or permit, or cause to be done any of the acts or things hereinabove mentioned is punishable;—as provided in section 103–46–10. (C. L. 17, § 8433.)

103–16–12. Id. Bribing Employees to Disclose Contents.

Every person who, by the giving or promise of any bribe, inducement or reward, procures or attempts to procure any telegraph or telephone agent, operator or employee to disclose any private message, or the contents, purport, substance or meaning thereof, or offers to any such agent, operator or employee any bribe, compensation or reward for the disclosure of any private information received by him by reason of his trust as such agent, operator or employee, or uses or attempts to use any such information so obtained, is punishable as provided in section 103–46–10. (C. L. 17, § 8434.)

103–16–13. Electric Transmission Lines—Injuring or Obstructing Use.

Every person who willfully or maliciously cuts, breaks or throws down any electric light, power, telegraph or telephone pole, or any tree or other material used in any electric light, power, telegraph or telephone line; or who willfully and maliciously breaks, displaces or injures any insulator in use in any electric light, power, telegraph or telephone line; or who willfully and maliciously cuts, breaks or removes from its insulator any wire used as an electric light, power, telegraph or telephone line; or by the attachment of a ground wire or by any other contrivance willfully destroys the insulation of such electric light, power, telegraph or telephone line, or interrupts the transmission of the electric current through the same; or in any other manner willfully injures, molests or destroys any property or materials appertaining to any electric light, power, telegraph or telephone line; or willfully interferes with the use of any such line; or obstructs or postpones the transmission of any message over any telephone or telegraph line, or procures or advises any such injury, interference or obstruction to any such lines;—is guilty of a misdemeanor.

(C. L. 17, § 8435.)

103–16–14. Id.

It is unlawful for any person willfully or maliciously to take down, remove, injure, obstruct, displace or destroy any line erected or constructed for the transmission of electric current, or any poles, wires, conduits, cables or insulators, or any support upon which wires or cables may be suspended, or any part of any such line or appurtenances

or apparatus connected therewith, or to sever any wire or cable thereof, or in any manner interrupt the transmission of electric current over and along any such line; or to take down, remove, injure or destroy any house, shop, building or other structure, or machinery connected with or necessary to the use of any line erected or constructed for the transmission of electric current. (C. L. 17, § 8436.)

Cross-references.
Larceny of electricity, 103–36–15.

103–46–15. Id. By Fire.

It is unlawful for any person willfully or maliciously to set any fire that shall result in the destruction or injury of any line erected or constructed for the transmission of electric current, or any poles, conduits, wires, cables or insulators, or any support upon which wires or cables may be suspended, or any part of any such line or appurtenances or apparatus connected therewith, or any house, shop, building or other structure, or machinery connected with or necessary to the use of any line erected or constructed for the transmission of electric current, or to set any fire that shall in any manner interrupt the transmission of electric current over and along any such line. (C. L. 17, § 8437.)

103–46–16. Id. Penalty.

Any person who willfully or maliciously violates any of the provisions of sections 103–46–14 or 103–46–15, shall be punished by a fine not exceeding $1,000, or by imprisonment in the state prison for not more than five years or by both such fine and imprisonment.
(C. L. 17, § 8438.)

103–46–17. Railroads and Carriers—Excessive Debt.

Every officer, agent or stockholder of any railroad company who knowingly assents to, or has an agency in, the contracting of any debt by or on behalf of such company, unauthorized by a special law for the purpose, the amount of which debt, with other debts of the company, exceeds the available means for the payment of its debts, in its possession, under its control and belonging to it at the time such debt is contracted, including its bona fide and available stock subscriptions and exclusive of its real estate, is guilty of a misdemeanor.
(C. L. 17, § 8373.)

103–46–18. Id.

The next preceding section does not affect the validity of a debt created in violation of its provisions, as against the company.
(C. L. 17, § 8374.)

103–46–19. Id. Refusing to Carry Passengers.

Every common carrier of passengers, and every agent or officer of such carrier, who refuses, without just cause or excuse to receive and carry any passenger is guilty of a misdemeanor. (C. L. 17, § 8445.)

103–46–20. Id. Demanding Excessive Fare.

Every officer, agent or employee of a railroad company or other common carrier who asks for or receives a greater sum than is allowed

by law for the carriage of passengers or freight is guilty of a misdemeanor. (C. L. 17, § 8327.)

103–16–21. Id. Malicious Injury to Track, etc.

Every person who maliciously, either:

(1) Removes, disables or injures, or in any way interferes with, changes or destroys, any part of any railroad, whether for cars propelled by steam or any other motive power, or any track of any railroad or any branch or branch way, switch, block or other signal or signalling device, turnout, bridge, viaduct, culvert, embankment, station house or other structure or fixture, or any part thereof, attached to or connected with any railroad; or,

(2) Places any obstruction upon the rails or track of any railroad, or of any switch, branch, branch way or turnout connected with any such railroad;—is punishable by imprisonment in the state prison not exceeding ten years, or in the county jail not exceeding one year.

(C. L. 17, § 8383.)

History.

This section is substantially identical with R. S 1898, § 4423; Comp. Laws 1907, § 4423.

1. Indictment or information.

Information, which charged that defendant displaced part of railroad by feloniously parting air hose and closing angle cocks on train of cars, held subject to defendant's objection that it did not sufficiently appear therefrom that train of cars referred to was "attached to or connected with any railroad" and was propelled by steam or other motive power. State v. McKenna, 24 U. 317, 67 P. 815.

103–16–22. Id. "Stealing a Ride."

Every person who clandestinely enters into or upon any railroad car for the purpose and with the intention of riding or being transported thereon, or who having entered into or upon any railroad car rides over any railroad line or portion thereof in this state, without the knowledge and consent of the person owning or operating such car or railroad and with the intention to defraud such person of the fare or compensation for such transportation, is guilty of a misdemeanor, and shall be punished by imprisonment in the county jail not exceeding fifty days, or by fine in any sum less than $50, or by both.

(C. L. 17, § 8266.)

103–16–23. Id. Abetting by Employees.

Every person, being at the time a servant or employee of any railroad company, who aids, abets, assists, counsels, advises or encourages another person to enter into or ride upon any railroad car for the purpose, with the intention and in the manner specified in the next preceding section, is guilty of a misdemeanor. (C. L. 17, § 8267.)

103–16–24. Id. Signaling at Crossings.

Every person in charge of a locomotive engine, who, before crossing any traveled street, road or highway, omits to cause a bell to ring or whistle to sound at the distance of at least 80 rods from the crossing and up to it, is guilty of a misdemeanor. (C. L. 17, § 8201.)

Cross-references.

Passing through cities or over crossings, 77–0–14.

103-46-25. Id. Neglect of Duty by Employees—Omnibus Penalty.

Every engineer, conductor, brakeman or switch tender, or other officer, agent or servant of any railroad company, who is guilty of any willful violation or omission of his duty as such officer, agent or servant, whereby human life or safety is endangered, the punishment of which is not otherwise prescribed, is guilty of a misdemeanor.

(C. L. 17, § 8204.)

103-46-26. Id. Intoxication of Operatives.

Every person who is intoxicated while in charge of a motor transport vehicle or of a locomotive engine, or while acting as conductor or driver upon any railroad train or car, or motor transport vehicle, or as motorman or as conductor of any streetcar, whether propelled by steam or electricity, or drawn by horses or otherwise, or while acting as train dispatcher or as telegraph operator and receiving or transmitting dispatches relating to the movement of trains, is guilty of a misdemeanor.

(C. L. 17, § 8202.)

103-46-27. Id. Negligent Collision Causing Death.

Every conductor, engineer, brakeman, switchman or other person having charge, wholly or in part, of any railroad car, locomotive or train, who willfully or negligently permits or causes the same to collide with another car, locomotive or train, or with any other object or thing, and every train dispatcher who willfully or negligently permits any such collision, whereby the death of a human being is produced, is punishable by imprisonment in the state prison for not less than one nor more than ten years. (C. L. 17, § 8175.)

CHAPTER 47

RECKLESS DRIVING

103-47-1. On Public Roads, etc., a Misdemeanor.

Every person operating, running, managing, controlling or driving any vehicle, conveyance or car over or upon any public road, street, public square or school ground, who willfully causes or permits such vehicle, conveyance or car to run at a speed sufficient to endanger human life or bodily safety, or to cause the destruction of property, or who causes or permits such vehicle, conveyance or car to run at a dangerous speed in attempting to pass another vehicle, conveyance or car or to prevent such other vehicle, conveyance or car from passing his own; and any person who rides or drives any animal over or upon any public road, street, highway, public square or school ground at a speed sufficient to endanger human life or bodily safety, or to cause the destruction of property, is guilty of a misdemeanor.

(C. L. 17, § 8206.)

Comparable provisions.

Iowa Code 1939, § 5022.04 (any person who drives any vehicle in such manner as to indicate willful or wanton disregard for safety of persons or property is guilty of reckless driving); § 5022.05 (imprisonment for period of not more than 30 days, or fine of not less than $25 nor more than $100).

Cross-references.

Reckless driving, 57-7-112.

CHAPTER 48

RESCUES AND ESCAPES *

103–48–1. Rescues—Penalty.
103–48–2. Escapes—By Prisoners in State Prison.
103–48–3. Id. By Prisoners in Other Jails.
103–48–4. Id. Aiding or Abetting—By Officers.
103–48–5. Id. By Others.
103–48–6. Id.
103–48–7. Id. Furnishing Appliances in Aid of, from State Prison.

*History of act. This chapter was Comp. Laws 1876, Title IV, Chapters II, III; R. S. 1898, Title 75, Chapters 7 and 8, p. 884; Comp. Laws 1907, Title 90, Chapters 7 and 8, p. 1277.

103–48–1. Rescues—Penalty.

Every person who rescues, or attempts to rescue, or aids another person in rescuing or attempting to rescue, any prisoner from any prison or jail, or from any officer or person having him in lawful custody, is punishable as follows:

(1) If such prisoner was in custody upon a conviction of felony punishable with death, by imprisonment in the state prison not less than one nor more than five years.

(2) If such prisoner was in custody upon a conviction of any other felony, by imprisonment in the state prison not less than six months nor more than one year.

(3) If such prisoner was in custody upon a charge of felony, by fine not exceeding $500 or by imprisonment in the county jail not exceeding one year, or by both.

(4) If such prisoner was in custody otherwise than upon a charge or conviction of felony, by fine in any sum less than $300 or by imprisonment in the county jail not exceeding six months, or by both.

(C. L. 17, § 7964.)

Comparable provisions.

Idaho Code, § 17–801 (pertains to rescue of prisoner).

Mont. Rev. Codes, § 10864 (substantially identical, except as to specified fines and terms of imprisonment).

Cross-references.

Retaking after rescue, 105–14.

A. L. R. notes.

Escape or prison breach as affected by means employed to effect it, 50 A. L. R. 989; responsibility of persons participating in jail delivery for homicide committed by one of their number, 15 A. L. R. 456.

103–48–2. Escapes—By Prisoners in State Prison.

Every prisoner confined in the state prison for a term less than life, and every such prisoner, while in custody of the warden, deputy warden or any keeper or guard in any convict camp, or any other place where he may be at work or housed or kept while outside the state prison walls, who escapes or attempts to escape from such prison, convict camp or place of work, or from any keeper or guard, or from any other place where such prisoner may be kept, shall be imprisoned in the state prison for a term of not more than ten years; such second term of imprisonment to commence from the time he would otherwise have

been discharged from said prison. An information filed under this section shall be filed in the county in which the alleged offense is committed, and the case shall be tried in such county, unless a change of venue is allowed as provided by law. (C. L. 17, § 7967.)

Cross-references.
Warden to post, 85-9-14; jurisdiction of escape, 105-8-13, 105-8-14.

103-48-3. Id. By Prisoners in Other Jails.

Every prisoner confined in any prison other than the state prison who escapes or attempts to escape therefrom is guilty of a misdemeanor. (C. L. 17, § 7968.)

103-48-4. Id. Aiding or Abetting—By Officers.

Every keeper of a prison, sheriff, deputy sheriff, constable, jailer or person employed as a guard, who fraudulently contrives, procures, aids, connives at or voluntarily permits the escape of any prisoner in custody is punishable by imprisonment in the state prison not exceeding three years, or by fine not exceeding $1,000, or by both. (C. L. 17, § 7969.)

Comparable provisions.
Idaho Code, § 17-805 (imprisonment not exceeding ten years, and fine not exceeding $10,000).

103-48-5. Id. By Others.

Every person who willfully assists any prisoner confined in any prison, or in the lawful custody of any officer or person, to escape, or in an attempt to escape, from such prison or custody is punishable as provided in the next preceding section. (C. L. 17, § 7970.)

Comparable provisions.
Idaho Code, § 17-806 (felony).

103-48-6. Id.

Every person who carries or sends into a prison anything to aid a prisoner in making his escape, with intent thereby to facilitate the escape of any prisoner confined therein, is punishable as provided in section 103-48-4. (C. L. 17, § 7971.)

Comparable provisions.
Idaho Code, § 17-807 (felony).

103-48-7. Id. Furnishing Appliances in Aid of, from State Prison.

Every person who, without the consent of the warden of the state prison, delivers to any convict or person within the state prison, or who gives or delivers to any convict when outside of the state prison, or leaves, deposits or places at or near any camp or other place where convicts are kept at work on public roads or otherwise, or who shall leave within the state prison grounds, or within any cell or cell house or building of any kind belonging to the state prison, or who shall leave, deposit or place at or near any such buildings, grounds or premises any explosives or explosive substance of any kind or character, or any poison of any kind, or any opium, or any preparation of like character, or any preparation commonly called "dope," or any substitute therefor,

or any deleterious drug of any kind, or any knife, dirk or weapon of any kind or character whatsoever, including firearms of all kinds, or any implement, instrument or substance which can be used by any convict or any person in the state prison as a means of injuring the warden or his deputy, or any guard, convict or any person whomsoever, or which can be used as a means of escape from the state prison by any such convict or person, is guilty of a felony, and shall be punished by imprisonment in the state prison at hard labor for a term of not more than ten years. (C. L. 17, § 7972.)

Cross-references.
Warden to post, 85–9–14.

CHAPTER 49

ROBBERY

103–49–1. Defined.
103–49–2. Penalty.
103–49–3. Attempts — Assault with Deadly Weapon.

103–49–1. Defined.

Robbery is the felonious taking of personal property in the possession of another from his person, or immediate presence, against his will, accomplished by means of force or fear. (C. L. 17, § 8043.)

History.
This section is identical with Comp. Laws 1876, § 1933; 2 Comp. Laws 1888, § 4468; R. S. 1898, § 4175; Comp. Laws 1907, § 4175.

Comparable provisions.
Cal. Penal Code, § 211, Idaho Code, § 17–1305, Mont. Rev. Codes, § 10973 (substantially identical).
Iowa Code 1939, § 13038 (stealing and taking from the person of another, any property that is the subject of larceny, with force or violence, or by putting in fear, is robbery).

Cross-references.
Assault with intent to commit, 103–7–8; indictment when property taken to another county, 105–8–12; jurisdiction when committed without state and property brought within, 105–8–16; information or indictment may also contain a count for larceny, 105–21–31; robbery outside state, 103–1–41.

1. Murder in perpetration of robbery.
See 103–28–3.

2. Elements of offense.
Where, on prosecution for robbery, based on defendant's alleged act of taking money from person and presence of another, defense was that, if defendant actually was guilty of such act, he took money under claim of ownership and in honest belief that he had right to it, held that it was error for trial court to give instruction whereby jury was, in effect, authorized to convict defendant notwithstanding absence, on his part, of felonious intent. People v. Hughes, 11 U. 100, 39 P. 492.

3. Arrest of accused.
Where facts showing commission of robbery are related to sheriff's posse, members thereof, although private citizens and nonresidents of county, may follow, and capture by use of such force as is necessary, persons who committed robbery. State v. Morgan, 22 U. 162, 61 P. 527, applying R. S. 1898, § 4175.

4. Reception of property by force.
Defendant, even if he took money from another by force or fear, was not guilty of robbery, regardless of whatever other offense he might have committed in taking of money, if money actually belonged to him and its possession by person from whom it was taken was wrongful, since, in such case, animus furandi

element of robbery was lacking. People v. Hughes, 11 U. 100, 39 P. 492.

5. **Indictment and information.**

5. — **sufficiency.**

An indictment under this section which charges a felonious taking by defendant by means of force, violence and fear from the immediate presence of a party and against his will, is sufficient. People v. Kerm, 8 U. 268, 30 P. 988.

Indictment, which failed to allege the value of the money taken "in current United States silver coin," was not thereby insufficient, nor was an amendment inserting these words prejudicial to defendant. State v. La Chall, 28 U. 80, 77 P. 3.

Indictment, which charged that the robbery was "from the person and immediate presence of one R., and by means of force and fear, and by threatening to shoot and kill him," and that defendants feloniously took a certain sum from the possession of said R., was sufficient, and insertion of words "and against his will" was unnecessary and not prejudicial. State v. La Chall, 28 U. 80, 77 P. 3.

Indictment for robbery, which failed to charge that the property taken from the person of the prosecutor was taken "by means of force or fear," was insufficient. State v. Davis, 28 U. 10, 76 P. 705.

7. — **amendments.**

In prosecution for robbery, where information charged that defendant while armed with revolver made assault on prosecuting witness, putting witness in bodily fear and danger of his life, "and by means of the force and fear aforesaid" feloniously and violently stole and carried away from witness certain articles, held permitting state to insert in information the words "and by force and fear," as an amendment was not reversible error, since without amendment the complaint charged the crime of robbery. State v. Crawford, 60 U. 6, 206 P. 717.

8. **Evidence.**

To justify a conviction, the evidence must be sufficient to connect the accused with the commission of the offense. State v. Bridwell, 48 U. 97, 158 P. 710.

Where, on prosecution for robbery, based on defendant's alleged act of taking money from person and presence of another, defense was that, if defendant actually was guilty of such act, he took money under claim of ownership and in honest belief that he had right to it, held that defendant had right to testify as to his intent, belief, and motive at time of alleged robbery, and that it was error for trial court to refuse to permit him to answer question, asked him while he was testifying in his own behalf, as to whether, at time when he allegedly took the money, he honestly believed money was his and that he had a right to take it. People v. Hughes, 11 U. 100, 39 P. 492.

In prosecution for robbery allegedly committed by use of .45 Colt's revolver, improper admission in evidence of leather bag containing .32 and .38 size cartridges found in room occupied by defendant, held not prejudicial error. State v. Crawford, 60 U. 6, 206 P. 717.

In prosecution for robbery, admission into evidence of revolver found in room, occupied by defendant and another, 40 days after crime was committed, while erroneous, was not prejudicial error. State v. Crawford, 60 U. 6, 206 P. 717.

9. **Instructions.**

Under this section, the fact the instruction defines robbery in the language thereof, does not render such proper definition improper, because instruction does not also define grand and petit larceny. State v. Sullivan, 73 U. 582, 276 P. 166.

10. **Recent possession of stolen property.**

103-36-1, making recent possession of stolen property, unexplained, prima facie evidence of guilt of larceny, applies to robbery. State v. Donovan, 77 U. 343, 294 P. 1108.

A. L. R. notes.

Offense of larceny, embezzlement, robbery or assault to commit robbery, as affected by defendant's intention to take or retain money or property in payment of, or as security for, claim, or to collect debt, or to recoup gambling losses, 116 A. L. R. 997.

Retention of property, or attempt to escape, by force or putting in fear as equivalent to taking in that manner for purposes of robbery, 58 A. L. R. 656.

Taking property from the person by stealth as robbery, 8 A. L. R. 369.

Threat to arrest or prosecute and acts in connection therewith as force or putting in fear for purposes of robbery, 27 A. L. R. 1299.

When person from whom property is taken is deemed to have been in possession thereof, as regards offense of robbery, 123 A. L. R. 1099.

or any deleterious drug of any kind, or any knife, dirk or weapon of any kind or character whatsoever, including firearms of all kinds, or any implement, instrument or substance which can be used by any convict or any person in the state prison as a means of injuring the warden or his deputy, or any guard, convict or any person whomsoever, or which can be used as a means of escape from the state prison by any such convict or person, is guilty of a felony, and shall be punished by imprisonment in the state prison at hard labor for a term of not more than ten years. (C. L. 17, § 7972.)

Cross-references.
Warden to post, 85–9–14.

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4. Recaption of property by force.
Defendant, even if he took money from another by force or fear, was not guilty of robbery, regardless of whatever other offense he might have committed in taking of money, if money actually belonged to him and its possession by person from whom it was taken was wrongful, since, in such case, animus furandi

element of robbery was lacking. People v. Hughes, 11 U. 100, 39 P. 492.

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Retention of property, or attempt to escape, by force or putting in fear as equivalent to taking in that manner for purposes of robbery, 58 A. L. R. 656.

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Threat to arrest or prosecute and acts in connection therewith as force or putting in fear for purposes of robbery, 27 A. L. R. 1299.

When person from whom property is taken is deemed to have been in possession thereof, as regards offense of robbery, 123 A. L. R. 1099.

103–49–2. Penalty.

Robbery is punishable by imprisonment in the state prison for a term not less than five years, and which may be for life.
(C. L. 17, § 8044.)

Comparable provisions.
Idaho Code, § 17–1307 (substantially identical).

103–49–3. Attempts—Assault with Deadly Weapon.

Every person who assaults another with a deadly weapon, instrument or other thing, with intent to commit robbery, is punishable by imprisonment in the state prison at hard labor for a term of from five years to life. (L. 23, p. 43, § 8044x.)

A. L. R. notes.
Offense of larceny, embezzlement, robbery or assault to commit robbery, as affected by defendant's intention to take or retain money or property in payment of, or as security for, claim, or to collect debt, or to recoup gambling losses, 116 A. L. R. 997; what constitutes attempt to commit robbery, 55 A. L. R. 714.

CHAPTER 50

ROUTS AND RIOTS *

103–50–1. Disturbing Assemblies.
103–50–2. Riot Defined.
103–50–3. Penalty for Riot.
103–50–4. Rout Defined.
103–50–5. "Unlawful Assembly" Defined.
103–50–6. Penalty for Rout or Unlawful Assembly.
103–50–7. Refusing to Disperse.
103–50–8. Officers Failing to Perform Duty.
103–50–9. Disturbing Neighborhood Quiet.
103–50–10. Members of Assembly Severally Guilty.

*History of act. This chapter was Comp. Laws 1876, Title XI, p. 614; R. S. 1898, Title 75, Ch. 36, p. 914; Comp. Laws 1907, Title 90, Ch. 36, p. 1313.

103–50–1. Disturbing Assemblies.

Every person who, without authority of law, willfully disturbs or breaks up any assembly or meeting, not unlawful in its character, is guilty of a misdemeanor. (C. L. 17, § 8217.)

Comparable provisions.
Idaho Code, § 17–3001 (identical).
Cal. Penal Code, § 403, Mont. Rev. Codes, § 11284 (substantially identical).

Cross-references.
Powers of cities and towns, 15–6–24, 15–6–65, 15–8–47, 15–12–9, 15–12–11; disturbing religious meetings, 103–53–3.

103–50–2. Riot Defined.

Any use of force or violence disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together and without authority of law is a riot. (C. L. 17, § 8218.)

History.
This definition of riot has persisted in the Penal Code of this state since Utah was a territory. People v. O'Loughlin, 3 U. 133, 147, 1 P. 653, quoting many other definitions from leading cases and well recognized textwriters.
This section is identical with Comp.

Laws 1876, § 2054; 2 Comp. Laws 1888, § 4589; R. S. 1898, § 4301; Comp. Laws 1907, § 4301.

Comparable provisions.

Cal. Penal Code, § 404, Mont. Rev. Codes, § 11285 (identical).

Iowa Code 1939, § 13340 (defining riot; three or more persons together, in violent or tumultuous manner, committing unlawful act or doing lawful act in unlawful, violent or tumultuous manner, to disturbance of others).

1. Definition of riot.

These words do not imply that such use of or threat to use force or violence should be noisy, boisterous, or tumultuous, or be accompanied with threatening speeches or turbulent gestures, or that the men using force, or threatening to use it, need be armed. A riot does not so much depend upon the strength of voice, as upon the intent or purpose, and the power of immediately executing the purpose. People v. O'Loughlin, 3 U. 133, 149, 1 P. 653.

Members of a union who band together and compel men to stop work and shut down a mine are guilty of a riot, though acting without force or violence or threat thereof, and though their acts were not boisterous or noisy. People v. O'Loughlin, 3 U. 133, 1 P. 653. For example, an order by a union boss to workers, backed up by 300 men, to cease work and close the plant, is all the force or violence necessary to constitute a riot, because resistance by those to whom it was directed would have been useless. People v. O'Loughlin, 3 U. 133, 150, 1 P. 653.

2. Grade of offense.

Formerly riot was a felony. People v. O'Loughlin, 3 U. 133, 143, 1 P. 653.

3. Included offenses.

Offense of disturbing the peace is included in crime of riot, and failure to so charge is reversible error. State v. Solomon, 93 U. 70, 71 P.2d 104.

Neither assault nor battery is included in offense of riot. State v. Solomon, 93 U. 70, 71 P.2d 104.

Crime of unlawful assembly was included in offense of crime of riot at common law. State v. Woolman, 84 U. 23, 33 P.2d 640, 94 A. L. R. 723. But as defined by statutes, offense of unlawful assembly is not necessarily included in offense of riot. State v. Woolman, 84 U. 23, 33 P.2d 640, 94 A. L. R. 723 (Straup, C. J., and Folland, J., dissenting); State v. Solomon, 93 U. 70, 71 P.2d 104.

4. Indictment or information.

Information, charging that on certain day and in certain county defendant and others acting together did, without authority of law, willfully, unlawfully, and feloniously use and threaten to use force and violence in disturbing public peace, said threat being then and there accompanied by immediate power of execution, was sufficient to charge riot, and fully informed defendant as to nature and cause of accusation against him. State v. Solomon, 93 U. 70, 71 P.2d 104.

Information in riot prosecution charging crime of riot in language of statute and in addition charging specific acts such as that defendant and others took possession of mine and prevented any persons from entering it for purposes of employment, with threats to use force and violence, charged public offense. State v. Guynn, 87 U. 320, 48 P.2d 902.

A. L. R. notes.

Liability of county for mob or riot damage, 44 A. L. R. 1137; unlawful parade as riot, 9 A. L. R. 552; what constitutes riot within criminal law, 40 A. L. R. 1135.

103-50-3. Penalty for Riot.

Every person who participates in any riot is punishable by imprisonment in the state prison not exceeding two years or by a fine not exceeding $1,000, or by both. (C. L. 17, § 8219.)

103-50-4. Rout Defined.

Whenever two or more persons, assembled and acting together, make any attempt or advance towards the commission of an act which would be a riot, if actually committed, such assembly is a rout. (C. L. 17, § 8220.)

Comparable provisions.

Cal. Penal Code, § 406, Idaho Code, § 17-3003 (substantially identical); Mont. Rev. Codes, § 11287 (identical).

103–50–5. "Unlawful Assembly" Defined.

Whenever two or more persons, assemble together to do any unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous or tumultuous manner, such assembly is an unlawful assembly. (C. L. 17, § 8221.)

History.
This section is identical with Comp. Laws 1876, § 2057; R. S. 1898, § 4304; Comp. Laws 1907, § 4304.

Comparable provisions.
Cal. Penal Code, § 407, Idaho Code, § 17–3004, Mont. Rev. Codes, § 11288 (substantially identical).

1. Included offenses.
Crime of unlawful assembly was included in offense of crime of riot at common law. State v. Woolman, 84 U. 23, 33 P.2d 640, 94 A. L. R. 723. But as defined by statutes, offense of unlawful assembly is not necessarily included in offense of riot. State v. Woolman, 84 U. 23, 33 P.2d 640, 94 A. L. R. 723 (Straup, C. J., and Folland, J., dissenting). See supra, 103–50–2.

2. Indictment, information or complaint.
To sustain conviction for unlawful assembly, complaint must not only allege that certain named persons assembled together to do an unlawful act or to do a lawful act in a violent, boisterous, or tumultuous manner, but must specify or characterize the particular act or acts alleged to be unlawful or the particular lawful act or acts characterizing the violent, boisterous, or tumultuous act or acts, intended to be done by persons so assembling together. State v. Woolman, 84 U. 23, 33 P.2d 640, 94 A. L. R. 723.

103–50–6. Penalty for Rout or Unlawful Assembly.

Every person who participates in any rout or unlawful assembly is guilty of a misdemeanor. (C. L. 17, § 8222.)

Comparable provisions.
Cal. Penal Code, § 408, Idaho Code, § 17–3005, Mont. Rev. Codes, § 11289 (identical).

103–50–7. Refusing to Disperse.

Every person remaining present at the place of any riot, rout or unlawful assembly after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor. (C. L. 17, § 8223.)

Comparable provisions.
Cal. Penal Code, § 409, Idaho Code, § 17–3006, Mont. Rev. Codes, § 11290 (identical).

Cross-references.
Suppression of riots, etc., 105–5.

103–50–8. Officers Failing to Perform Duty.

If a magistrate or officer, having notice of an unlawful or riotous assembly mentioned in this chapter, neglects to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor. (C. L. 17, § 8224.)

Comparable provisions.
Cal. Penal Code, § 410, Idaho Code, § 17–3007 (identical); Mont. Rev. Codes, § 11291 (substantially identical).

103–50–9. Disturbing Neighborhood Quiet.

Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood, family or person by loud or unusual noise,

or by discharging firearms, or by tumultuous or offensive conduct, or by threatening, quarreling, challenging to fight or fighting, is punishable by a fine not exceeding $200 or by imprisonment in the county jail not exceeding two months, or by both such fine and imprisonment. (C. L. 17, § 8227.)

History.
This section is substantially similar to Comp. Laws 1876, § 2063; R. S. 1898, § 4310; Comp. Laws 1907, § 4310.

Comparable provisions.
Idaho Code, § 17-3009 (misdemeanor).

Cross-references.
Keeping disorderly house, 103-29-4; security to keep the peace, 105-4.

1. Indictment, information or complaint.
Complaint charging that defendant disturbed the peace by "offensive conduct" consisting of using profane and insulting language, held sufficient though not stating whether language was mild and gentle, or boisterous and tumultuous. Olson v. Wall, 58 U. 20, 196 P. 1014.

A. L. R. notes.
Abusive language addressed to trespasser as breach of peace, 34 A. L. R. 575; abusive or insulting language addressed to group as breach of peace, 34 A. L. R. 580; failure of one on street to obey order of police officer to move on as disorderly conduct, 83 A. L. R. 788; opprobrious words addressed to policeman as breach of peace, 34 A. L. R. 566.

103-50-10. Members of Assembly Severally Guilty.

If two or more persons assemble for the purpose of disturbing the public peace or committing any unlawful act, and do not disperse on being commanded so to do by a public officer, the persons so offending are severally guilty of a misdemeanor. (C. L. 17, § 8228.)

Comparable provisions.
Idaho Code, § 17-3010 (identical).

A. L. R. notes.
Unlawful assembly, what constitutes, 93 A. L. R. 751.

CHAPTER 51

SEXUAL OFFENSES

103-51-1. Polygamy.
103-51-2. Unlawful Cohabitation — All Persons, Except Defendant Must Testify.
103-51-3. Adultery.
103-51-4. Incest.
103-51-5. Fornication.
103-51-6. Indictment and Information —Joining Counts.
103-51-7. Id.
103-51-8. Pandering.
103-51-9. Id. As to Wives.
103-51-10. Id. Profiting by Earnings of Fallen Women.
103-51-11. Id. Detaining Female in House of Prostitution for Debt.
103-51-12. Id. Transporting Females for Prostitution—Venue.
103-51-13. Id. Acts Committed Without State.
103-51-14. Id. Female, a Competent Witness.
103-51-15. Rape Defined.
103-51-16. Age of Defendant.
103-51-17. Necessity for Penetration.
103-51-18. Penalty.
103-51-19. Carnal Knowledge of Female Between 13 and 18.
103-51-20. Taking Female Under 18 for Prostitution.
103-51-21. Houses of Prostitution Prohibited—Penalty.
103-51-22. Sodomy — Unnatural and Detestable Practices.

103-51-1. Polygamy.

Every person who has a husband or wife living, who marries another, whether married or single, and any man who simultaneously, or on the same day, marries more than one woman, is guilty of polygamy, and

shall be punished by a fine of not more than $500, and by imprisonment in the state prison for a term of not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court on the ground of nullity of the marriage contract. (C. L. 17, § 8086.)

History.
This section is substantially identical with the Edmunds Law which appeared in 1 Comp. Laws 1888, p. 110. It is also practically identical with R. S. 1898, Title 75, § 4208; Comp. Laws 1907, Title 90, § 4208.

Comparable provisions.
Idaho Code, § 17-1801 (substantially identical; fine of not less than $200 and six months imprisonment, or fine not exceeding $2,000 and term of not more than five years).

Cross-references.
Polygamous or plural marriages to be forever prohibited, Enabling Act, § 3; polygamous or plural marriages forever prohibited, Const. Art. III, § 1, Art. XXIV, § 2.

1. General construction of section.
Enumeration in this section of defenses to charge of polygamy excludes all others. State v. Hendrickson, 67 U. 15, 245 P. 375, 57 A. L. R. 786.

2. Elements of offense.
Specific intention to commit crime of polygamy is not necessary, so long as marriage relied on as constituting crime was intentionally entered into. State v. Hendrickson, 67 U. 15, 245 P. 375, 57 A. L. R. 786.

3. Defenses.
In view of demands made by Enabling Act (section 3), in pursuance of which Constitution of Utah was framed and pledges made in the Constitution itself (Art. III, § 1), respecting this offense, it will not be presumed that legislature intended to be less rigorous than sister states in dealing with polygamy, nor should the courts of this state be more liberal than the courts of other states in permitting defenses which under rules of statutory construction appear to have been deliberately excluded. State v. Hendrickson, 67 U. 15, 245 P. 375, 57 A. L. R. 786.

In prosecution for polygamy, good faith of defendant in contracting second marriage and honest, reasonable belief that his wife had divorced him, no defense. State v. Hendrickson, 67 U. 15, 245 P. 375, 57 A. L. R. 786.

A. L. R. notes.
Bigamy as affected by place where second or later marriage is celebrated, 70 A. L. R. 1036; mistaken belief in existence, validity, or effect of divorce or separation as defense to prosecution for bigamy, 57 A. L. R. 792; presumption and burden of proof in prosecution for bigamy as to dissolution of first marriage, 56 A. L. R. 1273; religious belief as affecting crime of bigamy, 24 A. L. R. 1237.

103-51-2. Unlawful Cohabitation—All Persons, Except Defendant Must Testify.

If any person cohabits with more than one person of the opposite sex, such person is guilty of a felony.

Any person, except the defendant, may be compelled to testify in a prosecution for unlawful cohabitation; *provided, however*, that the evidence given in such prosecution shall not be used against him in any proceeding, civil or criminal, except for perjury in giving such testimony. A person so testifying shall not thereafter be liable to indictment, prosecution, or punishment for the offense concerning which such testimony was given. (C. L. 17, § 8087.)

History.

As amended by L. 35, ch. 112, eff. May 14, rewriting text and adding second paragraph.

This section was embodied in the Edmunds Act which is set forth in 1 Comp. Laws 1888, p. 111, but differs materially therefrom.

This section was derived from the Act of Congress known as the "Edmunds Act," and passed when Utah was a territory. See United States v. Cannon, 4 U. 122, 7 P. 369, aff'd 116 U. S. 55, 29 L. Ed. 561, 6 S. Ct. 278; United States v. Snow, 4 U. 280, 9 P. 501, dismissed for want of jurisdiction 118 U. S 346, 30 L. Ed. 207, 6 S. Ct. 1059.

Cross-references.

Competency of wife as witness, 105-45-4; testimony of accomplice, 105-32-18; joinder of offenses, 105-21-31.

1. Purpose and object of section.

The purpose of this legislation was to aid in breaking up polygamy and the pretense thereof. United States v. Cannon, 4 U. 122, 131, 7 P. 309, aff'd 116 U. S. 55, 29 L. Ed. 561, 6 S. Ct. 278.

The purpose of this whole statute is to destroy polygamy and the evils attendant thereon, and to confine his marital relations to a man's first and only legal wife. It is aimed directly at the destruction of polygamous and/or bigamous relations; at the destruction of the very pretense—the "outward semblance" of that relation. United States v. Snow, 4 U. 295, 298, 9 P. 686, quoting Cannon v. United States, 116 U. S. 55, 29 L. Ed. 561, 6 S. Ct. 278.

2. Words and phrases defined.

The term "cohabitation" in this section means, in general terms, the dwelling or living together as man and wife. It does not necessarily mean to live in the same house; the word "house" is not used in the definition of it. The man and woman may dwell or live together in an open field, or on a railroad train, or in the same house. United States v. Snow, 4 U. 295, 298, 9 P. 686.

To be cohabiting it is not necessary that the man actually dwell with the woman, nor is it necessary that he take his meals with his wife, to be living with her; nor is it necessary that they be under the same roof. And he need not pass a certain number of days and nights with his wife in order to be considered as living with her. If he sees her daily, or but a few times a year, he is living with her; he is cohabiting with her. If there has been no legal separation or divorce, whether one roof shelters them or not, if he holds her out to the world as a wife, supports her and recognizes her as a wife, they are living together. United States v. Snow, 4 U. 313, 319, 9 P. 697.

When a man lives and associates with two or more women as a husband with his wife, he is guilty of cohabitation. Holding more than one woman out to the world as his wife is sufficient to constitute the offense. United States v. Snow, 4 U. 313, 324, 9 P. 697, setting out approved instruction to jury.

3. Nature of offense.

This is a continuing offense and not one consisting of an isolated act. Ex parte Snow, 120 U. S. 274, 30 L. Ed. 658, 7 S. Ct. 556. But it seems that this is not necessarily so. For example, unlawful cohabitation with the same woman on different dates would constitute two or more different offenses. United States v. Groesbeck, 4 U. 487, 11 P. 542 (rehearing denied 11 P. 622 [not officially reported]), followed in United States v. Bromley, 4 U. 498, 11 P. 619.

4. Applicability and general construction.

While the words "male person" no longer appear in this section since the 1935 amendment, the word "sex" does appear, and it may not be amiss to note that such words as "George," "Mary" and the like disclose the sex of the person without so stating. See United States v. Eldredge, 5 U. 161, 170, 13 P. 673.

5. Elements of offense.

Sexual intercourse is not necessary ingredient of crime of unlawful cohabitation. State v. Springer, 40 U. 471, 121 P. 976; United States v. Smith, 5 U. 232, 14 P. 291, overruled on another point in United States v. Clark, 6 U. 120, 21 P. 463. Cohabitation contemplated by this section does not include sexual intercourse; the word does not even include necessarily the occupying of the same bed; therefore it is unnecessary to allege in indictment anything in regard to sexual intercourse, for sexual intercourse is not a necessary element in the crime here defined. United States v. Cannon, 4 U. 122, 128, 7 P. 369, aff'd 116 U. S. 55, 29 L. Ed. 561, 6 S. Ct. 278; United States v. Musser, 4 U. 153, 7 P. 389.

"Unlawful cohabitation" is proved by facts showing a course of conduct that to all outward appearances convinces one that the parties are living together as husband and wife; neither sexual intercourse nor actual attempted marriage are elements required as proof of the offense, nor is the offense proved by incidents alone of improper relations. State v. Jessup, 98 U. 482, 100 P.2d 960.

It is not the gist of the offense to "ostensibly" live with plural wives. Living with them secretly is just as much a violation of this section. United States v. Peay, 5 U. 263, 14 P. 342.

When a polygamist has a lawful wife living within the jurisdiction of the court, known and understood to be such, and he lives and cohabits with another woman as his wife, he is guilty of a violation of this section. The presumption that he cohabits with the legal wife is a legal one, and is conclusive, if it is a presumption at all. In other words, if they both bear his name and are known as his wives, he is regarded as cohabiting with them as a matter of law. United States v. Clark, 6 U. 120, 21 P. 463, overruling United States v. Smith, 5 U. 232, 14 P. 291; United States v. Harris, 5 U. 436, 17 P. 75; United States v. Clark, 5 U. 226, 14 P. 288.

6. Liability under present section.

Prior to amendment of this section in 1935 it was manifest that only a male person could be indicted for unlawful cohabitation thereunder. And it was held that an averment that defendant was a "male person" was unnecessary, since that would be supplied by presumption. United States v. Cannon, 4 U. 122, 7 P. 369, aff'd 116 U. S. 55, 29 L. Ed. 561, 6 S. Ct. 278.

But under the broad terms of the present section a woman who unlawfully cohabits with more than one man can be indicted, and furthermore the grade of the offense has been raised from a misdemeanor to a felony. In other words, the word "person" in the present section embraces all mankind, and mankind is divided into two classes, one male and the other female. United States v. Cannon, 4 U. 122, 125, 7 P. 369, aff'd 116 U. S. 55, 29 L. Ed. 561, 6 S. Ct. 278.

7. Indictment, information or complaint.

As this is purely a statutory crime, it is sufficient to describe the offense in the language of the statute. United States v. Cannon, 4 U. 122, 130, 7 P. 369, aff'd 116 U. S. 55, 29 L. Ed. 561, 6 S. Ct. 278. But definition of "cohabitation" is so general that to limit the information to it, word for word, states no more than a class of crimes. State v. Jessup, 98 U. 482, 100 P.2d 969.

An indictment under this section need not add the words "as wives" or "as husbands" after word "cohabit," although section was only intended to apply to unlawful marital cohabitation. United States v. Cannon, 4 U. 122, 7 P. 369, aff'd 116 U. S. 55, 29 L. Ed. 561, 6 S. Ct. 278.

Information charging defendant with unlawful cohabitation on a certain day, which failed to name the cohabitees of the opposite sex, should have been quashed, and where the preliminary hearing was waived by defendant, the court should have directed the filing of a new information. State v. Jessup, 98 U. 482, 100 P.2d 969.

Under terms of former section, prior to 1935 amendment, complaint did not have to allege that accused was a male person. United States v. Eldredge, 5 U. 161, 13 P. 673, following United States v. Cannon, 4 U. 122, 7 P. 369, appeal dismissed 116 U. S. 55, 29 L. Ed. 561, 6 S. Ct. 278.

8. Evidence.

9. — quantum of proof.

Defendant may be convicted under this section upon his admissions made out of court, where deliberately and intelligently made, and fully proved. Maxfield v. West, 6 U. 379, 24 P. 98.

Evidence that defendant was found in his home with two women, both pregnant, that one woman left immediately and the other was defendant's wife, but that both were again present the next day when the sheriff returned to serve subpoenas upon the women, held insufficient to warrant conviction of unlawful cohabitation. State v. Jessup, 98 U. 482, 100 P.2d 969.

10. — presumptions.

Under this section a man is conclusively presumed to cohabit with a legal wife living in the same town, from whom he has not been divorced, whom he recognizes as his wife, and to whose support he contributes. United States v. Snow, 4 U. 295, 9 P. 686.

11. Questions of law and fact.

Whether there has been cohabitation within the meaning of this section is a question for the jury under all the facts and circumstances of the particular case. But it is not necessary that the various women should "keep a room" for him, to constitute cohabitation. United States v. Snow, 4 U. 295, 9 P. 686.

12. Instructions.

It is proper to instruct the jury that the offense of cohabitation is complete under this section when a man, to all outward appearances, is living and associating with two or more wives. It is not necessary that he should board and lodge under the same roof or have sexual intercourse with them. United States v. Snow, 4 U. 280, 9 P. 501, dismissed for want of jurisdiction 118 U. S. 346, 30 L. Ed 207, 6 S. Ct. 1059.

It is highly proper to employ the word "unlawful" in describing the offense under this section. United States v. Eldredge, 5 U. 161, 170, 13 P. 673.

103-51-3. Adultery.

Whoever commits adultery shall be punished by imprisonment in the state prison not exceeding three years; and when the act is committed between a married woman and a man who is unmarried, both parties to such act are guilty of adultery; and when such act is committed between a married man and a woman who is unmarried, the man is guilty of adultery. (C. L. 17, § 8088.)

History.

This section is practically identical with 1 Comp. Laws 1888, Section XXIII, p. 115, § 3; R. S. 1898, § 4210; Comp. Laws 1907, § 4210.

Cross-references.

Adultery as ground for divorce, see 40-3-1.

1. Validity of territorial act.

Territorial legislature held to have had right to enact so much of law of 1892 as made adultery criminal offense, notwithstanding Edmunds-Tucker Law, previously enacted by Congress, provided for punishment of adultery as offense against laws of United States. State v. Norman, 10 U. 457, 52 P. 986 (Zane, C. J., dissenting), disapproved in People of Puerto Rico v. Shell Co. (P.R.) Ltd., 86 F.2d 577.

2. Nature of offense.

Adultery is not a continuous offense, but each act constitutes a separate offense. State v. Thompson, 31 U. 228, 87 P. 709.

3. Included offenses.

Crime of adultery is not necessarily included in crime of rape and does not constitute a lesser degree of that offense under 105-32-5 and 105-34-6. State v. Anderton, 69 U. 53, 252 P. 280.

4. Essential of offense.

The essentials of this offense are stated in statute. State v. Sheffield, 45 U. 426, 438, 146 P. 306. This case was followed in State v. Kimball, 45 U. 443, 146 P. 313.

Emission is not essential to constitute this crime. See State v. Warner, 79 U. 500, 506, 291 P. 307, rev'd on another point 79 U. 510, 13 P.2d 317.

5. Corpus delicti.

The corpus delicti must be proved by more than suspicion and conjecture. State v. Sheffield, 45 U. 426, 440, 146 P. 306.

In prosecution for adultery, corpus delicti was sufficiently shown by proof that prosecutrix, an unmarried woman, gave birth to child, and defendant's admission that he had sexual intercourse with her. State v. Greene, 38 U. 389, 115 P. 181.

6. Persons liable.

The crime of adultery does not necessarily involve the criminal concurrence of two persons, and may be committed notwithstanding failure of the female to consent or her legal incapacity to do so. State v. Wade, 66 U. 267, 241 P. 838.

An unmarried female under the age of 18 is legally incapable of the criminal intent necessary to the crime of adultery, in view of 103-51-19. State v. Wade, 66 U. 267, 241 P. 838.

7. Venue.

If information does not designate the place except as "within the county," state can prove it at any time within period named and at any place within the county, and judgment of acquittal or conviction will bar any other prosecution of defendant for any similar act alleged to have been committed within the same period and within same jurisdiction. It is otherwise if adulterous act is alleged to have been committed at a particularly described place. State v. Sheffield, 45 U. 426, 438, 146 P. 306.

8. Indictment, information or complaint.

That defendant, a married man, within venue and jurisdiction carnally knew ....., a woman, not his wife, sufficiently states essentials of offense. State v. Sheffield, 45 U. 426, 438, 146 P. 306.

In prosecution for adultery, information which charged that defendant, a married man, on February 13, and on divers other days, and thence continually between February 13 and April 1, committed adultery with unmarried woman, held sufficient. State v. Thompson, 31 U. 228, 87 P. 709.

In prosecution for adultery, information which charged that offense was committed on certain day and thence continually between certain days, charged but one offense as against contention that information was objectionable for duplicity. State v. Thompson, 31 U. 228, 87 P. 709.

In prosecution of married woman for adultery, information which charged defendant with having feloniously permitted certain named man to have carnal knowledge of her body, held not insufficient on ground that defendant was not charged with having done anything, but only with permitting some-

thing to be done by another. State v. Moore, 36 U. 521, 105 P. 293, Ann. Cas. 1912 A 284.

9. — date of offense.

It is immaterial when criminal act was committed, so long as it is alleged and proved to have been committed prior to filing of information and within period of limitation. State v. Sheffield, 45 U. 426, 438, 146 P. 306.

10. Issues, proof and variance.

In prosecution for adultery, whether prosecutrix was first defiled by defendant or some other person was not germane to any issue in case, and was therefore wholly immaterial and should have been excluded as prejudicial to defendant. State v. Hansen, 40 U. 418, 122 P. 375.

In prosecution for adultery, where information charged offense was committed on February 13, state could introduce proof of adulterous act committed on February 1. State v. Thompson, 31 U. 228, 87 P. 709.

11. Evidence.

12. — competency, admissibility and relevancy.

Circumstantial evidence under proper limitations and restrictions is, of course, admissible. State v. Sheffield, 45 U. 426, 440, 146 P. 306. Conviction for adultery could be had though no witness testified to seeing act complained of, and defendant made no admission or confession where crime was established by circumstances from which jury could infer defendant's guilt. State v. Odekirk, 56 U. 272, 190 P. 777.

In prosecution for adultery, certified copy of marriage record is admissible in evidence without first identifying parties named therein, but, if no further proof of their identity is produced, marriage of unidentified parties is not legally proved or established. State v. Springer, 40 U. 471, 121 P. 976.

In prosecution for adultery, affidavit purporting to have been made and signed by prosecutrix, and stating that she was mother of infant son, that defendant was its father, that she was unmarried, and had had sexual intercourse with defendant at divers times, which was handed to and read by defendant who replied that he had sexual intercourse with prosecutrix, but did not believe he was father of her child, held admissible in evidence to show admissions made by defendant with respect to statements contained in writing. State v. Greene, 38 U. 389, 115 P. 181. (McCarty, J., dissenting.)

In prosecution for adultery, court properly admitted into evidence deed signed and acknowledged by defendant and woman as husband and wife to show that woman was defendant's wife. State v. Greene, 33 U. 497, 94 P. 987.

In prosecution for adultery, where marriage was sought to be established by marriage certificate, or certified copy of record, evidence that real name of parties differed from names stated in marriage certificate was admissible. State v. Thompson, 31 U. 228, 87 P. 709.

In prosecution for adultery with unmarried woman, testimony of physician who had examined prosecutrix that she was eight months in pregnancy, and that in his opinion conception took place the previous February, was competent and properly received as corroborative of testimony of prosecutrix that crime had been committed on or about time relied on for conviction, though it did not fix defendant as participant therein. State v. Thompson, 31 U. 228, 87 P. 709.

In prosecution for adultery, instruction that jury could consider fact of pregnancy as tending to connect defendant with crime, held erroneous. State v. Thompson, 31 U. 228, 87 P. 709.

13. — proof of marriage.

In prosecution for adultery, while stricter proof of marriage is required in criminal than in civil cases, evidence given by accomplice of defendant as to place and date of marriage, of living with her husband, as to his absence and return, and as to living with him again, held sufficient to show that accomplice was married woman at time of her adulterous acts with defendant. State v. Stewart, 57 U. 224, 193 P. 855.

In prosecution for adultery, marriage may be proved by admissions of accused. State v. Greene, 38 U. 389, 115 P. 181; State v. Moore, 36 U. 521, 105 P. 293, Ann. Cas. 1912 A 284. These cases are followed in State v. Moore, 41 U. 247, 126 P. 322, Ann. Cas. 1915 C 976, and in State v. Park, 44 U. 360, 365, 140 P. 768.

In prosecution for adultery, where marriage was sought to be established by marriage certificate, or certified copy of record, there should be something more than mere production of certificate, or copy thereof; there should also be some evidence showing identity of parties. State v. Thompson, 31 U. 228, 87 P. 709.

In prosecution for adultery, marriage could be proven not only by marriage certificate, or certified copy of record, but also by person who performed ceremony, by person who witnessed ceremony, by cohabitation and other circumstances, and by admissions. State v. Thompson, 31 U. 228, 87 P. 709.

Statement of married woman, charged with adultery, made to sheriff in whose custody she was, in which she stated her name, age, and that she was married, was not in nature of confession and was admissible in evidence. State v. Moore, 36 U. 521, 105 P. 293, Ann. Cas. 1912 A 284.

14. — accomplices and accessories.

In prosecution for adultery, it is essential to conviction that there be evidence corroborative of testimony of accomplice which in itself and without aid of testimony of accomplice tends to connect defendant with commission of offense; and corroboration is not sufficient if it merely shows commission of offense, or circumstances thereof. State v. Thompson, 31 U. 228, 87 P. 709; State v. Kimball, 45 U. 443, 146 P. 313.

In prosecution for adultery, wherein testimony of accomplice of defendant attempted to connect defendant with crime of adultery, held there was sufficient corroborative evidence which in and of itself, independent of that of accomplice, tended directly to connect accused with commission of offense. State v. Stewart, 57 U. 224, 193 P. 855.

In prosecution for adultery, confession by defendant of act which related to an entirely separate and distinct transaction from which he was tried, did not corroborate testimony of prosecutrix. State v. Hansen, 49 U. 418, 122 P. 375.

Conviction of adultery on uncorroborated testimony of 14-year-old prosecutrix warranted, since she could not legally be accomplice within 105–32–18, in view of 103–51–19. State v. Wade, 66 U. 267, 241 P. 838.

15. — presumptions and burden of proof.

In prosecution for adultery, it will be presumed that 14-year-old prosecutrix was unmarried, in absence of evidence to contrary. State v. Wade, 66 U. 267, 241 P. 838.

16. — weight and sufficiency.

This crime is sufficiently established by proof of circumstances from which jury may reasonably infer guilt of the defendant. State v. Lewellyn, 71 U. 331, 266 P. 261.

In prosecution for adultery, proof that defendant was married man, and that he was married to woman other than prosecutrix, and further proof that he had sexual intercourse with latter, held sufficient to show him guilty of adultery, whether prosecutrix was married or unmarried woman. State v. Greene, 38 U. 389, 115 P. 181.

On prosecution for adultery, evidence of subsequent acts of association, not amounting to crime, is admissible as tending to show probability of guilt of offense charged. State v. Snowden, 23 U. 318, 65 P. 479.

Evidence held sufficient to sustain conviction for adultery, though testimony of prosecutrix, when considered in all its phases, including manner in which it was elicited by district attorney, was inherently weak. State v. Hansen, 49 U. 418, 122 P. 375.

Evidence held sufficient to sustain conviction for adultery. State v. Odekirk, 56 U. 272, 190 P. 777.

A judgment of conviction upon insufficient testimony will be reversed. State v. Kimball, 45 U. 443, 146 P. 313.

17. Raising and waiving objections.

Where defense to charge of rape amounted to admission of adultery, defendant convicted of latter cannot object to information as duplicitous where he interposed no special demurrer thereto and waived preliminary examination as to adultery by failure to move to quash duplicitous information charging both rape and adultery. State v. Anderton, 69 U. 53, 252 P. 280.

A. L. R. notes.

Conspiracy to commit adultery or other offense which can only be committed by the concerted action of the parties to it, 104 A. L. R. 1430; isolated acts of sexual intercourse as constituting criminal offense of adultery or fornication or illicit cohabitation, 74 A. L. R. 1361.

103–51–4. Incest.

If any person related to another person within and not including the fourth degree of consanguinity, computed according to the rules of the civil law, shall marry or cohabit with, or have sexual intercourse with, such other so related person, knowing her or him to be within said degree of relationship, the person so offending is guilty of incest, and shall be punished by imprisonment in the state prison not less than three years nor more than fifteen years. (C. L. 17, § 8089.)

History.
This section is practically identical with R. S. 1898, § 4211; Comp. Laws 1907, § 4211.

1. General construction of section.
The words "within and not including the fourth degree of consanguinity," etc., as used in this section, are descriptive of class of persons who are prohibited from marrying, cohabiting, or having sexual intercourse with each other, and are intended to group together all of different degrees of relationship to which statute applies, and thereby to avoid necessity of specifically enumerating them. State v. James, 32 U. 152, 89 P. 460.

2. Elements of offense.
To constitute this crime, there must be an actual contact of the sexual organs and a penetration into female's body, but not to any particular depth, nor is it essential to show an emission. State v. Warner, 79 U. 500, 291 P. 307, rev'd on another point 79 U. 510, 13 P.2d 317.

A father having intercourse with his daughter may be convicted of incest, though the daughter did not consent, and the intercourse was had by force. State v. Winslow, 30 U. 403, 86 P. 433, 8 Ann. Cas. 908.

3. Accomplices and accessories.
A prosecutrix 13 years old is not an accomplice in a prosecution of her father under this section, and, therefore, need not be corroborated under 105–32–18 before conviction can be had on her testimony. State v. Warner, 79 U. 500, 291 P. 307, rev'd on another point in 79 U. 510, 13 P.2d 317.

4. Indictment, information and complaint.
Allegation in information that defendant had sexual intercourse with his niece, knowing her to be of such relationship, held sufficient. State v. James, 32 U. 152, 89 P. 460.

103–51–5. Fornication.

If an unmarried man or woman commits fornication, each of them shall be punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding $100. (C. L. 17, § 8090.)

History.
This section is identical with R. S. 1898, § 4212; Comp. Laws 1907, § 4212, and it is substantially identical with 1 Comp. Laws 1888, Section XXIII, p. 115, which was the Edmunds-Tucker Law.

1. Validity of territorial law.
So much of territorial law of 1892 as made fornication criminal offense held valid, notwithstanding Edmunds-Tucker Law, previously enacted by Congress, also made it punishable as crime. State v. Pierpont, 16 U. 476, 52 P. 992 (Zane, C. J., dissenting, per notation under syllabus in official report), applying Session Laws 1896, Ch. 7, § 5.

2. Definition.
Fact that territorial law of 1892 failed to specifically define "fornication," held not to avail defendant, prosecuted for such offense under such law, since meaning of term was well understood and settled in legal parlance. State v. Pierpont, 16 U. 476, 52 P. 992.

3. Information.
In such cases as these it seems that the information may be amended. State v. Chipman, 40 U. 549, 560, 123 P. 89.

4. Evidence.
The general rules apply in prosecutions for this offense. Sufficient evidence must be produced to identify woman with whom offense was alleged to have been committed. State v. Chipman, 40 U. 549, 123 P. 89.

5. Instructions.
Instructions are set out in State v. Chipman, 40 U. 549, 123 P. 89.

A. L. R. notes.
Isolated acts of sexual intercourse as constituting criminal offense of adultery or fornication or illicit cohabitation, 74 A. L. R. 1361.

103–51–6. Indictment and Information—Joining Counts.

Counts for any or all offenses named in sections 103–51–1 and 103–51–2 may be joined in the same information or indictment. (C. L. 17, § 8091.)

Cross-references.
Joinder of sexual crimes, 105–21–31.

103–51–7. Id.

Counts for any or all offenses named in sections 103–51–3 and 103–51–5 may be joined in the same information or indictment.

(C. L. 17, § 8092.)

Cross-references.
Joinder of sexual offenses, 105–21–31.

103–51–8. Pandering.

Any person who procures a female inmate for a house of prostitution; or induces, persuades, encourages, inveigles or entices a female person to become a prostitute; or who by promises, threats, violence, or by any device or scheme, causes, induces, persuades, encourages, takes, places, harbors, inveigles or entices a female person to become an inmate of a house of prostitution or assignation place, or any place where prostitution is practiced, encouraged or allowed; and any person who by promises, threats or violence, or by any device or scheme, causes, induces, persuades, encourages, inveigles or entices an inmate of a house of prostitution or place of assignation to remain therein as such inmate; and any person who by promises, threats, violence, or by any device or scheme, or by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, or having legal charge, takes, places, harbors, inveigles, entices, persuades, encourages or procures any female person to enter any place within this state in which prostitution is practiced, encouraged or allowed, for the purpose of prostitution, or, not being her husband, for the purpose of sexual intercourse, or to inveigle, entice, persuade, encourage or procure any female person to come into this state or to leave this state for the purpose of prostitution, or, not being her husband, for the purpose of sexual intercourse; and any person who takes or detains a female with the intent to compel her by force, threats, menace or duress to marry him or to marry any other person or to be defiled, or upon the pretense of marriage takes or detains a female person for the purpose of sexual intercourse, or receives or gives, or agrees to receive or give, any money or thing of value for procuring or attempting to procure any female person to become a prostitute or to come into this state or leave this state for the purpose of prostitution, or, not being her husband, for the purpose of sexual intercourse;—is guilty of pandering, and shall be punished by imprisonment in the state prison for a term of not more than twenty years. (C. L. 17, § 8095.)

History.
This section was Session Laws 1911, Ch. 108.

Cross-references.
Corroboration necessary, 105–32–14; when husband and wife competent witnesses against each other, 105–45–4.

1. Validity.
This section and 103–51–10 are cognate and related to each other and are properly included in one act and under one title, as against contention that inclusion under one title conflicted with Const. Art. VI, § 23, which provides that no bill shall be passed containing more than one subject, which shall be clearly expressed in its title. State v. McCornish, 59 U. 58, 201 P. 637.

2. Words and phrases defined.
Under this section, the "promises" must have been made with the purpose of causing or inducing the inmate to remain, and must have actually tended to cause such result, and the inmate must have been induced thereby to remain in

the house. State v. Topham, 41 U. 39, 59, 123 P. 888, applying Session Laws 1911, Ch. 108.

3. Information.

Prior to 1935 amendments to Code of Criminal Procedure, it was held that an information for pandering was not sufficient which merely charged the offense in the language of the statute; the acts constituting the offense, and the particular circumstances of the offense, when they are necessary to constitute a complete offense, must be stated in information. State v. Topham, 41 U. 39, 123 P. 888.

4. Entrapment.

In prosecution for pandering, wherein it appeared that city detective deliberately planned and induced commission of offense which otherwise would not have been committed by anyone, held conviction would be reversed. State v. McCornish, 59 U. 58, 201 P. 637.

A. L. R. notes.

Constitutionality and construction of pandering acts, 74 A. L. R. 311.

103–51–9. Id. As to Wives.

Any person who by force, fraud, intimidation or threats places or leaves, or procures any other person or persons to place or leave, his wife in a house of prostitution or to lead a life of prostitution is guilty of a felony, and shall be punished by imprisonment in the state prison for not more than ten years. (C. L. 17, § 8096.)

103–51–10. Id. Profiting by Earnings of Fallen Women.

Any person who knowingly accepts, receives, levies or appropriates any money or other valuable thing, without consideration, from the proceeds of the earnings of any woman engaged in prostitution, is guilty of a felony, and shall be punished by imprisonment in the state prison for a period of not less than two nor more than twenty years. Any such acceptance, receipt, levy or appropriation of such money or valuable thing shall, upon any proceeding or trial for violation of this section, be presumptive evidence of lack of consideration; any person who procures a female person for the purpose of prostitution for a male person by either personal solicitation, messenger, telephone call, or other means, or who sends or directs any female person to the sleeping apartment or lodging room of any male person, or to any other place for the purpose of prostitution, whether for hire or for a commission of the proceeds of the prostitution, or for any other consideration of value, from either the man for whom such female was procured, sent or directed, or from the female so procured, sent or directed, whether collected at the time or not; every messenger, every hotel or rooming-house proprietor, clerk or other employee of such place, and every chauffeur or hack driver, or any other person, who by any means sends, directs, takes or conveys any female person to any room or other place for the purpose of prostitution with or for another male person; and any person who keeps a list of female persons to call or to be called for the purpose of prostitution, is guilty of a felony, and on conviction thereof shall be punished by imprisonment in the state prison for not less than two nor more than ten years. Any cafe, restaurant or coffee house proprietor, manager or waiter, or other employee having full or temporary charge of such place, and any proprietor or manager, or other person having charge of any road house or assignation house, or any other person who knowingly permits prostitutes to solicit patronage for prostitution in his place of business, or any

place over which such person has control, or aids or abets such prostitutes in so soliciting or securing patronage for prostitution in any place or in any manner whatsoever; and every hotel, rooming-house, lodging-house or boarding-house keeper, proprietor or manager, or other person having charge of such place, or any other person who knowingly rents any of the rooms of such a place, or any other room or rooms of any place for the purpose of prostitution, or knowingly permits any of such rooms or any other room or rooms over which he has control to be used for the purpose of prostitution, is guilty of a felony, and shall be punished by imprisonment for a period of not less than one nor more than five years. In the case of the procuring of a female for the purpose of prostitution, such female being under the age of twenty-one years at the time of procurement, and such female being procured, sent or directed by any of the persons or by any of the methods in this section described, or by any other person or method for the purpose of prostitution, and whether or not such female is of chaste character at the time of such procurement, or whether or not the procurer is the lawful husband of such female, such person shall be punished by imprisonment in the state prison for a period of not less than five nor more than twenty years. (C. L. 17, § 8097.)

1. Validity.

This section and 103-51-8 are cognate and related to each other and are properly included in one act and under one title, as against contention that inclusion under one title conflicted with Const. Art. VI, § 23, which provides that no bill shall be passed containing more than one subject, which shall be clearly expressed in its title. State v. McCornish, 59 U. 58, 201 P. 637.

2. Grade of offense and punishment.

It will be observed that the various acts are declared to be felonies by the provisions of this section, and that different penalties are provided for a violation of the various provisions thereof. State v. Lund, 75 U. 559, 564, 286 P. 960.

3. Information.

The information must, of course, comply with the requirements of the Code of Criminal Procedure. It must not charge more than one offense in violation of 105-21-31, and must otherwise comply with that Code. State v. Zaharopoulos, 60 U. 244, 208 P. 493, applying this section, and setting out improved form of information.

Prior to enactment of Laws 1935, Ch. 118, it was held that an information under this section which fails to allege that the money was accepted and received "without consideration," as provided for therein, is fatally defective; nor do words "unlawfully" and "feloniously" supply the omission. Proper pleading in a criminal action requires that the primary facts constituting the crime be alleged. State v. Lund, 75 U. 559, 286 P. 960, followed in State v. Juretish, 75 U. 565, 286 P. 962.

A. L. R. notes.

Constitutionality and construction of pandering acts, 74 A. L. R. 311.

103-51-11. Id. Detaining Female in House of Prostitution for Debt.

Any person who attempts to detain any female person in a disorderly house or house of prostitution because of any debt or debts she has contracted, or is said to have contracted, while living in such house, is guilty of a felony, and shall be punished by imprisonment in the state prison for not more than ten years. (C. L. 17, § 8098.)

103-51-12. Id. Transporting Females for Prostitution—Venue.

Any person who knowingly transports or causes to be transported, or aids or assists in obtaining transportation for, by any means of conveyance into, through or across this state, any female person for the

purpose of prostitution, or with intent and purpose to induce, entice or compel such female person to become a prostitute, is guilty of a felony, and shall be imprisoned in the state prison for not more than ten years. Any person who commits the crime in this section mentioned may be prosecuted, indicted, tried and convicted in any county in or through which he shall so transport or attempt to transport any female person as aforesaid. (C. L. 17, § 8099.)

103–51–13. Id. Acts Committed Without State.

It shall not be a defense to a prosecution for any of the acts prohibited in sections 103–51–8 to 103–51–12 inclusive that any parts of such act or acts shall have been committed outside this state, and the offense shall in such case be deemed and alleged to have been committed, and the offender may be tried and punished, in any county in which the prostitution was intended to be practiced or in which the offense was consummated, or any overt act in furtherance of the offense shall have been committed. (C. L. 17, § 8100.)

103–51–14. Id. Female, a Competent Witness.

Any such female person referred to in sections 103–51–8 to 103–51–12 inclusive shall be a competent witness in any prosecution under any of said sections to testify for or against the accused as to any transaction or as to any conversation with the accused or by him with another person or persons in her presence, notwithstanding her having married the accused before or after the violation of any of the provisions of said section, whether called as a witness during the existence of the marriage or after its dissolution. (C. L. 17, § 8101.)

103–51–15. Rape Defined.

Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under any of the following circumstances:

(1) When the female is under the age of thirteen years.

(2) Where she is incapable, through lunacy or any other unsoundness of mind, whether temporary or permanent, of giving legal consent.

(3) Where she resists, but her resistance is overcome by force or violence.

(4) Where she is prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution, or by any intoxicating, narcotic or anaesthetic substance administered by or with the privity of the accused.

(5) When she is at the time unconscious of the nature of the act, and this is known to the accused.

(6) Where she submits under the belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense or concealment practiced by the accused with intent to induce such belief. (C. L. 17, § 8105.)

History.

This section is practically identical with Comp. Laws 1876, p. 595, § 1964, except that the age of consent has been raised from 10 to 13 years. It is identical with 2 Comp. Laws 1888, Title IX, § 4499, p. 589; R. S. 1898, § 4217; Comp. Laws 1907, § 4217.

Comparable provisions.

Cal. Penal Code, § 261, Idaho Code, § 17–1601, Mont. Rev. Codes, § 11000

(substantially identical, except as to reading in part: "1. Where the female is under the age of eighteen years"; Montana provision uses word "when" in lieu of "where" in subd. 1, and reading also: "* * * under the age of eighteen years").

Cross-references.

Assault with intent to commit, 103-7-7; administering narcotics, etc., with intent to commit felony, 103-7-10.

1. Elements of offense.

2. — force, threats, violence, etc.

General rule, for purposes of crime of rape, requires not only that there should have been force, violence, or fraud, but also that utmost reluctance and resistance on part of woman should appear. State v. McCune, 16 U. 170, 51 P. 818.

Force or violence, or threats of immediate and great bodily harm, accompanied by apparent power of execution, are essential elements of crime of rape. State v. McCune, 16 U. 170, 51 P. 818. Essence of offense is not fact of intercourse, but injury and outrage to feelings of woman by means of carnal knowledge effectuated by force. State v. McCune, 16 U. 170, 51 P. 818.

Rape is not committed on person of woman over age of 13 years, when no circumstances of force or violence accompany carnal knowledge. State v. McCune, 16 U. 170, 51 P. 818.

Threats are sufficient, for purposes of crime of rape, if they are such as to create real apprehension of dangerous consequences, or of great and immediate bodily harm, accompanied by apparent power of execution, or are such as in any manner to overpower mind of woman so that she dare not resist. State v. McCune, 16 U. 170, 51 P. 818.

It is not necessary that state show that female resisted to her uttermost capacity to prevent penetration in order to show that there was no consent and act was forcibly done. State v. Roberts, 91 U. 117, 63 P.2d 584.

But if, from all of circumstances, it should appear that, although when prosecutrix was first laid hold of by force and violence it was against her will, she did not afterwards resist because, in some degree, she voluntarily consented to what was then done to her, defendant should not be convicted of rape, although he could be convicted of assault. State v. McCune, 16 U. 170, 51 P. 818.

3. — emissio seminis.

Emission is not essential to constitute this crime. See State v. Warner, 79 U. 500, 291 P. 307, rev'd on another point 79 U. 510, 13 P.2d 317.

4. Included offenses.

Assault always precedes completed offense of rape. State v. Blythe, 20 U. 378, 58 P. 1108.

Where defendant, charged with rape of six-year-old girl, was convicted of assault with intent to commit rape, held that, even though from evidence it might appear that rape was actually completed, jury had power to convict defendant of lesser offense, however illogical conviction of such offense might seem, and that jury's finding that defendant was guilty of lesser offense could not be regarded as injurious, but only as advantageous, to defendant. State v. Blythe, 20 U. 378, 58 P. 1108.

On prosecution for rape of six-year-old girl, held that, under evidence, trial court did not err in charging jury that defendant might be convicted of assault with intent to commit rape. State v. Blythe, 20 U. 378, 58 P. 1108.

Crime of adultery is not necessarily included in crime of rape and does not constitute a lesser degree of that offense under 105-32-5 and 105-34-6. State v. Anderton, 69 U. 53, 252 P. 280.

5. Assault with intent to commit rape.

As a girl under the age of 13 is, by subdivision (1) incompetent to consent to the act of intercourse, it follows that she cannot consent to an assault with intent to commit intercourse with her. If she cannot consent to the completed act, she may not consent to any essential criminal part of it. The crime of assault with intent to rape is accomplished by one who lays hands on such a girl with the intent and for the purpose, then and there, to accomplish an act of sexual intercourse with her, even though he does not use force or violence, and the girl offers no resistence or even consents to all he does. State v. Smith, 90 U. 482, 493, 62 P.2d 1110.

6. Female under age of consent.

A female under 13 years of age is incapable of consenting to this crime. State v. Warner, 79 U. 500, 291 P. 307, rev'd on another point 79 U. 510, 13 P.2d 317.

7. Accomplices and accessories.

One who merely aids and abets another in the commission of rape may be guilty thereof though he does not have intercourse with prosecutrix. State v. Brinkman, 68 U. 557, 251 P. 364.

Under former 105-21-24 (now see 105-21-40) every accessory is a principal, and in information charging rape, accessory may be charged as having himself committed the acts of violence and carnal knowledge, though evidence may show merely that he knowingly, will-

fully, and unlawfully aided or abetted another in committing the acts constituting the offense. State v. Steele, 67 U. 1, 246 P. 332; State v. Davis, 67 U. 7, 245 P. 334.

A female 13 years old is not an accomplice, because she is in law incapable of yielding consent. State v. Warner, 79 U. 500, 291 P. 307, rev'd on another point 79 U. 510, 13 P.2d 317.

8. Preliminary examination.

In prosecution for rape of female under 18 years of age, where defendant was given preliminary examination on complaint charging rape had been committed on April 1, and information charged rape on that date, but proof showed that female was then over 18 years of age, and state promptly introduced evidence of prior acts of intercourse before female became 18, it was held that conviction could not be upheld, since defendant was not given benefit of preliminary examination for offense for which he was convicted. State v. Hoben, 36 U. 186, 102 P. 1000.

9. Indictment or information.

Since rape can be committed only by male person, information, charging rape, need not specify defendant's sex. State v. Williamson, 22 U. 248, 62 P. 1022, 83 Am. St. Rep. 780. (Baskin, J., dissenting.)

Information, charging rape, need not state that ravished female was not defendant's wife. State v. Williamson, 22 U. 248, 62 P. 1022, 83 Am. St. Rep. 780. (Baskin, J., dissenting.)

Any allegation of force in information for assault upon girl under the age of 13 as provided for in subdivision (1) would be mere surplusage. State v. Smith, 90 U. 482, 494, 495, 62 P.2d 1110.

As against motion in arrest of judgment, made by defendant who had been convicted of rape, held that information sufficiently charged resistance on part of prosecutrix and defendant's overcoming of such resistance by force or violence. State v. Delvecchio, 25 U. 18, 69 P. 58.

Information, purporting to charge defendant as accessory in rape of 14-year-old girl, which alleged that defendant took principal and prosecutrix in his car and let them out on road, waiting in car some distance away until principal called after committing crime, but which did not allege knowledge or intent on part of defendant to aid principal in committing crime of rape on prosecutrix, insufficient. State v. Steele, 67 U. 1, 246 P. 332; State v. Davis, 67 U. 7, 246 P. 334.

In prosecution for rape, time is not material ingredient of such offense, and it is not essential that it be precisely stated in information, and evidence of commission of offense, alleged on date other than and prior to that alleged, is competent and admissible. State v. Hoben, 36 U. 186, 102 P. 1000.

10. Issues, proof and variance.

In prosecution for rape of female under 18 years of age, where defendant was given preliminary examination on complaint charging rape had been committed on April 1, and information charged rape on that date, but proof showed that female was then over 18 years of age, and state introduced evidence of prior acts of intercourse before female became 18, it was held conviction could not be upheld, on evidence showing rape had been committed after she reached age of 18, since state had elected to try defendant for offense committed on April 1. State v. Hoben, 36 U. 186, 102 P. 1000.

Where crime of rape is perpetrated on female under age of consent, assault is committed by perpetrator willfully or feloniously laying his hands on her person with design to carnally know her, and, in such case, whether or not female consents, is immaterial. State v. Blythe, 20 U. 378, 58 P. 1108.

11. Defenses.

Of course insanity is a defense to statutory rape if properly proven. See State v. Hudley, 65 U. 109, 234 P. 940, and 103-1-20, and 103-1-40. The above case sets out some approved instructions.

In prosecution under subdivision (1), previous illicit intercourse constitutes no defense and furnishes no ground for justification or excuse. The law condemns an act of intercourse with a female under 13 years of age, whether accomplished with or without her actual consent, and regardless of her previous chastity or lack of chastity; therefore she may not be cross-examined as to such previous acts to test credibility and to show motive, because such evidence would be immaterial. State v. Smith, 90 U. 482, 486, 62 P.2d 1110.

12. Evidence.

13. — In general.

This note does not purport to contain all of the Utah cases dealing with evidence in prosecutions for the crime of rape. That is a matter of the general law of evidence in criminal cases, and standard works should be consulted in that regard. And see State v. Christensen, 73 U. 575, 276 P. 163.

Of course a judgment of conviction will not be reversed for nonprejudicial error in the introduction of evidence.

State v. Christensen, 73 U. 575, 276 P. 163.

14. —competency, relevancy and admissibility.

In prosecution for rape, if prosecutrix has had sexual intercourse with defendant at other times than one in question, that fact may ordinarily be shown. State v. Scott, 55 U. 553, 188 P. 860.

In prosecution for rape, jury could properly consider conduct of prosecutrix towards defendant after commission of the assault as bearing upon whether she consented. State v. Roberts, 91 U. 117, 63 P.2d 584.

15. —complaints by prosecutrix.

Complaints by prosecutrix recently after the alleged act may be shown, but not details thereof. State v. Christensen, 73 U. 575, 276 P. 163.

On prosecution for rape, prosecutrix may, on her examination in chief, testify that she made complaint of alleged offense and to whom and when and where complaint was made, but she cannot testify to particulars of complaint unless it was part of res gestae. State v. Neel, 21 U. 151, 60 P. 510.

Fact that prosecutrix complained of alleged rape immediately thereafter, or delayed making complaint for considerable time, bears on credibility of her testimony. State v. Halford, 17 U. 475, 54 P. 819.

16. —character evidence.

In prosecution for rape, if it is desired to prove that prosecutrix is a lewd woman, that may only be done by attacking her general reputation for chastity and morality, and not by showing specific acts of wrongdoing. State v. Scott, 55 U. 553, 188 P. 860.

In prosecution for rape, where defendant admits sexual act, but contends that prosecutrix consented thereto, evidence as to general reputation of prosecutrix for chastity is relevant and material upon question of consent. State v. Scott, 55 U. 553, 188 P. 860.

In prosecution for rape, wherein defendant denied that he had sexual intercourse with prosecutrix, court properly refused defendant to prove that general reputation of prosecutrix for chastity was bad. State v. Scott, 55 U. 553, 188 P. 860.

17. —collateral facts and transactions.

Defendant, in prosecution for rape upon little girl, could not, over general objections, be cross-examined as to similar acts with other little girls. State v. Williams, 36 U. 273, 103 P. 260.

In prosecution for rape, prosecutrix cannot be interrogated on cross-examination as to whether she had sexual intercourse with others than defendant. State v. Scott, 55 U. 553, 188 P. 860.

18. —corroborative evidence.

Declarations of prosecutrix, made immediately or soon after attack, are admissible in evidence as part of res gestae, not to prove commission of offense, but in corroboration of prosecutrix' testimony. State v. Imlay, 22 U. 156, 61 P. 557.

19. —evidence in rebuttal.

In prosecution for rape of ten-year-old girl, physician may testify that defendant had gonorrhea notwithstanding provisions of 104-49-3, subd. (4), 105-45-1 and 105-45-2; and where prosecutrix' gonorrheal infection is relied on by state as evidence of commission of the crime, defendant may submit evidence that prosecutrix' father, mother and sister also had disease, as casting doubt on contention that defendant was source of infection. State v. Dean, 69 U. 268, 254 P. 142.

20. —weight and sufficiency.

Of course any conviction of rape must be supported by the evidence (State v. Roberts, 91 U. 117, 63 P.2d 584), and the quantum of proof is provided for by the Code of Criminal Procedure (105-32-4).

In prosecution for rape, mere fact that prosecutrix received money from defendant, did not of itself establish consent. State v. Roberts, 91 U. 117, 63 P.2d 584.

21. —witnesses.

In prosecution for rape, wherein defendant produced witness, who testified that general reputation of prosecutrix for truth and veracity was bad, held state had right to impeach witness by showing that his general reputation for truth and veracity was bad. State v. Scott, 55 U. 553, 188 P. 860.

In prosecution for rape, wherein defendant produced witness, who testified that general reputation of prosecutrix for truth and veracity was bad, held it was improper for prosecuting attorney on cross-examination to ask such witness what his reputation in community was for truth veracity, since subject to which witness testified was reputation of prosecutrix. State v. Scott, 55 U. 553, 188 P. 860.

In prosecution for rape, where defendant denied sexual intercourse with prosecutrix, held it was error for prosecuting attorney in cross-examination to repeat all that was testified to by prosecutrix by asking numerous questions, in each one of which some fact stated by her was included. State v. Scott, 55 U. 553, 188 P. 860.

In prosecution for rape, wherein it was theory of defendant that prosecutrix had had intercourse with another person, and that in order to shield herself in view of her supposed pregnancy she wrongfully charged defendant with offense, held, under those circumstances, defendant would have right to prove by her on cross-examination that such was her purpose in lodging complaint against defendant, and, in order to establish fact, he would be permitted to prove that she had had intercourse with other person. State v. Scott, 55 U. 553, 188 P. 860.

22. Instructions.

On prosecution for rape of six-year-old girl, held that charge of rape necessarily included charge of assault with intent to commit rape. State v. Blythe, 20 U. 378, 58 P. 1108.

In prosecution for rape, instruction to jury that it was their province to determine weight and credibility to be given testimony of female upon whom it was alleged that rape had been committed, and who testified to facts and circumstances of such rape, "as of any other witness testifying in the case," held erroneous, since prosecutrix necessarily has greater interest in result of case than disinterested witness would have. State v. Scott, 55 U. 553, 569, 188 P. 860.

A. L. R. notes.

Assault and battery, acquittal or conviction of as bar to prosecution for rape, or assault with intent to commit rape, based on same transaction, 78 A. L. R. 1213.

Criminal responsibility of husband as for rape, or assault to commit rape, on wife, 18 A. L. R. 1063.

Evidence of complaint by victim of rape who is not a witness, 2 A. L. R. 1522.

Impotency as defense to charge to rape or assault with intent to commit rape, 26 A. L. R. 772.

Marriage with girl below the age of consent, intercourse as statutory rape, 10 A. L. R. 409.

Necessity and sufficiency of corroboration of prosecutrix in prosecution for rape, 60 A. L. R. 1124.

Subsequent marriage as bar to prosecution for rape, 9 A. L. R. 339.

103–51–16. Age of Defendant.

No conviction for rape can be had against one who was under the age of fourteen years at the time of the act alleged, unless his physical ability to accomplish penetration is proved as an independent fact, and beyond a reasonable doubt. (C. L. 17, § 8106.)

History.

This section is practically identical with Comp. Laws 1876, p. 595, § 1965. And it is identical with R. S. 1898, § 4218, and with Comp. Laws 1907, § 4218.

Comparable provisions.

Cal. Penal Code, § 262, Idaho Code, § 17–1602 (identical); Mont. Rev. Codes, § 11001 (identical, except as reading in part: "* * * under the age of sixteen years * * *").

103–51–17. Necessity for Penetration.

The essential guilt of rape consists in the outrage to the person and feeling of the female. Any sexual penetration, however slight, is sufficient to complete the crime. (C. L. 17, § 8107.)

History.

This section is practically identical with Comp. Laws 1876, p. 595, § 1966. And it is identical with R. S. 1898, § 4219; Comp. Laws 1907, § 4219.

Comparable provisions.

Cal. Penal Code, § 263, Mont. Rev. Codes, § 11002 (identical); Idaho Code, § 17-1603 (substantially identical).

103–51–18. Penalty.

Rape is punishable by imprisonment in the state prison not less than five years. (C. L. 17, § 8108.)

History.

This section is practically identical with Comp. Laws 1876, p. 595, § 1967. And it is identical with R. S. 1898, § 4220; Comp. Laws 1907, § 4220.

103-51-19. Carnal Knowledge of Female Between 13 and 18.

Any person who carnally and unlawfully knows any female over the age of thirteen years and under the age of eighteen years is guilty of a felony. (C. L. 17, § 8109.)

History.

This section is practically identical with R. S. 1898, § 4221; Comp. Laws 1907, § 4221.

1. Words and phrases defined.

The terms "sexual intercourse" and "carnal knowledge" are analogous. State v. Warner, 79 U. 500, 291 P. 307, rev'd on another point 79 U. 510, 13 P.2d 317.

2. Elements of offense.

Prosecutrix' consent to sexual act is not defense to prosecution under this section. State v. Hilberg, 22 U. 27, 61 P. 215.

3. Accomplices and accessories.

In view of this provision an unmarried female under the age of 18 is incapable of the criminal intent necessary to the crime of adultery and cannot be an accomplice to such crime. State v. Wade, 66 U. 267, 241 P. 838.

A female 13 years of age, being incapable of yielding consent, is not an accomplice. State v. Warner, 79 U. 500, 291 P. 307, rev'd on another point 79 U. 510, 13 P.2d 317.

Prosecutrix is not accomplice, and her testimony need not be corroborated. State v. Hilberg, 22 U. 27, 61 P. 215.

In prosecution for carnal knowledge, the chastity or general character of prosecutrix may not be attacked, and as she is not an accomplice, her testimony does not require corroboration, but veracity of her testimony is material and is subject to acceptance or rejection by court. State v. Olson, 100 U. 174, 111 P.2d 548.

4. Indictment or information.

An indictment under this section alleging that defendant did lay hold upon the person of said . . . . . and threw her to the ground, etc., is not improper as embodying unnecessary allegations calculated to prejudice the jury. State v. Benson, 46 U. 74, 148 P. 445.

Under this section and 103-1-29, an information charging that accused unlawfully and feloniously did attempt to carnally know and have sexual intercourse with a certain female over the age of 13 and under 18, she being an unmarried female, sufficiently charges a public offense, as against an attack after verdict. State v. Evans, 27 U. 12, 73 P. 1047.

5. — election by state.

Where, in prosecution under this section, only single offense was charged, but, on trial, six different offenses were proven, four of them prior to offense charged, and state failed to elect on which offense to stand, law would make election and choose first offense of which evidence was offered, and no subsequent election could be made, nor could state prove any other act of carnal knowledge as substantive offense on which conviction could be had. State v. Hilberg, 22 U. 27, 61 P. 215.

Where state elected to prosecute for offense committed in latter part of August, and prosecuting witness testified that act took place between August 24 and September 20 on direct, and that it took place on August 28 on cross-examination, and no evidence of any other act of sexual intercourse other than the one for which defendant was being prosecuted was introduced, refusal of court to instruct jury that offense must have been committed between August 24 and September 1 was not prejudicial to defendant. State v. Hanna, 81 U. 583, 21 P.2d 537.

6. Issues, proof and variance.

Question of prosecutrix' chastity is not in issue in prosecution under this section. State v. Hilberg, 22 U. 27, 61 P. 215.

In prosecution under this section, where state relies upon birth of child to prosecutrix as evidence of crime charged, defendant is entitled to submit evidence that prosecutrix had intercourse with others during month of conception. State v. Orton, 69 U. 304, 254 P. 1003.

Where complaint on preliminary examination for statutory rape charged act of unlawful intercourse as having occurred on July 13, held defendant could not be convicted for offense committed on same girl on July 15. State v. Nelson, 52 U. 617, 176 P. 860.

7. Evidence.

In prosecution under this section, evidence of former relations of parties and that former acts were committed is admissible as tending to show probability or improbability of commission of offense charged. State v. Hadley, 65 U. 109, 234 P. 940.

On prosecution under this section, evidence tending to show want of chastity

In prosecution for rape, wherein it was theory of defendant that prosecutrix had had intercourse with another person, and that in order to shield herself in view of her supposed pregnancy she wrongfully charged defendant with offense, held, under those circumstances, defendant would have right to prove by her on cross-examination that such was her purpose in lodging complaint against defendant, and, in order to establish fact, he would be permitted to prove that she had had intercourse with other person. State v. Scott, 55 U. 553, 188 P. 860.

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5. — election by state.

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7. Evidence.

In prosecution under this section, evidence of former relations of parties and that former acts were committed is admissible as tending to show probability or improbability of commission of offense charged. State v. Hadley, 65 U. 109, 234 P. 940.

On prosecution under this section, evidence tending to show want of chastity

on part of prosecutrix is inadmissible. State v. Williamson, 22 U. 248, 62 P. 1022, 83 Am. St. Rep. 780. (Baskin, J., dissenting.)

Intimacy and improper relations of parties may be proved only so far as such intimacy and improper relations occurred prior, and not subsequent, to offense relied on for conviction. State v. Hilberg, 22 U. 27, 61 P. 215. (Bartch, C. J., dissenting.)

In prosecution under this section it is competent to prove birth of a child in corroboration of the testimony of the prosecuting witness. State v. Hanna, 81 U. 583, 21 P.2d 537. Admissibility of evidence of birth of child was not error, although child was born eight days before the end of the ordinary period of gestation calculated from date offense was alleged to have been committed. State v. Hanna, 81 U. 583, 21 P.2d 537.

Where prosecutrix is not an accomplice, her testimony alone, if believed by the jury, is sufficient to sustain a finding that the sexual act occurred. State v. Noyes, 47 U. 474, 155 P. 335, following State v. Reese, 43 U. 447, 454, 135 P. 270.

8. Instructions.

The giving of an instruction which assumed that offense had been committed was prejudicial error. State v. Hanna, 81 U. 583, 21 P.2d 537.

Refusal of court to give cautionary instructions held not error where testimony of prosecutrix was corroborated and jury was properly instructed as to presumption of defendant's innocence, requirement that he be found guilty beyond reasonable doubt, and that they were sole judges of weight of evidence and credibility of witnesses, considering the bias and interest of such witnesses. State v. Rutledge, 63 U. 546, 227 P. 479.

In prosecution under this section in which information charged that offense was committed on certain day, instruction describing time of offense as on or about such day was not prejudicial error, where instruction also charged that jury was to find that offense was committed at certain place, which was only intercourse evidence introduced. State v. Rosenberg, 84 U. 402, 35 P.2d 1004.

9. New trial.

In prosecution under this section, affidavits of jurors, that they did not believe that defendant committed offense charged on day charged in information, but since instructions referred to time as on or about certain day, they found defendant guilty, and if they had not been so charged, they would have found defendant not guilty, were incompetent to support motion for new trial, since affidavits of jurors cannot be received to show that verdict was result of misconception of court's instructions. State v. Rosenberg, 84 U. 402, 35 P.2d 1004.

10. Appellate review.

Supreme court has reversed judgment of conviction under this section upon confession of error and consent of attorney general. State v. Thompson, 71 U. 329, 265 P. 1118.

103-51-20. Taking Female Under 18 for Prostitution.

Every person who takes away any female under the age of eighteen years from her father, mother, guardian or other person having the legal charge of her person, with or without their consent, for the purpose of prostitution is punishable by imprisonment in the state prison not exceeding five years, or by a fine not exceeding $1,000, or by both. (C. L. 17, § 8110.)

History.

This section is practically identical with Comp. Laws 1876, p. 595, § 1969. And it is practically identical with R. S. 1898, § 4223; Comp. Laws 1907, § 4223.

103-51-21. Houses of Prostitution Prohibited—Penalty.

It shall be unlawful for any person:

(1) To keep a house of ill fame resorted to for the purpose of prostitution or lewdness, or to willfully reside in such house, or to resort thereto for lewdness; or,

(2) To be the owner of any building or tenement, the whole or any part of which is used for any of the purposes mentioned in the first subdivision of this section; or,

(3) To have control of such building or tenement as agent, guardian or lessee of such owner, after written notice to such owner, agent, guard-

ian or lessee that such building or tenement is being used for the purposes mentioned in the first subdivision of this section; or,

(4) To let any building or tenement, knowing that the lessee intends to use the same, or any part thereof, for any of the purposes mentioned in the first subdivision of this section; or to harbor or keep about his premises any person known to be guilty of following a lewd course of life.

Any person violating any of the provisions of this section shall be punished by a term of imprisonment in the county jail which shall not be less than three months nor more than one year. Any corporation violating any of the provisions of this section shall be punished by a fine which shall not be less than $1,000 nor more than $10,000.

(C. L. 17, § 8148.)

History.
This was R. S. 1898, § 4251; Comp. Laws 1907, § 4251.

1. Definition.
A house of ill-fame is a house kept for the convenience and shelter of persons desiring unlawful sexual intercourse, and in which such intercourse is practiced. People v. Hampton, 4 U. 258, 262, 9 P. 508, citing other definitions.

2. Jurisdiction.
Under the organic act of Utah territory, justices of the peace had no jurisdiction of offenses against this section. People v. Spiers, 4 U. 385, 391, 10 P. 609, 11 P. 509. But see People v. Douglass, 5 U. 283, 294, 14 P. 801, apparently overruling this case.

A. L. R. notes.
Disorderly character of house as affected by the number of females who reside therein or resort thereto for immoral purposes, 12 A. L. R. 529.

103-51-22. Sodomy—Unnatural and Detestable Practices.

Every person who is guilty of sodomy or any other detestable and abominable crime against nature, committed with mankind or with any animal with either the sexual organs or the mouth, is punishable by imprisonment in the state prison not less than three years nor more than twenty years. (L. 23, p. 21, § 8121.)

History.
This was Comp. Laws 1876, p. 598, Ch. V, §§ 144, 145, and became sections 4228 and 4229 of R. S. 1898, and same sections of Comp. Laws 1907.

Comparable provisions.
Cal. Penal Code, § 286, Mont. Rev. Codes, § 11031 (any sexual penetration, Cal. Penal Code, § 287, Mont. Rev. Codes, § 1103 (any sexual penetration, however slight, is sufficient to complete the crime against nature).

Cross-references.
Assault with intent to commit, 103-7-7.

1. Characterization of crime.
Fellatio and cunnilingus represent the lowest and most debasing forms of sexual perversion. In re Ford's Estate, 70 U. 456, 462, 261 P. 15.

2. Common-law sodomy.
At common law the term "sodomy" was equivalent to the term "infamous crime against nature." Therefore copulation by one male person in the mouth of another did not constitute a crime under this section prior to its amendment, because sodomy could be accomplished only by copulation in anum. State v. Johnson, 44 U. 18, 137 P. 632.

3. Elements of offense.
Information held sufficient although not alleging that there was emission within subject, since emission was not necessary to constitute the crime. State v. Peterson, 81 U. 340, 17 P.2d 925.

4. Copulation with mouth.
Prior to the amendment of this section it was held that penetration of mouth was not a violation of this section, because that was neither sodomy nor the "infamous crime against nature," at common, and under 88-2-1 the definition must be sought in the common law. State v. Johnson, 44 U. 18, 137 P. 632.

Since legislature by amending this section clearly intended crime of sodomy to include offense with use of mouth,

this section was not open to construction that it included crime of sodomy only as it was known to common law. State v. Peterson, 81 U. 340, 17 P.2d 925.

5. Trial.

Upon the trial of one for an assault with intent to commit the infamous crime against nature upon a child of tender years, in which the child is the principal witness, cautionary instructions with regard to weight of such evidence should be given to safeguard rights of accused; and evidence is also admissible regarding substance found on boy's underwear. State v. Morasco, 42 U. 5, 128 P. 571

6. Evidence.

In prosecution for infamous crime against nature committed upon 15-year-old high school boy, admission of testimony of friend of prosecuting witness that he visited defendant who took indecent liberties with him was reversible error as tending to prove commission of another offense. State v. Gregorius, 81 U. 33, 16 P.2d 893. (Folland and Harris, JJ., dissenting.)

CHAPTER 52

STEAM ENGINES AND BOILERS

103–52–1. Carrying Excessive Steam Pressure—On Boats.
103–52–2. Id. In Boilers.
103–52–3. Id. In Engines.

103–52–1. Carrying Excessive Steam Pressure—On Boats.

Every captain or other person having charge of any steamboat used for the conveyance of passengers, or of the boilers and engines thereof, who, from ignorance or gross neglect or for the purpose of excelling any other boat in speed, creates, or allows to be created, such an undue quantity or pressure of steam as to burst or break the boiler, or any apparatus or machinery connected therewith, whereby human life is endangered, is guilty of a misdemeanor. (C. L. 17, § 8172.)

103–52–2. Id. In Boilers.

Every engineer or other person having charge of any steam boiler, steam engine or other apparatus for generating or employing steam who willfully, or from ignorance or gross neglect, creates, or allows to be created, such an undue quantity of steam as to burst or break the boiler or engine or apparatus, or to cause any other accident whereby human life is endangered, is guilty of a misdemeanor.

(C. L. 17, § 8173.)

Comparable provisions.
Mont. Rev. Codes, § 11195 (felony).

103–52–3. Id. In Engines.

Every person having charge of any steam boiler or steam engine or other apparatus for generating or employing steam, who willfully, or from ignorance or neglect, creates, or allows to be created, such an undue quantity or pressure of steam as to burst or break the boiler, engine or apparatus, or to cause any other accident whereby the death of a human being is produced, is punishable by imprisonment in the state prison for not less than one nor more than ten years.

(C. L. 17, § 8174.)

CHAPTER 53

SUNDAY

103-53-1. Transacting Business on—Penalty.
103-53-2. [Id.] Exemptions.
103-53-3. Disturbing Assembly for Religious Worship.
103-53-4. Sunday Defined.

103-53-1. Transacting Business on—Penalty.

Every person who keeps open on Sunday any store, workshop, banking house, or other place of business for the purpose of transacting business therein, is punishable by a fine not less than $5 nor more than $100. (C. L. 17, § 8129.)

History.
This section was formerly R. S. 1898, § 4234; Comp. Laws 1907, § 4234.

Cross-references.
Boxing matches, 9-0-1.

1. Validity.
Exceptions, contained in immediately succeeding section, held not to render this section unconstitutional as to barber. State v. Sopher, 25 U. 318, 71 P. 482, 60 L. R. A. 468, 95 Am. St. Rep. 845.

A. L. R. notes
Application of Sunday laws to attorneys, 8 A. L. R. 1356.
Constitutionality of discrimination as regards degree of penalty or punishment for violation of Sunday law, 8 A. L. R. 566.
Constitutionality of discrimination by Sunday law or ordinance as between different kinds of business, 119 A. L. R. 752.
Discrimination as between localities in Sunday law, 62 A. L. R. 642.
Effect of delivery of insurance policy on Sunday, 19 A. L. R. 623.
Injunction to prevent violation of Sunday law, 9 A. L. R. 925.
Legislative acts or proceedings, Sunday law as applicable to, 31 A. L. R. 676.
Liability of bailee for conversion or negligence as affected by Sunday law, 34 A. L. R. 762.
Power of municipal corporation to legislate as to Sunday observance, 37 A. L. R. 575.
Protection of innocent party to contract against consequences of violation of Sunday law in its execution, 67 A. L. R. 881.
Publication of notice on Sunday or holiday, 13 A. L. R. 667.
Ratification of contract invalid because made on Sunday, 68 A. L. R. 1487.
Sports, games, or amusements as work, labor, avocation, business, or the like within Sunday laws, 56 A. L. R. 813.
Sunday law as applicable to contracts signed by guarantor or surety on Sunday but delivered to obligee on weekday, 112 A. L. R. 1200.
Time for performance of an act under a lease when date fixed falls on Sunday or holiday, 29 A. L. R. 239.
Violation of Sunday statute which prescribes a fine without other punishment, as a criminal offense, 39 A. L. R. 1397.

103-53-2. [Id.] Exemptions.

The provisions of the preceding section do not apply to persons who keep open hotels, boarding houses, baths, restaurants, bakeries, taverns, livery stables, garages, automotive service stations, golf courses, bowling alleys, ball parks, theatres, bathing resorts, ice stations, news stands, skating rinks, confectionery stores for the sale of confections only, tobacco stores for the sale of tobacco, pharmacies, or the prescription counters of retail drug stores on Sunday, for the legitimate business of each, or such industries as are usually kept in continuous operation. (C. L. 17, § 8130.)

History.
As amended by L. 37, ch. 136, eff. May 11, making material changes in text.
This section was formerly R. S. 1898, § 4235; Comp. Laws 1907, § 4235.

1. Validity.
Exceptions, contained in this section, held not to render immediately preceding section unconstitutional as to barber. State v. Sopher, 25 U. 318, 71 P. 482, 60 L. R. A. 468, 95 Am. St. Rep. 845.

A. L. R. notes.
Operation of place for sale of candy, soft drinks, or the like, as work of necessity within Sunday law, 59 A. L. R. 1547.
Power of municipality to require closing on Sunday of amusements not forbidden on that day by state law, 18 A. L. R. 738.
Publication, sale, and distribution of newspapers or magazines, Sunday laws in application to, 82 A. L. R. 495.
Sale of gasoline or oil as necessity within Sunday laws, 60 A. L. R. 763.
Soft drinks, ice cream, and the like, as food within Sunday law, 21 A. L. R. 754.
What is "restaurant," "cafe," or "victualing house" within Sunday law, 9 A. L. R. 428.
Work of necessity within Sunday law as question of law or of fact, 29 A. L. R. 1298.

103-53-3. Disturbing Assembly for Religious Worship.

Every person who willfully disturbs or disquiets any assemblage of people met for religious worship, by profane discourse, rude or indecent behavior or by any unnecessary noise, either within the place where such meeting is held or so near it as to disturb the order and solemnity of the meeting, is guilty of a misdemeanor. (C. L. 17, § 8131.)

Comparable provisions.
Idaho Code, § 17-2501, Mont. Rev. Codes, § 11042 (substantially identical).

Cross-references.
Disturbing any lawful meeting, 103-50-1.

A. L. R. notes.
Conduct amounting to offense of disturbing public or religious meeting, 12 A. L. R. 650.

103-53-4. Sunday Defined.

For the purposes of this chapter, Sunday shall commence at midnight Saturday and terminate the following midnight.
(C. L. 17, § 8135.)

A. L. R. notes.
Power to extend Sunday observance laws beyond Sunday hours, 50 A. L. R. 628.

CHAPTER 54

SYNDICALISM AND SABOTAGE

103-54-1. Criminal Syndicalism Defined.
103-54-2. Sabotage Defined.
103-54-3. Penalty.
103-54-4. Assembly for Advocating Doctrine—Penalty.
103-54-5. Id. Liability of Owner of Premises Permitting.

L. 1941, 2nd Spec. Sess., ch. 31; eff. June 18.

SABOTAGE PREVENTION ACT

103-54-6. Purpose of Act—Declaration of Public Policy.
103-54-7. Definitions.

103-54-8. Hindering, Delaying or Interfering with Preparation for Defense or War —Penalty.
103-54-9. Causing Defects in Articles to Be Used in Preparation for Defense or War —Penalty.
103-54-10. Attempts to Commit Crimes Defined in Act—Penalty.
103-54-11. Conspiring to Commit Crimes Defined in Act.
103-54-12. Witnesses Required to Testify and Produce Evidence—Facts to Be Kept Secret Until Complaint Filed.
103-54-13. Posting of Signs "No Entry Without Permission" —Entering Posted Premises Without Permission —Penalty.
103-54-14. Id. Arrest Without Warrant for Violation.
103-54-15. Closing or Restricting Use of Highways — Petition Filed with Highway Commission — Hearing — Notice—Permits.
103-54-16. Id. Violation—Penalty.
103-54-17. Act Shall Not Interfere with Rights of Employees to Bargain Collectively.
103-54-18. Partial Invalidity of Act—Saving Clause.
103-54-19. Title of Act.
103-54-20. Laws Inconsistent with Act Suspended.
103-54-21. When Act Effective.

103-54-1. Criminal Syndicalism Defined.

Criminal syndicalism is hereby defined to be the doctrine which advocates crime, violence, force, arson, destruction of property, sabotage or other unlawful acts or methods, as a means of accomplishing or effecting industrial or political ends, or as a means of effecting industrial or political revolution. (L. 19, p. 347, § 1.)

Comparable provisions.
Iowa Code 1939, § 12906 (similar).
Mont. Rev. Codes, § 10740 (identical, except as reading in part: "* * * or other unlawful acts or methods, or any such acts, as a means * * *").

Cross-references.
Desecration of flag, 103-26-84; sabotage prevention, 103-54-6 et seq.

A. L. R. notes.
Validity of legislation directed against political, social, or industrial propaganda deemed to be of a dangerous tendency, 73 A. L. R. 1494.

103-54-2. Sabotage Defined.

Sabotage is hereby defined to be the malicious felonious, intentional or unlawful damage or injury to, or destruction of, real or personal property, in any form whatsoever, of any employer or owner by his employees, or by any employer, or by any person at the instance of any employer, or at the instance, request or instigation of employees, or any other person. (L. 19, p. 347, § 2.)

Comparable provisions.
Mont. Rev. Codes, § 10741 (substantially identical).

103-54-3. Penalty.

Any person who by word of mouth or writing, advocates, suggests or teaches the duty, necessity, propriety or expediency of crime, criminal syndicalism or sabotage, or who advocates, suggests or teaches the duty, necessity, propriety or expediency of doing any act of violence, the destruction of or damage to any property, the bodily injury to any person, or the commission of any crime or unlawful act, as a means

of accomplishing or effecting any industrial or political ends, change or revolution, or who prints, publishes, edits or issues, or knowingly circulates, sells or distributes, or publicly displays, any books, pamphlets, paper, handbill, poster, document, or written or printed matter in any form whatsoever, containing, advocating, advising, suggesting or teaching crime, criminal syndicalism, sabotage, the doing of any act of violence, the destruction of or damage to any property, the injury to any person, or the commission of any crime or unlawful act, as a means of accomplishing, effecting or bringing about any industrial or political ends or change, or as a means of accomplishing, effecting or bringing about any industrial or political revolution, or who openly or at all attempts to justify by word of mouth or writing the commission or the attempt to commit sabotage, any act of violence, the destruction of or damage to any property, the injury of any person or the commission of any crime or unlawful act, with the intent to exemplify, spread or teach or suggest criminal syndicalism, or organizes, or helps to organize, or becomes a member of, or voluntarily assembles with, any society or assemblage of persons formed to teach or advocate, or which teaches, advocates or suggests the doctrine of criminal syndicalism or sabotage, or the necessity, propriety or expediency of doing any act of violence or the commission of any crime or unlawful act as a means of accomplishing or effecting any industrial or political ends, change or revolution, is guilty of a felony, and shall be punished by a fine of not less than $200 nor more than $1,000 or by imprisonment in the state prison for a term of not less than one year nor more than five years, or by both such fine and imprisonment. (L. 19, p. 347, § 3.)

Comparable provisions.

Mont. Rev. Codes, § 10742 (imprisonment, one to five years, or fine of $200 to $1000, or both such fine and imprisonment).

A. L. R. notes.

Validity of legislation directed against political, social, or industrial propaganda deemed to be of a dangerous tendency, 73 A. L. R. 1494.

103–54–4. Assembly for Advocating Doctrine—Penalty.

The assembly or consorting of two or more persons for the purpose of advocating, teaching or suggesting the doctrine of criminal syndicalism, or to advocate, teach, suggest or encourage sabotage, or the duty, necessity, propriety or expediency of doing any act of violence, the destruction of or damage to any property, the bodily injury to any person, or the commission of any crime or unlawful act as a means of accomplishing or effecting any industrial or political ends, change or revolution, is hereby declared unlawful, and every person voluntarily participating therein, or by his presence aiding and instigating the same, is guilty of a felony, and shall be punished by imprisonment in the state prison for not less than one year nor more than five years, or by a fine of not less than $200, nor more than $1,000, or by both such imprisonment and fine. (L. 19, p. 347, § 4.)

Comparable provisions.

Mont. Rev. Codes, § 10743 (imprisonment, one to five years, or fine of $200 to $1000, or both such imprisonment and fine).

A. L. R. notes.

Validity of legislation directed against political, social, or industrial propaganda deemed to be of a dangerous tendency, 73 A. L. R. 1494.

103-54-5. Id. Liability of Owner of Premises Permitting.

The owner, lessee, agent, superintendent or person in charge or occupation of any place, building, room or structure, who knowingly permits therein any assembly or consort of persons prohibited by the provisions of section 103-54-4, or who after notification that the place or premises, or any part thereof, is so used, permits such use to be continued, is guilty of a misdemeanor and punishable by imprisonment in the county jail for not less than sixty days, nor more than one year, or by a fine of not less than $100, nor more than $500, or by both such imprisonment and fine. (L. 19, p. 347, § 5.)

Comparable provisions.

Iowa Code 1939, §12909 (similar; imprisonment for not more than one year, or fine of not more than $500, or both).

Mont. Rev. Codes, § 10744 (substantially identical).

A. L. R. notes.

Validity of legislation directed against political, social, or industrial propaganda deemed to be of a dangerous tendency, 73 A. L. R. 1494.

L. 1941, 2nd Spec. Sess., ch. 31; eff. June 18.

SABOTAGE PREVENTION ACT

AN ACT declaring a public policy; providing for the protection of property by making criminal certain unlawful entries on, injuries to and interferences with property, conspiracy to damage property, evidence, posting of signs, authorizing the closing of streets, and providing penalties.

Be it enacted by the Legislature of the State of Utah:

103-54-6. Purpose of Act—Declaration of Public Policy.

As a guide to the interpretation and application of this act, the public policy of this state is declared to be as follows: The present national emergency proclaimed by the president necessitating the united coöperation of all of the people of this state and nation to produce, manufacture, assemble, transport and store articles necessary for the defense of this state and nation with the greatest speed possible, and realizing that aggression to other peace loving nations by their enemies was made possible by enemies within their nation acting in coöperation with the armed forces of the enemy from without, resulted in their destruction, the legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police power of the state, to provide additional safeguards for the national defense program in the production, manufacture, assembling, transporting and storing of articles of defense.

The legislature further declares that in enacting this measure curtailing certain civil liberties of the citizens it expressly states that it is not their intent to repeal or modify any state act or the intent and purpose of any national act designated or enacted for the purpose of adjusting industrial disputes between employer and employees.

(Sec. 1.)

Comparable provisions.
Cal. Gen. Laws, Act 8427, § 16 (declaring urgency of this statute, "Sabotage Prevention Act," in view of existing emergency as to providing adequate armies and facilities of defense).

103–54–7. Definitions.

As used in this act: "Highway" includes any private or public street, way or other place used for travel to or from property.

"Highway commissioners" means any individual, board or other body having authority under then existing law to discontinue the use of the highway which it is desired to restrict or close to public use and travel.

"Public utility" includes any pipe line, gas, electric, heat, water, oil, sewer, telephone, telegraph, radio, railway, railroad, airplane, transportation communication or other system by whomsoever owned or operated for public use. (Sec. 2.)

Comparable provisions.
Cal. Gen. Laws, Act 8427, § 1 (substantially identical).

103–54–8. Hindering, Delaying or Interfering with Preparation for Defense or War—Penalty.

Whoever intentionally destroys, impairs, injures, interferes or tampers with real or personal property with reasonable grounds to believe that such act will hinder, delay or interfere with the preparation of the United States or of any of the states for defense or for war, or with the prosecution of war by the United States, shall be punished by imprisonment for not more than ten years, or by a fine of not more than ten thousand dollars, or both; *provided*, if such person so acts with the intent to hinder, delay or interfere with the preparation of the United States or of any of the states for defense or for war, or with the prosecution of war by the United States, the minimum punishment shall be imprisonment for not less than one year. (Sec. 3.)

Comparable provisions.
Cal. Gen. Laws, Act 8427, § 2 (substantially identical).

103–54–9. Causing Defects in Articles to Be Used in Preparation for Defense or War—Penalty.

Whoever intentionally makes or causes to be made or omits to note on inspection any defect in any article or thing with reasonable grounds to believe that such article or thing is intended to be used in connection with the preparation of the United States or any of the states for defense or for war, or for the prosecution of war by the United States, or that such article or thing is one of a number of similar articles or things, some of which are intended so to be used, shall be punished by imprisonment for not more than ten years, or a fine of not more than ten thousand dollars, or both; *provided*, if such person so acts or so fails to act with the intent to hinder, delay or interfere with the preparation of the United States or of any of the states for defense or for war, or with the prosecution of war by the United States, the minimum punishment shall be imprisonment for not less than one year. (Sec. 4.)

Comparable provisions.
Cal. Gen. Laws, Act 8427, § 3 (substantially identical).

103-54-10. Attempts to Commit Crimes Defined in Act—Penalty.

Whoever attempts to commit any of the crimes defined by this act shall be liable to one-half the punishment prescribed for the completed crime. In addition to the acts which constitute an attempt to commit a crime under the law of this state, the solicitation or incitement of another to commit any of the crimes defined by this act not allowed by the commission of the crime, the collection or assemblage of any materials with the intent that the same are to be used then or at a later time in the commission of such crime, or the entry, with or without permission, of a building, enclosure or other premises of another with the intent to commit any such crime therein or thereon shall constitute an attempt to commit such crime. (Sec. 5.)

Comparable provisions.
Cal. Gen. Laws, Act 8427, § 4 (substantially identical).

103-54-11. Conspiring to Commit Crimes Defined in Act.

If two or more persons conspire to commit any crime defined by this act, each of such persons is guilty of conspiracy and subject to the same punishment as if he had committed the crime which he conspired to commit, whether or not any act be done in furtherance of the conspiracy. It shall not constitute any defense or ground of suspension of judgment, sentence or punishment on behalf of any person prosecuted under this section, that any of his fellow conspirators has been acquitted, has not been arrested or convicted, or is amenable to justice or has been pardoned or otherwise discharged before or after conviction. (Sec. 6.)

Comparable provisions.
Cal. Gen. Laws, Act 8427, § 5 (substantially identical, except as being worded in part: "* * * is not amenable to justice or has been pardoned * * *").

103-54-12. Witnesses Required to Testify and Produce Evidence—Facts to Be Kept Secret Until Complaint Filed.

No person shall be excused from attending and testifying, or producing any books, papers, or other documents before any court, magistrate, referee or grand jury upon any investigation, proceeding or trial, for or relating to or concerned with a violation of any section of this act or attempt to commit such violation, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him by the state may tend to convict him of a crime or subject him to penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him, upon any criminal investigation, proceeding or trial, except upon a prosecution for perjury or contempt of court based upon the giving or producing of such testimony. No person shall make public any evidence of fact or the name of the person accused of violating the provisions of Sections 3, 4, 5 and 6 of this act prior to the filing of a formal complaint by the prosecuting attorney or committing magistrate charged with the performance of that duty. (Sec. 7.)

Comparable provisions.
Cal. Gen. Laws, Act 8427, § 6 (substantially identical, except that concluding sentence herein is omitted).

103–54–13. Posting of Signs "No Entry Without Permission"—Entering Posted Premises Without Permission—Penalty.

Any individual, partnership, association, corporation, municipal corporation or state or any political subdivision thereof engaged in, or preparing to engage in, the manufacture, transportation or storage of any product to be used in the preparation of the United States or of any of the states for defense or for war or in the prosecution of war by the United States, or the manufacture, transportation, distribution or storage of gas, oil, coal, electricity or water, or any of said natural or artificial persons operating any public utility, whose property, except where it fronts on water or where there are entrances for railway cars, vehicles, persons or things, is surrounded by a fence or wall, or a fence or wall and buildings, may post around his or its property at each gate, entrance, dock or railway entrance and every one hundred feet of water front a sign reading "No Entry Without Permission." Such sign shall also designate a point of entrance or place where application may be made for permission to enter, and permission shall not be denied to any loyal citizen who has a valid right to enter. Whoever without permission of such owner shall willfully enter upon premises so posted shall be punished by imprisonment for not more than ten days, or a fine of not more than fifty dollars, or both. (Sec. 8.)

Comparable provisions.
Cal. Gen. Laws, Act 8427, § 7 (substantially identical, although omitted therefrom is the sentence herein beginning: "Such sign shall also designate").

103–54–14. Id. Arrest Without Warrant for Violation.

Any peace officer or any person employed as watchman, guard, or in a supervisory capacity on premises posted as provided in Section 8 may stop any person found on any premises to which entry without permission is forbidden by Section 8 and may detain him for the purpose of demanding, and may demand, of him his name, address and business in such place. If said peace officer or employee has reason to believe from the answers of the person so interrogated that such person has no right to be in such place, said peace officer shall forthwith release such person or he may arrest such person without a warrant on the charge of violating the provisions of Section 8; and said employee shall forthwith release such person or turn him over to a peace officer, or may arrest him without a warrant on the charge of violating the provisions of Section 8. (Sec. 9.)

Comparable provisions.
Cal. Gen. Laws, Act 8427, § 8 (substantially the same).

103–54–15. Closing or Restricting Use of Highways—Petition Filed with Highway Commission—Hearing—Notice—Permits.

Any individual, partnership, association, corporation, municipal corporation or state or any political subdivision thereof engaged in or pre-

paring to engage in the manufacture, transportation or storage of any product to be used in the preparation of the United States or any of the states for defense or for war or in the prosecution of war by the United States, or in the manufacture, transportation, distribution or storage of gas, oil, coal, electricity or water, or any of said natural or artificial persons operating any public utility who has property so used which he or it believes will be endangered if public use and travel is not restricted or prohibited on one or more highways or parts thereof upon which such property abuts, may petition the highway commissioners of any city, town or county to close one or more of such highways or parts thereof to public use and travel or to restrict by order the use and travel upon one or more of said highways or parts thereof.

Upon receipt of such petition, the highway commissioners shall set a day for hearing and give notice thereof by publication in a newspaper having general circulation in the city, town or county in which said property is located, such notice to be at least seven days prior to the date set for hearing. If after hearing the highway commissioners determine that the public safety and the safety of the property of the petitioner so require, they shall by suitable order close to public use and travel or reasonably restrict the use of and travel upon one or more of said highways or parts thereof; *provided*, the highway commissioners may issue written permits to travel over the highway so closed or restricted to responsible and reputable persons for such term, under such conditions and in such form as said commissioners may prescribe. Appropriate notices in letters at least three inches high shall be posted conspicuously at each end of any highway so closed or restricted by such order. The highway commissioners may at any time revoke or modify any order so made. (Sec. 10.)

Comparable provisions.
Cal. Gen. Laws, Act 8427, § 9 (similar).

103-54-16. Id. Violation—Penalty.

Whoever violates any order made under Section 10 shall be punished by imprisonment for not more than ten days, or a fine of not more than fifty dollars, or both. (Sec. 11.)

Comparable provisions.
Cal. Gen. Laws, Act. 8427, § 10 (substantially identical).

103-54-17. Act Shall Not Interfere with Rights of Employees to Bargain Collectively.

Nothing in this act shall be construed to impair, curtail or destroy the rights of employees and their representatives to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection as provided by state or federal laws. (Sec. 12.)

Comparable provisions.
Cal. Gen. Laws, Act 8427, § 11 (identical, except that concluding words herein, "as provided by state or federal laws" are omitted; the section concludes as follows: "* * * or other mutual aid or protection. Nor shall anything in this act be construed to impair, curtail or destroy the rights of employees, former employees, and their representatives to strike").

103–54–18. Partial Invalidity of Act—Saving Clause.

If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable. (Sec. 13.)

Comparable provisions.
Cal. Gen. Laws, Act 8427, § 12 (identical).

103–54–19. Title of Act.

This act may be cited as "The Sabotage Prevention Act." (Sec. 14.)

Comparable provisions.
Cal. Gen. Laws, Act 8427, § 13 (identical).

103–54–20. Laws Inconsistent with Act Suspended.

All laws and parts of laws inconsistent with this act are hereby suspended in their application to any proceedings under this act. If conduct prohibited by this act is also made unlawful by another or other laws, the offender may be convicted for the violation of this act or of such other law or laws. (Sec. 15.)

103–54–21. When Act Effective.

This act shall take effect upon approval and it and all orders made under it shall be in force until May 15, 1943, and thereafter whenever the United States is at war; *provided*, any violation of this act, committed while the act is in force, may be prosecuted and punished thereafter, whether or not this act is in force at the time of such prosecution and punishment.

Approved June 18, 1941. (Sec. 16.)

CHAPTER 55

TRADE AND COMMERCE

103–55–1. Fraudulent Practices to Affect Market Price.
103–55–2. Unfair Competition and Unlawful Discrimination.
103–55–3. Id. By Corporations — Attorney-General to Prosecute.
103–55–4. Id. Penalty.
103–55–5. Id. Trafficking in Milk, Cream and Butter Fat.

103–55–1. Fraudulent Practices to Affect Market Price.

Every person who willfully makes or publishes any false statement, spreads any false rumor, or employs any other false or fraudulent means or device, with intent to affect the market price of any kind of property, is guilty of a misdemeanor. (C. L. 17, § 8412.)

103–55–2. Unfair Competition and Unlawful Discrimination.

Every person, engaged in the production, manufacture or distribution of any commodity in general use, who intentionally for the purpose of destroying the competition of any regular, established dealer in such commodity, or to prevent the competition of any person who in good faith intends and attempts to become such dealer, discriminates between different sections, communities or cities of this state by selling such commodity at a lower rate in one section, community or city, or any portion thereof, than such person charges for such commodity in another section, community or city, after equalizing the distance from the point of production, manufacture or distribution and freight rates therefrom, is guilty of unfair discrimination. (C. L. 17, § 8333.)

Cross-references.

Prevention of unfair competition by trade commission, 16A–2–14; fair trade and price fixing, 16A–3; unfair trade practices and relief therefrom, 16A–4; restraint of trade, 73–1.

103–55–3. Id. By Corporations—Attorney-General to Prosecute.

If complaint is made to the attorney-general that any corporation is guilty of unfair discrimination as defined by the preceding section, he shall investigate such complaint, and for that purpose he may subpoena witnesses, administer oaths, take testimony, and require the production of books or other documents, and, if in his opinion sufficient grounds exist therefor, he may prosecute an action in the name of the state in the proper court to annul the charter or revoke the license of such corporation, as the case may be, and to permanently enjoin such corporation from doing business in this state, and, if in such action the court shall find that such corporation is guilty of unfair discrimination as defined by the preceding section, such court shall annul the charter or revoke the license of such corporation, and may permanently enjoin it from transacting business in this state. (C. L. 17, § 8334.)

103–55–4. Id. Penalty.

Any person, firm or corporation violating any of the foregoing provisions of this chapter shall be fined not less than $100, nor more than $3000 for each offense. (C. L. 17, § 8335.)

103–55–5. Id. Trafficking in Milk, Cream and Butter Fat.

Any person doing business in this state and engaged in the business of buying milk, cream or butter fat for the purpose of sale or storage, who, for the purpose of creating a monopoly or destroying the business of a competitor, discriminates between different sections, communities, localities, cities or towns of this state by purchasing such commodity or commodities at a higher price or rate in one section, community, location, city or town than is paid for the same commodity by such person in another section, community, locality, city or town, after making due allowance for the difference, if any, in the grade or quality, and in the actual cost of transportation from the point of purchase to the point of manufacture, sale or storage is guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful; and any person, firm,

company, association or corporation, or any officer, agent, receiver or member of such firm, company, association or corporation, found guilty of unfair discrimination as herein defined shall be punished by a fine in any sum not more than $5000 or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

(C. L. 17, § 8336.)

Cross-references.
Dairy and food products, 3-10; milk marketing control, 3-10a.

CHAPTER 56

TRADE-MARKS, TRADE NAMES AND TRADE DEVICES

103–56–1. Forging and Counterfeiting.
103–56–2. Id. Sales of Goods Thereunder.
103–56–3. Id. Every Alteration or Imitation Constitutes.
103–56–4. Trade-Mark, Name and Device Defined.
103–56–5. Sales in Containers of Substituted Articles.

103–56–1. Forging and Counterfeiting.

Every person who willfully forges or counterfeits, or procures to be forged or counterfeited, any trade-mark, trade name or trade device, usually affixed by any person, or by any association or union of workingmen, to his or its goods, which has been filed in the office of the secretary of state, with intent to pass off any goods to which such forged or counterfeited trade-mark, trade name or trade device is affixed, or intended to be affixed, as the goods of such person or such association or union of workingmen, is guilty of a misdemeanor.

(C. L. 17, § 8472.)

Comparable provisions.
Mont. Rev. Codes, § 11199 (similar in purport).

Cross-references.
Protection of trade marks and names by fair trade agreements, 16A–3; trade marks and names generally, Title 95.

103–56–2. Id. Sales of Goods Thereunder.

Every person who sells or keeps for sale any goods upon or to which any counterfeited trade-mark, trade name or trade device has been affixed, after the same has been filed in the office of the secretary of state, intending to represent such goods as the genuine goods of another, knowing the same to be counterfeited, is guilty of a misdemeanor.

(C. L. 17, § 8473.)

Comparable provisions.
Mont. Rev. Codes, § 11200 (substantially identical).

Cross-references.
Commercial feeding stuffs, 3-8; fertilizers, 3-8a.

103–56–3. Id. Every Alteration or Imitation Constitutes.

The words "forged trade-mark," "forged trade name," "forged trade device," and "counterfeited trade-mark," "counterfeited trade name,"

"counterfeited trade device" or their equivalents, as used in this chapter, include every alteration or imitation of any trade-mark, trade name or trade device so resembling the original as to be likely to deceive.
(C. L. 17, § 8474.)

103–56–4. Trade-Mark, Name and Device Defined.

The word "trade-mark" or "trade name" or "trade device," as used in this chapter, includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label or wrapper, usually affixed by any mechanic, manufacturer, druggist, merchant or tradesman, or by any association or union of workingmen, to denote any goods to be goods imported, manufactured, produced, compounded or sold by him or by such association or union of workingmen, other than any name, word or expression generally denoting any goods to be of some particular class or description. (C. L. 17, § 8475.)

103–56–5. Sales in Containers of Substituted Articles.

Every person who has or uses any cask, bottle, vessel, case, cover, label or other thing bearing or having in any way connected with it the duly filed trade-mark, trade name, trade device or name of another, for the purpose of disposing, with intent to deceive or defraud, of any article other than that which such cask, bottle, vessel, case, cover, label or other thing originally contained or was connected with by the owner of such trade-mark or name is guilty of a misdemeanor.
(C. L. 17, § 8476.)

Comparable provisions.
Mont. Rev. Codes, § 11203 (substantially the same).

CHAPTER 57

TRESPASS, ETC.*

103–57–1. Injury to Rafts, Boats, etc.
103–57–2. Taking Timber, Earth or Stone; Putting Up Advertisements; Using Another's Personal Property — Without Authority.
103–57–3. Injury to Crops.
103–57–4. Removing or Injuring Boundary Monuments.
103–57–5. Injury to or Destruction of Property.
103–57–6. Removing Relics and Injuring Hieroglyphics.
103–57–7. Injuring Monuments, Works of Art, Ornamental Trees and Plants.
103–57–8. Injuring Collections in Museums, etc.

*History of act. This chapter formerly appeared under the head "Malicious Mischief." R. S. 1898, Title 75, Ch. 51, p. 932; Comp. Laws 1907, Title 90, Ch. 51, p. 1336.

103–57–1. Injury to Rafts, Boats, etc.

Every person who willfully and maliciously burns, injures or destroys any pile or raft of wood, plank, boards or other lumber, or any part thereof, or cuts loose or sets adrift any such raft or any part thereof, or cuts, breaks, injures, sinks or sets adrift any vessel, boat or skiff, the

property of another, is punishable by a fine in any sum less than $300 or by imprisonment in the county jail not exceeding six months.
(C. L. 17, § 8395.)

Comparable provisions.
Iowa Code 1939, § 13093 (similar; fine, not exceeding $500, and imprisonment for not more than one year; forfeit, to person injured, of double the amount of damages sustained).

Mont. Rev. Codes, § 11488 (substantially identical, except as reading in part: "* * * fine not exceeding five hundred dollars * * *").

103–57–2. Taking Timber, Earth or Stone; Putting Up Advertisements; Using Another's Personal Property—Without Authority.

Every person who willfully and maliciously commits any trespass by either:

(1) Cutting down, destroying or injuring any kind of wood or timber standing or growing upon land of another; or,

(2) Carrying away any kind of wood or timber that has been cut down and is lying on such lands; or,

(3) Maliciously injuring or severing from the freehold of another anything attached thereto, or the product thereof; or,

(4) Digging, taking or carrying away from any lot situated within the limits of any incorporated city, without the license of the owner or legal occupant thereof, any earth, soil or stone; or,

(5) Digging, taking or carrying away from any land in any city, laid down on the map or plan of such city, or otherwise recognized or established as a street, alley, avenue or park, without the license of the proper authorities, any earth, soil or stone; or,

(6) Putting up, affixing, fastening, printing or painting upon any property belonging to the state, or to any city, town or county, or dedicated to the public, or upon any property of any person, without license from the owner, any notice, advertisement or designation of, or any name for, any commodity, whether for sale or otherwise, or any picture, sign or device, intended to call attention thereto; or,

(7) Using any animal or other personal property, except vehicles, without the consent of the owner thereof, or of a person having charge of such property;—is guilty of a misdemeanor. (L. 19, p. 352, § 8390.)

Comparable provisions.
Idaho Code, § 17–4306 (similar to subds. (1) to (5) herein); Mont. Rev. Codes, § 11481 (similar to subds. (1) to (6) herein).

Cross-references.
Larceny of things severed from realty, 103–36–11; wrongful taking of ore from mine, damages, 55–1–12.

103–57–3. Injury to Crops.

Every person who maliciously injures or destroys any standing crops, grain, cultivated fruits or vegetables, the property of another, in any case for which a punishment is not otherwise prescribed by this code, is guilty of a misdemeanor. (C. L. 17, § 8391.)

Comparable provisions.
Idaho Code, § 17–4308 (identical); Mont. Rev. Codes, § 11483 (substantially identical).

103-57-4. Removing or Injuring Boundary Monuments.

Every person who either:

(1) Maliciously removes any monument erected for the purpose of designating any point in the boundary of any lot or tract of land; or,

(2) Maliciously defaces or alters the marks upon any such monument; or,

(3) Maliciously cuts down or removes any tree upon which any such marks have been made for such purpose, with intent to destroy such marks;—is guilty of a misdemeanor. (C. L. 17, § 8392.)

Comparable provisions.
Mont. Rev. Codes, § 11484 (similar).

Cross-references.
United States monuments, etc., 103-26-73; injuring or destroying mining notices, etc., 55-1-11.

103-57-5. Injury to or Destruction of Property.

Every person who maliciously injures or destroys any real or personal property not his own, in cases other than such as are specified in this code, is guilty of a misdemeanor. (C. L. 17, § 8385.)

History.
This section is practically identical with R. S. 1898, § 4425; Comp. Laws 1907, § 4425.

Cross-references.
Tampering with aircraft, 4-0-50; with airports or equipment, 4-0-51.

1. Common-law rule.
The wanton and malicious injury or destruction of property belonging to another was an indictable offense at common law. People v. Olsen, 6 U. 284, 286, 22 P. 163.

2. Malice.
Malice against the owner of the property is an essential ingredient of the crime of malicious mischief, and must be alleged and proved to sustain a conviction. People v. Olsen, 6 U. 284, 286, 22 P. 163.

It is not necessary, in order to prove malice under this section, to show that defendant ever said or did anything indicating malice against the owner. Malice may be inferred, if the injury is unlawful, from the instrument used, or the wantonness, cruelty, or recklessness of the deed, or from any attendant circumstances which would justify the inference of malice where malice is an essential constituent. People v. Olsen, 6 U. 284, 286, 22 P. 163.

3. Larceny.
Mere fact that property is destroyed maliciously and with intent to deprive owner permanently of its use does not constitute larceny, though defendant might be prosecuted under this section. State v. Allen, 56 U. 37, 189 P. 84.

103-57-6. Removing Relics and Injuring Hieroglyphics.

Any person who takes from, removes or carries off from any public land, or any land not his own, without permission of the owner thereof, any relics, consisting of baskets, jars, cups, urns, utensils, bones, bodies, mummies or any other relics known as cliff dwellers' relics, or the relics of any ancient race of people, or who destroys or effaces any hieroglyphics, is guilty of a misdemeanor. (C. L. 17, § 8505.)

103-57-7. Injuring Monuments, Works of Art, Ornamental Trees and Plants.

Every person, not the owner thereof, who willfully injures, disfigures or destroys any monument or work of art, or useful or ornamental improvement, within the limits of any town or city, or any shade tree

or ornamental plant growing therein, whether situated upon private ground or on any street, sidewalk or public park or place, is guilty of a misdemeanor. (C. L. 17, § 8406.)

Cross-references.
Injuring or destroying United States and other monuments, 55–1–11, 103–26–73.

103–57–8. Injuring Collections in Museums, etc.

Every person who maliciously cuts, tears, defaces, breaks or injures any book, map, chart, picture, engraving, statue, coin, model, apparatus or other work of literature, art or mechanics, or object of curiosity, deposited in any public library, gallery, museum, collection, fair or exhibition, is guilty of a misdemeanor. (C. L. 17, § 8407.)

CHAPTER 58

VAGRANCY

103–58–1. Defined.

(1) Every person (except an Indian) without visible means of support, who has the physical ability to work, and who does not seek employment, nor labor when employment is offered him; and,

(2) Every healthy beggar who solicits alms as a business; and,

(3) Every person who roams about from place to place without any lawful business; and,

(4) Every person known to be a pickpocket, thief, burglar, or confidence operator, either by his own confession or by his having been convicted of either of such offenses, and having no visible or lawful means of support, when found loitering around any railroad depot, banking institution, broker's office, place of amusement, auction room, store, shop, or crowded thoroughfare, car or omnibus, or at any public gathering or assembly; and,

(5) Every idle or lewd or dissolute person, or associate of known thieves; and,

(6) Every person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business; and,

(7) Every person who lodges in any barn, shed, shop, outhouse, vessel, or place other than such as is kept for lodging purposes, without the permission of the owner or person entitled to the possession thereof; and,

(8) Every person who lives in and about houses of ill fame; and,

(9) Every person who acts as a runner or capper for attorneys in and about police courts or city prisons; and,

(10) Every common prostitute, and every woman who from the doorways on the streets or any other place solicits men for immoral purposes; and,

(11) Every common drunkard; and,

(12) Every drug addict;—is a vagrant, and is punishable by imprisonment in the county jail not exceeding six months and may be sentenced to hard labor in the discretion of the court.

(L. 21, p. 395, § 8446.)

Comparable provisions.

Cal. Penal Code, § 647 (substantially the same, except as follows: subd. 1 "[except a California Indian]"; subd. 2. "Every beggar * * *"; subd. 10 is briefly worded: "10. Every common prostitute"; drug addicts are not mentioned; fine of not exceeding $500 or imprisonment not exceeding six months, or both such fine and imprisonment).

Iowa Code 1939, § 13371 (defining vagrants).

Mont. Rev. Codes, § 11521 (includes provisions similar to subds. (1), (2), (3) and (10) herein).

CHAPTER 59

WATERS

103–59–1. Interfering with Control of Water Commissioner.
103–59–2. Taking Out of Turn or Excess Amount — Injuring Means of Diversion and Conveyance.
103–59–3. Obstructing Gates by Logs.
103–59–4. Injuring Dams, Flumes, Reservoirs, etc.

103–59–1. Interfering with Control of Water Commissioner.

Every person who in any way interferes with or alters the flow of water in any stream, ditch or lateral while under the control or management of any water commissioner, is guilty of a misdemeanor.

(C. L. 17, § 8514.)

Cross-references.

Administration and distribution of waters, 100–5; interfering with water devices, 100–1–15.

103–59–2. Taking Out of Turn or Excess Amount—Injuring Means of Diversion and Conveyance.

Every person who, in violation of any right of any other person, willfully turns or uses the water, or any part thereof, of any canal, ditch, pipe line or reservoir, except at a time when the use of such water has been duly distributed to such person, or willfully uses any greater quantity of such water than has been duly distributed to him, or in any way changes the flow of water when lawfully distributed for irrigation or other useful purposes, except when duly authorized to make such change, or willfully and maliciously breaks or injures any dam, canal, pipe line, watergate, ditch or other means of diverting or conveying water for irrigation or other useful purposes, is guilty of a misdemeanor.

(C. L. 17, § 8410.)

Cross-references.

Larceny of water, 103–36–16.

103–59–3. Obstructing Gates by Logs.

Every person who rafts or floats logs, timber or wood down any river or stream and allows such logs, timber or wood to accumulate at or

obstruct the watergates owned by any person or irrigation company taking or diverting the water of such river or stream for irrigation or manufacturing purposes, is guilty of a misdemeanor.

(C. L. 17, § 8411.)

103–59–4. Injuring Dams, Flumes, Reservoirs, etc.

Every person who willfully and maliciously cuts, breaks, injures or destroys any bridge, dam, canal, flume, aqueduct, levee, embarkment, reservoir or other structure erected to create hydraulic power, or to drain or reclaim any swamp and overflowed or marsh land, or to conduct water for mining, manufacturing, reclamation or agricultural purposes, or for the supply of the inhabitants of any city or town; or willfully or maliciously makes or causes to be made any aperture in any such dam, canal, flume, aqueduct, reservoir, embankment, levee or structure with intent to injure or destroy the same; or draws up, cuts or injures any piles fixed in the ground and used for securing any lake or river bank or walls, or any dock, quay, jetty or lock, is punishable by fine not exceeding $500 or by imprisonment in the state prison not exceeding two years, or by both such fine and imprisonment.

(C. L. 17, § 8394.)

Cross-references.
Interfering with water faucet, etc., 103–46–4, 103–46–5; interference with or larceny of water, 103–36–16.

CHAPTER 60

WRITINGS

103–60–1. Mutilation and Destruction.
103–60–2. Reading and Publishing Contents of Letter.
103–60–3. Sending Threatening Letter.

103–60–1. Mutilation and Destruction.

Every person who maliciously mutilates, tears, defaces, obliterates or destroys any written instrument, the property of another, the false making of which would be forgery, is punishable by imprisonment in the state prison for not less than one year nor more than two years.

(C. L. 17, § 8400.)

Comparable provisions.
Cal. Penal Code, § 617, Idaho Code, § 17–4316, Mont. Rev. Codes, § 11492 (substantially identical, except as reading in part: "* * * nor more than five years").

103–60–2. Reading and Publishing Contents of Letter.

Every person who willfully and corruptly opens or reads, or causes to be read, any sealed letter not addressed to himself, without being authorized so to do either by the writer of such letter or by the person to whom it is addressed, and every person who, without the like au-

thority, publishes any of the contents of such letter, knowing the same to have been unlawfully opened, is guilty of a misdemeanor.

(C. L. 17, § 8401.)

Comparable provisions.
Cal. Penal Code, § 618, Idaho Code, § 17-4317, Mont. Rev. Codes, § 11493 (substantially identical).

Cross-references.
Opening messages, 103–46–8, 103–46–11.

103–60–3. Sending Threatening Letter.

Every person who knowingly and willfully sends or delivers to another any letter or writing, whether subscribed or not, threatening to accuse him or another of a crime, or to expose or publish any of his failings or infirmities, is guilty of a misdemeanor. (C. L. 17, § 8402.)

History.
This section is practically identical with Comp. Laws 1876, § 2209; R. S. 1898, § 4442; Comp. Laws 1907, § 4442. It was derived from and is practically identical with the California Penal provision. Cal. Penal Code (1941) § 650.

Comparable provisions.
Cal. Penal Code, § 650 (identical).

Cross-references.
Extortion, 103–17; offense of sending letter deemed complete, when, 103–1–27.

1. Evidence.
Evidence that defendant verbally demanded money from complaining witness, and that defendant's wife wrote threatening letter to him, was insufficient to sustain conviction of husband. State v. Anderson, 63 U. 542, 227 P. 810.

Evidence that married woman wrote letter to complaining witness that husband had left her, and demanding witness to make settlement for certain tragedy or she would cause trouble and scandal, held insufficient to sustain conviction. State v. Anderson, 63 U. 542, 227 P. 810.