CIVIL CODE

CHAPTER 1.

GENERAL DEFINITIONS AND DIVISIONS.

§ **4001. Title.** This act shall be known as the civil code of the state of North Dakota. [Civ. C. 1877, § 1; R. C. 1899, § 2689.]

§ **4002. Origin** of law. Law is a rule of property and of conduct prescribed by the sovereign power. [Civ. C. 1877, § 2; R. C. 1899, § 2690.]

§ **4003. Expression of law.** The will of the sovereign power is expressed:

1. By the constitution of the state.
2. By the statutes of the state.
3. By the ordinances of other and subordinate legislative bodies.
4. By the decisions of the tribunals enforcing those rules, which, though not enacted, form what is known as customary or common law. [Civ. C. 1877, § 3; R. C. 1899, § 2691.]

§ **4004. Common law divided.** The common law is divided into:

1. Public law, or the law of nations.
2. Domestic or municipal law. [Civ. C. 1877, § 4; R. C. 1899, § 2692.]

§ **4005. Evidence of same.** The evidence of the common law is found in the decisions of the tribunals. [Civ. C. 1877, § 5; R. C. 1899, § 2693.]

§ **4006. Codes exclude common law.** In this state there is no common law in any case where the law is declared by the codes. [Civ. C. 1877, § 6; R. C. 1899, § 2694.]

When a case is within the provision of code, common law inapplicable. Banbury v. Sherin, 4 S. D. 88, 55 N. W. 723; McClain v. Williams, 11 S. D. 227, 76 N. W. 930; Garrison v. Purdy, 3 Dak. 184, 14 N. W. 100.

§ **4007. Classification of civil rights.** All original civil rights are either:

1. Rights of person; or,
2. Rights of property. [Civ. C. 1877, § 7; R. C. 1899, § 2695.]

§ **4008. Rights, how waived.** Rights of property and of person may be waived, surrendered or lost by neglect in the cases provided by law. [Civ. C. 1877, § 8; R. C. 1899, § 2696.]

§ **4009. Code divisions.** This code has four general divisions:

1. The first relates to persons.
2. The second, to property.
3. The third, to obligations.
4. The fourth contains general provisions relating to persons, property and obligations. [Civ. C. 1877, § 9; R. C. 1899, § 2697.]

CHAPTER 2.

PERSONS.

§ **4010. Minority defined.** Minors are:

1. Males under twenty-one years of age.
2. Females under eighteen years of age.

The periods thus specified must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority. [Civ. C. 1877, § 10; R. C. 1899, § 2698.]

§ **4011. Adults.** All other persons are adults. [Civ. C. 1877, § 11; R. C. 1899, § 2699.]

§ **4012. Unborn child.** A child conceived, but not born, is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth. [Civ. C. 1877, § 12; R. C. 1899, § 2700.]

§ **4013. Minor's disability.** A minor cannot give a delegation of power, nor under the age of eighteen make a contract relating to real property or any interest therein, or relating to any personal property not in his immediate possession or control. [Civ. C. 1877, § 15; R. C. 1899, § 2701.]

§ **4014. Contract subject to disaffirmance.** A minor may make any contract other than as above specified in the same manner as an adult, subject only to his power of disaffirmance under the provisions of this chapter and subject to the provisions of the chapters on marriage and on master and servant. [Civ. C. 1877, § 16; R. C. 1899, § 2702.]

§ **4015. Minor's contracts.** In all cases other than those specified in sections 4016 and 4017 the contract of a minor, if made while he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within one year's time afterwards; or in case of his death within that period, by his heirs or personal representatives; and if the contract is made by the minor while he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received or paying its equivalent with interest. [Civ. C. 1877, § 17; R. C. 1899, § 2703.]

May be disaffirmed by restoring consideration. Retention of consideration and promise to pay after reaching majority affirms minor's contract. Once affirmed he cannot disaffirm; liability is upon his contract, not quantum meruit. Luce v. Jestrab, 12 N. D. 548, 97 N. W. 848.

§ **4016. Cannot disaffirm contracts for necessaries.** A minor cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support or that of his family entered into by him when not under the care of a parent or guardian able to provide for him or them. [Civ. C. 1877, § 18; R. C. 1899, § 2704.]

§ **4017. Nor statutory contracts.** A minor cannot disaffirm an obligation, otherwise valid, entered into by him under the express authority or direction of a statute. [Civ. C. 1877, § 19; R. C. 1899, § 2705.]

§ **4018. Idiot's powers.** A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family. [Civ. C. 1877, § 20; R. C. 1899, § 2706.]

§ **4019. When idiot's contract subject to rescission.** A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined is subject to rescission as provided in the chapter of rescission of this code. [Civ. C. 1877, § 21; R. C. 1899, § 2707.]

Conveyance by person of unsound mind is subject to recission. Mach v. Blanchard, 15 S. D. 432, 90 N. W. 1042.

§ **4020. Cannot contract after incapacity determined.** After his incapacity has been judicially determined a person of unsound mind can make no conveyance or other contract, nor delegate any power, nor waive any right, until his restoration is judicially determined. But if actually restored to capacity he may make a will, though his restoration is not thus determined. [Civ. C. 1877, § 22; R. C. 1899, § 2708.]

§ 4021. **Minor liable for wrongs.** A minor or a person of unsound mind of whatever degree is civilly liable for a wrong done by him in like manner as any other person. [Civ. C. 1877, § 23; R. C. 1899, § 2709.]

§ 4022. **When subjected to exemplary damages.** A minor or person of unsound mind cannot be subjected to exemplary damages unless at the time of the act he was capable of knowing that it was wrongful. [Civ. C. 1877, § 24; R. C. 1899, § 2710.]

§ 4023. **Rights of action.** A minor may enforce his rights by civil action or other legal proceedings in the same manner as a person of full age, except that a guardian must be appointed to conduct the same. [Civ. C. 1877, § 25; R. C. 1899, § 2711.]

§ 4024. **Indian rights. Disabilities.** Indians resident within this state have the same rights and duties as other persons, except that:

1. They cannot vote or hold office except as prescribed in subdivision three of section 121 of the constitution of this state.
2. They cannot grant, lease or incumber Indian lands except in the cases provided by law. [Civ. C. 1877, § 26; R. C. 1895, 2713.]

CHAPTER 3.

PERSONAL RIGHTS.

§ 4025. **General personal rights.** Besides the personal rights mentioned or recognized in the political code every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation and from injury to his personal relations. [Civ. C. 1877, § 27; R. C. 1899, § 2713.]

§ 4026. **Defamation.** Defamation is effected by:

1. Libel; or,
2. Slander. [Civ. C. 1877, § 28; R. C. 1899, § 2714.]

§ 4027. **Libel defined.** Libel is a false and unprivileged publication by writing, printing, picture, effigy or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. [Civ. C. 1877, § 29; R. C. 1899, § 2715.]

A direct charge of perjury is actionable per se, but the words "he made false affidavits in order to commence his case" are not. Casselman v. Winship, 3 Dak. 292, 19 N. W. 412.

Legal malice is conclusively presumed to sustain the action and to recover actual damages, if defamatory charge was unprivileged. Wrege v. Jones, 13 N. D. 267, 100 N. W. 705.

Jury determines whether language was used in an innocent or defamatory sense. Actionable if defamatory charge is made indirectly. Lauder v. Jones, 13 N. D. 525, 101 N. W. 907.

Malice essential to recovery of damages. In an unprivileged charge the law implies malice to sustain action and to recover compensatory damages. Lauder v. Jones, 13 N. D. 525, 101 N. W. 907.

§ 4028. **Slander.** Slander is a false and unprivileged publication, other than libel, which:

1. Charges any person with crime or with having been indicted, convicted, or punished for crime.
2. Imputes to him the present existence of an infectious, contagious or loathsome disease.
3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualifications in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business, that has a natural tendency to lessen its profit.

4. Imputes to him impotence or want of chastity; or,
5. Which, by natural consequence causes actual damage. [Civ. C. 1877, § 30; R. C. 1899, § 2716.]

Where one is charged with indictable offense proof of special damages unnecessary. Bedtkey v. Bedtkey, 15 S. D. 310, 89 N. W. 479.

§ 4029. **Privileged communications.** A privileged communication is one made:

1. In the proper discharge of an official duty.
2. In any legislative or judicial proceeding, or in any other proceeding authorized by law.
3. In a communication without malice to a person interested therein by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information.
4. By a fair and true report without malice of a judicial, legislative or other public official proceeding, or of anything said in the course thereof.

In the cases provided for in subdivisions three and four of this section malice is not inferred from the communication or publication. [Civ. C. 1877, § 31; R. C. 1899, § 2717.]

Testimony in judicial proceedings is privileged. Exemption of witness from liability is absolute. Lauder v. Jones, 13 N. D. 525, 101 N. W. 907.

Good faith and absence of malice presumed in privileged utterances. Lauder v. Jones, 13 N. D. 525, 101 N. W. 907.

Candidate's fitness for office. Publication privileged. Boucher v. Clark Pub. Co., 14 S. D. 72, 84 N. W. 237; Ross v. Ward, 14 S. D. 240, 85 N. W. 182; Myers v. Longstaff, 14 S. D. 98, 84 N. W. 233.

§ 4030. **Offenses against personal relation.** The rights of personal relation forbid:

1 The abduction of a husband from his wife or of a parent from his child.
2. The abduction or enticement of a wife from her husband, of a child from a parent or from a guardian entitled to its custody, or of a servant from his master.
3. The seduction of a wife, daughter, orphan sister or servant; and,
4. Any injury to a servant which affects his ability to serve his master. [Civ. C. 1877, § 32; R. C. 1899, § 2718.]

Wife can recover damages against a woman for alienating husband's affections. King v. Hanson, 13 N. D. 85, 99 N. W. 1085.

§ 4031. **Force to protect.** Any necessary force may be used to protect from wrongful injury the person or property of one's self or of a wife, husband, child, parent or other relative or member of one's family, or of a ward, servant, master or guest. [Civ. C. 1877, § 33; R. C. 1899, § 2719.]

CHAPTER 4.

MARRIAGE CONTRACT.

§ 4032. **Marriage defined.** Marriage is a personal relation arising out of a civil contract to which the consent of the parties thereto is essential, but the marriage relation may be entered into, maintained, annulled or dissolved only as provided by law. [1890, ch. 91, § 1; R. C. 1899, § 2720.]

§ 4033. **Age of consent to marriage.** Any unmarried male of the age of eighteen years or upwards, and any unmarried female of the age of fifteen years or upwards, and not otherwise disqualified, are capable of consenting to and consummating marriage; provided, that if the male is under twenty-one years, or the female under eighteen years of age, the license provided in

this chapter shall not be issued without the consent of the parents or guardian, if there be any. [1897, ch. 4; R. C. 1899, § 2721.]

Record evidence unnecessary, parol sufficient. Mathews v. Silvander, 14 S. D. 505, 85 N. W. 998.

§ 4034. Who disqualified to marry. Marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, between uncles and nieces, aunts and nephews, or cousins of the first degree of the half as well as the whole blood, are declared to be incestuous and absolutely void. This section shall apply to illegitimate as well as legitimate children and relations. [1890, ch. 91, § 3; R. C. 1895, § 2722.]

§ 4035. When marriage voidable. A marriage contracted by a person having a former husband or wife living, if the former marriage has not been annulled or dissolved, is illegal and void from the beginning unless such former husband or wife was absent and believed by such person to be dead for a period of five years immediately preceding. [1890, ch. 91, § 6; R. C. 1895, § 2723.]

§ 4036. Who may solemnize marriages. License. Marriages may be solemnized by all judges of courts of record within their respective jurisdictions; by justices of the peace within their respective jurisdictions; by ordained ministers of the gospel and priests of every church, but marriages solemnized in the society of Friends or Quakers according to the form used in their meetings shall be valid. No such person shall solemnize any marriage until the parties thereto shall produce a license, issued by a county judge of the county in which such ceremony is to be performed, or if such county is unorganized, of the county to which it is attached for judicial purposes. When any person authorized by law shall solemnize a marriage he shall fill out and sign a certificate following the marriage license on the blank form prescribed by law, giving his official title, or if a minister of the gospel or priest, the ecclesiastical body with which he is connected and return such license and certificate to the county judge of the county within thirty days thereafter. Such certificate shall be signed by two witnesses to the marriage ceremony in addition to the signature of the person who solemnized the marriage. [1890, ch. 91, § 7; R. C. 1895, § 2724.]

§ 4037. Marriage license, how obtained. The county judge of each county in this state, when applied to by any person for a marriage license, shall inquire of such person upon oath relative to the legality of such contemplated marriage and he may examine other witnesses upon oath if deemed best; and if any of the persons intending to marry are under age said judge shall require the consent of the parent or guardian, if there is any, personally given, or a certificate of consent signed by such parent or guardian and attested by two witnesses, one of whom shall appear before such judge and make oath that he saw such parent or guardian sign such certificate; and if said judge shall be satisfied there is no legal impediment thereto, he shall issue and sign such marriage license and affix his seal, in the form prescribed by law. [1890, ch. 91, § 8; R. C. 1899, § 2725.]

§ 4038. License and certificate. The marriage license and certificate of the person solemnizing the marriage shall be upon one blank form substantially as follows:

MARRIAGE LICENSE.

State of North Dakota, } ss.
County of ..... }

To any person authorized by law to perform the mariage ceremony, greeting:

You are hereby authorized to join in marriage....., of ....., aged..... and....., of.....,

aged.....; and of this license and your certificate you will make due return to my office within thirty days.

Dated at ..... this ..... day of .....19...

[Seal.] .....

County Judge.

CERTIFICATE OF MARRIAGE.

I hereby certify that the persons named in the foregoing license were by me joined in marriage at....., county of....., state of North Dakota, on the ..... day of .....19...

In presence of

....

....

Witnesses.

[1890, ch. 91, § 9; R. C. 1899, § 2726.]

§ **4039. Record to be kept by county court.** The county judge shall keep a marriage record book, in which he shall keep a correct copy of all marriage licenses issued by him; and when a license is returned with the certificate of the person performing the marriage ceremony properly filled out and signed, he shall also record such certificate immediately following the record of such license; and for each license and the record herein required he shall be entitled to a fee of one dollar to be paid by the party applying for the same. [1890, ch. 91, § 10; R. C. 1899, § 2727.]

§ **4040. Indian marriage contracts valid.** Indians contracting marriage according to the Indian custom and cohabiting as man and wife shall be deemed legally married. [1890, ch. 91, § 13; R. C. 1899, § 2728.]

§ **4041. Marriages valid where contracted, valid in this state.** All marriages contracted outside of this state, which are valid according to the laws of the state or country where contracted, shall be valid in this state. [1890, ch. 91, § 14; R. C. 1899, § 2729.]

§ **4042. Certified record is evidence.** The books of record of marriage licenses issued and certificates returned kept by the county judge of any county, or copies of such entries certified by such judge under the seal of the court, shall be received as evidence in all courts. [1890, ch. 91, § 15; R. C. 1895, § 2730.]

§ **4043. Causes for annulling marriage.** A marriage may be annulled by an action in the district court to obtain a decree of nullity for any of the following causes existing at the time of the marriage:

1. When the party in whose behalf it is sought to have the marriage annulled was under the age of legal consent and such marriage was contracted without the consent of his or her parent or guardian, unless after attaining the age of consent such party freely cohabited with the other as husband or wife.
2. When the former husband or wife of either party was living and the marriage with such former husband or wife was then in force.
3. When either party was of unsound mind, unless such party after coming to reason freely cohabited with the other as husband or wife.
4. When the consent of either party was obtained by fraud, unless such party afterwards with full knowledge of the facts constituting the fraud freely cohabited with the other as husband or wife.
5. When the consent of either party was obtained by force, unless such party afterwards freely cohabited with the other as husband or wife.
6. When either party was at the time of the marriage physically incapable of entering into the marriage state and such incapacity continues and appears to be incurable. [Civ. C. 1877, § 54; R. C. 1895, § 2731.]

§ **4044. Limitation of action.** An action to obtain a decree of nullity of marriage for causes mentioned in the preceding section, must be commenced within the periods and by the parties as follows:

1. For causes mentioned in subdivision one, by the party to the marriage, who was married under the age of legal consent, within four years after arriving at the age of consent, or by his or her parent or guardian at any time before such party has arrived at the age of legal consent.
2. For causes mentioned in subdivision two, by either party during the life of the other, or by such former husband or wife.
3. For causes mentioned in subdivision three, by the party injured, or a relative or guardian of the party of unsound mind at any time before the death of either party.
4. For causes mentioned in subdivision four, by the party injured within four years after the discovery of the facts constituting the fraud.
5. For causes mentioned in subdivisions five and six, by the injured party within four years after the marriage. [Civ. C. 1877, § 55; R. C. 1895, § 2732.]

§ **4045. Children legitimate.** When a marriage is annulled children begotten before the judgment are legitimate and succeed to the estate of both parents. [Civ. C. 1877, § 56; R. C. 1895, § 2733.]

§ **4046. Custody of children.** The court must award the custody of the children of a marriage annulled on the ground of fraud or force to the innocent parent and may also provide for their education and maintenance out of the property of the guilty party. [Civ. C. 1877, § 57; R. C. 1899, § 2734.]

§ **4047. Effect of judgment.** A judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them. [Civ. C. 1877, § 58; R. C. 1899, § 2735.]

CHAPTER 5.

DISSOLUTION OF MARRIAGE.

ARTICLE 1.—CAUSES FOR GRANTING DIVORCE.

§ **4048. Marriage, how dissolved.** Marriage is dissolved only:
1. By the death of one of the parties; or,
2. By judgment of a court of competent jurisdiction decreeing a divorce of the parties.

The effect of a judgment decreeing a divorce is to restore the parties to the state of unmarried persons, except that neither party to a divorce may marry within three months after the time such decree is granted. [Civ. C. 1877, § 59; R. C. 1895, § 2736; 1901, ch. 70.]

§ **4049. Causes for divorce.** Divorces may be granted for any of the following causes:
1. Adultery.
2. Extreme cruelty.
3. Willful desertion.
4. Willful neglect.
5. Habitual intemperance.
6. Conviction of felony. [1899, ch. 77; R. C. 1899, § 2737; 1901, ch. 71, § 1.]

§ **4050. Adultery defined.** Adultery within the meaning of this article is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. [Civ. C. 1877, § 60; R. C. 1899, § 2738.]

§ **4051. Extreme cruelty defined.** Extreme cruelty is the infliction by one party to the marriage of grievous bodily injury or grievous mental suffering upon the other. [Civ. C. 1877, § 60; R. C. 1899, § 2739.]

False charges of marital infidelity, if husband's conduct gave wife reasons for making charges, not ground for divorce, for mental suffering. McAllister v. McAllister, 7 N. D. 324, 75 N. W. 256.

Grievous mental suffering ground for divorce. Question of fact. Mahnken v. Mahnken, 9 N. D. 188, 82 N. W. 871.

Divorce granted for infliction of grievous mental suffering, though no bodily injury. Mahnken v. Mahnken, 9 N. D. 188, 82 N. D. 871.

§ 4052. Desertion defined. Willful desertion is the voluntary separation of one of the married parties from the other with intent to desert.

1. Persistent refusal to have reasonable matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary, or the refusal of either party to dwell in the same house with the other party, when there is no just cause for such refusal, is desertion.
2. When one party is induced by the stratagem or fraud of the other party to leave the family dwelling place or to be absent, and during such absence the offending party departs with intent to desert the other, it is desertion by the party committing the stratagem or fraud, and not by the other.
3. Departure or absence of one party from the family dwelling place caused by cruelty or by threats of bodily harm from which danger would be reasonably apprehended from the other is not desertion by the absent party, but it is desertion by the other party.
4. Separation by consent, with or without the understanding that one of the parties will apply for a divorce, is not desertion.
5. Absence or separation, proper in itself, becomes desertion whenever the intent to desert is fixed during such absence or separation.
6. Consent to a separation is a revocable act and if one of the parties afterwards in good faith seeks a reconciliation and restoration, but the other refuses it, such refusal is desertion.
7. If one party deserts the other and before the expiration of the statutory period required to make the desertion a cause of divorce returns and offers in good faith to fulfill the marriage contract and solicits condonation, the desertion is cured. If the other party refuses such offer and condonation, the refusal shall be deemed and treated as desertion by such party from the time of the refusal.
8. A husband may choose any reasonable place or mode of living, and if the wife does not conform thereto it is desertion.
9. If the place or mode of living selected by the husband is unreasonable and grossly unfit and the wife does not conform thereto, it is desertion on the part of the husband from the time her reasonable objections are made known to him. [Civ. C. 1877, § 60; R. C. 1899, § 2740.]

It is desertion on part of wife who drives husband from home by threats or acts of cruelty. Pollock v. Pollock, 9 S. D. 48, 68 N. W. 176.

§ 4053. Willful neglect defined. Willful neglect is the neglect of the husband to provide for his wife the common necessaries of life, he having the ability to do so; or it is the failure to do so by reason of idleness, profligacy or dissipation. [Civ. C. 1877, § 60; R. C. 1899, § 2741.]

§ 4054. Habitual intemperance defined. Habitual intemperance is that degree of intemperance from the use of intoxicating drinks, morphine, opium, chloral, cocaine or other like narcotic drugs, which disqualifies the person a great portion of the time from properly attending to business or which would reasonably inflict a course of great mental anguish upon the innocent party. [Civ. C. 1877, § 60; R. C. 1895, § 2742.]

§ 4055. Duration of offenses as grounds for divorce. Willful desertion, willful neglect or habitual intemperance must continue for one year before either is a ground for divorce. [1899, ch. 77; R. C. 1899, § 2743; 1901, ch. 73, § 2.]

Article 2.—Causes for Denying Divorce.

§ 4056. When divorce will be denied. Divorces must be denied upon showing:

1. Connivance; or,
2. Collusion; or,

3. Condonation; or,
4. Recrimination; or,
5. Limitation and lapse of time. [Civ. C. 1877, § 61; R. C. 1899, § 2744.]

§ **4057. Connivance defined.** Connivance is the corrupt consent of one party to the commission of the acts of the other constituting the cause of divorce. Corrupt consent is manifested by passive permission with intent to connive at or actively procure the commission of the acts complained of. [Civ. C. 1877, § 61; R. C. 1899, § 2745.]

§ **4058. Collusion defined.** Collusion is an agreement between the husband and wife that one of them shall commit, or appear to have committed, or be represented in court as having committed, acts constituting a cause of divorce for the purpose of enabling the other to obtain a divorce. [Civ. C. 1877, § 61; R. C. 1899, § 2746.]

Arrangements between the parties to avoid a threatened scandal not amenable to judicial censure. Clopton v. Clopton, 11 N. D. 212, 91 N. W. 46.

Agreement as to property rights not collusion. Burgess v. Burgess, 17 S. D. 44, —N. W. —.

§ **4059. Condonation defined.** Condonation is the conditional forgiveness of a matrimonial offense constituting a cause of divorce. [Civ. C. 1877, § 61; R. C. 1899, § 2747.]

§ **4060. Requisites of condonation.** The following requirements are necessary to condonation:

1. A knowledge on the part of the condoner of the facts constituting the cause of divorce.
2. Reconciliation and remission of the offense by the injured party.
3. Restoration of the offending party to all marital rights.

Condonation implies a condition subsequent, that the forgiving party must be treated with conjugal kindness. When the cause of divorce consists of a course of offensive conduct, or arises in cases of cruelty from successive acts of ill treatment, which may aggregately constitute the offense, cohabitation or passive endurance or conjugal kindness shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone. In such cases condonation can be made only after the cause of divorce has become complete as to the acts complained of. A fraudulent concealment by the condonee of facts constituting a different cause of divorce from the one condoned and existing at the time of condonation avoids such condonation. [Civ. C. 1877, § 61; R. C. 1899, § 2748.]

Supreme court reviews entire case. Condonation of cruelty by cohabitation. Revocation of condonation. Record remanded for judgment in lower court. Taylor v. Taylor, 5 N. D. 58, 63 N. W. 893; Gardner v. Gardner, 9 N. D. 192, 82 N. W. 872.

§ **4061. Revocation of condonation.** Condonation is revoked and the original cause of divorce revived:

1. When the condonee commits acts constituting a like or other cause of divorce; or,
2. When the condonee is guilty of great conjugal unkindness, not amounting to a cause of divorce, but sufficiently habitual and gross to show that the conditions of condonation had not been accepted in good faith or not fulfilled. [Civ. C. 1877, § 61; R. C. 1899, § 2749.]

§ **4062. Recrimination defined.** Recrimination is a showing by the defendant of any cause of divorce against the plaintiff in bar of the plaintiff's cause of divorce. Condonation of a cause of divorce shown in the answer as a recriminatory defense is a bar to such defense, unless the condonation is revoked as above provided, or two years have elapsed after the condonation and before accruing or completion of the cause of divorce against which the recrimination is shown. [Civ. C. 1877, § 61; R. C. 1899, § 2750.]

§ **4063. Adultery by husband.** When a divorce is granted for the adultery of the husband, the legitimacy of children of the marriage begotten of the

wife before the commencement of the action is not affected. [Civ. C. 1877, § 62; R. C. 1899, § 2751.]

§ 4064. **By wife. Legitimacy.** When a divorce is granted for the adultery of the wife the legitimacy of children begotten of her before the commission of the adultery is not affected; but the legitimacy of other children of the wife may be determined by the court upon the evidence in the case. In every such case all children begotten before the commencement of the action are to be presumed legitimate until the contrary is shown. [Civ. C. 1877, § 63; R. C. 1899, § 2752.]

§ 4065. **Time limited.** A divorce must be denied when there is an unreasonable lapse of time before the commencement of the action. Unreasonable lapse of time is such a delay in commencing the action as establishes the presumption that there has been connivance, collusion or condonation of the offense, or full acquiescence in the same with intent to continue the marriage relation, notwithstanding the commission of the offense set up as a ground of divorce. The presumption arising from lapse of time may be rebutted by showing reasonable grounds for the delay in commencing the action. [Civ. C. 1877, § 65; 1881, ch. 29, § 1; R. C. 1899, § 2753.]

§ 4066. **Only statutory limitations.** There are no limitations of time for commencing actions for divorce except such as are contained in the foregoing section. [Civ. C. 1877, § 66; R. C. 1895, § 2754.]

§ 4067. **Term of residence.** A divorce must not be granted unless the plaintiff has in good faith been a resident of the state for twelve months next preceding the commencement of the action and is a citizen of the United States or has declared his intention to become such. The provisions of this section shall not apply to any action for divorce in which the complaint shall have been filed in the office of the clerk of the district court prior to the first day of July, 1899. [1899, chs. 75, 76; R. C. 1899, § 2755.]

Residence construed to mean domicile. Good faith residence required. Mere temporary residence in state for divorce purposes insufficient. Smith v. Smith, 7 N. D. 404, 75 N. W. 783; Graham v. Graham, 9 N. D. 88, 81 N. W. 44; Smith v. Smith, 10 N. D. 219, 86 N. W. 721.

Residence in good faith must be clearly shown. Grant v. Grant, 6 S. D. 147, 60 N. W. 743.

Can not acquire domicile for divorce pending suit for divorce. See Strutwolf v. Strutwolf, 181 U. S. 179.

§ 4068. **Presumption of domicile.** In actions for divorce the presumption of law that the domicile of the husband is the domicile of the wife does not apply. After separation each party may have a separate domicile, depending for proof upon actual residence and not upon legal presumptions. [Civ. C. 1877, § 68; R. C. 1899, § 2756.]

§ 4069. **Affirmative proof required.** No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission or testimony of the parties, or upon any statement or finding of fact made by a referee; but the court must in addition to any statement or finding of the referee require proof of the facts alleged. [Civ. C. 1877, § 69; R. C. 1899, § 2757.]

Corroboration unnecessary where complaint alleges and answer admits facts. Clopton v. Clopton, 11 N. D. 212, 91 N. W. 46.

Article 3.—General Provisions.

§ 4070. **Maintenance.** Though a judgment of divorce is denied the court may in an action for divorce provide for the maintenance of a wife and her children, or any of them, by the husband. [Civ. C. 1877, § 70; R. C. 1899, § 2758.]

A court in an action for separate maintenance may require defendant to provide counsel fees and temporary support, though the allegations of the complaint are denied. Milliron v. Milliron, 9 S. D. 181, 68 N. W. 286; Bueter v. Bueter, 1 S. D. 94, 45 N. W. 208.

§ 4071. Alimony pending action. While an action for divorce is pending, the court may in its discretion require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action. [Civ. C. 1877, § 71; R. C. 1899, § 2759.]

Alimony or allowance for expenses will not be allowed where marriage is denied in answer until it is made fairly to appear to court that marital relations exist. Bardin v. Bardin, 4 S. D. 305. 56 N. W. 1069.

Order for alimony does not preclude wife from asking, or court from making, further order. Grant v. Grant, 5 S. D. 1, 57 N. W. 948.

Order for temporary alimony must have been served on plaintiff personally to authorize dismissal of action for non-payment. Scott v. Scott, 9 S. D. 125, 63 N. W. 194.

§ 4072. Custody of children. In an action for divorce the court may before or after judgment give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper and may at any time vacate or modify the same. [Civ. C. 1877, § 72; R. C. 1899, § 2760.]

Allowance of alimony creates a valid obligation. Allison v. Allison, 5 S. D. 216, 58 N. W. 563.

Court has power to modify decree for alimony when changed conditions justify. Greenleaf v. Greenleaf, 6 S. D. 348, 61 N. W. 42.

Alimony may be made in gross sum or by monthly payments. Williams v. Williams, 6 S. D. 284, 61 N. W. 38.

Where homestead is sold to pay alimony year's redemption shall be allowed. Harding v. Harding, 16 S. D. 406, 98 N. W. 1080.

§ 4073. Support. When a divorce is granted for an offense of the husband the court may make such suitable allowance to the wife for her support during her life or for a shorter period as the court may deem just; and when such divorce is granted for the offense of either the husband or wife, the court may compel such husband to provide for the maintenance of the children of the marriage, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects. [1899, ch. 78; R. C. 1899, § 2761.]

Divorce granted husband for fault of wife, court has no power to make allowance for support of wife. Express contract to pay for support can not be enforced by contempt proceedings. Glynn v. Glynn, 8 N. D. 233, 77 N. W. 594.

For wrong of husband court may grant gross amount of alimony. DeRoche v DeRoche, 12 N. D. 17, 94 N. W. 767.

§ 4074. Security. Separate estate. Homestead. The court may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter and may enforce the same by the appointment of a receiver or by any other remedy applicable to the case. But when the wife has a separate estate sufficient to give her a proper support, the court in its discretion may withhold any allowance to her out of the separate property of the husband. The court in rendering a decree of divorce may assign the homestead to the innocent party either absolutely or for a limited period according to the facts in the case and in consonance with the law relating to homesteads. The disposition of the homestead by the court and all orders and decrees touching the alimony and maintenance of the wife and for the custody, education and support of the children as above provided are subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the court. [Civ. C. 1877, § 74; R. C. 1899, § 2762.]

Decree being silent upon the subject, homestead remains in possession of party holding legal title, discharged of claims of other party. Rosholt v. Mehus, 3 N. D. 513, 57 N. W. 783.

Wife acquires no right to homestead except by provisions of decree. Brady v. Kreuger, 8 S. D. 464, 66 N. W. 1083.

Court may decree homestead to wife or may make alimony lien on same. Harding v. Harding, 16 S. D. 406, 92 N. W. 1080.

CHAPTER 6.

HUSBAND AND WIFE.

§ **4075. Mutual relations.** Husband and wife contract toward each other obligations of mutual respect, fidelity and support. [Civ. C. 1877, § 75; R. C. 1899, § 2763.]

§ **4076. Head of family.** The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto. [Civ. C. 1877, § 76; R. C. 1899, § 2764.]

Head of family may be either husband or wife under certain circumstances. Ness v. Jones, 10 N. D. 587, 88 N. W. 706.

Wife may be head of family for homestead purposes. Linander v. Longstaff, 7 S. D. 157, 63 N. W. 775.

§ **4077. Duty to support.** The husband must support himself and his wife out of his property or by his labor. The wife must suupport the husband when he has not deserted her out of her separate property, when he has no separate property and he is unable from infirmity to support himself. [Civ. C. 1877, § 77; R. C. 1899, § 2765.]

§ **4078. Separate property. Dwelling.** Except as mentioned in section 4077, neither the husband nor the wife has any interest in the property of the other, but neither can be excluded from the other's dwelling. [Civ. C. 1877, § 78; R. C. 1899, § 2766.]

Wife not liable for assault and battery committed by husband while in her employ. Curtis v. Dinneen, 4 Dak. 245, 30 N. W. 148.

The fact that the husband gratuitously devotes his time and skill to management of wife's land and farming operations does not vest in him title to crop. Olson v. O'Connor, 9 N. D. 504, 84 N. W. 359.

§ **4079. Rights and capacity of husband and wife.** Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which the other might, if unmarried. The wife after marriage has with respect to property, contracts and torts the same capacity and rights and is subject to the same liabilities as before marriage, and in all actions by or against her she shall sue and be sued in her own name. [1899, ch. 100; R. C. 1899, § 2767.]

Husband may be employed by wife as servant. Curtis v. Dinneen, 4 Dak. 245, 30 N. W. 148.

Wife joining in mortgage to secure notes given by husband not personally liable for debt. Peoples State Bank v. Frances, 8 N. D. 369, 79 N. W. 853.

Husband may deal with wife in regard to property as a stranger. Williams v. Harris, 4 S. D. 22, 54 N. W. 926.

Before husband's fraudulent intent in transferring land to wife can be of avail, wife must have knowledge of such intent. Bank v. O'Leary, 13 S. D. 204, 83 N. W. 45; Hewitt v. Usher, 11 S. D. 512, 78 N. W. 993; Williams v. Harris, 4 S. D. 22, 54 N. W. 926.

A married woman is liable on a note signed by her as surety for her husband, although she does not charge her separate estate with payment thereof. Colonial & U. S. Mortgage Co. v. Stevens, 3 N. D. 265, 55 N. W. 578; Colonial & U. S. Mortgage Co. v. Bradley, 4 S. D. 158, 55 N. W. 1108; Miller v. Purchase, 5 S. D. 232, 58 N. W. 556; Granger v. Roll, 6 S. D. 611, 62 N. W. 970.

Husband may deed homestead direct to wife. Olson v. O'Connor, 9 N. D. 504, 84 N. W. 359; Johnson v. Brauch, 9 S. D. 116, 68 N. W. 173.

Transfer of homestead to wife without consideration to defraud creditors held void. Kettleschlager v. Ferrick, 12 S. D. 455, 81 N. W. 889.

A husband has a right to pay his wife an honest debt in an honest manner. Garvin v. Pettee, 15 S. D. 266.

§ **4080. Cannot alter relations.** A husband and wife cannot by any contract with each other alter their marital relations, except that they may agree in writing to an immediate separation and may make provision for the

support of either of them and of their children during such separation. [Civ. C. 1877, § 80; R. C. 1895, § 2768.]

By contract to live separate and apart husband and wife may release all interests in property possessed, or to be acquired. Aspey v. Barry, 13 S. D. 220, 83 N. W. 91.

§ 4081. **Separation.** The mutual consent of the parties is a sufficient consideration for such an agreement as is mentioned in the last section. [Civ. C. 1877, § 81; R. C. 1899, § 2769.]

§ 4082. **Separate and mutual rights.** Neither the husband nor the wife, as such, is answerable for the acts of the other.

2. The earnings of the wife are not liable for the debts of the husband and the earnings and accumulations of the wife and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife.

3. The separate property of the husband is not liable for the debts of the wife contracted before the marriage.

4. The separate property of the wife is not liable for the debts of her husband, but is liable for her own debts contracted before or after marriage.

5. No estate is allowed the husband as tenant by courtesy upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband. [Civ. C. 1877, § 83; 1893, ch. 52, § 2; R. C. 1899, § 2770.]

Wife not liable for husband's torts. Curtis v. Dinneen, 4 Dak. 245, 30 N. W. 148.

The estate of dower and courtesy unknown to our laws, nor have we any estate that corresponds therewith. Fore v. Fore, 2 N. D. 260, 50 N. W. 712.

Fact that wife, with knowledge of husband sells intoxicating liquors at home, does not relieve husband from liability. State v. Rozum, 8 N. D. 548, 80 N. W. 477; State v. Ekanger, 8 N. D. 559, 80 N. W. 482.

Divorced husband of a testatrix, having custody and control of child, has no interest in wife's property, except as contingent on child's death. Halde v. Schultz, 17 S. D. 465.

Husband and wife contract as individuals. Colonial & U. S. Mortgage Co. v. Bradley, 4 S. D. 158, 55 N. W. 1108.

For exemption from liability of wife for crime committed in presence of husband, see Neys v. Taylor, 12 S. D. 488, 81 N. W. 901.

§ 4083. **Wife's necessaries.** If the husband neglects to make adequate provision for the support of his wife, except in the cases mentioned in the next section, any other person may in good faith supply her with articles necessary for her support and recover the reasonable value thereof from the husband. [Civ. C. 1877, § 84; R. C. 1899, § 2771.]

§ 4084. **Abandonment. Separation.** A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified by his misconduct in abandoning him; nor is he liable for her support when she is living separate from him by agreement, unless such support is stipulated in the agreement. [Civ. C. 1877, § 85; R. C. 1899, § 2772.]

§ 4085. **Transfer of property when abandoned.** In case the husband or wife abandons the other and removes from the state and is absent therefrom for one year without providing for the maintenance and support of his or her family, or is sentenced to imprisonment either in the county jail or penitentiary for the period of one year or more, the district court of the county or judicial subdivision where the husband or wife so abandoned, or not in prison, resides may, on application by affidavit of such husband or wife, setting forth fully the facts, supported by such other testimony as the court may deem necessary, authorize him or her to manage, control, sell or incumber the property of the said husband or wife for the support and maintenance of the family and for the purpose of paying debts contracted prior to such abandonment or imprisonment. Notice of such proceedings shall be given the opposite party and shall be served as summons is served in ordinary actions. [1883, ch. 68, § 1; R. C. 1899, § 2773.]

§ 4086. **Contracts binding on both.** All contracts, sales or incumbrances made either by the husband or the wife by virtue of the power contemplated

and granted by order of the court as provided in the preceding section, shall be binding on both, and during such absence or imprisonment the person acting under such power may sue and be sued thereon, and for all acts done the property of both shall be liable, and execution may be levied or attachment issued thereon according to statute. No suit or proceedings shall abate or be in anywise affected by the return or release of the person confined, but he or she may be permitted to prosecute or defend jointly with the other. [1883, ch. 68, § 2; R. C. 1899, § 2774.]

§ **4087. When order set aside.** The husband or wife affected by the proceedings contemplated in the two preceding sections may have the order or decree of the court set aside or annulled by affidavit of such party, setting forth fully the facts and supported by such other testimony as the court shall deem proper. Notice of such proceedings to set aside and annul such order must be given the person in whose favor the same was granted and shall be served as summons is served in ordinary actions. The setting aside of such decree or order shall in no wise affect any act done thereunder. [1883, ch. 68, § 3; R. C. 1899, § 2775.]

CHAPTER 7.

PARENT AND CHILD.

§ **4088. Legitimacy presumed.** All children born in wedlock are presumed to be legitimate. [Civ. C. 1877, § 86; R. C. 1899, § 2776.]

§ **4089. Children born after dissolution of marriage or before wedlock.** All children of a woman who has been married born within ten months after the dissolution of the marriage are presumed to be legitimate children of that marriage. A child born before wedlock becomes legitimate by the subsequent marriage of its parents. [Civ. C. 1877, § 87; R. C. 1899, § 2777.]

§ **4090. Who may dispute presumption.** The presumption of legitimacy can be disputed only by the husband or wife or the descendent of one or both of them. Illegitimacy in such case may be proved like any other fact. [Civ. C. 1877, § 88; R. C. 1899, § 2778.]

§ **4091. Both parents support children.** The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability. [Civ. C. 1877, § 89; R. C. 1899, § 2779.]

Statutory duty not changed by decree of divorce of parents. Glynn v. Glynn, 8 N. D. 233, 77 N. W. 594.

§ **4092. Who entitled to the custody of a child.** The father of a legitimate unmarried minor child is entitled to its custody, services and earnings; but he cannot transfer such custody or services to any other person except the mother without her written consent, unless she has deserted him or is living separate from him by agreement. If the father is dead or is unable or refuses to take the custody or has abandoned his family the mother is entitled thereto. [Civ. C. 1877, § 90; R. C. 1899, § 2780.]

§ **4093. Of illegitimate child.** The mother of an illegitimate unmarried minor is entitled to its custody, services and earnings. [Civ. C. 1877, § 91; R. C. 1899, § 2781.]

§ **4094. Allowance to parent.** The district court may direct an allowance to be made to a parent of a child out of its property for its past or future support and education on such conditions as may be proper, whenever such direction is for its benefit. [Civ. C. 1877, § 92; R. C. 1899, § 2782.]

§ **4095. Control of property.** The parent as such has no control over the property of the child. [Civ. C. 1877, § 93; R. C. 1899, § 2783.]

§ **4096. Parental abuse.** The abuse of parental authority is the subject of judicial cognizance in a civil action in the district court brought by the child, or by its relatives within the third degree, or by the officers of the poor where the child resides; and when the abuse is established, the child may be freed from the dominion of the parent and the duty of support and education enforced. [Civ. C. 1877, § 94; R. C. 1899, § 2784.]

§ **4097. When parent's authority ceases.** The authority of a parent ceases:

1. Upon the appointment by a court of a guardian of the person of the child;
2. Upon the marriage of the child; or,
3. Upon its attaining majority. [Civ. C. 1877, § 95; R. C. 1899, 2785.]

§ **4098. Action for support of child.** If a parent chargeable with the support of a child dies, leaving it chargeable upon the county and leaving an estate sufficient for its support, the county commissioners of the county in the name of the county may claim provision for its support from the parent's estate by civil action, and for this purpose may have the same remedies as any creditor against that estate and against the heirs, devisees and next of kin of the parent. [Civ. C. 1877, § 96; R. C. 1895, § 2786.]

§ **4099. Support of poor.** It is the duty of the father, the mother and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessaries previously furnished to such parent is binding. [Civ. C. 1877, § 97; R. C. 1899, § 2787.]

While statute does not provide for enforcing future maintenance, county may recover against children for necessaries furnished indigent parents. McCook Co. v. Kammoss, 7 S. D. 558, 64 N. W. 1123.

§ **4100. Neglect of child.** If a parent neglects to provide articles necessary for his child, who is under his charge, according to his circumstances, a third person may in good faith supply such necessaries and recover the reasonable value thereof from the parent. [Civ. C. 1877, § 98; R. C. 1899, § 2788.]

§ **4101. Parent when not liable.** A parent is not bound to compensate the other parent or relative for the voluntary support of his child without an agreement for compensation, nor to compensate a stranger for the support of a child who has abandoned the parent without just cause. [Civ. C. 1877, § 99; R. C. 1899, § 2789.]

Duty on plaintiff to establish agreement by preponderance of the evidence. Under common law not liable for support of minor child to relative. Flugel v. Henschel, 6 N. D. 205, 69 N. W. 195.

§ **4102. Support of stepchildren.** A husband is not bound to maintain his wife's children by a former husband; but if he receives them into his family and supports them, it is presumed that he does so as a parent and when such is the case, they are not liable to him for their support, nor he to them for their services. [Civ. C. 1877, § 100; R. C. 1899, § 7890.]

§ **4103. After majority.** When a child after attaining majority continues to serve and to be supported by the parent, neither party is entitled to compensation in the absence of an agreement therefor. [Civ. C. 1877, § 101; R. C. 1899, § 2791.]

Evidence of contract must be positive and direct. Contract not implied from fact that grandson lived with grandfather. Murphy v. Murphy, 1 S. D. 316, 47 N. W. 142.

§ **4104. Child's earnings.** The parent, whether solvent or insolvent, may relinquish to the child the right of controlling him and receiving his earnings. Abandonment by the parent is presumptive evidence of such relinquishment. [Civ. C. 1877, § 102; R. C. 1899, § 2792.]

§ **4105. Wages paid.** The wages of a minor employed in service may be paid to him or her until the parent or guardian entitled thereto gives the employer notice that he claims such wages. [Civ. C. 1877, § 103; R. C. 1899, § 2793.]

§ 4106. **Change of residence.** A parent entitled to the custody of a child has a right to change his residence, subject to the power of the district court to restrain a removal which would prejudice the rights or welfare of the child. [Civ. C. 1877, § 104, R. C. 1899, § 2794.]

§ 4107. **Not liable for acts of other.** Neither parent nor child is answerable as such for the act of the other. [Civ. C. 1877, § 105; R. C. 1899, 2795.]

Father liable for continued known negligent acts of son. Johnson v. Glidden, 11 S. D. 236, 76 N. W. 933.

§ 4108. **Custody of father and mother.** The husband and father as such has no rights superior to those of the wife and mother in regard to the care, custody, education and control of the children of the marriage, while such husband and wife live separate and apart from each other; and when they so live in a state of separation without being divorced, the district court or judges thereof upon application of either may grant a writ of habeas corpus to inquire into the custody of any minor unmarried child of the marriage, and may award the custody of such child to either for such time and under such regulations as the case may require. The decision of the court or judge must be guided by the rules prescribed in section 4129. [Civ. C. 1877, § 106; R. C. 1895, § 2796.]

CHAPTER 8.

ADOPTION.

§ 4109. **Adoption of minor.** Any minor child may be adopted by any adult person in the cases and subject to the rules prescribed in this chapter. [Civ. C. 1877, § 107; R. C. 1899, § 2797.]

Adopted child stands in same relation to parent as natural child. Under a contract with mother of child, person adopting such child cannot deprive him of right to share in property at death of person so adopting. Quinn v. Quinn, 5 S. D. 328, 58 N. W. 808.

§ 4110. **Relative age limited.** A person adopting a child must be at least ten years older than the person adopted. [Civ. C. 1877, § 108; R. C. 1899, § 2798.]

§ 4111. **Consent of husband and wife.** A married man not lawfully separated from his wife cannot adopt a child without the consent of his wife, nor can a married woman not thus separated from her husband without his consent; provided the husband or wife not consenting is capable of giving such consent. [Civ. C. 1877, § 109; R. C. 1899, § 2799.]

§ 4112. **Consent of parents or guardian.** A legitimate child cannot be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother, if living, except that such consent is not necessary from a parent deprived of civil rights, or adjudged guilty of adultery or cruelty, and for either cause divorced, or from a parent adjudged to be an habitual drunkard, or of unsound mind, or who has been judicially deprived of the custody of the child on account of cruelty or neglect. In case the child has no parent living, or the consent of the parent living is not necessary under the provisions of this section, consent to the adoption may be given by the guardian, if the child has a guardian, and if there is no guardian, consent to the adoption may be given by the person having the custody of the child, or by the next of kin of the child residing in this state; provided, however, that if a child under the age of four years, who has been in the sole care of persons other than its parents, with or without their consent and approval, for the period of two years or over, whose parent or parents have refused or neglected to support such child, then and in such case it may be legally adopted by the persons so having the custody of such

child, by first obtaining the consent of the mother, or upon due proof of the facts of the parent or parents having refused to support such child for a period above specified, then such child may be adopted without the consent of such parent or parents. [Civ. C. 1877, § 110; 1891, ch. 4, § 2; R. C. 1895, § 2800; 1903, ch. 124.]

Where it appears to court that mother has abandoned illegitimate child, consent not required. Richards v. Matteson, 8 S. D. 77, 65 N. W. 428.

§ 4113. **When child must consent.** The consent of a child, if over the age of ten years, is necessary to its adoption. [Civ. C. 1877, § 111; 1891, ch. 4, § 3; R. C. 1895, § 2801.]

§ 4114. **Petition for adoption.** Any inhabitant of this state may petition the district court or county court having increased jurisdiction in the county of his residence for leave to adopt a child not his own, and if desired for a change of the child's name; but such petition by a person having a husband or wife shall not be granted unless the husband or wife joins therein. [1897, ch. 1; R. C. 1899, § 2802.]

§ 4115. **Proceedings on hearing. Decree.** If upon the hearing of the petition so presented and consented unto as aforesaid, the court shall be satisfied of the identity and relations of the persons concerned, and that the petitioner is or, in case of husband and wife, that the petitioners are of sufficient ability to bring up the child and to furnish him suitable nurture and education and that it is fit and proper that the petition for leave to adopt such child be granted, a decree shall be made, setting forth the facts and ordering that from and after the date of the decree the child shall be deemed and taken to be the child of the petitioner or petitioners, and the court may if desired in and by the same decree change the name of such child. [1891, ch. 4, § 5; R. C. 1899, § 2803.]

§ 4116. **Status of adopted child.** The child so adopted shall be deemed, as respects all legal consequences and incidents of the natural relation of parent and child, the child of such parent or parents by adoption the same as if he had been born to them in lawful wedlock. [1891, ch. 4, § 6; R. C. 1895, § 2804.]

§ 4117. **Effect of decree.** The natural parents of such child shall be deprived by the decree aforesaid of all legal rights respecting the child and such child shall be free from all obligations of maintenance and obedience respecting his natural parents. [1891, ch. 4, § 7; R. C. 1899, § 2805.]

§ 4118. **Illegitimate child.** The father of an illegitimate child by publicly acknowledging it as his own, receiving it as such with the consent of his wife if he is married, into his family, and otherwise treating it as if it was a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption. [Civ. C. 1877, § 116; R. C. 1899, § 2806.]

Must be domiciled within state when adoption occurs. Same in legal effect as adoption by decree of court. Eddie v. Eddie, 8 N. D. 376, 79 N. W. 856.

CHAPTER 9.

GUARDIAN AND WARD.

§ 4119. **Guardian defined.** A guardian is a person appointed to take care of the person or property of another. [Civ. C. 1877, § 117; R. C. 1899, § 2807.]

§ 4120. **Ward defined.** The person over whom, or over whose property a guardian is appointed, is called his ward. [Civ. C. 1877, § 118; R. C. 1899, § 2808.]

§ **4121. Guardians classified.** Guardians are either:
1. General; or,
2. Special. [Civ. C. 1877, § 119; R. C. 1899, § 2809.]

§ **4122. General guardian.** A general guardian is a guardian of the person, or of all the property of the ward within this state, or of both. [Civ. C. 1877, § 120; R. C. 1899, § 2810.]

§ **4123. Special guardian.** Every other is a special guardian. [Civ. C. 1877, § 121; R. C. 1899, § 2811.]

§ **4124. How guardian appointed.** 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:
1. If the child is legitimate, by the father with the written consent of the mother or by either parent, if the other is dead or incapable of consent.
2. If the child is illegitimate, by the mother. [Civ. C. 1877, § 122; R. C. 1899, § 2812.]

§ **4125. No power without appointment.** No person, whether a parent or otherwise, has any power as a guardian of property except by appointment as hereinafter provided. [Civ. C. 1877, § 123; R. C. 1899, § 2813.]

§ **4126. Jurisdiction in county court.** A guardian of the person or property or both of a person residing in this state, who is a minor or of unsound mind, may be appointed in all cases, other than those named in section 4124, by the county court as provided in the probate code. [Civ. C. 1877, § 124; R. C. 1899, § 2814.]

§ **4127. Guardian of nonresident.** A guardian of the property within this state of a person not residing therein who is a minor or of unsound mind may be appointed by the county court. [Civ. C. 1877, § 125; R. C. 1899, § 2815.]

§ **4128. Court appointing has exclusive jurisdiction.** In all cases the court making the appointment of a guardian has exclusive jurisdiction to control him. [Civ. C. 1877, § 126; R. C. 1899, § 2816.]

§ **4129. Rules in appointing.** In awarding the custody of a minor or in appointing a general guardian the court or judge is to be guided by the following considerations:
1. By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare; and if the child is of sufficient age to form an intelligent preference, the court or judge may consider that preference in determining the question.
2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor or business, then to the father. [Civ. C. 1877, § 127; R. C. 1899, § 2817.]

Appointment of guardian is in discretion of court. On appeal circuit court should retry case and pronounce judgment. Engle v. Yorks, 7 S. D. 254, 64 N. W. 132.

§ **4130. Preference between two equally entitled.** Of two persons equally entitled to the custody in other respects preference is to be given as follows:
1. To a parent.
2. To one who was indicated by the wishes of a deceased parent.
3. To one who already stands in the position of a trustee of a fund to be applied to the child's support.
4. To a relative. [Civ. C. 1877, § 127; R. C. 1899, § 2818.]

Interest and welfare of child best promoted by guardianship of parents. Parental relations not to be disturbed unless well being of child requires it. Engle v. Yorks, 7 S. D. 254, 64 N. W. 132.

§ **4131. Guardian's power.** A guardian appointed by a court has power over the person and property of the ward unless otherwise ordered. [Civ. C. 1877, § 128; R. C. 1899, § 2819.]

§ 4132. **Power of guardian of the person.** A guardian of the person is 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. [Civ. C. 1877, § 129; R. C. 1899, § 2820.]

§ 4133. **Of the 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 county 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 guardianship in as good condition as he received it. [Civ. C. 1877, § 130; R. C. 1899, § 2821.]

Order of court required before guardian can invest, lease or loan property of ward. Dalrymple v. Loan Co., 9 N. D. 306, 83 N. W. 245.

§ 4134. **Nature of the relation.** The relation of guardian and ward is confidential and is subject to the provisions of the chapter on trusts. [Civ. C. 1877, § 131; R. C. 1899, § 2822.]

§ 4135. **Guardian controlled by court.** In the management and disposition of the person or property committed to him a guardian may be regulated and controlled by the court. [Civ. C. 1877, § 132; R. C. 1899, § 2823.]

§ 4136. **Joint guardians.** On the death of one of two or more joint guardians the power continues to the survivor until a further appointment is made by the court. [Civ. C. 1877, § 133; R. C. 1899, § 2824.]

§ 4137. **Causes for removal.** A guardian may be removed by the county court for any of the following causes:

1. For abuse of his trust.
2. For continued failure to perform his duties.
3. For incapacity to perform its duties.
4. For gross immorality.
5. For having an interest adverse to the faithful performance of his duty.
6. For removal from the state.
7. In the case of a guardian of the property, for insolvency; or
8. When it is no longer proper that the ward should be under guardianship. [Civ. C. 1877, § 134; R. C. 1899, § 2825.]

Children's home association occupies position of guardian. Court may order children returned to parent. Residence of father residence of children for jurisdictional purposes of county court. McFall v. Simmons, 12 S. D. 562, 81 N. W. 898.

Jurisdiction of court continued through infancy of minor. Children's home society occupies legal relation of substitute as temporary guardian. Order for removal denied on petition of parent leading an immoral life. State ex rel Kol v. Home Society, 10 N. D. 493, 88 N. W. 273.

§ 4138. **When power of parental guardian superseded.** The power of a guardian appointed by a parent is superseded:

1. By his removal as provided in the last section; or,
2. By the solemnized marriage of the ward; or,
3. By the ward's attaining majority. [Civ. C. 1877, § 135; R. C. 1899, § 2826.]

§ 4139. **When power of court guardian suspended.** The power of a guardian appointed by a court is suspended only:

1. By order of the court; or,
2. If the appointment was made solely because of the ward's minority, by his attaining majority; or,
3. The guardianship over the person of the ward, by the marriage of the ward. [Civ. C. 1877, § 136; R. C. 1899, § 2827.]

§ 4140. **Ward's power on majority.** After the ward has come to his majority he may settle accounts with his guardian and give him a release,

which is valid if obtained fairly and without undue influence. [Civ. C. 1877, § 137; R. C. 1899, § 2828.]

§ **4141. When discharge granted.** A guardian appointed by a court is not entitled to his discharge until one year after the ward's majority. [Civ. C. 1877, § 138; R. C. 1899, § 2829.]

§ **4142. Asylum for persons of unsound mind.** A person of unsound mind may be placed in an asylum for such persons upon the order of the county court of the county in which he resides, as follows:

1. The court must be satisfied by the oath of two reputable physicians that such person is of unsound mind and unfit to be at large.
2. Before granting the order the judge must examine the person himself or, if that is impracticable, cause him to be examined by an impartial person duly sworn for that purpose.
3. After the order is granted the person alleged to be of unsound mind, his or her husband or wife or relative to the third degree, may appeal to the district court and demand therein an investigation before a jury, which must be substantially in all respects conducted as under an inquisition of lunacy. [Civ. C. 1877, § 139; R. C. 1899, § 2830.]

CHAPTER 10.

MASTER AND SERVANT.

§ **4143. Apprenticeship authorized.** Male minors and unmarried females under the age of eighteen years, with the consent of the persons or officers hereinafter mentioned, may bind themselves by a writing called an indenture as fully as if they were of age to serve as clerks, apprentices or servants in a particular calling until majority or for any shorter time. [Civ. C. 1877, § 140; R. C. 1895, § 2831.]

§ **4144. By whom consent given.** Consent to an indenture of apprenticeship must be given by certificate at the end thereof, or indorsed thereon, signed:

1. By the father and mother of the apprentice.
2. If the father lacks capacity to consent, or has abandoned or neglected to provide for the family, or is dead, and no testamentary guardian or executor has been appointed by him with power under the will to bring up the child to a calling, and a certificate of such fact is indorsed on the indenture by a justice of the peace of the county, then by the mother.
3. If the father is dead and such guardian or executor has been appointed by him, then by such guardian or executor.
4. If the mother is dead or lacks capacity to consent, then by the father.
5. If there is no parent of capacity to consent and no such executors, then by the guardian; or,
6. If there is no such parent, executor or guardian, then by the county commissioners of the county, or by any two justices of the peace of the county, or by the county judge. [Civ. C. 1877, § 141; R. C. 1899, § 2832.]

§ **4145. Liability on breach of contract.** A parent, executor or guardian, consenting to an indenture is not liable for a breach thereof by the apprentice, unless the indenture or consent expresses an intention to bind him therefor. [Civ. C. 1877, § 142; R. C. 1899, § 2833.]

§ **4146. Poor may be bound.** Any child who is chargeable, or whose parents are chargeable, to a county may be bound to service until attaining majority by the county commissioners as provided in this chapter; but such binding by such county commissioners must be with the consent in writing of the county judge of the county. [Civ. C. 1877, § 143; R. C. 1895, § 2834.]

§ 4147. **Indian child.** No child of an Indian woman can be bound under this chapter, except in the presence and with the consent of a justice of the peace; and his certificate of consent must be filed with the county judge of the county where the indenture is executed. [Civ. C. 1877, § 144; R. C. 1899, § 2835.]

§ 4148. **Indenture must state age.** In every indenture of apprenticeship the age of the apprentice must be stated, and such statement is presumptive evidence thereof; and before an officer executes an indenture or consents thereto, he must inform himself of the age of the apprentice. [Civ. C. 1877, § 145; R. C. 1899, § 2836.]

§ 4149. **Consideration.** If there is any pecuniary consideration for an indenture of apprenticeship on either part it must be stated therein. [Civ. C. 1877, § 146; R. C. 1899, § 2837.]

§ 4150. **Education required.** The indenture shall also contain an agreement on the part of the person to whom such child shall be bound, that he will cause such child to be instructed to read and write and to be taught the general rules of arithmetic or, in lieu thereof, that he will send such child to school three months of each year of the period of indenture; and that he will give him a new Bible at the expiration of his term of service. [Civ. C. 1877, § 147; R. C. 1899, § 2838.]

§ 4151. **Filing counterpart.** Every officer executing an indenture of apprenticeship must file a counterpart thereof with the county judge of the county in which he is an officer. [Civ. C. 1877, § 148; R. C. 1899, § 2839.]

§ 4152. **Immigrant minor.** An immigrant minor may bind himself to service until he attains majority, or for a shorter term, in such manner as may be prescribed by the law of the country in which the contract is made. If the indenture is made for the purpose of enabling him to pay his passage to this country it may be for the term of one year, although such term extends beyond his majority; but in no case for a longer term. [Civ. C. 1877, § 149; R. C. 1899, § 2840.]

§ 4153. **Acknowledgment.** Every indenture under section 4152 must be duly acknowledged by the minor on a private examination before a county judge or a justice of the peace, and a certificate of the acknowledgment, showing that the same was made freely, must be indorsed upon the contract. [Civ. C. 1877, § 150; R. C. 1899, § 2841.]

§ 4154. **Assignment allowed.** The master under an indenture specified in section 4152 may assign it by writing indorsed thereon and with the approval also indorsed of a magistrate mentioned in section 4153. [Civ. C. 1877, § 151; R. C. 1899, § 2842.]

§ 4155. **When indenture void.** No indenture or contract for the service of an apprentice is binding upon him unless made as hereinbefore prescribed. [Civ. C. 1877, § 152; R. C. 1899, § 2843.]

§ 4156. **Duty of county commissioners.** The county commissioners must see that every apprentice or other servant in their respective counties is properly treated, and that the terms of the contract are fulfilled in his favor; and it is their duty to redress any grievance of such persons in the manner prescribed by law. [Civ. C. 1877, § 153; R. C. 1895, § 2844.]

§ 4157. **Penalty for willful absence.** If an apprentice for whose instruction the master receives no pecuniary consideration willfully absents himself from service without leave, he may be compelled to serve double the time of such absence unless he makes satisfaction for the injury; but such additional term of service cannot extend more than three years beyond the original term. [Civ. C. 1877, § 154; R. C. 1895, § 2845.]

§ 4158. **Free vocation.** No person may accept from an apprentice or servant an agreement, oath or promise not to exercise his vocation in any particular place; nor may any person exact from an apprentice or servant any con-

sideration for exercising his vocation in any place after his term of service has expired. [Civ. C. 1877, § 155; R. C. 1899, § 2846.]

§ 4159. Penalty for restraint. Any consideration exacted contrary to the last section may be recovered back with interest, and every person accepting such agreement or exacting such consideration is liable to the apprentice or servant in a penalty of one hundred dollars. [Civ. C. 1877, § 156; R. C. 1899, § 2847.]

§ 4160. Deceased master. The executors or administrators of the master of any apprentice bound by officers of the poor may assign the indenture with the written consent of the apprentice, acknowledged before a justice of the peace. [Civ. C. 1877, § 157; R. C. 1899, § 2848.]

§ 4161. Consent to assignment. If an apprentice refuses consent to an assignment under the last section, the county or district court may authorize such assignment without his consent, upon application after fourteen days' notice to the apprentice or to his parents or guardian, if he has any in the county. [Civ. C. 1877, § 158; R. C. 1899, § 2849.]

CHAPTER 11.

CORPORATIONS.

Article 1.—The Creation of Corporations.

§ 4162. Corporation defined. A corporation is a creature of the law, having certain powers and duties of a natural person. Being created by the law, it may continue for any length of time which the law prescribes. [Civ. C. 1877, § 373; R. C. 1899, § 2850.]

§ 4163. Reserved power of legislative assembly. Every grant of corporate power is subject to alteration, suspension or repeal in the discretion of the legislative assembly. [Civ. C. 1877, § 375; R. C. 1899, § 2851.]

§ 4164. Collateral inquiry prohibited. The due incorporation of any company, claiming in good faith to be a corporation under this chapter, and doing business as such, or its right to exercise corporate powers shall not be inquired into collaterally in any private action to which such de facto corporation may be a party. [Civ. C. 1877, § 376; R. C. 1899, § 2852.]

Person contracting with corporation as such estopped to deny its corporate existence. School District v. Alderson, 6 Dak. 149, 41 N. W. 466; Building & Loan Association v. Chamberlain, 4 S. D. 271; Wright v. Lee, 2 S. D. 596, 617, 51 N. W. 706.

Can be attacked only in proceedings instituted by state. Gilbert v. Hole, 2 S. D. 164, 49 N. W. 1.

Where there is no law under which corporation may exist, validity of corporate existence may be attacked collaterally. Applies only to de facto corporations. Davis v. Stevens (S. D. case), 104 Fed. 235.

§ 4165. Name required. Every corporation must have a corporate name which it has no power to change unless expressly authorized by law; but the misnomer of a corporation in any written instrument does not invalidate the instrument if it can be reasonably ascertained from it what corporation is intended. [Civ. C. 1877, § 377; R. C. 1899, § 2853.]

§ 4166. Corporations classified. Corporations are either:

1. Public; or,
2. Private. [Civ. C. 1877, § 378; R. C. 1899, § 2854.]

§ 4167. Public, how regulated. Public corporations are formed or organized for the government of a portion of the state. Such corporations are regulated by the political code or by local statute. [Civ. C. 1877, § 379; R. C. 1899, § 2855.]

State is body politic and not a public corporation. State v. Taylor, 7 S. D. 533, 64 N. W. 548.

§ **4168. Private. Purposes.** All corporations not public are private. Private corporations may be formed for any purpose for which individuals may lawfully associate themselves. [Civ. C. 1877, § 380; R. C. 1895, § 2856.]

Life insurance association, whose membership is restricted to members of certain fraternal society, is a corporation. Masonic Association v. Taylor, 2 S. D. 324, 50 N. W. 93.

§ **4169. Articles.** The instrument by which a private corporation is formed is called "Articles of Incorporation." [Civ. C. 1877, § 381; R. C. 1895, § 2857.]

§ **4170. How formed.** Private corporations may be formed by the voluntary association of three or more persons, except as otherwise expressly provided, upon complying with the provisions of this chapter. [Civ. C. 1877, § 384; 1887, ch. 35, § 1; 1893, ch. 39, § 1; R. C. 1895, § 2858.]

§ **4171. Religious and charitable limited.** No corporation or association for religious or charitable purposes shall acquire or hold real estate in this state of greater value than one hundred thousand dollars. [1899, ch. 53; R. C. 1899, § 2859.]

§ **4172. Penalty for violating last section.** All real estate acquired or held by such corporations contrary to the provisions of the last section shall be forfeited and escheat to the state; but existing vested rights in real estate shall not be impaired by the provisions of this section. [Civ. C. 1877, § 385; R. C. 1895, § 2860.]

§ **4173. Contents of articles.** The articles of incorporation must set forth:

1. The name of the corporation.
2. The purpose for which it is formed.
3. The place where its principal business is to be transacted.
4. The term for which it is to exist.
5. The number of its directors or trustees and the names and residences of those who are to serve until their successors are elected and qualified.
6. If there is a capital stock, its amount and the number of shares into which it is divided. [Civ. C. 1877, § 386; R. C. 1895, § 2861.]

§ **4174. Articles. Roads, etc.** The articles of any corporation formed for the purpose of constructing wagon roads, telegraph or telephone lines must also state:

1. The place from and to which the road or line is intended to be run and branches contemplated.
2. The counties through which it is intended to be run.
3. The estimated length and cost of the road or line. [Civ. C. 1877, § 387; R. C. 1895, § 2862.]

§ **4175. Articles. Railways, etc.** The articles of incorporation of railway corporations shall be in compliance with section 4263; of insurance corporations, in compliance with section 4420; of fraternal associations or corporations, in compliance with section 4545; of banking corporations, in compliance with section 4637. [R. C. 1895, § 2863.]

§ **4176. Subscribed by three persons.** The articles of incorporation must be subscribed by three or more persons, one-third of whom must be residents of this state, and acknowledged by each before some officer authorized to take acknowledgments of conveyances of real property. [Civ. C. 1877, § 388; R. C. 1895, § 2864.]

§ **4177. Fees for articles.** Every corporation for profit, except corporations organized for the purpose of irrigation, water users' associations, building and loan associations, county mutual insurance companies, corporations for the manufacture of dairy products, agricultural fair corporations, and corporations whose capital stock does not exceed five thousand dollars formed for the purchase and maintenance of male animals for the improvement of stock, shall at or before the filing of the articles of incorporation pay into the state treasury, the sum of fifty dollars for the first fifty thousand dollars,

or fraction thereof, of the capital stock of such corporation, and the further sum of five dollars for every additional ten thousand dollars, or fraction thereof, of its capital stock. [1890, ch. 139, § 1; 1891, ch. 105, § 1; R. C. 1895, § 2865; 1905, ch. 67.]

§ **4178. Fee in case of increase of stock.** No increase of the capital stock of any corporation heretofore or hereafter formed, other than those excepted in the last section, shall be valid until such corporation shall have paid into the state treasury the sum of five dollars for every ten thousand dollars, or fraction thereof, of such increase in the capital stock of such corporation. [1890, ch. 139, § 2; R. C. 1895, § 2866.]

§ **4179. Receipt of treasurer filed.** It shall be the duty of every corporation hereafter organized, or which shall hereafter increase its capital stock, other than those excepted in section 4177, to file with the secretary of state at the time of filing the articles of incorporation, or instrument evidencing such increase, a duplicate receipt of the state treasurer for the payments herein required to be made, which receipt, in duplicate, it is made the duty of such treasurer to furnish. [1890, ch. 139, § 3; R. C. 1895, § 2867.]

§ **4180. Secretary's certificate.** Upon the filing of the articles of incorporation with the secretary of state he shall issue to the corporation over the great seal of the state a certificate that the articles containing the required statement of facts have been filed in his office; and thereupon the persons signing the articles and their associates and successors, shall be a body politic and corporate by the name and for the purposes stated in said articles. [Civ. C. 1877, § 389; 1885, ch. 35, § 1; R. C. 1899, § 2868.]

Not necessary that capital stock of corporation shall have been actually subscribed or paid in at time articles are filed. Singer Mfg. Co. v. Peck, 9 S. D. 29, 67 N. W. 947.

§ **4181. Record by secretary and certifying to state examiner.** Upon the filing of any articles of incorporation as in the last section prescribed, the secretary of state shall cause the same to be recorded in a book to be kept in his office for that purpose to be called the "Book of Corporations," with the date of filing. And upon filing and recording of any articles of incorporation of any bank, building and loan association, or any monied corporation subject to examination by the state examiner, the secretary of state shall forthwith certify to the state examiner the fact that articles of incorporation have been filed, giving the date of such filing. [1899, ch. 52; R. C. 1899, § 2869.]

§ **4182. Copy. Evidence.** A copy of any articles of incorporation filed in pursuance of this chapter, and certified by the secretary of state, must be received in all courts and other places as prima facie evidence of the facts therein stated and of the existence of such corporation. [Civ. C. 1877, § 391; R. C. 1899, § 2870.]

Duly authenticated articles of incorporation sufficient evidence of corporate existence in absence of showing to the contrary. Dowagiac Mfg. Co. v. Higinbotham, 15 S. D. 547, 91 N. W. 330.

§ **4183. Stockholders and members defined.** The owners of shares in a corporation which has a capital stock are called stockholders. If a corporation has no capital stock the corporators and their successors are called members. [Civ. C. 1877, § 392; R. C. 1899, § 2871.]

§ **4184. Stock of minors, etc., how represented.** The shares of stock of an estate of a minor or insane person may at all elections and meetings of a corporation be represented by his guardian, and of a deceased person, by his executor or administrator. [Civ. C. 1877, § 393; R. C. 1899, § 2872.]

Article 2.—Annual Reports of Corporate Existence.

§ **4185. Post office address.** Every corporation hereafter organized under the laws of the state of North Dakota shall before receiving a certificate of

organization file with the secretary of state, a statement setting forth the post office address of its business office. [1905, ch. 65, § 1.]

§ 4186. **Annual report. Fees. Penalty for failure. Duties of secretary of state.** Every incorporated company or joint stock company, other than railroads, banking, insurance, religious corporations and corporations not organized for pecuniary profit and authorized to do business in this state, shall annually between the first day of July and the first day of August report to the secretary of state the location of its principal office in this state, the names of its officers with their residence and post office address, the date of the expiration of their respective terms of office, whether or not the corporation is pursuing active business under its charter, and the kind of business engaged in, if any, which said report shall be made under the seal of the company and be signed and sworn to by the president, secretary, managing agent or other officer of the corporation, and in case said corporation is in the hands of an assignee or receiver, then such report shall be signed and sworn to by such assignee or receiver, which said report, together with a fee of two dollars and a half for filing the same shall be sent to the secretary of state in whose office it shall be filed. The secretary of state shall in no case receive or file said report until said fee is paid and a failure to make said report and pay said fee shall be prima facie evidence that said corporation is out of business. And it is made the duty of the secretary of state to notify such corporation by registered letter of its default, and unless such corporation shall within sixty days thereafter file such report and pay such fee, he shall enter upon the records of his office the cancellation of such charter or certificates to do business of the corporation failing to make report at the time and in the manner herein provided. [1905, ch. 65; § 2.]

§ 4187. **Secretary of state to furnish blanks.** The secretary of state is hereby required on or before the first day of June of each year to mail to every corporation embraced in this article proper blanks to be used in making the report hereinbefore provided for; also a copy of this article together with a notice that a failure on the part of said corporation to make such report within the time prescribed by law, shall be prima facie evidence that such corporation is out of business and that upon such failure its articles of incorporation will be canceled upon the records in the office of the secretary of state. [1905, ch. 65, § 3.]

§ 4188. **Corporations may be restored, how.** Any corporation which is pursuing an active business under its charter or certificate of authority to do business in the state of North Dakota failing to make said report at the time provided by law, may at any time within six months from such default be reinstated upon the record of the office of the secretary of state upon the payment of a fee in the sum of five dollars for such reinstatement and filing in said office an affidavit stating all the facts required in section 4186, and in addition thereto the fact that it was at the time of such default and still is in active business in the state of North Dakota. [1905, ch. 65, § 4.]

§ 4189. **Record of forfeitures and publication of same.** The secretary of state shall keep a record in his office showing all forfeitures and shall publish annually a list of the names and location of all corporations whose authority to do business has been forfeited by virtue of the provisions of this article. [1905, ch. 65, § 5.]

§ 4190. **Fees, how disposed of.** The secretary of state shall keep an accurate account of all expenses incurred by him in carrying out the provisions of this article, and he shall render to the state board of auditors bills of the expenses so incurred, the amount of which shall, when approved by the state board of auditors, be paid out of any moneys coming to the hands of the secretary of state by the provisions of this article, and he shall turn over and pay to the state treasurer any and all moneys coming to his hands for fees

collected under the provisions of this article and not paid out as hereinbefore specified. [1905, ch. 65, § 6.]

ARTICLE 3.—CORPORATE STOCK.

§ **4191. Subscription enforced.** A subscription to the stock of a corporation about to be formed is to be held for the benefit of the corporation when it is formed and may be enforced by it. [Civ. C. 1877, § 395; R. C. 1899, § 2873.]

§ **4192. Books opened for subscriptions.** After the secretary of state issues the certificates of incorporation as provided in section 4180, the directors named in the articles of incorporation must proceed in the manner specified or provided in their by-laws, or, if none, then in such manner as they may by order adopt, to open books of subscription to the capital stock then unsubscribed, and to secure subscriptions to the full amount of the fixed capital; and to levy and collect assessments thereon in the manner provided by article 7 of this chapter. [Civ. C. 1877, § 396; R. C. 1895, § 2874.]

§ **4193. May forfeit stock or recover subscription.** When a corporation is authorized by the terms of subscription, or otherwise, to forfeit stock for nonpayment, it may either forfeit the stock, or recover the amount of the subscription, but it cannot do both. [Civ. C. 1877, § 397; R. C. 1899, § 2875.]

§ **4194. Stock negotiable. How indorsed.** All corporations for profit must issue certificates of stock when fully paid up, signed by the president and secretary, and may provide in their by-laws for the issuance of certificates prior to the full payment under such restrictions and for such purposes as their by-laws provide. Upon all certificates of stock which are fully paid up, issued by a corporation shall be indorsed the words "fully paid up." When certificates of stock are issued before they are fully paid up the secretary shall, before the same are issued, indorse thereon the amount which has been paid. No corporation shall issue any certificates of stock under an agreement or with the understanding that the full par value shall not be paid. Any officer of a corporation who issues certificates of stock in violation of the provisions of this chapter, or who has knowledge thereof, and does not at the time dissent therefrom in writing shall be liable to the creditors of the corporation and to purchasers in good faith of such stock for all damages they may sustain thereby. Whenever the capital stock of any corporation is divided into shares, and certificates thereof are issued, such shares of stock are personal property and may be transferred by indorsement by the signature of the proprietor or his attorney or legal representative, and delivery of the certificate; but such transfer is not valid except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares and the date of the transfer. [Civ. C. 1877, § 398; R. C. 1895, § 2876.]

The pledgee of stock in whose name it stands on corporate records has right to vote stock. In re Argus Printing Co., 1 N. D. 434, 48 N. W. 347.

Not competent for state legislation to interfere with transferable quality of national bank stock; same is left to statutes of United States. Transferee's rights under unrecorded transfer superior to subsequent attaching creditors. Doty v. Bank, 3 N. D. 9, 53 N. W. 77.

Transfer will prevail over subsequent creditor with notice. Stock may be pledged. To constitute a valid pledge not essential that transfer of same be made on books of corporation. Sale under execution will pass equitable interest of pledgor. Van Cise v. Merchants National Bank, 4 Dak. 485, 33 N. W. 897.

§ **4195. For what stock and bonds can be issued.** No corporation shall issue stock or bonds except for money, labor done or property, estimated at its true money value, actually received by it, and all the officers of a corporation who consent to the issuance of stock or bonds for labor or property in excess of its actual cash value, or who have knowledge thereof and do not

at the time dissent therefrom in writing shall be jointly and severally liable to the creditors of such corporation for the difference between the actual cash value of such labor or property at the time such stock or bonds were issued and the par value of the stock or bonds issued therefor. [Const. § 138; R. C. 1899, § 2877.]

§ **4196. Note for payment for stock.** No note or obligation given by a stockholder, whether secured by pledge or otherwise, shall be considered as payment of any part of the capital stock; but the capital stock shall be paid in, either in cash, or in the manner provided in this article. [R. C. 1895, § 2878.]

§ **4197. Excess void.** A corporation whose capital is limited by its articles of incorporation, either in amount or in number of shares cannot issue valid certificates in excess of the limit thus prescribed. [Civ. C. 1877, § 399; R. C. 1895, § 2879.]

§ **4198. Corporation may own its stock.** Unless otherwise provided, a corporation may purchase, hold and transfer shares of its own stock from its surplus profits, or as provided in the article on assessments of stock, or by the unanimous consent in writing of all its stockholders, in such manner and for such price or consideration as the said stockholders may unanimously decide upon. [Civ. C. 1877, § 400; 1893, ch. 10, § 1; R. C. 1899, § 2880.]

Cannot borrow money to purchase its own stock. Adams & Westlake Co. v. Deyette, 5 S. D. 418, 59 N. W. 214; Adams & Westlake Co. v. Deyette, 8 S. D. 119, 65 N. W. 471.

Contract for purchase of shares which corporation could not lawfully make, void. Tolman v. New Mexico & Dakota Mica Co., 4 Dak. 12, 22 N. W. 505.

§ **4199. Dividend belongs to whom.** A dividend belongs to the person in whose name the stock stands upon the books of the corporation on the day when it becomes payable. [Civ. C. 1877, § 401; R. C. 1899, § 2881.]

Article 4.—Corporate Powers.

§ **4200. Powers of corporations.** Every corporation as such has power:

1. To have succession by its corporate name for the period limited, not exceeding twenty years, if a corporation for profit; and if not a corporation for profit, perpetually, subject to the power of the legislative assembly as hereinbefore declared.
2. To sue and be sued in any court.
3. To make and use a common seal and alter the same at pleasure.
4. To purchase, hold, transfer and convey such real and personal property as the legitimate purposes of the corporation may require, not exceeding in any case any amount limited by law.
5. To appoint such subordinate officers and agents as the business of the corporation may require, and to allow them suitable compensation.
6. To make by-laws not inconsistent with the law of the land for the management of its property, the regualtion of its affairs and for the transfer of its stock.
2. To admit stockholders or members and to sell their stock or shares for the payment of assessments or installments.
8. To enter into any obligations or contracts essential to the transacting of its ordinary affairs, or for the purposes of the corporation.
9. The powers of banking corporations are prescribed in sections 4640 and 4641.

In addition to the above enumerated powers and to those expressly given in any other statute under which it is incorporated, no corporation shall possess or exercise any corporate powers, except such as are necessary to the exercise of the powers enumerated and given. [Civ. C. 1877, § 402; R. C. 1895, § 2882.]

§ 4201. **By-laws. Who adopt.** Every corporation formed under this chapter must within one month after filing articles of incorporation adopt a code of by-laws for its government, not inconsistent with the constitution and laws of this state. The assent of stockholders representing a majority of all the subscribed capital stock, or of a majority of the members, if there is no capital stock, is necessary to adopt by-laws, if they are adopted at a meeting called for that purpose; and in the event of such meeting being called notice thereof shall be published two times, once in each week, for two successive weeks in some newspaper published in the county in which the principal place of business of the corporation is located, or if none is published therein, then in a newspaper published at the seat of government. The written assent of the holders of two-thirds of the stock, or of two-thirds of the members, if there is no capital stock, shall be effectual to adopt a code of by-laws without a meeting for that purpose. [Civ. C. 1877, § 403; R. C. 1895, § 2883.]

§ 4202. **Scope of by-laws.** A corporation may by its by-laws, when no other provision is specially made, provide:

1. The time, place and manner of calling and conducting its meetings.
2. The number of stockholders or members constituting a quorum.
3. The mode of voting by proxy.
4. The time of the annual election for directors and the mode and manner of giving notice thereof.
5. The compensation and duties of officers.
6. The manner of election and the tenure of office of all officers other than the directors; and,
7. Suitable penalties for violation of by-laws, not exceeding in any case one hundred dollars for any one offense. [Civ. C. 1877, § 404; R. C. 1899. § 2884.]

By-laws silent as to compensation and official duties, how construed. **Edwards** v. Fargo & Southern Ry., 4 Dak. 549, 33 N. W. 100.

§ 4203. **Religious corporations, how officered.** In addition to the provisions of section 4202, religious corporations may in their by-laws provide for the number and qualifications of their officers and directors, and the time and mode of their election or appointment, their tenure of office, and the qualifications of voters at meetings of the members, for their election. The board of trustees, vestry, chapter, governing committee, or other like body, having charge of the temporal concerns and property of any religious association which has become a corporation, shall constitute the board of directors of such corporation, and shall be of such number as may be determined by the by-laws of the corporation, and may be appointed or elected, and act, at such time and in such manner as may be in conformity with, or provided by the general laws, canons, rules, regulations, usages or discipline of the religious organization to which the members of such corporation are attached. [1901, ch. 146.]

§ 4204. **Record. Certificates. Repeal of by-laws.** All by-laws adopted must be certified by a majority of the directors and secretary of the corporation and copied in a legible hand in some book kept in the office of the corporation to be known as the "Book of By-Laws," and no by-laws shall take effect until so copied, and the book shall then be opened to the inspection of the public during office hours of each day except holidays. The by-laws may be repealed or amended or new by-laws may be adopted at the annual meeting or at any other meeting of the stockholders or members, called for that purpose by the directors, by a vote representing two-thirds of the subscribed stock, or by two-thirds of the members; or the power to repeal and amend the by-laws and to adopt new by-laws may by a similar vote at any such meeting be delegated to the board of directors. The power when delegated may be revoked by a similar vote at any regular meeting of the stockholders or members. Whenever any amendment or new by-law is adopted it shall be copied in the book of by-

laws with the original by-laws and immediately after them, and shall not take effect until so copied. If any by-law is repealed, the fact of the repeal with the date of the meeting at which the repeal was enacted shall be stated in the said book and until so stated the repeal shall not take effect. [Civ. C. 1877, § 405; R. C. 1899, § 2885.]

§ **4205. Election of directors.** The directors of a corporation must be elected annually by the stockholders or members unless otherwise expressly provided, and if no provision is made in the by-laws for the time of election, the election must be held on the first Tuesday in June. Notice of election of directors must be given for the same time and in the same manner as provided in section 4201. [Civ. C. 1877, § 406; R. C. 1895, § 2886.]

§ **4206. Same.** At the first meeting at which by-laws are adopted, or at such subsequent meeting as may then be designated, directors must be elected to hold their offices for one year and until their successors are elected and qualified. [Civ. C. 1877, § 406; R. C. 1899, § 2887.]

Transferee of stock upon corporate records qualified to become director, if transfer not made for fraudulent purpose. In re Argus Printing Co., 1 N. D. 434, 48 N. W. 347.

§ **4207. Manner of voting.** All elections of directors must be by ballot and every stockholder shall have the right to vote, in person or by proxy, the number of shares standing in his name as provided in section 4214, for as many persons as there are directors to be elected, or to cumulate such shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit. The persons receiving the highest number of votes shall be declared elected. [Civ. C. 1877, § 406; R. C. 1895, § 2888.]

Pledgee of stock in whose name it stands on corporate records may vote stock. Vote of stockholders representing majority of stock necessary to choice of director. In re Argus Printing Co., 1 N. D. 434, 48 N. W. 347.

§ **4208. Number and power of directors.** Unless otherwise expressly provided, the corporate powers, business and property of all corporations formed under this chapter must be exercised, conducted and controlled by a board of not less than three nor more than eleven directors, to be elected from among the holders of stock; or when there is no capital stock, then, from the members of such corporation, and at least one of such directors must be a resident of this state and the removal of such resident director from the state shall create a vacancy in his office. Directors of corporations for profit must be holders of stock therein in an amount to be fixed by the by-laws of the corporation. Directors of all other corporations must be members thereof. Unless a quorum is present and acting, no business performed, or act done, is valid, as against the corporation. Whenever a vacancy occurs in the office of director, unless the by-laws of the corporation otherwise provide, such vacancy must be filled by an appointee of the board; provided, that the trustees or directors of any private corporation created for religious, educational, or benevolent purposes, may number not less than three nor more than twenty-one, and may be elected at such times, and for such periods, and in such manner, and their qualifications be such as may be provided by the articles of incorporation or by-laws of such corporation. [1897, ch. 57; R. C. 1899, § 2889.]

Transferee of stock upon corporate records qualified to become director if transfer not made for fraudulent purpose. In re Argus Printing Co., 1 N. D. 434, 48 N. W. 347.

Cashier of bank must act within scope of power authorized by directors. North Star Boot & Shoe Co. v. Stebbins, 2 S. D. 74, 48 N. W. 833.

Adoption of agreement of promoter may be implied from acts of corporation. Huron Printing & Binding Co. v. Kittleson, 4 S. D. 520, 57 N. W. 233.

Has power to bring suit. Must act as board. Minnehaha County v. Thorne, 6 S. D. 449, 61 N. W. 688.

Officers unauthorized to diminish capital and release stockholders so as to defeat rights of bona fide creditors. Adams & Westlake Co. v. Deyette, 8 S. D. 119, 65 N. W. 471.

Bank not liable for acts of officers in their individual capacity. Staples v. Bank, 8 S. D. 222, 66 N. W. 314.

Officers have no power to bind corporation by contracts not authorized by board of directors. One dealing with officers chargeable with notice of limit of their power and authority. Des Moines Mfg. & Supply Co. v. Tilford Milling Co., 9 S. D. 542, 70 N. W. 839.

Corporation accepting benefit of unauthorized act of officer bound by act. Dedrick v. Ormsby Land & Mortgage Co., 12 S. D. 59, 80 N. W. 153.

§ **4209. Organization and election of officers.** Immediately after their election the directors must organize and elect a president of the corporation, who must be one of their number, a secretary and treasurer. They must perform the duties enjoined on them by law and the by-laws of the corporation. A majority of the directors is a sufficient number to form a board for the transaction of business, and every decision of a majority of the directors forming such board, made when duly assembled, is valid as a corporate act. [Civ. C. 1877, § 408; R. C. 1895, § 2890.]

§ **4210. Dividends only from profits. Limitations of indebtedness. Exception.** The directors of corporations must not make dividends except from the surplus profits arising from the business thereof; nor must they divide, withdraw or pay to the stockholders, or any of them, any part of the capital stock, nor must they create debts beyond the subscribed capital stock, or reduce or increase the capital stock, except as specially provided by law; provided, however, that the above limitation as to the creation of debts, shall not apply to the policy risks of insurance companies on which no loss has occurred, or the notes, bonds or debentures of any loan or trust company, organized under the provisions of this chapter when the payment of such notes, bonds or debentures shall be secured by the actual transfer of real estate by trust deed or mortgage for the payment of such notes, bonds or debentures, which said real estate so transferred shall be of twice the value of the par value of such notes, bonds or debentures; provided, further, that such limitation shall not apply to any loan or trust company's guarantee of payment after transfer of any note, bond or debenture when the same is secured by trust deed or mortgage as above stated. [Civ. C. 1877, § 409; 1889, ch. 81, § 1; R. C. 1895, § 2891.]

§ **4211. Penalty for violation of last section.** For a violation of the provisions of the last section the directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen, are, in their individual and private capacity, jointly and severally liable to the corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock so divided, withdrawn, paid out, or reduced, or debt contracted; and no statute of limitations is a bar to any action against such directors for any sums for which they are made liable by this section. There may, however, be a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution or the expiration of its term of existence. [Civ. C. 1877, § 409; R. C. 1895, § 2892.]

§ **4212. False certificate or notice.** Any officer of a corporation who willfully gives a certificate, or willfully makes an official report, public notice or entry in any of the records or books of the corporation concerning the corporation or its business, which is false in any material representation, shall be liable for all damages resulting therefrom to any person injured thereby; and if two or more officers unite or participate in the commission of any of the acts herein designated, they shall be jointly and severally liable. [Civ. C. 1877, § 409; R. C. 1895, § 2893.]

§ 4213. **Removal of directors.** No director shall be removed from office, unless by a vote of two-thirds of the members, or of stockholders holding two-thirds of the capital stock, at a general meeting held after notice of the time and place and of the intention to propose such removal. Meetings of stockholders for this purpose may be called by the president, or by a majority of the directors, or by members or stockholders holding at least one-half of the votes. Such calls must be in writing and addressed to the secretary, who must thereupon give notice of the time, place and object of the meeting and by whose order it was called. If the secretary refuses to give the notice, or if there is none, the call may be addressed directly to the members or stockholders, and be served as a notice, in which case it must specify the time and place of meeting. The notice must be given in the manner provided in section 4201, unless other express provision has been made therefor in the by-laws. In case of removal the vacancy may be filled by election at the same meeting. [Civ. C. 1877, § 410; R. C. 1899, § 2894.]

§ 4214. **Quorum. Proxy.** At all elections or votes had for any purpose there must be a majority of the subscribed capital stock, or of the members, represented either in person or by proxy in writing. Every person acting therein in person, or by proxy, or representative must be a member thereof or a bona fide stockholder, having stock in his own name on the stock books of the corporation at least ten days prior to the election. Any vote or election had other than in accordance with the provisions of this article is voidable at the instance of absent stockholders or members and may be set aside by petition to the district court of the county where the same was held. Any regular or called meeting of the stockholders or members may adjourn from day to day, or from time to time, if for any reason there is not present a majority of the subscribed stock or members, or no election had, such adjournment and the reasons therefor being recorded in the journal of proceedings of the board of directors. [Civ. C. 1877, § 411; R. C. 1895, § 2895.]

§ 4215. **Election failing.** If from any cause an election does not take place on the day appointed in the by-laws, it may be held on any day thereafter as provided for in such by-laws, or to which such election may be adjourned, or ordered by the directors. If an election has not been held at the appointed time, and no adjourned or other meeting for the purpose has been ordered by the directors, a meeting may be called by the stockholders as provided in section 4213. [Civ. C. 1877, § 412; R. C. 1899, § 2896.]

§ 4216. **Action. Election confirmed or new one ordered.** Upon the application of any person or body corporate aggrieved by any election held by any corporate body, or any proceedings thereof, the district judge of the district in which such election is held must proceed forthwith summarily to hear the allegations and proofs of the parties or otherwise inquire into the matters of complaint, and thereupon confirm the election, order a new one or direct such other relief in the premises as accords with right and justice. Before any proceedings are had under this section, five days' notice thereof must be given to the adverse party, or those to be affected thereby. [Civ. C. 1877, § 412; R. C. 1899, § 2897.]

§ 4217. **Where meetings held.** The meetings of the stockholders and board of directors for the election of officers of a corporation must be held at its office or principal place of business within this state, and the corporate records must be kept at such office or principal place of business. All other meetings of the board of directors may be held at such place, within or without the state, as may be provided in the by-laws; provided, that the meetings of the board of directors of a railway corporation may be held at the business office of such corporation without the state as well as at its principal place of business within the state. [1897, ch. 116; R. C. 1899, § 2898.]

§ 4218. Same. The meetings of the board of directors of any private corporation created and existing or which may hereafter be created under and by virtue of the laws of the state of North Dakota, having one or more directors, resident in this state or having duly appointed an agent resident in this state upon whom service may be made, may be held at any place mentioned and provided in its by-laws either within or without the state. [1895, ch. 36, § 1; R. C. 1899, § 2899.]

§ 4219. Meetings, how called. When no provision is made in the by-laws for regular meetings of the directors and the mode of calling special meetings, all meetings must be called by special notice in writing, to be given to each director by the secretary on the order of the president, or if there is none, on the order of two directors. [Civ. C. 1877, § 412; R. C. 1899, § 2900.]

In absence of by-laws meeting legal where all are present. Troy Mining Co. v. White, 10 S. D. 475, 74 N. W. 236.

§ 4220. When called by justice. Whenever from any cause there is no person authorized to call or to preside at a meeting of a corporation, any justice of the peace of the county where such corporation is established, may, on written application of three or more of the stockholders or of the members thereof, issue a warrant to one of the stockholders or members, directing him to call a meeting of the corporation by giving the notice required, and the justice may in the same warrant direct such person to preside at such meeting until a clerk is chosen and qualified, if there is no other officer present legally authorized to preside thereat. [Civ. C. 1877, § 412; R. C. 1899, § 2901.]

§ 4221. Liability of stockholders. Trust funds. Each stockholder of a corporation is individually and personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him. Any creditor of the corporation may institute joint or several actions against any or all of the stockholders of a corporation whose shares have not been fully paid up, and in such action the court must ascertain the amount that is unpaid upon the stock held by each stockholder and for which he is liable, and several judgment must be rendered against each in conformity therewith. The liability of each stockholder is determined by the amount unpaid upon the stock or shares owned by him at the time such action is commenced, and such liability is not released by any subsequent transfer of stock. The term stockholder, as used in this section, shall apply not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appears on the books in the name of another; and also to every person who has advanced the installments or purchase money of stock in the name of a minor, so long as the latter remains a minor; and also to every guardian or other trustee who voluntarily invests any trust funds in the stock. Trust funds in the hands of a guardian or trustee shall not be liable under the provisions of this section by reason of any such investment, nor shall the person for whose benefit the investment is made be responsible in respect to the stock until he becomes competent and able to control the same; but the responsibility of the guardian or trustee making the investment shall continue until that period. Stock held as collateral security, or by a trustee, or in any other representative capacity does not make the holder thereof a stockholder within the meaning of this section, except in the cases above mentioned, so as to charge him with the debts or liabilities of the corporation; but the pledgor, or person, or estate represented is to be deemed the stockholder as respects such liability. [Civ. C. 1877, § 413; 1879, ch. 9, § 1; R. C. 1895, § 2902.]

Creditor may maintain an action to enforce stockholders' liabilities, though claim not reduced to judgment. Marshall-Wells Hardware Co. v. New Era Coal Co. et al., 13 N. D. 396, 100 N. W. 1084.

Creditors having distinct and independent claims cannot unite in one action. Capital stock a trust fund and creditors have right of priority of payment over stockholders. South Bend Toy Mfg. Co. v. Pierre Fire & Marine Ins. Co., 4 S. D. 173, 56 N. W. 98.

Liability limited to amount due upon stock. Busby v. Riley, 6 S. D. 401, 61 N. W. 164.

Authority of president of corporation loaning money and buying and selling negotiable instruments to indorse notes payable to corporation, presumed. Merrill v. Hurley, 6 S. D. 592, 62 N. W. 958.

Officers may bind themselves individually by their conduct. Rust-Owen Lumber Co. v. Wellman, 10 S. D. 122, 72 N. W. 89.

§ **4222. When uncalled meeting valid.** When all the stockholders or members of a corporation are present at any meeting, however called or notified and sign a written consent thereto on the record of such meeting, the doings of such meeting are as valid as if had at a meeting legally called and noticed; but this section shall not be construed to authorize the stock or bonded indebtedness of corporations to be increased, except at a meeting held after sixty days' notice. The stockholders or members of such corporation, when so assembled, may elect officers to fill all vacancies then existing, and may act upon such other business as might lawfully be transacted at regular meetings of the corporation. [Civ. C. 1877, § 414; R. C. 1895, § 2903.]

§ **4223. Nonresident transfers.** When the shares of stock in a corporation are owned by parties residing out of the state, the president, secretary and directors of the corporation before entering any transfer of the shares on its books, or issuing a certificate therefor to the transferee, may require from the attorney or agent of the nonresident owner, or from the person claiming under the transfer, an affidavit or other evidence that the nonresident owner was alive at the date of the transfer, and if such affidavit or other satisfactory evidence is not furnished, may require from the attorney, agent or claimant a bond of indemnity with two sureties satisfactory to the officers of the corporation or if not so satisfactory, then one approved by the district judge of the county in which the principal office of the corporation is situated, conditioned to protect the corporation against any liability to the legal representatives of the owner of the shares in case of his or her death before the transfer, and if such affidavit, or other evidence, or bond is not furnished when required, as herein provided, neither the corporation, nor any officer thereof, shall be liable for refusing to enter the transfer on the books of the corporation. [Civ. C. 1877, § 415; R. C. 1895, § 2904.]

§ **4224. Increasing or diminishing stock.** Every corporation may increase or diminish its capital stock at a meeting called for that purpose by the directors as follows:

1. Notice of the time and place of the meeting, stating its object and the amount to which it is proposed to increase or diminish its capital stock must be personally served on each stockholder resident in the state sixty days prior to the time of such meeting at his place of residence, if known; and the notice must be given to stockholders whose place of residence is unknown or who are not residents in the state by the publication of such notice in a newspaper published in the county where the principal office of the corporation is situated, not less than once a week for sixty days prior to such meeting.

2. The capital stock must in no case be diminished to an amount less than the indebtedness of the corporation, or the estimated cost of the works which it may be the purpose of the corporation to construct.

3. At least two-thirds of the entire capital stock must be represented by the vote in favor of the increase or diminution before it can be effected.

4. A certificate must be signed by the chairman and secretary of the meeting and a majority of the directors, showing a compliance with the requirements of this section, the amount to which the capital stock has been

increased or diminished, the amount of stock represented at the meeting and the vote by which the object was accomplished.

5. The certificate must be filed in the office of the secretary of state, there to be recorded in the book of corporations, and thereupon the capital stock shall be so increased or diminished. [Civ. C. 1877, § 416; R. C. 1899, § 2905.]

§ 4225. Bonds, how issued. At a meeting of the stockholders of the corporation called for that purpose by the directors a corporation may issue bonds, as follows:

1. Notice of the time and place of the meeting, stating its object and the amount of bonds to be issued, must be served in the manner provided in the last section.

2. At least two-thirds of the entire capital stock must be represented by the vote in favor of the issuance of bonds.

3. The certificate must be signed by the chairman and secretary of the meeting and a majority of the directors, showing a compliance with the requirements of this section, the amount of bonds to be issued, the amount of stock represented at the meeting and the vote by which the object was accomplished, which certificate shall be filed in the office of the secretary of state, there to be recorded in the book of corporations.

A violation of any of the provisions of this section shall render every director, officer and stockholder of the corporation, who had knowledge of such violation and did not dissent therefrom and cause his dissent to be entered at large upon the journal of the corporation, jointly and severally liable for all debts so created. [R. C. 1895, § 2906.]

Article 5.—Corporate Records.

§ 4226. Record of business transactions. Stock book. Publicity. All corporations for profit are required to keep a record of all their business transactions; a journal of all meetings of their directors, members or stockholders, with the time and place of holding the same, whether regular or special, and, if special, its object, how authorized and the notice thereof given. The record must embrace every act done, or ordered to be done; who were present and who were absent; and if requested by any director, member or stockholder, the time shall be noted when he entered the meeting or obtained leave of absence therefrom. On a similar request the yeas and nays must be taken on any proposition and a record thereof made. On a similar request the protest of any director, member or stockholder to any action or proposed action must be entered in full. All such records shall be open to the inspection of any director, member or stockholder or creditor of the corporation. In addition to the records above required to be kept corporations for profit must keep a book to be known as the "stock and transfer book," in which must be kept a record of all stock; the names of the stockholders or members alphabetically arranged: installments paid or unpaid; assessments levied and paid or unpaid; a statement of every alienation, sale or transfer of stock made, the date thereof, and by and to whom, and all such other records as the by-laws prescribe. Corporations for religious and benevolent purposes must provide in their by-laws for such records to be kept as may be necessary. Such stock and transfer book must be kept open to the inspection of any stockholder, member or creditor. [Civ. C. 1877, § 417; R. C. 1899, § 2907.]

State legislation cannot limit or interfere with transferability of national bank stock. Doty v. Bank, 3 N. D. 9, 53 N. W. 77.

Pledged stock need not be transferred on books of corporation. Van Cise v. Bank, 4 Dak. 485, 33 N. W. 897.

Article 6.—Amending Articles of Incorporation.

§ 4227. Amending articles of incorporation. Any private corporation created or existing, or which may hereafter be created under the laws of

the state of North Dakota, may amend or change its articles of incorporation at a meeting called for that purpose by the directors, as follows:

1. Notice of the time and place of the meeting stating its object, must be served in the manner prescribed in section 4224.

2. At least two-thirds of the entire capital stock must be represented by the vote in favor of the amendment or change in the articles of incorporation.

3. A certificate must be signed by the chairman and secretary of the meeting and a majority of the directors, showing a compliance with the requirements of this section, the articles to be amended or changed, the amount of stock or the number of members represented at the meeting and the vote by which the object was accomplished.

4. The certificate must be filed in the office of the secretary of state, there to be recorded in the book of corporations, and thereupon the articles shall be so amended.

5. The written assent of the holders of three-fourths of the capital stock or members shall be as effectual to authorize the change or amendment of the articles of incorporation as if a meeting of the stockholders, as prescribed by this section, was called and held and upon such written assent the directors may proceed to make the certificate to the secretary of state as herein provided. [1893, ch. 40, § 1; R. C. 1895, § 2908.]

§ **4228. Renewal of corporate existence.** Any private corporation now existing in this state or which may hereafter be created under the laws of this state may at any time prior to the expiration of the period of its corporate existence as limited by its articles of incorporation or by this chapter renew the term of its corporate existence for another term of years, not exceeding the period limited by law, by amending its articles of incorporation in the manner and upon the notice prescribed in section 4227. [R. C. 1895, § 2909.]

Article 7.—Changing Corporate Name.

§ **4229. Changing corporate name.** Every private corporation created and existing, or which may hereafter be created under the laws of the state of North Dakota, may change its name at a meeting called for that purpose by the directors, as follows:

1. Notice of the time and place of the meeting, stating its object, must be served in the manner prescribed in section 4224.

2. At least two-thirds of the entire capital stock must be represented by the vote in favor of the change of name.

3. A certificate must be signed by the chairman and secretary of the meeting and a majority of the directors, showing a compliance with the requirements of this section, the name adopted as the new name of such corporation, the amount of stock or the number of the members represented at the meeting and the vote by which the change of name was accomplished.

4. The certificate must be filed in the office of the secretary of state, there to be recorded in the book of corporations, and thereupon the name of such corporation shall be so changed.

5. The written assent of the holders of three-fourths of the subscribed capital stock shall be as effectual to authorize the change of name as if a meeting was called and held, as prescribed by this section, and upon such written assent the president and secretary may proceed to make the certificate to the secretary of state as herein provided.

6. Every proceeding, act, liability or thing done, undertaken, or incurred by or on behalf of the corporation, under its former name, shall be and continue of the same validity and obligation under such new name as if the name had remained unchanged. [1893, ch. 41, § 1; R. C. 1895, § 2910.]

ARTICLE 8.—CHANGING CORPORATE HEADQUARTERS.

§ 4230. Changing corporate headquarters. Every private corporation created and existing, or which may hereafter be created under the laws of the state of North Dakota, except banking and building and loan associations, annuity, safety deposit and trust companies, and all corporations subject under the laws to examination by the state examiner, may change the place where its principal business is to be transacted at a meeting called for that purpose by the directors, as follows:

1. Notice of the time and place of the meeting, stating its object, must be served in the manner specified in section 4224.

2. At least two-thirds of the entire capital stock must be represented by the vote in favor of the change of the place where the principal business of the corporation is to be transacted.

3. A certificate must be signed by the chairman and secretary of the meeting and a majority of the directors, showing a compliance with the requirements of this section, the place to which the place where the principal business of the corporation is to be transacted has been changed, the amount of stock or the number of the members represented at the meeting, and the vote by which the object was accomplished.

4. The certificate must be filed in the office of the secretary of state, there to be recorded in the book of corporations, and thereupon the place where the principal business of the corporation is to be transacted shall be so changed.

5. The written assent of the holders of three-fourths of the subscribed capital stock shall be as effectual to authorize such change as if a meeting was called and held; and upon such written assent the directors may proceed to make the certificate herein provided for. [1890, ch. 49; R. C. 1895, § 2911; 1905, ch. 66.]

ARTICLE 9.—DISSOLUTION OF CORPORATIONS.

§ 4231. Involuntary. Voluntary, how. A corporation is dissolved:

1. By the expiration of the time limited by its articles of incorporation.

2. Its involuntary dissolution is provided for in chapter 27 of the code of civil procedure.

3. If voluntary, its dissolution may be effected in the following manner:

(a) A corporation may be dissolved by the district court of the county where its office or principal place of business is situated, upon its voluntary application for that purpose.

(b) The application must be in writing and must set forth, that at a meeting of the stockholders or members called for that purpose the dissolution of the corporation was resolved upon by a two-thirds vote of all the stockholders or members, and that all claims and demands against the corporation have been satisfied and discharged.

(c) The application must be signed by a majority of the board of directors, trustees or other officers having the management of the affairs of the corporation and must be verified in the same manner as a complaint in a civil action.

(d) If the court is satisfied that the application is in conformity with this article, it must order the application to be filed and that the clerk give not less than thirty nor more than fifty days' notice of the application by publication in some newspaper published in the county and if there are none such, then by advertisement posted in five of the principal places in the county.

(e) At any time before the expiration of the time of publication any person may file objections to the application.

(f) After the time of publication has expired the court may upon five days' notice to the persons who have filed objections, or without further notice, if no objections have been filed, proceed to hear and determine the

application; and if all the statements therein made are shown to be true, the court must declare the corporation dissolved.

(g) The application, notices and proof of publication, objections, if any, and declaration of dissolution constitute the judgment roll, and from the judgment an appeal may be taken in the same manner as in other actions. [Civ. C. 1877, § 418; R. C. 1899, § 2912.]

§ **4232. Lapse by nonuser.** If a corporation does not organize and commence the transaction of business or the construction of its works within one year from the date of its incorporation, its corporate powers cease. [Civ. C. 1877, § 419; R. C. 1899, § 2913.]

§ **4233. Directors trustees on dissolution.** Unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution, are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation, and to collect and pay debts, and divide among the stockholders the property which remains after the payment of debts and necessary expenses; and for such purposes may maintain or defend actions, in their own names, by the style of the trustees of such corporation dissolved, naming it, and no action whereto any such corporation is a party shall abate by reason of such dissolution. And the said trustees, for the purposes aforesaid, may convey, in the name of such corporation dissolved, any real or personal property owned by it at the time of such dissolution, and execute proper instruments of conveyance for the transfer thereof, and satisfy any real estate or chattel mortgages and other liens, which may appear of record in favor of such corporation dissolved, which instruments shall be acknowledged, in the form as near as may be, as prescribed for the acknowledgment of instruments by corporations, such trustees being treated as officers. The form of signature shall be as follows, viz:

The.....
A Corporation Dissolved.

By.....
Trustees.

[Civ. C. 1877, § 420; R. C. 1899, § 2914; 1903, ch. 59.]

May maintain action in another state where corporation could have done so. Root v. Sweeney, 12 S. D. 43, 80 N. W. 149.

§ **4234. Liability of trustees.** The trustees mentioned in the preceding section are jointly and severally responsible to the creditors, stockholders and members of the corporation to the extent of its property in their hands. [Civ. C. 1877, § 421; R. C. 1899, § 2915.]

§ **4235. How revived.** A corporation once dissolved can be revived only by the same power by which it could be created. [Civ. C. 1877, § 422; R. C. 1899, § 2916.]

Article 10.—Assessments of Stock.

§ **4236. When levied.** The directors of any corporation formed or existing under the laws of this state, after one-fourth of its capital stock has been subscribed, may for the purpose of paying expenses, conducting business or paying debts, levy and collect assessments upon the subscribed capital stock thereof in the manner and form and to the extent provided herein. [Civ. C. 1877, § 423; R. C. 1899, § 2917.]

§ **4237. Limitation of.** No assessment must exceed ten per cent of the amount of the capital stock named in the articles of incorporation, except in the cases in this section otherwise provided for, as follows:

1. If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital

stock; or if a less amount is sufficient then it may be for such a percentage as will raise that amount.

2. The directors of railroad corporations may assess the capital stock in installments of not more than ten per cent per month, unless in the articles of incorporation it is otherwise provided.

3. The directors of fire or marine insurance corporations may assess such a percentage of the capital stock as they deem proper. [Civ. C. 1877, § 424; R. C. 1899, § 2918.]

§ 4238. **When new assessment can be levied.** No assessment must be levied while any portion of a previous one remains unpaid, unless:

1. The power of the corporation has been exercised in accordance with the provisions of this article for the purpose of collecting such previous assessment.

2. The collection of the previous assessment has been enjoined; or,

3. The assessment falls within the provisions of either the first, second or third subdivision of section 4237. [Civ. C. 1877, § 425; R. C. 1899, § 2919.]

§ 4239. **Requisites of assessment.** Every order levying an assessment must specify the amount thereof, when, to whom and where payable, fix a day subsequent to the full term of publication of the assessment notice on which the unpaid assessments shall be delinquent, not less than thirty nor more than sixty days from the time of making the order of levying the assessment; and a day for the sale of delinquent stock, not less than fifteen nor more than sixty days from the day the stock is declared delinquent. [Civ. C. 1877, § 426; R. C. 1899, § 2920.]

§ 4240. **Form of notice.** Upon the making of the order the secretary shall cause to be published a notice thereof in the following form:

(Name of corporation in full. Location of principal place of business.)

Notice is hereby given that at a meeting of the directors, held on the (date), an assessment of (amount) per share was levied upon the capital stock of the corporation, payable (when, to whom and where). Any stock upon which this assessment shall remain unpaid on the (day fixed) will be delinquent and advertised for sale at public auction and unless payment is made before, will be sold on the (day appointed), to pay the delinquent assessment together with costs of advertising and expenses of sale.

(Signature of secretary with location of office.)

[Civ. C. 1877, § 427; R. C. 1899, § 2921.]

§ 4241. **Service of notice.** The notice must be personally served upon each stockholder, or in lieu of personal service, must be sent through the mail, addressed to each stockholder at his place of residence, if known, and if not known, at the place where the principal office of the corporation is situated, and be published once a week for four successive weeks in some newspaper of general circulation and devoted to the publication of general news, published at the place designated in the articles of incorporation as the principal place of business, and also in some newspaper published in the county in which the works of the corporation are situated, if a paper is published therein. If the works of the corporation are not within a state or territory of the United States, publication in a paper of the place where they are situated is not necessary. If there is no newspaper published at the place designated as the principal place of business of the corporation, then the publication must be made in some other newspaper of the county, if there is one, and if there is none, then in a newspaper published in an adjoining county. [Civ. C. 1877, § 428; R. C. 1899, § 2922.]

§ 4242. **Notice of delinquency.** If any portion of the assessment mentioned in the notice remains unpaid on the day specified therein for declaring the stock delinquent, the secretary must, unless otherwise ordered by the board of directors, cause to be published in the same papers in which the

notice hereinbefore provided for shall have been published a notice substantially in the following form:

(Name in full. Location of principal place of business.)

Notice. There is delinquent upon the following described stock on account of assessment levied on the (date), (and assessments levied previous thereto, if any), the several amounts set opposite the names of the respective shareholders, as follows: (Names, number of certificate, number of shares, amount). And in accordance with law (and an order of the board of directors made on the (date), if any such order shall have been made), so many shares of each parcel of such stock as may be necessary, will be sold, at the (particular place), on the (date), at (the hour) of such day, to pay delinquent assessments thereon, together with costs of advertising and expenses of the sale.

(Name of secretary with location of office.)

[Civ. C. 1877, § 429; R. C. 1899, § 2923.]

§ **4243. Contents of notice.** The notice must specify every certificate of stock, the number of shares it represents and the amount due thereon, except when certificates may not have been issued to parties entitled thereto, in which case the number of shares and amount due thereon together with the fact that the certificate for such shares has not been issued must be stated. [Civ. C. 1877, § 430; R. C. 1899, § 2924.]

§ **4244. Publication thereof.** The notice when published in a daily paper must be published for ten days, excluding Sundays and holidays, previous to the day of sale. When published in a weekly paper it must be published in each issue for two weeks previous to the day of sale. The first publication of all delinquent sales must be at least fifteen days prior to the day of sale. [Civ. C. 1877, § 431; R. C. 1899, § 2925.]

§ **4245. Jurisdiction to sell stock.** By the publication of the notice the corporation acquires jurisdiction to sell and convey a perfect title to all of the stock described in the notice of sale upon which any portion of the assessment or costs of advertising remains unpaid at the hour appointed for the sale, but must sell no more of such stock than is necessary to pay the assessments due and costs of sale. [Civ. C. 1877, § 432; R. C. 1899, § 2926.]

§ **4246. Manner of sale.** On the day, at the place and at the time appointed in the notice of sale the secretary must, unless otherwise ordered by the directors, sell or cause to be sold at public auction to the highest bidder for cash so many shares of each parcel of the described stock as may be necessary to pay the assessment and charges thereon according to the terms of sale; if payment is made before the time fixed for sale, the party paying is only required to pay the actual cost of advertising in addition to the assessment. [Civ. C. 1877, § 433; R. C. 1899, § 2927.]

§ **4247. Highest bidder defined.** The person offering at such sale to pay the assessment and costs for the smallest number of shares or fraction of a share is the highest bidder and the stock purchased must be transferred to him on the stock books of the corporation on payment of the assessment and costs. [Civ. C. 1877, § 434; R. C. 1899, § 2928.]

§ **4248. When corporation may bid.** If at the sale of stock no bidder offers the amount of the assessment and costs and charges due, the same may be bid in and purchased by the corporation through the secretary, president or any director thereof at the amount of the assessment, costs and charges due; and the amount of the assessments, costs and charges must be credited as paid in full on the books of the corporation and an entry of the transfer of the stock of the corporation must be made on the books thereof. While the stock remains the property of the corporation it is not assessable, nor must any dividend be declared thereon; but all assessments and dividends must be apportioned upon the stock held by the stockholders of the corporation. [Civ. C. 1877, § 435; R. C. 1899, § 2929.]

§ **4249. Title to stock in corporation.** All purchases of its own stock made by any corporation vest the legal title to the same in the corporation; and the stock so purchased is held subject to the control of the stockholders, who may make such disposition of the same as they deem fit, in accordance with the by-laws of the corporation or vote of a majority of all the remaining shares. Whenever any portion of the capital stock of a corporation is held by the corporation by purchase, a majority of the remaining shares is a majority of the stock for all purposes of election or voting on any question at a stockholders' meeting. [Civ. C. 1877, § 436; R. C. 1899, § 2930.]

§ **4250. Time extended by publication.** The dates fixed in any notice of assessment or notice of deliquent sale, published according to the provisions hereof, may be extended from time to time for not more than thirty days by order of the directors entered on the records of the corporation; but no order extending the time for the performance of any act specified in any notice is effectual unless notice of such extension or postponement is appended to and published with the notice to which the order relates. [Civ. C. 1877, § 437; R. C. 1899, § 2931.]

§ **4251. Irregularities do not invalidate.** No assessment is invalidated by a failure to make publication of the notices hereinbefore provided for, nor by the nonperformance of any act required in order to enforce the payment of the same; but in case of any substantial error or omission in the course of proceedings for collection, all previous proceedings except the levying of the assessment, are void and publication must be begun anew. [Civ. C. 1877, § 438; R. C. 1899, § 2932.]

§ **4252. Redemption. Limitation.** No action must be sustained to recover stock sold for delinquent assessments upon the ground of irregularity in the assessment, irregularity or defect of the notice of sale, or defect or irregularity in the sale, unless the party seeking to maintain such action first pays or tenders to the corporation, or the party holding the stock sold, the sum for which the same was sold, together with all subsequent assessments which may have been paid thereon and interest on such sums from the time they were paid; and no such action must be sustained unless the same is commenced by the filing of a complaint and the issuing of a summons thereon within six months after such sale is made. [Civ. C. 1877, § 439; R. C. 1895, § 2933.]

§ **4253. Proof of publication and sale.** The publication of notice required by this article may be proved by the affidavit of the printer, foreman or principal clerk of the newspaper in which the same was published; and the affidavit of the secretary or auctioneer is prima facie evidence of the time and place of sale, of the quantity and particular description of the stock sold, and to whom, and for what price and of the fact of the purchase money being paid. The affidavits must be filed in the office of the corporation and copies of the same certified by the secretary thereof are prima facie evidence of the facts therein stated. Certificates signed by the secretary and under the seal of the corporation are prima facie evidence of the contents thereof. [Civ. C. 1877, § 440; R. C. 1899, § 2934.]

§ **4254. Stock may be declared delinquent or action brought.** On the day specified for declaring the stock delinquent, or at any time subsequent thereto and before the sale of the delinquent stock, the board of directors may elect to waive further proceedings under this article for the collection of delinquent assessments, or any part or portion thereof, and may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part or portion thereof. [Civ. C. 1877, § 441; R. C. 1899, § 2935.]

ARTICLE 11.—JUDGMENT AGAINST AND SALE OF CORPORATE FRANCHISES.

§ 4255. **Franchise saleable. No exemption.** For the satisfaction of any judgment against a corporation authorized to receive tolls its franchise and all the rights and privileges thereof may be levied upon and sold under execution in the same manner and with the same effect as any other property, but without any exemption. [Civ. C. 1877, § 442; R. C. 1899, § 2936.]

§ 4256. **Certificate of purchase. Rights of purchaser.** The purchaser at the sale must receive a certificate of purchase of the franchise and be immediately let into the possession of all property necessary for the exercise of the powers and the receipt of the proceeds thereof and must thereafter conduct the business of such corporation with all its powers and privileges and subject to all its liabilities, until the redemption of the same as hereinafter provided. [Civ. C. 1877, § 443; R. C. 1899, § 2937.]

§ 4257. **Further rights.** The purchaser or his assignee is entitled to recover any penalties imposed by law and recoverable by the corporation for an injury to the franchise or property thereof, or for any damages or other cause occurring during the time he holds the same and may use the name of the corporation for the purpose of any action necessary to recover the same. A recovery for damages or any penalties thus had is a bar to any subsequent action by or on behalf of the corporation for the same. [Civ. C. 1877, § 444; R. C. 1899, § 2938.]

§ 4258. **Other powers of corporation remain.** The corporation whose franchise is sold, as in this article provided, in all other respects retains the same powers, is bound to the discharge of the same duties and is liable to the same penalties and forfeitures as before such sale. [Civ. C. 1877, § 445; R. C. 1899, § 2939.]

§ 4259. **Corporation may redeem.** The corporation may at any time within one year after such sale redeem the franchise by paying or tendering to the purchaser thereof the sum paid therefor with twelve per cent interest thereon, but without any allowance for the toll which he may in the meantime have received; and upon such payment or tender the franchise and all the rights and privileges thereof revert and belong to the corporation as if no such sale had been made. [Civ. C. 1877, § 446; R. C. 1899, § 2940.]

§ 4260. **Where sold.** The sale of any franchise under execution must be made in the county in which the corporation has its principal place of business, or in which the property, or some portion thereof, upon which the taxes are paid is situated. [Civ. C. 1877, § 447; R. C. 1899, § 2941.]

ARTICLE 12.—EXAMINATION OF CORPORATIONS, ETC.

§ 4261. **Examination by legislative assembly.** The legislative assembly or either branch thereof, may examine into the affairs and condition of any corporation in this state at all times; and for that purpose any committees appointed by the said assembly or either branch thereof, may administer all necessary oaths to the directors, officers and stockholders of such corporation, and may examine them on oath in relation to the affairs and condition thereof, and may examine the safes, books, papers and documents belonging to such corporation, or pertaining to its affairs and condition and compel the production of all keys, books, papers and documents by summary process to be issued on application to any district court or any judge thereof under such rules and regulations as the court may prescribe. [Civ. C. 1877, § 448; R. C. 1899, § 2942.]

§ 4262. **Power reserved by legislative assembly.** The legislative assembly may at any time amend or repeal this chapter, or any article or section thereof and dissolve all corporations thereunder; but such amendment or repeal does not, nor does the dissolution of any such corporation, take away or impair any remedy given against such corporation, its stockholders or

officers, for any liability which has been previously incurred. [Civ. C. 1877, § 449; R. C. 1895, § 2943.]

CHAPTER 12.

RAILROAD CORPORATIONS.

ARTICLE 1.—INCORPORATION AND REGULATION.

§ **4263. Who may form. Articles.** Any number of persons, not less than five, may form a corporation for the purpose of constructing, maintaining and operating a railroad for the transportation of freight and passengers and for the purpose of maintaining and operating any railroad already constructed for the like purpose.

The articles of incorporation shall state:

1. The name of the corporation.
2. The place from and to which such railroad is to be constructed, or maintained and operated as the case may be.
3. The estimated length of such railroad and the name of each county in this state through or into which it is made or intended to be made.
4. The amount of the capital stock of the corporation, the number of shares of which it shall consist, and if such stock shall consist of common and preferred stock, the number and amount of each class.
5. The names and residences of the directors of the corporation, who shall manage its affairs for the first year and until others are chosen in their places, and who shall not be less than five nor more than thirteen in number; and each such person shall subscribe thereto his name, place of residence and the number of shares of stock he agrees to take in such corporation. There shall be annexed to such articles an affidavit of at least three of the directors therein named, that the signatures thereto are genuine and that it is intended in good faith to construct or maintain and operate the railroad therein mentioned; and thereupon said articles and affidavits shall be filed in the office of the secretary of state. [1879, ch. 46, § 1; R. C. 1895, § 2944.]

§ **4264. Number and term of directors.** There shall be a board of not less than five nor more than thirteen directors of every such corporation, who shall be elected at such time, in such manner and for such term as shall be prescribed by its by-laws and shall hold their office until their respective successors shall be chosen. [1879, ch. 46, § 3; R. C. 1895, § 2945.]

§ **4265. Stock not transferable until calls paid.** No stock of a railroad corporation is transferable, until all previous calls thereon shall have been fully paid in. [1879, ch. 46, § 6; R. C. 1899, § 2946.]

§ **4266. Powers.** Every corporation formed under this article, and every railroad corporation authorized to construct, operate or maintain a railroad within this state, shall have in addition to the powers mentioned in section 4200 the following powers:

1. To cause such examination and surveys for its proposed railroad, as may be necessary to the selection of the most advantageous route; and for such purpose by its officers or agents and servants to enter upon the lands or waters of any person, but subject to responsibility for all damage which shall be done thereto.
2. To take and hold such voluntary grants of real estate and other property as may be made to it to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by voluntary grant shall be held and used for the purposes of such grant only.
3. To acquire under the provisions of the chapter on eminent domain or by purchase all such real estate and other property as may be necessary

for the construction, maintenance and operation of its railroads and the stations, depot grounds and other accommodations reasonably necessary to accomplish the objects of its incorporation; to hold and use the same, to lease or otherwise dispose of any part or parcel thereof, to sell the same when not required for railroad uses and no longer necessary to its use.

4. To lay out its road not exceeding one hundred feet in width and to construct the same; and for the purpose of cuttings and embankments and of obtaining gravel and other material to take as much land as may be necessary for the proper construction, operation and security of the road, and for the protection of such road from snow, and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided by law for land taken for the use of the corporation.

5. Subject to the provisions of section 4275, to construct its railroad across, along or upon any stream of water, water course, street, highway, toll or wagon road, plank road, turnpike, wharf, levee, river front, steamboat or other public landing or canal which its route shall intersect or touch; to carry any highway, street, toll or wagon road, plank road or turnpike which it shall touch, intersect or cross, over or under its track, as may be most expedient for the public good; to change the course or direction of any highway, street, turnpike, toll or wagon road or plank road when made necessary or desirable to secure more easy ascent or descent by reason of any embankment or cut made in the construction of the railroad and to take land necessary therefor; provided, such highway or road is not so changed from its original course more than six rods nor its distance thereby lengthened more than five rods.

6. To cross, intersect, join and unite its railroad with any railroad heretofore or hereafter constructed at any point on its route and upon the grounds of such railroad corporation, with the necessary turn-outs, sidings and switches and other conveniences in furtherance of the objects of its connections. And every corporation whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined in the manner provided by law for the ascertainment and determination of damages for the taking of real property. But the making of such crossing by the railway corporation constructing said new railroad shall not be hindered, delayed or prevented pending the ascertainment and determination of said matter; provided, said railroad company proposing to make such crossing shall execute and file with the clerk of the district court in which such proceedings are pending, a bond in such amount as the judge of said court may order, conditioned that the railroad company executing the same shall pay whatever amount may be so ascertained and determined, and shall abide any judgment or order of the court made in relation to the matter in controversy; the sufficiency of said bond and the sureties thereof shall be approved by said judge, but no corporation which shall have obtained the right of way and constructed its road at the point of intersection before the commencement of an action under the provisions of the chapter on eminent domain shall be required to alter the grade or change the location of its road or be required to bear any part of the expense of making and maintaining such crossing.

7. To have and use equal room, ground rights, privileges and conveniences for tracks, switches, sidings and turn-outs upon any levee, river bank, or front, steamboat or other public landing and upon any street, block, alley, square or public ground within any incorporated town or city, any charter or ordinance of any such city or town to the contrary notwithstanding; and to accomplish this may adjust with other corporations the ground to be occupied by each with such tracks, switches, sidings and turn-outs, and if such

corporations cannot agree upon such adjustment and the amount of compensation to be paid for the purchase or necessary change of location and removal of any track previously laid, the same shall be ascertained and determined and the common, mutual and separate rights adjusted in the manner provided by law for the ascertainment and determination of damages for the taking of real property. The court, or a judge thereof, may employ a competent engineer and define, locate and plat the ground and assign to each corporation the part for the tracks and other conveniences for each, and may require the removal or purchase of tracks previously laid so as to justly settle the rights of such corporation upon such ground, the damages to be paid being assessed in accordance with the chapter on eminent domain.

8. To take and convey persons or property over its road by the power or force of steam, or of animals, or by any mechanical power and to receive compensation therefor; and to do all business incident to railroad corporations.

9. To erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and use of its passengers, freight and business, subject to the statutes in relation thereto.

10. To regulate the time and manner in which passengers and property shall be transported and the compensation to be paid therefor.

11. To borrow from time to time such sums of money at such rates of interest and upon such terms as the corporation or board of directors shall agree upon and authorize as necessary or expedient, and to execute deeds or mortgages, or both, as occasion may require on any railroads or parts thereof constructed or in process of construction, for amounts borrowed or owing by the corporation, and therein to make provisions granting, transferring or mortgaging its railroad track, right of way, depot grounds, rights, privileges, franchises, immunities, exemptions, machine houses, rolling stock, furniture, tools, implements, appendages and appurtenances used in connection with such railroads, in any manner whatever then belonging to the corporation or which may thereafter belong to it as security for any bonds or evidences of debt therein mentioned, in such manner as the corporation or directors shall think proper, and such instruments shall fully convey the same, or so much thereof as shall be therein described. In case of sale by virtue of any such trust deed, or upon foreclosure of any such mortgage the persons acquiring title under such sale and their associates, successors and assigns, or such corporation as they shall organize according to section 4263, with all the powers conferred upon corporations by this chapter, shall thereafter have, exercise and enjoy all such described grants which were purchased at such sale, including all rights, privileges, grants, franchises, immunities and advantages mentioned in such instruments which were possessed by such corporation making the same or contracting such debts, so far as the same relate or appertain to that portion or line of road granted or mortgaged and purchased at such sale, and no further, as fully and absolutely in all respects as such corporation, its shareholders, officers and agents might have done if such sale had not taken place. And whenever the person so acquiring title under any such sale shall own or represent a majority in amount of the bonds or other evidences of debt secured by any such trust deed or mortgage, and shall also include the persons who owned at the time of the sale a majority in amount of the capital stock of such mortgagor corporation, such purchasers and such corporation as they shall organize as aforesaid, shall also have, possess and enjoy any exemption, privilege or immunity previously granted by any law to such former corporation relating to any of the property so acquired to the same extent as if such latter corporation had been named in such law as the grantee thereof. [1897, ch. 46, §§ 9, 10; 1883, ch. 92, § 1; R. C. 1895, § 2947; 1905, ch. 150.]

Right of riparian owner to have natural stream flow over land is such property as may be condemned. Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570.

Right of way and roadway synonymous. Right of way includes ground necessary for construction of side tracks, connecting tracks, station houses, freight houses and other accommodations. C., M. & St. P. Ry. Co. v. Cass County, 8 N. D. 18, 76 N. W. 239.

§ 4267. **Right of way through state lands. Conditions.** Every railroad company duly organized under the laws of any state or territory, or by the United States authorized to build and operate a railroad within this state, which shall have filed with the secretary of state a copy of its articles of incorporation properly certified, shall have the right to take, hold and use for the purposes of a railroad a strip of land one hundred feet wide, fifty feet on each side of the center line of such railroad, through each and every tract of public land owned or held by the state across which its road has been or shall be located or constructed; provided, that when it shall be necessary to protect such railroad from snow, or to use extra width in its construction such company shall have the right to take, hold and use a strip of land not exceeding two hundred feet in width, one hundred feet on each side of such center line, through such public lands; provided, further, that at all its regular stations established upon such land such company shall have the right to take a strip of land one thousand six hundred feet long and three hundred feet wide for station purposes. [1893, ch. 99, § 1; R. C. 1895, § 2948.]

§ 4268. **School lands at appraised value.** Whenever any school or state lands are taken for railway purposes as provided in the preceding section, the railway company so taking such lands shall pay to the state treasurer the appraised value thereof, but in no case any sum less than ten dollars per acre for all such lands so taken. [1893, ch. 99, § 2; R. C. 1899, § 2949.]

§ 4269. **How right of way obtained.** Any railway company desiring to secure the benefits of section 4267 shall within ninety days after the definite location of its road across any section of such lands file in the office of the board of university and school lands a plat of such section of land, showing the location of such road through the same and all stations located thereon; and thereafter all such lands over which such roads shall pass shall be disposed of subject to this grant; and every certificate or patent for such lands thereafter sold shall contain an express reservation to the use of such company of all lands which it shall have appropriated in accordance with the provisions of this article; provided, that if such road shall not be completed across any such section within five years after the location of the same thereon the rights herein granted shall be forfeited as to any such section of land. [1893, ch. 99, § 3; R. C. 1895, § 2950.]

§ 4270. **When right of way reverts to state.** If any railway company appropriating any public lands by virtue of section 4267 shall at any time abandon the use thereof for railway purposes for a period of one year the same shall revert to the state. [1893, ch. 99, § 4; R. C. 1899, § 2951.]

§ 4271. **Extensions and branches.** Any railroad corporation may, under the provisions of this article, extend its road from any point named in its articles of incorporation or may build branch roads, either from any point on its line of road, or from any point on the line of any other road connecting or to be connected with its road, the use of which other road between such points and the connection with its own road such corporation shall have secured by a lease or agreement for a term of not less than ten years from its date. Before making such extension or building any such branch road such corporation shall by resolution of its directors, to be entered in the record of its proceedings, designate the route of such proposed extension or branch in the manner provided in section 4263 and file a copy of such record certified by the president and secretary in the office of the secretary of state and cause the same to be recorded as provided in such section. Thereupon such corporation shall have all the rights and privileges to make such extension or build such branch and receive aid thereto which it would have had if it had been authorized in its articles of incorporation. But this section shall not be

construed to authorize railroad corporations to consolidate with each other. [1879, ch. 46, § 11; R. C. 1895, § 2952.]

§ **4272. Directors may alter route.** The board of directors of every railroad corporation may by a vote of two-thirds of the whole number at any time alter the route, or any portion of the route of its road, or any extension or branch thereof, or part of its road, or any extension or branch as constructed, if it shall appear to it that the line can be improved thereby; but no railroads shall be so diverted from any county, town, city or village which in its corporate capacity shall have extended aid to such road, either while in the hands of the then present owner or any former person or corporation; and no such alteration shall be made in any city or village after the road shall have been constructed therein, unless the same shall have been sanctioned by a vote of two-thirds of the council of such city or the trustees of such village. Before making any such alterations the board of directors shall designate the route thereof by resolution, to be entered in its records, filed and recorded in the office of the secretary of state, as provided in the preceding section; thereupon it shall have the same rights and privileges to build such road as altered as if it was the original line. [1879, ch. 46, § 12; R. C. 1895, § 2953.]

§ **4273. Consolidation, leasing and purchase of non-competing lines.** Any railroad corporation organized and existing under the laws of the territory of Dakota or state of North Dakota, or existing by consolidation of different railway companies under the laws of such territory or state and of any other territory or state, may consolidate its stock, franchises and property with any other railroad corporation, whether within or without the state, when their respective railroads can be lawfully connected and operated together to constitute one continuous main line with or without branches upon such terms as may be agreed upon, and become one corporation by any name selected, which within this state shall possess all the powers, franchises and immunities, including the right of further consolidation with other corporations under this section, and be subject to all liabilities and restrictions of this chapter. Articles stating the terms of consolidation shall be approved by each corporation by a vote of the stockholders owning a majority of the stock in person or by proxy at a meeting called for that purpose of which notice, stating the object of the meeting, shall be given in the manner prescribed in section 4224, and a copy thereof with a copy of the record of such approval and accompanied by lists of their stockholders and the number of shares held by each, duly certified by their respective presidents and secretaries with the respective seals of such corporations affixed, shall be filed for record in the office of the secretary of state before any such consolidation shall have any validity or effect. Any such railroad corporation may lease or purchase and take a conveyance or assignment of the railroad, franchises, immunities and all other property and appurtenances of any other railroad corporation, or any portion thereof within or without this state, when their respective railroads can be lawfully connected and operated together to constitute one continuous main line, or when the road so purchased will constitute branches or feeders of any road maintained and operated by such purchasing corporation. Such purchase or lease must be authorized by the stockholders of the respective corporations at a meeting called as herein provided for the consolidation of railroads and by the same vote. But no railroad corporation shall consolidate with, or lease or purchase, or in any way become owner of, or control any other railroad corporation or any stock, franchises, rights or property thereof which owns and controls a parallel and competing line. In no case shall the capital stock of the company formed by such consolidation exceed the sum of the capital stock of the companies consolidated at the par value thereof, nor shall any bonds or other evidences of debt be issued as a consideration for or in connection with such consolidation. [1879, ch. 46, § 13; 1883, ch. 91, § 1; R. C. 1895, § 2954.]

§ **4274. Highways, etc., to be restored to former state.** Every corporation constructing, owning or using a railroad shall restore every stream of water, water course, street, highway, plank road, toll or wagon road, turnpike or canal across, along or upon which such railroad may be constructed to its former state or to such condition as that its usefulness shall not be materially impaired, and thereafter maintain the same in such condition against any effects in any manner produced by such railroad. [1879, ch. 46, § 15; R. C. 1895, § 2955.]

§ **4275. Clear passage over highways.** When it shall be necessary in the construction of a railroad to erect a bridge or culvert over any highway, street, turnpike or plank road, toll or wagon road it shall be sufficient to construct the same so as to give a clear passage way of twenty feet or two passage ways of fourteen feet each. [1879, ch. 46, § 16; R. C. 1899, § 2956.]

§ **4276. Fixtures defined. What subject to mortgage.** All rolling stock of any railroad corporation organized under the provisions of this article used and employed in connection with its railroad and all fuel necessary to the operation of the same are declared and shall be held to be fixtures; and all such property and all additional rights of way, depot grounds and other real property acquired subsequently to the execution of any trust deed or mortgage which shall have been described or provided for therein shall be subject to the lien thereof to the same extent as the property therein described which the corporation owned at the time of its execution. [1879, ch. 46, § 17; R. C. 1899, § 2957.]

§ **4277. Conveyances, etc., how executed and recorded.** Every conveyance or lease, deed of trust, mortgage or satisfaction thereof made by any railroad corporation of any franchises, real estate, fixtures or other real property in pursuance of law, shall be executed and acknowledged in the manner in which conveyances of real estate by corporations are required to be to entitle the same to be recorded and shall be recorded in the office of the secretary of state, who shall indorse thereon his certificate thereof, specifying the day and hour of its reception and the volume and page where recorded, which shall be evidence of such facts. Every such record of any such instrument shall from the time of reception have the same effect as to any property in this state described therein as the record of any similar instrument in the office of a register of deeds may have by law as to property in his county and shall be notice of the rights and interests of the grantee, lessee, or mortgagee by such instrument to the same extent as if it was recorded in each and all of the several counties in which any property therein described may be situated. [1879, ch. 46, § 18; R. C. 1899, § 2958.]

§ **4278. Conditional sale valid.** In all cases where railroad equipment and rolling stock may have been or shall be sold to any person, firm or corporation to be paid for in whole or in part in installments, or shall be leased, rented, hired or delivered on condition that the same may be used by the person, firm or corporation purchasing, leasing, renting, hiring or receiving the same, and that the title to the same shall remain in the vendor, lessor, renter, hirer or deliverer of the same until the price agreed upon or rent for such property shall have been fully paid, such condition in regard to the title so remaining in the vendor, lessor, renter, hirer or deliverer until such payments are fully made shall be valid for all intents and purposes as to subsequent purchasers in good faith, and creditors; provided, that the term during which the installments or rents are to be paid shall not exceed ten years and such contract shall be in writing and acknowledged. [1883, ch. 93, § 1; R. C. 1895, § 2559.]

§ **4279. Where recorded. Cars, etc., how marked.** Such contract shall be recorded in the office of the secretary of state and on each locomotive or car that may have been or may be sold or leased the name of the vendor, or lessor, or assignee of the vendor or lessor shall be marked in a conspicuous place

followed by the word, "owner" or "lessor," as the case may be. [1883, ch. 93, § 2; R. C. 1895, § 2960.]

§ **4280. Sinking fund.** The board of directors of any railroad corporation may annually or oftener, as may be deemed expedient, set apart and appropriate a sum of money not exceeding fifty per cent of its net earnings as resources for any one year, after paying the current expense of its road and the interest on its outstanding indebtedness, in order to sink, redeem, pay off, cancel or discharge the indebtedness of such corporation; and the said sums so set apart shall be annually applied to the payment and discharge of such debts of such corporation as shall be due, and to the purchase and redemption of the outstanding evidences of indebtedness of such corporation, as the board of directors thereof shall deem most for the interest of such corporation and for no other purpose. [1879, ch. 46, § 19; R. C. 1899, § 2961.]

§ **4281. Defense of usury prohibited.** No railroad corporation shall be allowed to make the defense of usury against the holder of any bond or other obligation for the payment of money issued by such corporation. [1879, ch. 46, § 20; R. C. 1899, § 2962.]

§ **4282. May classify directors.** Any railroad corporation may by a vote of a majority in amount of the stockholders present or represented at any annual meeting classify its directors into three classes, each of which shall be composed, as nearly as may be, of one-third of the directors; the term of office of the first class to expire in one year, of the second in two years and of the third in three years. At each annual election thereafter a number of directors shall be elected for three years equal to the number whose term of office shall then expire; all other vacancies shall be filled in accordance with the by-laws. [1879, ch. 46, § 21; R. C. 1899, § 2963.]

§ **4283. Annual report must be made. Contents.** Every railroad corporation shall make an annual report to the stockholders of its operations during the year ending on the thirtieth day of June, which report shall be verified by the affidavit of the secretary, treasurer, superintendent and directors of the corporation and shall state;

1. The length of road in operation, the length of single track, the length of double track, the weight of the rail per yard.
2. The capital stock actually subscribed and the amount paid thereon.
3. The whole cost of the road, showing the amount expended for the right of way, bridging, grading, iron and buildings respectively and for all other purposes incidental to the construction of such road.
4. The amount and nature of its indebtedness, distinguishing the first, second and third mortgage bonds, and the unsecured indebtedness and the amount due the corporation.
5. The amount received for the transportation of passengers, property and mails, for interest and from other sources respectively.
6. The amount of freight, specifying the quantity in tons or other usual mode of measurement.
7. The amount paid for the repairs of the road, buildings, engines and cars respectively, for fuel, taxes and interest, specifying the indebtedness on which the same is paid; for wages of employes; the aggregate amount paid for salaries of officers and for any other purpose incidental to the business of transportation so as to give a complete statement of the entire annual expense of the corporation.
8. The amount of loss to the corporation paid for loss and damage to freight and injury to person and property.
9. The number and amount of dividends and when made and in what manner such dividends have been paid.
10. The amount appropriated to sinking fund and the manner in which the same has been applied and the total amount then held by such sinking fund.

11. The number of persons killed or injured, the causes thereof and whether passengers or persons employed by the corporation.

12. Whether any such accidents have arisen from carelessness or negligence of any person in the employ of the corporation and whether such person is retained in the service of such corporation. The secretary of each railroad corporation shall mail to every stockholder thereof, whose post office address is known, a copy of its annual report and shall file a certified copy thereof with the commissioners of railroads on or before the fifteenth day of September in each year. [1879, ch. 46, § 22; R. C. 1899, § 2964.]

§ **4284. Must maintain office in the state.** Every railroad corporation organized and doing business in this state under the laws or authority thereof shall have and maintain a public office or place in the state for the transaction of its business, where transfers of its stock shall be made and in which shall be kept for public inspection books in which shall be recorded the amount of capital stock subscribed and by whom, the names of the owners of its stock and the amount owned by them respectively; the amount of stock paid in and by whom, and the transfers of said stock; the amount of its assets and liabilities and the names and places of residence of its officers. Any corporation violating any of the provisions of this section or of section 4283 shall, upon conviction thereof in any district court, be subject to a penalty of not less than one hundred and not more than five thousand dollars and its corporate rights shall be subject to forfeiture. [Const. § 140; R. C. 1899, § 2965.]

§ **4285. How foreign corporation may extend its road into this state.** Any railroad corporation chartered by or organized under the laws of the United States or of any state or territory, whose constructed railroad shall reach or intersect the boundary line of this state at any point may extend its railroad into the state from any such point or points to any place or places within the state, and may build branches from any point on such extension. Before making such extension or building any such branch road such corporation shall by resolution of its directors to be entered in the records of its proceedings, designate the route of such proposed extension or branch in the manner provided in section 4263 and file a copy of such record certified by the president and secretary in the office of the secretary of state. Thereupon such corporation shall have all the rights and privileges to make such extension or build such branch and receive such aid thereto as it would have had had it been authorized so to do by articles of association duly filed in accordance with the provisions of this article, [1879, ch. 46, § 27; R. C. 1895, § 2966.]

§ **4286. Train to be run each week day.** Every railway company owning or operating a railway line in this state, excepting railways or branch lines that may hereafter be constructed or extensions of railways or branch lines now in operation, for five years after construction of same, and also railways or branch lines whose total length does not exceed twenty-five miles, is required to run a train of cars over its lines and branches of any line one way during each week day of the year unless prevented by storm, accident or other cause over which the railroad company has no control. [1893, ch. 103. § 1; R. C. 1895, § 2967; 1905, ch. 152.]

§ **4287. Penalty.** For each and every violation of the provisions of the last section the railway company shall be subject to a fine of five hundred dollars. [1893, ch. 103, § 2; R. C. 1895, § 2968.]

§ **4288. Trains to be run at regular times.** Every such railroad corporation shall start and run its cars for the transportation of persons or property at regular times to be fixed by public notice and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall within a reasonable time previous thereto offer or be offered for the transportation at the place of starting or at the junction of other railroads and at siding and stopping places established for receiving and discharging way passengers and freight

and shall take, transport and discharge passengers and property at, from and to such places on the due payment of tolls, freight or fare therefor. [Civ. C. 1877, § 474; R. C. 1899, § 2969.]

§ **4289. Penalty.** In case of the refusal by such corporation or its agents to take or transport any passenger or property as provided in the preceding section, or in case of the neglect or refusal of such corporation or its agents to discharge or deliver passengers or property at the regularly appointed place under the laws which regulate common carriers such corporation shall pay to the party aggrieved all damages which shall be sustained thereby with costs of action. [Civ. C. 1877, § 475; R. C. 1899, § 2970.]

§ **4290. When not liable for personal injuries.** In case any passenger on any railroad shall be injured while on the platform of a car while in motion, or in any baggage, wood or freight car in violation of the printed regulations of the corporation posted up at the time in a conspicuous place inside of its passenger cars then in the train, such corporation shall not be liable for the injury; provided, it had furnished room inside its passenger cars sufficient for the accommodation of its passengers. [Civ. C. 1877, § 476; R. C. 1899, § 2971.]

§ **4291. Same responsibility on all trains carrying passengers.** When fare is taken by any railroad corporation for transporting passengers on any mixed train of passenger and freight cars or on any baggage, wood, gravel or freight car the same care must be taken and the same responsibility and duties are assumed by the corporation as for passengers on passenger cars. [Civ. C. 1877, § 477; R. C. 1899, § 2972.]

§ **4292. Temporary ways while changing highway.** Every railroad corporation while employed in raising or lowering any turnpike or other way, or in making any other alterations, by means of which the said way may be obstructed shall provide and keep in good order suitable temporary ways to enable travelers to avoid or pass such obstructions. [Civ. C. 1877, § 479; R. C. 1899, § 2973.]

§ **4293. Bridges must be in good repair.** Every railroad corporation shall maintain and keep in good repair all bridges with their abutments which such corporation shall construct for the purpose of enabling its road to pass over or under any turnpike road, canal, water course or other way. [Civ. C. 1877, § 480; R. C. 1899, § 2974.]

§ **4294. Signs at crossings.** Every railroad corporation operating a line of road within this state must erect suitable signs of caution at each crossing of its road with a public highway, which signs shall be painted with black Roman or block letters on white background, said letters to be at least eight inches in length and proportionately broad; said signs shall be placed at the top of posts at least fifteen feet high. [Civ. C. 1877, § 481; R. C. 1895, § 2975.]

§ **4295. Bell and whistle.** A bell of at least thirty pounds in weight or a steam whistle shall be placed on each locomotive engine and shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad shall cross any other road or street and be kept ringing or whistling until it shall have crossed said road or street under a penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer, and the other half to this state, and also be liable for all damages which shall be sustained by any person by reason of such neglect. [Civ. C. 1877, § 483; R. C. 1899, § 2976.]

Not the sole measure of duty at public crossings to ring bell and blow whistle. Effect of city ordinances. Coulter v. G. N. Ry., 5 N. D. 568, 67 N. W. 1046.

Failure to give signals no ground for recovery in absence of evidence that such failure was cause of injury. Mankey v. C., M. & St. P. Ry. Co., 14 S. D. 468, 85 N. W. 1013.

§ **4296. Trains must stop before crossing other railroads or drawbridges. Exception.** Every train of cars, and every locomotive about to cross the

track of another railroad, shall come to a full stop before arriving at, or crossing the track of such other, and within four hundred feet thereof; and the train or locomotive arriving near such crossing first, shall cross and move on first; and every such train or locomotive shall also come to a full stop before crossing or running upon any drawbridge over a stream which is regularly navigated by vessels during the season when such stream is so used for navigation, and the use of such draw is necessary for the passage of boats, vessels and other crafts, navigating the waters of such stream, at a distance from such bridge of not more than six hundred feet; provided, that no such stop need be made before crossing such drawbridge or railroad crossing of railroads operated by the same company, if at the time an employe of the company shall be standing on such drawbridge or crossing with a proper light by night, or flag by day, and signal such train to proceed; provided, however, that in case any two railroads which cross each other, or in any way connect at a common grade, shall by any works or fixtures to be erected and maintained by them, or either of them, render it safe to pass over said crossings without stopping, and such work or fixtures shall first be approved by the commissioners of railroads of this state, and the plan of such works or fixtures for such crossing, designating the place of such crossing, shall be filed with the said commissioners of railroads; then in that case the foregoing provisions of this section requiring the stoppage of trains at such railroad crossings shall not apply; but if said commissioners of railroads shall disapprove such plan, or fail to approve the same within twenty days after the filing thereof with them, such railroad companies, or either of them, may apply in the county where such crossing is situated, to the judge of the district court in and for said county, either in term or vacation, by a petition in writing, setting forth the object of said application, and said court or judge shall thereupon appoint a time and place for the hearing of said petition, and a copy of the order appointing such time and place, together with a copy of said petition, shall be served upon the commissioners of railroads at least ten days before the day appointed for such hearing; and the said district court or any judge thereof, either in term time or vacation, shall have full power upon the hearing of said petition, to grant the prayer thereof, or to make such other order thereon as may be proper in the premises. [R. C. 1895, § 2977; 1903, ch. 148.]

§ 4297. Killing of stock prima facie evidence of negligence. The killing or damaging of any horses, cattle or other stock by the cars or locomotives along a railroad shall be prima facie evidence of carelessness and negligence on the part of the corporation. [Civ. C. 1877, § 679; R. C. 1895, § 2978.]

As to prima facie case, how overcome. Hodgins v. R. R. Co., 3 N. D. 382, 56 N. W. 139.

Proof of ownership value and killing by train sufficient to create presumption of negligence. Contributory negligence, what is. Wright v. M., St. P. & S. St. M. Ry., 12 N. D. 159, 96 N. W. 324.

Sufficiency of a complaint. John R. Jones & Son v. G. N. Ry., 12 N. D. 343, 97 N. W. 535.

§ 4298. Crossing when land on both sides owned by one person. When any person owns land on both sides of any railroad the corporation owning such railroad shall, when required so to do, make and keep in good repair one causeway or other safe and adequate means of crossing the same. [Civ. C. 1877, § 484; R. C. 1899, § 2979.]

§ 4299. When required to fence. Whenever the owner of any tract of land abutting against any line of railroad within this state shall desire to inclose any such tract of land for pasturage or other purposes and shall construct a good and sufficient fence about said tract of land on all sides except along the side abutting against such railroad it shall be the duty of such railroad company to construct a good and sufficient fence not less than four and one-half feet high on the side of such tract or lot as far as the same

extends along the line of such railroad and to maintain the same in good repair and condition, until released therefrom by the owner of said tract or until the owner of said tract shall have ceased to maintain, in good repair and condition for the term of one year, his portion of the fence around such inclosure. [1883, ch. 57, § 1; R. C. 1899, § 2980.]

§ **4300. Notice from owner.** Whenever the owner of any tract of land shall have completed his portion of the fence about such proposed inclosure he shall give written notice of its completion to the railroad company upon whose line said tract is situated by personal service upon the agent of said company at the station nearest to the proposed inclosure describing in said notice the situation of said tract and the number of acres to be inclosed, as near as may be, and the length of the fence required along the line of such railroad to complete the proposed inclosure; and it shall be the duty of the railroad company to construct and complete its portion of such fence within sixty days after the service of such notice. [1883, ch. 57, § 2; R. C. 1899, § 2981.]

§ **4301. Liability of company.** If any railroad company shall neglect or refuse to comply with any of the requirements of the last two sections it shall be lawful for the owner of such tract to construct or repair the fence along the line of such railroads and the railroad company shall be liable to the owner thereof to an amount not exceeding one dollar and twenty-five cents per rod to be recovered in a civil action; and such railroad company shall be liable for all damages accruing by reason of such neglect or refusal. [1883, ch. 57, § 3; R. C. 1895, § 2982.]

Article 2.—Stopping of Trains at County Seats.

§ **4302. Stop at county seats. Penalty.** Every person, company or corporation operating a railroad within or through this state, shall cause all its regular passenger trains to stop upon their arrival at its station at each county seat through which such trains run, a sufficient length of time to receive and let off passengers with safety; provided, that this article shall not compel such person, company or corporation to cause its through railroad trains entering this state from any other state, or its transcontinental trains, to stop at any county seat of less than five hundred inhabitants. Every person, company or corporation failing to comply with the provisions of this section shall be subject to a penalty of five hundred dollars, to be recovered in a civil action in the name of the state and paid, when collected, to the state of North Dakota, to be credited to the common school fund; and it is hereby made the duty of the state's attorney of the county, upon complaint of any citizen, to commence and prosecute such action on behalf of the state. [1901, ch. 130.]

Article 3.—Liability of Railroads for Causing Fires.

§ **4303. Liability for damages from fire.** All railroad companies or corporations operating or running cars or steam engines over roads in this state shall be liable to any party aggrieved for all damages resulting from fire negligently escaping or being negligently scattered or thrown from said cars or engines; provided, that such railroad company or corporation shall not be liable for said damages when the same results from the default or negligence of the party injured. [1893, ch. 102, § 1; R. C. 1899, § 2983.]

§ **4304. Escape of fire prima facie evidence of negligence.** Upon the trial of any action against a railroad company doing business in this state for damages resulting from fire escaping or being scattered or being thrown from its cars or engines or from cars or engines under its control the party injured shall not be required to show defect in such cars or engines or negligence on the part of the employes of such company; but the fact of such

fire so escaping or being so scattered or thrown shall be construed as prima facie evidence of such defect or negligence. [1893, ch. 102, § 2; R. C. 1899. § 2984.]

Presumption of negligence one of law. Mere fact that fire started 118 feet from track not in itself sufficient to warrant submission of question of negligence to jury. Smith v. N. P. Ry. Co., 3 N. D. 17, 53 N. W. 173.

Article 4.—Maintenance of Station Houses.

§ **4305. When station house to be maintained.** Every railroad corporation in the state shall build a station house and keep a station agent twelve months each year at all its sidings where there is grain and merchandise of any description to be shipped, the freight on which amounts to fifteen thousand dollars or more in any one year, and the receipts of incoming freight shall amount to four thousand dollars per annum, or more. [1895, ch. 97, § 1; R. C. 1899, § 2985; 1901, ch. 179; 1903, ch. 147.]

§ **4306. Penalty.** Any railroad company or corporation failing to comply with the provisions of the last section shall be punished by a fine of not less than two thousand dollars and it shall be the duty of the commissioners of railroads to enforce the provisions of such section in the name of the state of North Dakota. [1895, ch. 97, § 2; R. C. 1899, § 2986.]

Article 5.—Regulating Number of Train Men.

§ **4307. Number of train men.** It shall be the duty of every corporation operating a railway within the limits of this state which has not complete air equipments in good order on all rolling stock in use on said road to furnish at least two brakemen to each freight train consisting of forty-five cars and it shall be the duty of said company to furnish an extra brakeman on said freight train for every ten cars or fraction thereof in excess of said forty-five cars; provided, that this section shall not apply to any train which has therein, equipped with air brakes, a sufficient number of cars to render hand brakes unnecessary in the ordinary stoppage of trains. [1895, ch. 94, § 1; R. C. 1899, § 2987.]

§ **4308. Penalty.** For each and every violation of the last section the railroad corporation so offending shall be subject to a penalty of fifty dollars to be recovered in a civil action and paid to the state of North Dakota and it is made the duty of the attorney general upon complaint of any citizen to commence and prosecute this action in his own name as attorney general on behalf of the state. [1895, ch. 94, § 2; R. C. 1899, § 2988.]

Article 6.—Licensing Ticket Agents.

§ **4309. Agents to obtain state license. Fee.** It shall be the duty of the owners of any railroad or steamboat for the transportation of passengers to provide each agent who may be authorized to sell within the state tickets or other evidence thereof entitling the holder thereof to travel upon his or their railroad or steamboat with a certificate setting forth the authority of such agent to make such sales, which certificate shall be duly attested by the corporate seal of any corporate owner of such railroad or steamboat and shall for the information of travelers be kept posted in a conspicuous place in the office of such agent. After issue of such certificate as aforesaid such agent or a superintendent or general officer of such owners shall within ten days thereafter exhibit the same to the secretary of state of the state of North Dakota and at the same time shall pay to said secretary of state a license fee of five dollars, whereupon said secretary of state shall issue to such agent so presenting said certificate a license under the seal of the state of North Dakota, authorizing such agent to engage in the business of selling transportation tickets of said common carrier and said license so issued to

such agent by said secretary of state shall also be kept posted in a conspicuous place in the office of such agent for the information of travelers and of the public. Whenever any agent so authorized as aforesaid shall by death, resignation or otherwise cease to be such agent his successor, appointed by said railroad or steamboat company, or the owner or owners thereof, shall be authorized to sell tickets for said company and act as the agent thereof under the provisions of this article. [1893, ch. 104, § 1; R. C. 1899, § 2989.]

§ 4310. No transfer of ticket without license. It shall not be lawful for any person not in the possession of such certificate and license so posted as aforesaid to sell, barter or transfer within this state for any consideration the whole or any part of any ticket or other evidence of the owner's title or right to travel on said railroad or steamboat, whether such railroad or steamboat is situated, operated or owned within or without the limits of this state. [1893, ch. 104, § 2; R. C. 1899, § 2990.]

§ 4311. Penalty for violation. Whoever shall violate the provisions of section 4310 shall be deemed guilty of a misdemeanor and shall be punishable by a fine not exceeding five hundred dollars or by imprisonment not exceeding one year, or either or both, in the discretion of the court in which such offender shall be convicted. [1893, ch. 104, § 3; R. C. 1899, § 2991.]

§ 4312. Agent to exhibit license. It shall be the duty of any agent residing or acting within this state who shall be authorized to sell therein tickets or other evidences of the holder's title to travel upon any railroad or steamboat to exhibit to any person desiring to purchase a ticket or any officer of the law who may request him so to do such certificate of his authority thus to sell and such license. [1893, ch. 104, § 4; R. C. 1899, § 2992.]

§ 4313. Redemption. Violation. Penalty. It shall be the duty of the owners of every railroad or steamboat situated or operated in whole or in part within this state to provide for the redemption under reasonable precautions of the whole or of any coupon or coupons of any ticket theretofore sold by any agent authorized as aforesaid, which the purchaser for any reason, other than the expiration of the time limited in said ticket for the use thereof, has not used, in case of a ticket not used and, in case of a coupon or a ticket partially used, at a rate which shall be equal to the difference between the price paid for the whole ticket and the cost of a ticket between the points for which the used portion of said ticket was actually used; provided, that such ticket or coupon or coupons shall be presented for such redemption to any agent authorized as aforesaid before the time therein limited for the use thereof shall have expired and the deposit of such ticket or part of ticket in the post office, addressed to any such agent, with postage thereon duly paid, before the expiration of the time limited on any such ticket or part of ticket shall be deemed such presentation; and the sale by any person of such ticket or the unused portion of any such ticket or coupon or coupons, otherwise than by the presentation of the same for redemption, as hereinbefore provided, shall be deemed to be a violation of the provisions of this article and any person guilty of such violation shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding one year, or either or both, in the discretion of the court in which such offender shall be convicted; provided, however, that when any ticket selling agent so licensed as aforesaid or any common carrier subject to the provisions of this article shall sell, barter or transfer to any person any mileage book or commutation ticket or excursion ticket at any reduced rate authorized by law, and when such mileage book, commutation ticket or excursion ticket shall by the terms thereof be limited in respect to the time in which the same shall be used, then and in that case such mileage book, commutation ticket or excursion ticket shall be redeemed by said common carrier, subject to the provisions of this article. [1893, ch. 104, § 5; R. C. 1899, § 2993.]

§ 4314. Refusal to redeem. Penalty. Any railroad company or steamboat company which shall by any of its authorized ticket selling agents within this state unreasonably refuse to redeem any coupon of a ticket or any ticket as required by section 4313 shall pay to the state of North Dakota a fine not exceeding five hundred dollars for each offense. [1893, ch. 104, § 6; R. C. 1899, § 2994.]

§ 4315. Penalty for fraudulent use or transfer. Whenever any person in the employ of any railroad or steamboat company doing business in this state shall fraudulently neglect to cancel or return to the proper officer of the company or agent of such railroad or steamboat company any coupon, or any ticket, or pass with intent to permit the same to be used in fraud of any railroad company or steamboat company; or if any person shall steal or embezzle any such coupon or other ticket or pass, or shall fraudulently stamp or print or sign any such ticket, coupon or pass, or shall fraudulently sell or put in circulation any such ticket, coupon or pass said person shall be deemed guilty of a felony and upon conviction thereof shall be punished by imprisonment in the penitentiary for a period not exceeding five years. [1893, ch. 104, § 7; R. C. 1899, § 2995.]

§ 4316. Discrimination in price. Penalty. It is unlawful for any ticket selling agent so authorized and licensed as aforesaid or for any common carrier subject to the provisions of this article to charge, demand, collect, receive from, or to sell, barter, transfer or assign to any person or persons, firm or company, corporation or association any tickets of any class whatever entitling the purchaser or holder thereof to transportation by the common carrier issuing such ticket or tickets for a greater or less sum or price than is charged, demanded, collected or received by such ticket selling agent or common carrier subject to the provisions of this article for a similar ticket or tickets of the same class. Any person, ticket selling agent or common carrier subject to the provisions of this article who shall violate the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars for each offense. [1893, ch. 104, § 8; R. C. 1899, § 2996.]

Article 7.—Maps of Right of Way.

§ 4317. To file maps of right of way. All railroad corporations doing business in this state shall file with the county auditor of each county in which such railroad or any part thereof may be located a map showing the correct location of all right of way and side tracks in such county owned or occupied by such railroad corporation and also showing the number of acres in each parcel of land included by such railroad corporation or any of them in such county as right of way. [1890, ch. 130, § 1; R. C. 1895, § 2997.]

§ 4318. Same. Any railroad corporation, which may hereafter acquire any right of way or other property as set forth in the last section, shall file within six months after the location of its right of way a map as provided for in the last section. [1890, ch. 130, § 2; R. C. 1895, § 2998.]

§ 4319. Penalty. Any railroad corporation which shall violate any of the provisions of the last two sections shall upon conviction thereof be fined in a sum of not less than one hundred dollars nor more than five hundred dollars. [1890, ch. 130, § 3; R. C. 1899, § 2999.]

Article 8.—Crossings.

§ 4320. To maintain sufficient crossings. All railway companies operating a line of railway in this state shall build or cause to be built and kept in repair good and sufficient crossings over such line at all points where any

public highway in use is now or may hereafter be intersected by the same. [1890, ch. 127, § 1; R. C. 1899, § 3000.]

§ **4321. How to be constructed.** Such crossings shall be constructed as follows:

1. Of a grade of earth on one or both sides of the railroad track as the location may require, twenty feet in width, the middle point of which shall be as nearly as practicable at the middle point of the highway and such grade shall be of such slope as shall be necessary for the safety and convenience of the traveling public.

2. Plank shall be firmly spiked on and for the full length of the ties used in the roadbed of such railway where such crossing occurs and shall be laid not more than one inch apart except where the rail prevents; the plank next inside of the rail shall not be more than two and one-half inches from the inside surface of such rail and the plank used in the crossing shall not be less than three inches in thickness and so laid that the upper surface of the plank shall be on a level with the upper surface of the rail; such plank shall extend along the railway the entire width of the highway grade and in no case less than twenty feet. [1890, ch. 127, § 2; R. C. 1895, § 3001.]

§ **4322. Penalty for violation.** Any railroad company which shall violate any of the provisions of the last two sections shall be subject to a fine of not less than twenty-five dollars nor more than one hundred dollars and shall be liable for all damages caused thereby. [1890, ch. 127, § 5; R. C. 1895, § 3002.]

Article 9.—Transfer Facilities.

§ **4323. Transfer facilities.** All common carriers, doing business in the state of North Dakota, shall provide at all points of connection, crossing or intersection at grade where it is practicable and necessary for the interest of traffic, ample facilities by track connections for transferring any cars used in the regular business of their respective lines of road, from their lines or tracks to those of any other common carrier whose lines or track may connect with, cross or intersect their own, and shall provide equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding and delivering of property and cars to and from their several lines and those of other common carriers connecting therewith, and shall not discriminate in their rate or charges between such connecting lines, or on freight coming over such lines; but this shall not be construed as requiring any common carrier to furnish for another common carrier its tracks, equipment or terminal facilities without reasonable compensation. Each of said connecting lines shall pay its proportionate share for the building and maintenance of such track and switches as may be necessary to furnish the transfer facilities required by this article, and in case they cannot agree on the amount which each line shall pay, then said amount shall, upon application by either party, be determined and adjusted by the board of railroad commissioners, and either party shall have the right to appeal from the order of said board, fixing the amount so to be paid, to the district court of the county where said transfer facilities are furnished, by serving a notice in writing on the adverse party within ten days after the making and filing of such order by said board, and upon the service of such notice there shall be pending in said district court a civil action for the adjustment and determination of the amount to be paid by each carrier for the expense of the building and maintenance of such transfer facilities. Pleadings shall be made, served, and filed in said action in conformity to those required by law and rules of practice in said court, and said cause shall be tried in the manner provided for the trial of civil actions in the district courts of this state. [1901, ch. 195.]

ARTICLE 10.—TO REGULATE COMMON CARRIERS AND DEFINE THE DUTIES OF THE COMMISSIONERS OF RAILROADS.

§ **4324. To whom article applies.** The provisions of this article shall apply to the transportation of passengers and property, and to receiving, delivering, storing and handling of property wholly within this state, and shall apply to all railroads, railroad corporations and railway companies, express companies, car companies, sleeping car companies, freight or freight line companies, and to any common carrier or carriers engaged in this state in the transportation of passengers or property by railroads therein, and shall also be held to apply to shipments of property made from any point to some other point within the state, whether the transportation of the same shall be wholly within this state, or partially within this and an adjoining state or states. [1897, ch. 115, § 14; R. C. 1899, § 3011.]

§ **4325. Railroad and transportation defined.** The term "railroad" as used in this article shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation, receiver, trustee or other person used as a common carrier or operated as a railroad whether owned or operated under contract, agreement, lease or otherwise, and the term "transportation" shall include all the instrumentalities of shipment or carriage, and the term "railroad corporation" contained in this article shall be deemed and taken to mean all corporations, companies or individuals now owning or operating or using or which may hereafter own, operate or use as a common carrier any railroad operated by steam in whole or in part in this state, or leases cars by whatever name known for the purpose of transportation; and the provisions of this article shall apply to all persons, firms and companies and to all associations of persons whether incorporated or otherwise that shall do business as common carriers upon any of the lines of railway operated by steam in this state the same as to railroad corporations herein mentioned. Nothing in this article shall be construed to stop or hinder any persons or corporations from bringing suit against any railroad company for any violation of any of the laws of this state or of the United States for the government or railroads, except as hereinafter provided. [1897, ch. 115, §§ 10, 14; R. C. 1899, §§ 3012, 3013.]

§ **4326. Duty of railroad to furnish and transport cars.** It shall be the duty of any railroad corporation, when within its power to do so, and upon reasonable notice, to furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all kinds of freight or express, and to receive and transport such freight with all reasonable dispatch, and to provide and keep suitable facilities for the receiving and handling the same at any depot or receiving office of such corporation on the line of its road; and also to receive and transport in like manner the empty or loaded cars, furnished by any connecting road, to be delivered at any station on the line of its road, to be loaded or discharged, or reloaded and returned to the road so connecting; and for compensation it shall not demand or receive any greater sum than is accepted by it from any other connecting railroad for a similar service. [1897, ch. 115, § 5; R. C. 1899, § 3014.]

§ **4327. Charges to be reasonable.** All charges made for any service rendered or to be rendered by any railroad, railroad corporation or common carrier subject to the provisions of this article, in the transportation of passengers or property in this state as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. [1897, ch. 115, § 6; R. C. 1899, § 3015.]

§ **4328. Penalty for extortion or unjust discrimination.** Any railroad, railroad corporation or common carrier, which shall violate any of the pro-

visions of this article, as to extortion or unjust discrimination, shall forfeit for every such offense to the person, company or corporation aggrieved thereby three times the actual damages sustained or overcharges paid by said party aggrieved, together with the cost of suit and a reasonable attorney's fee to be fixed by the court, and if an appeal be taken from the judgment or any part thereof, it shall be the duty of the appellate court to include in the judgment an additional reasonable attorney's fee for service in the appellate court or courts, or the same may be recovered in a civil action therefor. And in all cases where complaint shall be made, in accordance with the provisions of this article, that an unreasonable charge is made, the commissioners shall require a modified charge for the service rendered, such as they shall deem to be reasonable, and all cases of a failure to comply with the recommendation of the commissioners shall be embodied in the report of the commissioners to the governor; and the same shall apply to any unjust discrimination, extortion or overcharge by said railroad, railroad corporation or common carrier or other violation of law. [1897, ch. 115, § 7; R. C. 1899, § 3016.]

§ **4329. Examination of rates.** It shall be the duty of said commissioners upon the complaint and application of the mayor and aldermen of any city or the president and trustees of any incorporated town or the supervisors of any township, to make an examination of the rate of passenger fare, express or freight tariff charged by any railroad, railroad corporation or common carrier, subject to the provisions of this article, and of the condition or operation of any railroad, railroad corporation or common carrier, any part of whose location or route lies within the limits of such city, town or township, and if twenty-five or more legal voters in any city, town or township shall, by petition in writing request the mayor and aldermen of such city, the president and trustees of such town or the supervisors of such township, to make said complaint and application, and the said mayor and aldermen, president and trustees or supervisors refuse or decline to comply with the prayer of the petition, they shall state the reason for such non-compliance in writing upon the petition, and return the same to the petitioners; and the petitioners may thereupon, within ten days from the date of such refusal and return, present such petition to said commissioners and said commissioners shall, if upon due inquiry and hearing of the petitioners, they think the public good demands the examination, proceed to make it in the same manner as if called upon by the mayor and aldermen of any city, the president and trustees of any town or the supervisors of any township. Before proceeding to make such examination, in accordance with such application or petition, said commissioners shall give to the petitioners and the railroad, railroad corporation or common carrier reasonable notice, in writing, of the time and place of entering upon the same. If, upon such an examination, it shall appear to said commissioners that the complaint alleged by the applicant or petitioners is well founded, they shall so adjudge, and shall inform the corporation operating such railroad or such railroad corporation or common carrier of their adjudication within ten days and shall also report their doings to the governor, as provided in section 4363. [1897, ch. 115, § 8; R. C. 1899, § 3017.]

§ **4330. Ample facilities for transferring.** All railroads, railroad corporations and common carriers subject to the provisions of this article, shall according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and switching of cars, and the receiving, forwarding and delivering of passengers and property to and from their several lines; and to and from other lines and places connected therewith; and shall not discriminate in their accomodations, rates and charges between such connecting lines. Any railroad, railroad corporation or common carrier may

be required to switch and transfer cars for another for the purpose of being loaded or unloaded, upon such terms and conditions as may be prescribed by the board of commissioners of railroads. [1897, ch. 115, § 16; R. C. 1899, § 3018.]

§ **4331. Shall furnish, start and run cars without delay.** Every common carrier operating a railway in this state shall without unreasonable delay furnish, start and run cars for the transportation of persons and property, which within a reasonable time theretofore is offered for transportation at any of its stations on its line of road and at the junctions of other railroads and at such stopping places as may be established for receiving and discharging passengers and freights; and shall take, receive, transport and discharge such passengers and property at, from and to such stations, junctions and places on and from all trains advertised to stop at the same for passengers and freight respectively upon the due payment or tender of payment of tolls, freight or fare therefor, if such payment is demanded. Every such common carrier shall permit connection to be made and maintained in a reasonable manner with its side tracks to and from any warehouse, elevator or manufactory without reference to its size or capacity; provided, that this shall not be construed so as to require any common carrier to construct or furnish any side track off from its own line; provided, further, that where stations are twelve miles apart or more the common carrier, when required to do so by the commissioners of railroads, shall construct and maintain a side track for the use of shippers between such stations. [1890, ch. 122, § 3; R. C. 1895, § 3019.]

§ **4332. Continuous shipments.** It shall be unlawful for any railroad, railroad corporation or common carrier subject to the provisions of this article to enter into any combination, contract or agreement, expressed or implied, to prevent by change in time schedules, carriage in different cars or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination in this state; and no break of bulk, stoppage or interruption made by such railroad, railroad corporation or common carrier shall prevent the carriage of freight from being, and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this article. [1897, ch. 115, § 20; R. C. 1899, § 3020.]

§ **4333. No preference or advantage.** It shall be unlawful for any railroad, railroad corporation or common carrier, subject to the provisions of this article, to make or give any preference or advantage to any particular person, company, firm, corporation or locality or any particular description of traffic, in any respect whatsoever or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic to any prejudice or disadvantage in any respect whatsoever; provided, however, that nothing herein shall be construed to prevent any railroad, railroad corporation or common carrier from giving preference as to time of shipment of live stock, uncured meats and other perishable property. [1897, ch. 115, § 16; R. C. 1899, § 3021.]

§ **4334. What constitutes unjust discrimination.** If any railroad, railroad corporation or common carrier subject to the provisions of this article shall directly or indirectly, by any special rate, rebate, drawback or other device charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this article, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, it shall be deemed guilty of unjust discrim-

ination, which is hereby prohibited and declared unlawful; this section, however, is not to be construed as prohibiting a less rate per one hundred pounds in a car load lot than is charged, collected or received from the same kind of freight in less than a carload lot. [1897, ch. 115, § 15; R. C. 1899, § 3022.]

§ 4335. **Long and short hauls.** It shall be unlawful for any railroads, railroad corporations or common carriers, subject to the provisions of this article, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of a like kind of freight or property, for a shorter than for a longer distance over its railroads, all or any portion of the shorter haul being included within the longer; and said railroad, railroad corporations or common carriers shall charge no more for transporting passengers or freight to or from any point on its railroads than a fair and just rate as compared with the price it charges for the same kind of transportation to or from any other point; provided, that all the provisions of this section shall apply to the transportation of passengers and all kinds of freight and property shipped and transported over one or more connecting lines; provided, further, that such connecting lines shall transfer car lots without extra compensation, and shall transfer less than car lots at actual cost for such transfer; and provided, further, that rates shall be made and published by such connecting lines for such continuous shipment upon demand of any shipper or shippers and that such rates so made by two or more connecting lines shall be no greater in the aggregate than the rate would be if shipped continuously upon one line of road. [1897, ch. 115, § 17; R. C. 1899, § 3023; 1903, ch. 143.]

§ 4336. **Freight pooling.** It shall be unlawful for any railroad, railroad corporation or common carrier, subject to the provisions of this article, to enter into any contract, agreement or combination with any other railroad, railroad corporation or common carrier for the pooling of freight of different and competing railroads or railroad corporations or common carriers, or divide between them the aggregate or net proceeds of the earnings of such railroads or railroad corporations or common carriers or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense. [1897, ch. 115, § 18; R. C. 1899, § 3024.]

§ 4337. **Distribution of cars.** When any railroad company doing business in this state shall be unable from any reasonable cause to furnish cars at any railway station or side track in accordance with the demands made by all persons demanding cars at such station or side track for the shipment of freight in car load lots, such cars as are furnished shall be divided daily equally among the applicants in the order of their application until each shall have received one car, when the remainder shall be divided ratably among the several shippers in the proportion that the car load lots of freight offered by each bear to the entire number of car load lots of freight offered at such station or side track on that day; provided, that every application made in good faith on an earlier day shall be filled before supplying any to any applicant of a succeeding day. [1899, ch. 110, § 7; R. C. 1895, § 3025.]

§ 4338. **But one terminal charge for switching or transferring.** There shall in no case be more than one terminal charge for switching or transferring any car, whether the same is loaded or empty, within the limits of any one city or town. If it is necessary for any car to pass over the tracks of more than one company within such city or town limits in order to reach its final destination or to be returned therefrom to its owner or owners, then the company first switching or transferring such car shall be entitled to receive the entire charge to be made therefor and shall be liable to the company or companies doing the subsequent switching or transferring thereof for its or their reasonable and equitable share of the compensation received and if the companies so jointly interested therein cannot agree upon the share thereof which each is entitled to receive, the same shall be determined by the commis-

sioners of railroads, whose decision thereon shall be final and conclusive upon all parties interested and the said commissioners are authorized to establish such rules and regulations in that behalf as to them may seem just and reasonable and not in conflict with this article. [1890, ch. 122, § 7; R. C. 1899, § 3026.]

§ **4339. Schedules of rates and fares.** Every railroad, railroad corporation or common carrier subject to the provisions of this chapter, shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such railroad, railroad corporation or common carrier has established, and which are in force at the time upon its railroads as defined by this chapter. The schedules printed as aforesaid by any such railroad, railroad corporation or common carrier shall plainly state the places upon its railroads between which property and passengers will be carried and shall contain the classification of freight or express in force upon it, and shall also state separately any terminal charges and any rules or regulations which in any wise change, affect or determine any part of the aggregate of such aforesaid rates, fares and charges. Such schedules shall be plainly printed in large type of at least the size of ordinary pica, and a copy for the use of the public shall be kept in every freight, express or receiving office or passenger station of such railroad, railroad corporation or common carrier where it can be conveniently inspected, and it shall keep a printed notice posted in every such office and passenger station indicating where therein such schedules can be found. [1897, ch. 115, § 19; R. C. 1899, § 3027.]

§ **4340. Notice of changes in schedules.** No advance shall be made in the rates, fares and charges which have been established and published as aforesaid by any railroad, railroad corporation or common carrier in compliance with the requirements of this article, except after ten days' notice in writing to the commissioners of railroads, which shall plainly state the changes proposed to be made in the schedules then in force and the time when the increased rates, fares or charges will go into effect; and the proposed charges shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept for public inspection. Reduction in such published rates, fares or charges may be made without previous notice, but whenever any such reduction is made, notice of the same shall immediately be publicly posted, and the change made shall immediately be made public by printing new schedules, or shall immediately be plainly indicated upon the schedules at the time in force and kept for public inspection. [1897, ch. 115, § 19; R. C. 1899, § 3028.]

§ **4341. No charge greater than the schedule.** When any such railroad, railroad corporation or common carrier shall have established and published its rates, fares and charges, in compliance with the provisions of this article, it shall be unlawful for it to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any service in connection therewith than is specified in such published schedule of rates, fares and charges as may at the time be in force. [1897, ch. 115, § 19; R. C. 1899, § 3029.]

§ **4342. Schedules and contracts to be filed.** Every railroad, railroad corporation or common carrier subject to the provisions of this article shall file with the board of commissioners of railroads of this state copies of its schedules of rates, fares and charges which have been established and published in compliance with the requirements of this article, and shall promptly notify said commissioners of all changes made in the same. Every such railroad, railroad corporation or common carrier shall also file with said commissioners copies of all contracts, agreements or arrangements with other railroads, railroad corporations or common carriers in relation to any traffic affected by the provisions of this article to which it may be a party. In

cases where passengers and freight pass over continuous lines or routes in this state operated by more than one person or company and the several railroads, railroad corporations or common carriers operating such lines or routes have established joint tariffs or rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also in like manner be filed with said commissioners. Such joint rates, fares and charges on such continuous lines so filed as aforesaid shall be made public by such railroads, railroad corporations or common carriers when directed by said commissioners, in so far as may, in the judgment of the commissioners be deemed practicable; and said commissioners shall, from time to time, prescribe the measures of publicity which shall be given to such rates, fares and charges, or to such parts of them as they may deem it practicable for such railroads, railroad corporations or common carriers to publish and the places in which they shall be published; but no railroad, railroad corporation or common carrier, party to any such joint tariff shall be liable for the failure of any other railroad, railroad corporation or common carrier party thereto, to observe and adhere to the rates, fares or charges thus made and published. If any such shall neglect or refuse to file or publish its schedules or tariff of rates, fares and charges as provided in this article or any part of the same, it shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus to be issued by any district court of this state in the judicial district wherein such offense may be committed. And if such railroad, railroad corporation or common carrier be a foreign corporation then such writ may be issued by any district court, in the judicial district where such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this article, and such writ shall issue in the name of the state of North Dakota at the relation or upon the petition of the said board of commissioners of railroads of this state; and failure to comply with its requirements shall be punishable as and for a contempt; and shall make said railroad, railroad corporation or common carrier liable to a penalty of five hundred dollars for each day's failure to comply therewith and when any such writ of mandamus shall be so applied for by said commissioners, no bond shall be required of them by any court or judge, in which or before whom any such application may be made. [1897, ch. 115, § 19; R. C. 1899, § 3030.]

§ **4343. Commissioners to make schedules.** The board of commissioners of railroads of this state are hereby empowered and directed to make for each of the railroads, railroad corporations and common carriers, subject to this article doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of passengers, freight, property and cars on each of said railroads; and said power to make schedules shall include the power of classification of all such freights and property, and it shall be the duty of said commissioners to make such classification; and said schedules so made by said commissioners, shall in all suits brought against any such railroad, railroad corporation or common carriers, wherein is in any way involved the charges of any such railroad, railroad corporation or common carriers, for the transportation of any passenger, freight, property or cars or unjust discrimination in relation thereto, be deemed and taken in all courts of this state as prima facie evidence that the rates therein fixed are reasonable and just maximum rates or charges for the transportation of passengers, freight, property and cars upon the railroads for which said schedules may have been respectively prepared. Said commissioners shall from time to time but not oftener than once in six months unless upon appeal from the order fixing such rate the court should modify or reverse such order, and then only to the extent made necessary by such modification or reversal, change and revise said schedules. When any schedule shall have been made or revised as aforesaid, it shall be the duty of

said commissioners to forthwith serve a copy of said schedule upon such railroad, railroad corporation or common carrier affected thereby and a notice stating when such schedule shall go into effect, and to cause notice thereof to be published for two successive weeks in one public newspaper published in each judicial district in this state which notice shall state the fact that a new schedule has been made and the date of the taking effect of said schedule; and said schedule shall take effect at the time so stated in such notice and a printed copy of said revised schedule shall be conspicuously posted by such railroad, railroad corporation or common carrier in each freight, express or receiving office and passenger depot upon its line or lines. All such schedules, so made, shall be received and held in all such suits as prima facie the schedule of said commissioners without further proof than the production of the schedule desired to be used as evidence, with a certificate of said commissioners of railroads, that the same is a true copy of the schedule prepared by them for the railroad, railroad corporation or common carrier therein named, and that notice of making the same has been published as required by law; provided, that before finally fixing and deciding what the original maximum rates and classification shall be, it shall be the duty of the commissioners of railroads to publish ten days' notice in two daily papers published in the state, setting forth in such notice that at a certain time and place they will proceed to fix and determine such maximum rates and classifications; and they shall at such time and place and as soon as practicable afford to any person, firm, corporation, railroad, railroad corporation or common carrier who may desire it, an opportunity to make an explanation or showing or to furnish information to said commissioners on the subject of determining and fixing such maximum rates, fares and classification; and a schedule of rates, fares and classification of freights or property on all lines of railroad, railroad corporations or common carriers subject to this article in North Dakota shall be fixed within sixty days from the taking effect of this article. [1897, ch. 115, § 29; R. C. 1899, § 3031.]

Reasonableness of rates determined by comparison between gross receipts and cost of doing business. C., M. & St. P. Ry. Co. v. Tomkins, 176 U. S. 167.

§ **4344. Complaint of violation of schedule.** Whenever any person upon his own behalf, or class of persons similarly situated, or any firm, corporation, or association, or any mercantile, agricultural or manufacturing society, or any body politic or municipal organization, shall make complaint to said board of commissioners of railroads that the rate charged or published by any railroad, railroad corporation or common carrier, or the maximum rate fixed by said commissioners in the schedule of fares or rates made by them under the provisions of section 4343 or the maximum rate that may now or may hereafter be fixed is unreasonably high or discriminating, it shall be the duty of said commissioners to immediately investigate the matter of such complaint. If such complaint appears to be well founded and not trivial in character, the board shall fix a day for hearing the same and shall notify such railroad, railroad corporation, or common carrier of the time and place of such hearing by serving a notice properly directed on any division superintendent, general or assistant superintendent, general manager, president, secretary or agent of such railroad, railroad corporation or common carrier, which notice shall contain the substance of the complaint so made, and the board shall also notify the person or persons complaining of such time and place. [1897, ch. 115, § 30; R. C. 1899, § 3032.]

§ **4345. Hearing evidence.** Upon such hearing so provided for the said commissioners shall receive whatever evidence, statements or arguments either party may offer pertinent to the matter under investigation; and the burden of proof shall not be held to be upon the person or persons making the complaint, but the commissioners shall add to the showing made at such hearing whatever information they may then have, or can secure from any

source whatsoever, and the person or persons complaining shall be entitled to introduce any published schedule of rates of any railroad, railroad corporation or common carrier or evidence of rates actually charged by any railroad, railroad corporation or common carrier for substantially the same kind of service, whether in this or in any other state, and the lowest rate published or charged by any railroad, railroad corporation or common carrier for substantially the same kind of service, whether in this state or in any other state, shall, at the instance of the person or persons complaining, be accepted as prima facie evidence of a reasonable rate for the services under investigation. and if the railroad, railroad corporation or common carrier complained of is operating a line of railroad beyond the state of North Dakota, or if it appears that it has a traffic arrangement with any such railroad, railroad corporation or common carrier, then the commissioners in determining what is a reasonable rate. shall take into consideration the charge made, or rate established by said railroad, railroad corporation or common carrier, or the company with which it has traffic arrangements for carrying freight, passengers or property from beyond the state to points within the state, and from within the state to points beyond the state; and if such company be operating a line of railway beyond the state they shall also take into consideration the rate charged or established for a substantially similar or greater service by such company in any other state in which said railroad, railroad corporation or common carrier operates a line of railway. [1897, ch. 115, § 31; R. C. 1899, § 3033.]

§ 4346. **Decision.** After such hearing and investigation the said commissioners shall fix and determine the maximum charge to be thereafter made by the railroad, railroad corporation or common carrier complained of, and the said commissioners shall render their decision in writing; and shall spread the same at length in the record to be kept for that purpose. Such decision shall specifically set out the sums or rates which the railroad, railroad corporation or common carrier, so complained of, may thereafter charge or receive for the service therein named and include a classification of such freight or property; and the said commissioners shall not be limited in their said decision and the schedule to be contained therein to the specific case or cases complained of, but it shall be extended to all such rates between points in this state and whatever part of the line of railway of such company, railroad, railroad corporation or common carrier within this state as may have been fairly within the scope of such investigation; and any such decisions so made and entered on record of said commissioners, including any such schedules and classifications shall when duly authenticated, be received and held in all suits brought against any such railroad, railroad corporation or common carrier wherein is in any way involved the charges of any such railroad, railroad corporation or carrier mentioned in said decisions, in any of the courts of this state, as prima facie evidence that the rates therein fixed are reasonable maximum rates, the same as the schedules made by said commissioners as provided in section 4343; and the rates, charges and classifications so established after such hearing and investigation shall from time to time thereafter upon complaint duly made be subject to revision by said commissioners the same as any other rates, charges and classifications. [1897, ch. 115, § 32; R. C. 1899, § 3034.]

§ 4347. **Decrees of commissioners enforced.** The district courts of this state shall have jurisdiction to enforce, by proper decrees, injunctions and orders, the reasonable rulings, orders and regulations affecting public right, made or to be made by the board of commissioners of railroads, such as are now, or may hereafter be authorized to be made by them for the future direction and observance of railroads, railroad corporations or common carriers in this state. The proceedings shall be by equitable action in the name of the state of North Dakota, and shall be instituted by the attorney general,

whenever advised by the board of commissioners of railroads that any railroad, railroad corporation or common carrier is violating and refusing to comply with any rule, order or regulation made by such commissioners of railroads, and applicable to such railroad, railroad corporation or common carrier. It shall be the duty of the court in which any cause shall be pending to require the issues to be made up at the first term of the court to which the cause is brought which shall be the trial term, and to give the same precedence over other civil business. If the court shall find that such passenger fare, freight, or express rate, rule, regulation or order is reasonable and just, and that in refusing compliance therewith said railroad company, railroad corporation or common carrier is failing and omitting the performance of any public duty or obligation, the court shall decree a mandatory and perpetual injunction compelling obedience to and compliance with such rule, fare, rate, order or regulation by said railroad, railroad corporation or common carrier or its officers, agents, servants and employes and may grant such other relief as may be deemed just and proper with costs. All violations of such decree shall render the company, person, officers, agents, servants and employes, who are in any manner instrumental in such violation, guilty of contempt of court, and the court may punish such contempt by fine not exceeding one thousand dollars for each offense, or may imprison the person guilty of contempt until he shall sufficiently purge himself therefrom. And such decree shall continue and remain in effect and be enforced until the rule, fare or rate, order or regulation shall be modified or vacated by the board of commissioners of railroads. [1897, ch. 115, § 11; R. C. 1899, § 3035.]

§ **4348. Compensation of attorney. Costs.** The attorney general is hereby authorized, in case he shall deem it necessary so to do in order to enforce the provisions of this article, to employ an attorney to assist him in any proceedings brought under this article, and such attorney shall be paid from the general fund of the state of North Dakota for his services an amount to be approved by the attorney general and the board of railroad commissioners, and all necessary and usual costs of actions brought by the attorney general under this article shall be itemized and paid from said fund upon his approval. Whenever a decree shall be entered against a railroad, railroad corporation, common carrier or person under section 4347, the court shall render judgment for costs, including a reasonable attorney's fee for counsel representing the state in said case, and said judgment shall be enforced by execution. [1897, ch. 115, §§ 12, 13; R. C. 1899, § 3036.]

§ **4349. Liability for neglect of duty. Treble damages.** In case any railroad, railroad corporation or common carrier subject to the provisions of this article shall do, cause to be done, or permit to be done any act, matter or thing in this article prohibited, or declared to be unlawful, or shall omit to do any act, matter or thing in this article required to be done, it shall be liable to the person or persons injured thereby, for three times the amount of damages sustained in consequence of any violation of the provisions of this article, together with costs of suit and a reasonable counsel or attorney's fee to be fixed by the court in which the same is heard on appeal or otherwise, which shall be taxed and collected as part of the costs in the case; provided, that in all cases demand in writing on said railroad, railroad corporation or common carrier shall be made for the money damages sustained before suit is brought for recovery under this section and that no suit shall be brought until the expiration of fifteen days after such demand. [1897, ch. 115, § 21; R. C. 1899, § 3037.]

§ **4350. Remedy. Evidence.** Any person or persons claiming to be damaged by any railroad, railroad corporation or common carrier, subject to the provisions of this article, may either make complaint to the board of commissioners of railroads of this state, who may bring suit in their own name when they deem it advisable, or such person or persons may bring suit in his

or their own behalf for the recovery of damages for which any such railroad, railroad corporation or common carrier may be liable, under the provisions of this article, in any court of this state of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies at the same time. In any such action brought for the recovery of damages, the court before whom the same shall be pending may compel any director, officer, receiver, trustee or agent of the defendant in such suit to attend, appear and testify in such case and may compel the production of the books and papers of such railroad, railroad corporation or common carrier party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person or witness from testifying or producing said books and papers; but such evidence or testimony shall not be used against such person in any way, on the trial of any criminal proceedings. [1897, ch. 115, § 22; R. C. 1899, § 3038.]

§ 4351. Appeals. Power of court to modify orders appealed from. Any railroad, railroad corporation or common carrier subject to the provisions of this article, or any other person interested in the order made by the commissioners of railroads may appeal to the district court of the proper county in the judicial district of this state from which the complaint arose, and which is the subject and basis of the order, from any order made by the commissioners of railroads regulating or fixing its tariffs of rates, fares, charges or classifications, or from any other order made by said commissioners under the provisions of this article by serving a notice in writing upon the secretary of said commissioners, or any one of said commissioners, within twenty days after such railroad, railroad corporation or common carrier shall receive notice from such commissioners of the making and entry of such order. If the order appealed from does not regulate or fix the tariff of rates, fares or charges, the district court to which the appeal is taken may in its discretion suspend the operation and effect of the order appealed from, pending such appeal. The district courts of this state shall be deemed to be always in session for the purpose of hearing and determining all appeals taken under the provisions of this article. The party taking such appeal may bring the same on for hearing and determination at any time after taking such appeal, upon serving a notice to that effect upon any one of the commissioners or their secretary at least ten days prior to the day set for such hearing. The district court shall, upon the hearing of such appeal, receive and consider such evidence as may be adduced by either party and shall rescind, modify or alter said order appealed from in such manner as may be equitable and just. Any railroad, railroad corporation, common carrier, the commissioners of railroads or any party interested in the decision of said court may appeal from the decision of the district court to the supreme court of this state by serving a notice of such appeal upon the opposite party within twenty days after the rendition of such decision and service of notice thereof. For the purpose of hearing such appeal the supreme court shall be deemed to be in session, and appeals to it may be heard summarily by either party serving upon the other a notice of hearing at least fifteen days before the day fixed for such hearing. When evidence has been taken before the district court such evidence shall be signed by the judge of said district court, the party presenting such evidence to said judge for signature, giving the other party five days' notice of the time and place for such presentation. The evidence signed as aforesaid shall become a part of the record in the case, and upon an appeal to the supreme court being taken as hereinbefore mentioned shall be transmitted by the clerk of the district court to the supreme court, together with all the records and files in the case. The supreme court may reverse, affirm or modify the decision of the district court as may seem equitable and just. [1897, ch. 115, § 22; R. C. 1899, § 3039.]

§ 4352. **Penalty against individuals.** Except as otherwise specially provided in this article, and unless relieved from the consequence of a violation of the law, as provided in section 4357, any railroad, railroad corporation or common carrier subject to the provisions of this article, or any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for, or employed by it who alone or with any other corporation, company, person or party shall willfully do, or cause to be done, or shall willingly suffer or permit to be done any act, matter or thing in this article prohibited or declared to be unlawful or who shall aid and abet therein, or shall willfully omit or fail to do any act, matter or thing in this article required to be done or shall cause or willingly suffer, or permit any act, matter or thing so directed or required by this article to be done, not to be so done, or shall aid or abet any such omission, or failure, or shall be guilty of any infraction of this article, or shall aid or abet therein, shall be deemed guilty of a misdemeanor and shall upon conviction thereof in any district court of this state of competent jurisdiction be subject to a fine of not to exceed five thousand dollars and not less than five hundred dollars for each offense. [1897, ch. 115, § 23; R. C. 1899, § 3040.]

§ 4353. **Inquiry by commissioners.** It shall be the duty of, and the board of railroad commissioners of this state shall have the authority to, inquire into the management of the business of all railroads, railroad corporations and common carriers subject to the provisions of this article, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from them full and complete information necessary to enable the said commissioners to perform the duties and carry out the objects for which said board was created and which are contemplated by this article; and for the purpose of this article the said commissioners shall have power to require the attendance and testimony of witnesses and the production of books, papers, tariffs, schedules, contracts, agreements and documents relating to any matter under investigation, and to that end may invoke the aid of any court of competent jurisdiction in this state in requiring the attendance and testimony of witnesses and the production of books, papers and documents under the provisions of this section. [1897, ch. 115, § 24; R. C. 1899, § 3041.]

§ 4354. **Proceedings when subpenas disobeyed.** Any court of this state within the jurisdiction of which such inquiry is carried on, shall in case of contumacy, or refusal to obey a subpena, or other process issued to any railroad, railroad corporation or common carrier or person subject to the provisions of this article, or other persons, issue an order requiring such railroad, railroad corporation, common carrier or other person to appear before said commissioners (and produce books and papers if so ordered), and give evidence touching or in relation to the matter in question; and any failure to obey such order of the court shall be punished by such court as a contempt thereof; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person or witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding. [1897, ch. 115, § 24; R. C. 1899, § 3042.]

§ 4355. **Complaint.** Any person, firm, corporation or association, or any mercantile, agricultural or manufacturing society, or any body politic or municipal organization, complaining of anything done, or omitted to be done, by any railroad, railroad corporation or common carrier subject to the provisions of this article, in contravention of the provisions thereof, may apply to said commissioners by petition which shall briefly state the facts, whereupon a statement of the complaint thus made with the damages, if any are alleged, shall be forwarded by the said commissioners to such railroad, railroad corporation or common carrier, who shall be called upon to satisfy the complaint,

or to answer the same in writing within a reasonable time to be specified by the commissioners. If such railroad, railroad corporation or common carrier within the time specified shall make reparation for the injury alleged to have been done or shall correct the wrong complained of, it shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If it shall not satisfy the complaint, within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the said commissioners to investigate the matters complained of in such manner and by such means as said commissioners shall deem proper, and said commissioners whenever they may have sufficient reason to believe that any railroad, railroad corporation or common carrier is violating any of the provisions of this article shall at once institute an inquiry in the same manner, and to the same effect, as though complaint had been made. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant or petitioner. [1897, ch. 115, § 25; R. C. 1899, § 3043.]

§ **4356. Findings of board in writing.** Whenever an investigation shall be made by said commissioners, as provided by this article, it shall be their duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the commissioners are based, together with its or their recommendation or orders as to what reparation, if any, should be made by the railroad, railroad corporation or common carrier to any party or parties, who may be found to have been injured; and such finding so made shall thereafter in all judicial proceedings be deemed and taken as prima facie evidence as to each and every fact found. All reports of investigations made by such commissioners shall be entered of record, and a copy thereof shall be furnished to the party who may have complained and any other person or persons directly interested, and to any railroad, railroad corporation or common carrier that may have been complained of. [1897, ch. 115, § 26; R. C. 1899, § 3044.]

§ **4357. Report to common carrier, if findings against.** If in any case in which an investigation shall be made by said commissioners it shall be made to appear to the satisfaction of the commissioners, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this article, or of any law cognizable by said commissioners, by any railroad, railroad corporation or common carrier, or that any injury or damages have been sustained by the party or parties complaining, or by other parties aggrieved, in consequence of any such violation it shall be the duty of said commissioners forthwith to cause a copy of their report in respect thereto to be delivered to such railroad, railroad corporation or common carrier, together with a notice to said railroad, railroad corporation or common carrier, to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time to be specified by the commissioners; and if within the time specified it shall be made to appear to the commissioners that such railroad, railroad corporation or common carrier has ceased from violation of such law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the commissioners, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the commissioners, and the said railroad, railroad corporation or common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law. [1897, ch. 115, § 27; R. C. 1899, § 3045.]

§ **4358. Enforcement of orders.** Whenever any railroad, railroad corporation or common carrier, subject to the provisions of this article, shall violate or refuse or neglect to obey any lawful order as to passenger, freight or property rates or fares, or as to any requirement of the said board of commissioners of railroads, it shall be the duty of said commissioners and lawful

for any company or person interested in such order or requirement, to apply in a summary way by petition to the district court in any county of this state in which the railroad, railroad corporation or common carrier complained of has its principal office, or in any county through which its line or road passes or is operated, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be. [1897, ch. 115, § 28; R. C. 1899, § 3046.]

Court has power to review orders of commissioners before enforcement. Tompkins v. Ry. Co., 11 S. D. 282, 77 N. W. 104.

§ 4359. **Power of court.** The said court shall have power to hear and determine the matter, on such notice to the party complained of as the court shall deem reasonable; and such notice may be served on such party, his or its officers, agents or servants, in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of said commissioners shall be prima facie evidence of the matter therein, or in any order made by them stated. [1897, ch. 115, § 28; R. C. 1899, § 3047.]

§ 4360. **Further powers. Appeals to supreme court.** If it be made to appear to such court on such hearing, or on the report of any such person or persons that the order or requirement of said commissioners drawn in the question, has been violated or disobeyed, it shall be the duty of such court to issue a writ of injunction, or other proper process, mandatory or otherwise, to restrain such railroad, railroad corporation or common carrier from further continuing such violation or disobedience of such order or requirement of said commissioners and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such courts to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such railroad, railroad corporation or common carrier or against one or more of the directors, officers or agents of the same, or against any owner, lessee, trustee, receiver or other person failing to obey such writ, writ of injunction or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such railroad, railroad corporation or common carrier or other person so disobeying such writ of injunction or other process, mandatory or otherwise, to pay such sum of money not exceeding for each corporation, carrier or person in default, the sum of one thousand dollars for every day after a day to be named in the order that such corporation, carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall, upon the order of the court, be paid into the treasury of the county in which the action was commenced, and one-half thereof shall be transferred by the county treasurer to the state treasury and the payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order, in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree in personam in such court, saving to the commissioners and any other party or person interested the right to appeal to the supreme court of the state under the same regulations now provided by law in relation to appeals to said court as to security for such appeal, except that in no case shall security for such appeal be required when the same is taken by said commissioners; but no appeal to said supreme court shall operate to stay or supersede the order of the court, or the execution of any writ or process thereon; and such

court may in every such matter order the payment of such costs and attorney fees as shall be deemed reasonable. [1897, ch. 115, § 28; R. C. 1899, § 3048.]

§ **4361. Attorney general to prosecute.** Whenever any such petition shall be filed or presented, or be prosecuted by the said commissioners, or by their direction, it shall be the duty of the attorney general of the state to prosecute the same, and in such prosecution he shall have the right to have the assistance of any state's attorney of the county in which any such proceedings are instituted, and it is hereby made the duty of any such state's attorney to render such assistance; and the costs and expenses on the part of said commissioners of any such prosecution, or proceeding in court, shall be paid out of the general fund of the state under the approval of the attorney general, governor, and state auditor. [1897, ch. 115, § 28; R. C. 1899, § 3049.]

§ **4362. Proceedings of commissioners.** The said board of commissioners of railroads may in all cases conduct its proceedings when not otherwise particularly prescribed by law, in such manner as will best conduce to the proper dispatch of business, and to the ends of justice. A majority of the commissioners shall constitute a quorum for the transaction of business, but no commissioner shall participate in any hearing or proceeding in which he has any direct personal pecuniary interest. Said commissioners may from time to time make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before them, including forms of notice and the service thereof, which shall conform as nearly as may be to those in use in courts of this state. Any party may appear before said board of commissioners and be heard in person or by attorney. Every vote and official action of said board of commissioners shall be entered of record and its proceedings shall be public upon the request of either party of any person interested. Said board of commissioners of railroads shall have an official seal, which shall be judicially noticed, and every commissioner shall have the right to administer oaths and affirmations in any proceeding pending before said board. [1897, ch. 115, § 33; R. C. 1899, § 3050.]

§ **4363. Annual report.** The said commissioners of railroads shall, on or before the first Monday in December in each year, make a report to the governor of their doings for the preceding year, containing such facts, statements and explanations as will disclose the workings of the system of railroad transportation in this state, and its relation to the general business and prosperity of the citizens of the state, and such suggestions and recommendations in respect thereto as may to them seem appropriate. Said report shall also contain, as to every railroad, railroad corporation or common carrier doing business in this state:

1. The total number of miles of main line and branches owned or operated.
2. The total number of miles of main line and branches owned or operated in each county within this state.
3. The total mileage of sidetracks within each county or taxing district in this state.
4. The amount of its capital stock issued.
5. The amount paid therefor.
6. The manner of the payment of the same.
7. The dividends paid.
8. The surplus fund, if any.
9. The number of stockholders.
10. The amount of its preferred stock, if any, and the condition of its preferment.
11. The amount of its funded debt and the rate of interest paid thereon.
12. The amount of its floating debt and the interest paid thereon.
13. The amount expended for improvements each year, and how and where expended, and the character of the improvement made.

14. The earnings and receipts from each branch of its business and from all sources.

15. The operating and other expenses.

16. The balances of profits and losses.

17. The cost and actual present cash value of its franchises, road and equipment, including permanent way, buildings and rolling stock, all real estate used exclusively in operating the road, and all fixtures and conveniences for transacting its business.

18. The estimated value of all other property owned by such corporation with a schedule of the same, not including lands granted in aid of its construction.

19. The number of acres originally granted in aid of construction of its road by the United States or by this state, the number of acres of such land remaining unsold.

20. A classified list of its officers and directors, with their respective places of residence and the salaries paid to each class.

21. The number of its employes, classified, and the salaries paid each class.

22. The average amount of tonnage that can be carried over each road in the state with an engine of given power.

Such additional statistics of the road and of its transportation business for the year as may, in the judgment of the commissioners be necessary and proper for the information of the legislative assembly, or as may be required by the governor. Such reports shall exhibit and refer to the condition of such corporation and the details of its transportation business transacted during the year ending June thirtieth. To enable said commissioners to make such a report, the president or managing officer of each railroad, railroad corporation or common carrier doing business in this state shall annually make to the said commissioners, on the fifteenth day of the month of July, such returns in the form which they may prescribe as will afford the information required for their said official report; such returns shall be verified by oath of the officer making them, and any railroad, railroad corporation or common carrier whose return shall not be made as herein prescribed by the fifteenth day of July, shall be liable to a fine of five hundred dollars for each and every day after the sixteenth day of July that such returns shall be willfully delayed or refused. [1897, ch. 115, §§ 2, 3; R. C. 1899, § 3051.]

§ **4364. Examination of books of officers.** The said commissioners shall have power, in the discharge of the duties of their office, to examine any of the books, papers or documents of any such person, company or corporation, or to examine under oath or otherwise any officer, director, agent or employe thereof, and any person who may willfully obstruct said commissioners in the performance of their duties, or who may refuse to give any information within his possession that may be required by said commissioners within the line of their duty, shall be deemed guilty of a misdemeanor, and shall be liable, on conviction thereof, to a fine not exceeding one thousand dollars, in the discretion of the court. [1897, ch. 115, § 4; R. C. 1899, § 3052.]

§ **4365. Special reports.** The commissioners of railroads are hereby authorized to require of any and all railroads, railroad corporations and common carriers, subject to the provisions of this article, such special reports, besides the annual reports hereinbefore required, as in the judgment of such commissioners shall be deemed necessary and reasonable. Such special reports shall be in such form and concerning such subjects and be from such sources as the commissioners shall reqiure, except as otherwise provided herein. The time when such special report shall be filed shall be fixed by the commissioners of railroads. Any railroad, railroad corporation or common carrier subject to the provisions of this article, which shall fail, neglect or refuse to make any of the special reports provided for herein by the date fixed by

the commissioners of railroads shall be subject to, and pay a penalty in the sum of one hundred dollars for each and every day of delay in making such reports after the date fixed. [1897, ch. 115, § 34; R. C. 1899, § 3053.]

§ **4366. Special reports biennially.** It shall also at such times as the governor shall direct examine any particular subject connected with the condition and management of such railroads and report to him in writing its opinion thereon with its reasons therefor. Such board shall also investigate and consider what, if any, amendment or revision of the railroad laws of this state the best interests of the state demand and it shall make a special biennial report on such subject to the governor. All such reports made to the governor shall be by him transmitted to the legislative assembly at the earliest practicable time. [1890, ch. 122, § 18b; R. C. 1899, § 3054.]

§ **4367. Semi-annual reports on condition of bridges and ferries.** Every railroad, bridge corporation, or ferry company doing business in this state shall make semi-annual reports in each year to the commissioners of railroads as to the safety of their bridges and ferries. Whenever, in the judgment of the commissioners of railroads, it shall appear that any railroad, railroad corporation or common carrier fails in any respect or particular, to comply with the terms of its charter or the laws of the state, or whenever in their judgment any repairs are necessary upon its road, or any addition to its rolling stock, or any addition to or change of its stations or station houses, or any change in its rate or fares for transporting freight, property or passengers, or any change in the mode of operating its road and conducting its business, is reasonable and expedient in order to promote the security, convenience and accommodation of the public, said commissioners of railroads shall inform such railroad corporation of the improvements and changes which they adjudge to be proper, by a notice thereof in writing, to be served by leaving a copy thereof, certified by the commissioners' secretary, with any station agent, clerk, treasurer or any director of said corporation, and a report of the proceedings shall be included in the annual report of the commissioners to the governor. Nothing in this section shall be construed as relieving any railroad company or railroad corporation from its present responsibility or liability for damage to person or property. [1897, ch. 115, § 1; R. C. 1899, § 3055.]

§ **4368. Extortion. Penalty.** If any railroad, railroad corporation or common carrier, subject to the provisions of this article, shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers, property or freight of any description or for the use and transportation of any railroad car upon its track, or any of the branches thereof, or upon any railroad within this state which it has the right, license or permission to use, operate or control, or shall make any unjust and unreasonable charge prohibited in section 4327, the same shall be deemed guilty of extortion, and shall be dealt with as hereinafter provided, and if any such railroad, railroad corporation or common carrier shall be found guilty of any unjust discrimination as defined in section 4334 upon conviction thereof shall be dealt with as hereinafter provided. [1897, ch. 115, § 35; R. C. 1899, § 3056.]

§ **4369. Discrimination. Punishment.** If any such railroad, railroad corporation or common carrier shall charge, collect or receive for transportation of any passenger, property or freight of any description upon its railroad for any distance within this state a greater amount of toll or compensation than is at the same time charged, collected or received for transportation in the same direction of any passenger or like quantity of property or freight of the same class over a greater distance of the same railroad; or if it shall charge, collect or receive at any point upon its railroad a higher rate of toll or compensation for receiving, handling or delivering property or freight of the same class and quantity, than it shall at the same time charge, collect or

receive for the transportation of any passenger, freight or property of any description over its railroad a greater amount of toll or compensation than shall at the same time be charged, collected or received by it for the transportation of any passenger or like quantity of property or freight of the same class being transported in the same direction over any portion of the same railroad of equal distance; or if it shall charge, collect or receive from any person or persons a higher or greater amount of toll or compensation than it shall at the same time charge, collect or receive from any other person or persons for receiving, handling or delivering property or freight of the same class and like quantity, at the same point upon its railroad; or if it shall charge, collect or receive from any person or persons, for the transportation of any property or freight upon its railroad a higher or greater rate of toll or compensation than it shall at the same time charge, collect or receive from any other person or persons, for the transportation of the like quantity of property or freight of the same class, being transported from the same point in the same direction over equal distance of the same railroad; or if it shall charge, collect or receive from any person or persons, for the use and transportation of any railroad car or cars upon its railroad for any distance, a greater amount of toll or compensation than is at the same time charged, collected or received from any other person or persons for the use and transportation of any railroad car of the same class or number, for a like purpose, being transported in the same direction, over a greater distance of the same railroad; or if it shall charge, collect or receive from any person or persons, for the use and transportation of any railroad car or cars upon its railroad a higher or greater compensation in the aggregate than it shall at the same time charge, collect or receive from any other person or persons for the use and transportation of any railroad car or cars of the same class for a like purpose, being transported from the same original point in the same direction over an equal distance of the same railroad; all such discriminating rates, charges, collections or receipts, whether made directly or by means of any rebate, drawback or other shift or evasion, shall be deemed and taken against such railroad, railroad corporation or common carrier as prima facie evidence of the unjust discriminations prohibited by the provisions of this article; and it shall not be deemed a sufficient excuse or justification of such discrimination on the part of said railroad, railroad corporation or common carrier that the railway station or point at which it shall charge, collect or receive less compensation in the aggregate for the transportation of such passenger, property or freight, or for the use and transportation of such railroad car the greater distance than for the shorter distance is a railway station or point at which there exists competition with any other railroad or means of transportation. This section shall not be construed so as to exclude other evidence tending to show any unjust discrimination in freight and passenger rates. The provisions of this section shall extend and apply to any railroad, the branches thereof and any road or roads which any railroad, railroad corporation or common carrier has the right, license or permission to use, operate or control wholly or in part within this state; provided, however, that nothing herein contained shall be so construed as to prevent railroad corporations from issuing commutation, excursion or thousand mile tickets, provided the same are issued alike to all applying therefor. [1897, ch. 115, § 36; R. C. 1899, § 3057.]

§ 4370. **Discrimination as to quantity.** It shall be unlawful for any such railroad, railroad corporation or common carrier to charge, collect, demand or receive more for transporting a car of freight than it at the same time charges, collects, demands or receives per car for several cars of a like class of freight over the same railroad, for the same distance in the same direction, or to charge, collect, demand or receive more for transporting a ton of freight than it charges, collects, demands or receives per ton for several tons of freight under a carload of a like class of freight over the same railroad for

the same distance, in the same direction, or to charge, collect, demand or receive more for transporting a hundred pounds of freight or property than it charges, collects, demands or receives per hundred for several hundred pounds of freight under a ton of a like class of freight or property over the same railroad, for the same distance, in the same direction. All such discriminating rates, charges, collections or receipts, whether made directly or by means of any rebate, drawback or other shift or evasion, shall be deemed and taken against such railroad, railroad corporation or common carrier as prima facie evidence of the unjust discrimination prohibited by this article; provided, however, that for the protection and development of any new industry within the state, such railroad, railroad corporation or common carrier may grant concessions or special rates for any agreed number of carloads, but such special rates aforesaid shall first be approved by the board of commissioners of railroads, and a copy thereof filed in the office thereof. [1897, ch. 115, § 37; R. C. 1899, § 3058.]

§ 4371. **Penalty for discrimination.** Any such railroad, railroad corporation or common carrier guilty of extortion or making any unjust discrimination as to passenger or freight or other rates for the use and transportation of railroad cars or in receiving, handling or delivering freights or property, shall upon conviction thereof, be fined in any sum not less than one thousand dollars nor more than five thousand dollars for the first offense, and for every subsequent offense not less than five thousand dollars nor more than ten thousand dollars, such fine to be imposed in a criminal prosecution, as provided by law, or shall be subject to the liability prescribed in section 4372, to be recovered as therein provided. [1897, ch. 115, § 38; R. C. 1899, § 3059.]

§ 4372. **Forfeiture.** Any such railroad, railroad corporation or common carrier guilty of extortion or of making any unjust discrimination as to passenger, property or freight rate or rates for the use and transportation of railroad cars, or in receiving, handling or delivering freights or property shall forfeit and pay to the state of North Dakota not less than one thousand dollars nor more than five thousand dollars for the first offense and not less than five thousand dollars nor more than ten thousand dollars for every subsequent offense, to be recovered in a civil action by proceedings instituted in the name of the state of North Dakota. And the release from liability or penalty provided for in section 4357 shall not apply to either a criminal prosecution or a civil action brought under this article. [1897, ch. 115, § 39; R. C. 1899, § 3060.]

§ 4373. **Suits by commissioners.** Whenever said commissioners of railroads have good reason to believe that any railroad, railroad corporation or common carrier subject to the provisions of this article has been guilty of extortion or unjust discrimination and thereby become liable to the penalties prescribed in sections 4371 and 4372, it shall be their duty to immediately cause suits to be commenced and prosecuted against any such railroad, railroad corporation or common carrier. Such suits and prosecutions may be instituted in any county of this state through or into which the line of the railroad corporation sued for violation of this article may extend. And the court may in its discretion give preference to such suits over all other business except criminal cases. [1897, ch. 115, § 40; R. C. 1899, § 3061.]

§ 4374. **Free transportation. Reduced rates.** Nothing in this article shall apply to the carriage, storage or handling of property free or at reduced rates for the United States or this state, or municipal governments or for charitable purposes, or to and from fairs and expositions for exhibition thereat, or for the employes of such common carriers or their families, or private property or goods for the family use of employes of such common carriers, or the issuance of mileage, excursion or commutation passenger tickets. Nothing in this article shall be construed to prohibit any railroad, railroad corporation or common carrier from giving reduced passenger rates

to ministers of religion, or to prevent railroads from giving free carriage to their own officers and employes and their families or others and to persons in charge of live stock being shipped from the point of shipment to destination and return; and nothing in this article contained shall in any way abridge or alter the remedies now existing at common law, or by statute, but the provisions of this article are in addition to such remedies; provided, that no pending litigation shall in any way be affected by this article. [1897, ch. 115, § 41; R. C. 1899, § 3062.]

§ **4375. Cannot limit its common law liability.** Whenever any property is received by any common carrier subject to the provisions of this article to be transported from one place to another within this state it shall be unlawful for such common carrier to limit in any way, except as stated in its classification schedule herein provided for, its common law liability with reference to such property while in its custody as a common carrier as hereinbefore mentioned; such liability must include the absolute responsibility of the common carrier for the acts of its agents in relation to such property. [1890, ch. 122, § 3d; R. C. 1899, § 3063.]

§ **4376. Courts always open.** For the purposes of this article, except its penal provisions, the district courts and the supreme court of the state shall be deemed to be always in open session. [1890, ch. 122, § 16b; R. C. 1899, § 3064.]

§ **4377. Annual reports from all carriers.** The board of commissioners of railroads are hereby directed to require annual reports from all common carriers subject to the provisions of this article, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the commissioners may need information. Such annual reports shall, in addition to the information required by section 4363, contain such information in relation to rates or regulations concerning fares or freights and agreements, arrangements or contracts with express companies, telegraph companies, sleeping and dining car companies, fast freight lines and other common carriers, as the commissioners may require, with copies of such contracts, agreements or arrangements. [1890, ch. 122, § 17a; R. C. 1899, § 3065.]

§ **4378. Costs and expenses.** All costs and expenses actually incurred by or upon the order of the attorney general incident to any litigation arising in reference to the enforcement of orders of the board of commissioners of railroads or other litigation commenced by or in charge of said attorney general shall be paid out of the general fund of the state upon vouchers to be approved by the attorney general, governor and state auditor. [1899, ch. 131, § 1; R. C. 1899, § 3066.]

§ **4379. Pending litigation not affected by this article.** Nothing in this article contained shall in any way abridge or alter the remedies now existing at law or in equity, but the provisions of this article are in addition to such remedies. No pending litigation shall in any way be affected by this article. Witnesses summoned before the commissioners of railroads shall be paid the same fees and mileage as are paid witnesses in the district court. All expenses of the commissioners of railroads in making an investigation or examination in any other place than the city of Bismarck shall be allowed and paid out of the state treasury on the presentation of itemized vouchers therefor approved by the chairman of the commission and the state auditor. [1890, ch. 122, § 18c; R. C. 1899, § 3067.]

§ **4380. Grain to be shipped without discrimination.** Any railroad company doing business in this state, when requested by any person wishing to ship grain on its road, shall receive and transport such grain in bulk, and permit the same to be loaded either on its track adjacent to its depot, or at any warehouse or sidetrack at any station or siding without discrimination or distinction as to the manner or condition in which such grain is offered

for transportation, or as to person, corporation, warehouse, elevator or place where, or to which it may be consigned and shall receive the same in carload lots from wagons, sleighs or other vehicles on its sidetrack at any station the same as when offered from warehouses or elevators, allowing forty-eight hours' time for loading all cars, which time shall be held to embrace such time as car to be loaded is placed and kept by such railroad company in a convenient and proper place for loading; and it shall not be held a proper place for loading unless such car can be reached by teams or other suitable means of conveying property, after the same have been loaded, whether at sidetrack, elevator, warehouse or depot, without unnecessary delay, proceed to ship the same to the place where the same is consigned. [1899, ch. 110, § 5; R. C. 1899, § 3068; 1903, ch. 145.]

§ 4381. **Track from elevator to railroad.** It shall be lawful for the owner of any elevator, warehouse or mill at any station on the line or at the termination of any railroad in this state to construct from such elevator, warehouse or mill a railroad track to the track of any railroad company and to connect with the same by switch at his own expense, and it shall be the duty of any such railroad company to allow such connection. Such side tracks and switch shall at all times be under the control and management of and kept in repair by such railroad company; provided, that the party for whose benefit such side track and switch shall be constructed, shall pay to such railroad company the actual cost of maintaining such side track and switch, which payment shall be made monthly, and in case such payment shall not be made as provided, then the obligations of this section upon such railroad company shall cease and be inoperative as against it until such costs and expenses are fully paid. [1889, ch. 110, § 6; R. C. 1899, § 3069.]

§ 4382. **Side tracks adjacent to coal mines.** Whenever any person, owning or operating any coal mine within this state, from which not less than fifty cars of coal have been shipped from any one station over any portion of any railroad within the limits of the state shall petition any such railroad company to build a side track or spur at least three hundred feet in length adjacent to such mine it shall then be the duty of such railroad company to build, equip and operate such side track or spur; provided, that such spur is not nearer than two miles from any station already in operation; provided, further, that any person opening a coal mine within two miles of any station may petition for a side track or spur and by executing an indemnity bond in favor of such railroad company in the sum of two thousand dollars, conditioned on the agreement that such person will ship within one year after the completion of such spur or side track not less than one hundred car loads of coal and when such bond is duly executed with two sureties, approved by the county judge of the county wherein such side track is situated, such railroad company shall within sixty days build, equip and operate such side track or spur as provided for in this section. And the commissioners of railroads shall have power to locate such side track or spur and order it properly provided with platforms and other conveniences for loading coal and other commodities thereat. [1890, ch. 128, § 1; R. C. 1899, § 3070.]

§ 4383. **Penalty.** Any neglect or refusal to comply with any part of the provisions of the last section within fifteen days after being requested in writing by the person operating the coal mine or by the commissioners of railroads shall subject such railroad company to a forfeiture of fifty dollars per day for each and every day such railroad company shall neglect or refuse to comply with the provisions of the last section, to be recovered by the person affected by such neglect or refusal; provided, that no railroad company shall be compelled to put in a side track between the fifteenth day of November and the fifteenth day of May of any year when it cannot be done without grading. [1890, ch. 128, § 2; R. C. 1899, § 3071.]

§ 4384. Time to remove property from cars. Any consignee, or person entitled to receive the delivery of any freight shipped to him in car load lots, by any railroad company, shall have twenty-four hours free of expense after notice of arrival by the company to the consignee or person entitled to receive the same in which to remove the same from the cars of such railroad company, which twenty-four hours shall be held to embrace such time as the car containing such property is placed and kept by such railroad company in a convenient and proper place for unloading and it shall not be held to be in a proper place for unloading unless it can be reached with teams or other suitable means for removing the property from the cars and reasonably convenient to the depot of the company at which it is accustomed to receive and unload merchandise consigned to that station or place. [1889, ch. 110, § 12; R. C. 1899, § 3071a.]

§ 4385. Stop over rates on cars. Whenever any railroad company doing business in this state as a common carrier shall ship any car or cars of freight over any of its railway lines or branches thereof, which car or cars contain freight to any intermediate point or points, it shall be the duty of such railroad company to stop such car or cars at such point or points and the consignee of such freight shall be permitted to unload the same upon payment to such railroad company of the full freight rates from the shipping point to the terminal point of such car or cars and in addition thereto the sum of five dollars per car for each and every day such car or cars is or are delayed during such stop over; provided, the car or cars contain no perishable goods and are billed to one consignee, and in no case over one stop or stop over shall be made, nor shall said car or cars be opened but once for distributing goods at intermediate stations. [1895, ch. 95, § 1; R. C. 1899, § 3071b.]

§ 4386. Penalty. Every railroad company neglecting or refusing to comply with the provisions of the last section shall be liable to damages in the sum of twenty dollars for each and every day such railroad company neglects or refuses to comply with the provisions hereof, to be recovered by any person damaged by reason of such neglect or refusal in any court of competent jurisdiction. [1895, ch. 95, § 2; R. C. 1899, § 3071c.]

§ 4387. Railroads to build platforms. Every railroad company doing business in this state shall within sixty days after notice from the commissioners of railroads erect one or more platforms for the transfer of live stock, grain and other commodities from wagons or otherwise to cars at each and every station or siding designated in such notice; such platforms to be erected so as not to endanger life and property. If any railroad company after receiving notice as provided for in this section shall fail, refuse or neglect to erect platforms as required by this and the following section within the required sixty days the commissioners of railroads are authorized and empowered and it is made their duty to notify such railroad company to appear before them at a certain time and place and show cause, if any there is, why such commissioners should not issue an order requiring such railroad company to comply with the requirements of this section. The commissioners of railroads shall have power after such hearing to issue an order upon such railroad company commanding it to erect such platforms, if the commissioners shall upon such examination and hearing deem such platform necessary. Any notice required to be served upon any railroad company to carry out any of the provisions of this section or similar provisions relating to the enlarging of such platforms may be served upon any agent of said company within the state of North Dakota. [1899, ch. 128; R. C. 1899, § 3071d.]

§ 4388. Dimensions of platform. Each platform shall be not less than twelve feet wide and thirty-two feet long, extending four feet and six inches, or such height as shall be determined by the railroad commissioners above the rails of the track with suitable approaches to and from such platform to admit

of the driving of loaded teams thereon. [1890, ch. 123, § 2; 1892, Spl. H. B. 2, § 2; R. C. 1899, § 3071e.]

§ 4389. When platforms to be enlarged. The commissioners of railroads shall have power to order an enlargement of such platforms whenever petitioned to that effect and whenever the capacity of such platform is in their judgment clearly insufficient for the accommodation of the public. [1890, ch. 123, § 5; R. C. 1899, § 3071f.]

§ 4390. Platform scales. Every railroad company shall allow suitable scales to be erected either upon the platform or upon the grounds adjacent thereto, if upon their right of way, for weighing and shipping purposes. [1890, ch. 123, § 6; R. C. 1899, § 3071g.]

§ 4391. Penalty. Every railroad company neglecting or refusing to comply with the requirements of the last four sections shall be deemed guilty of a misdemeanor and be subject to a fine of not less than five hundred dollars for every thirty days such failure shall continue after notice as aforesaid. [1890, ch. 123, § 3; R. C. 1899, § 3071h.]

§ 4392. Y and other tracks to be provided. In all cases where any line of railroad shall cross or intersect any other line of railroad in this state on the same grade, it shall be the duty of each of the railroad companies owning or operating such intersecting railroad lines to provide at such crossing or intersection, when deemed necessary by the board of railroad commissioners, suitable and sufficient facilities, such as building Y or other tracks and connections for transferring cars and traffic of all kinds and classes, or cars from one such line of railroad to another, and to maintain the same and afford equal and reasonable facilities for the interchange of cars and traffic between the respective lines, the expense of constructing and maintaining such Y or track to be borne equally by each such railroad company, or in such proportion as they may agree upon, but in case either or both of said companies fail, neglect or refuse to provide such facilities after notice as provided in section 4393, it shall be the duty of the board of railroad commissioners in the name of the state of North Dakota to commence an action in any court of competent jurisdiction to compel such company or companies to provide such facilities; which action shall be commenced and prosecuted for the enforcement of the order and notice of said commissioners in accordance with the provisions of this chapter relating to the enforcement of the orders of such commissioners. [1899, ch. 130; R. C. 1899, § 3071i.]

§ 4393. Notice served on carrier in case of noncompliance. Upon the failure of any railroad companies to build or maintain Y or other tracks and suitable connections at railroad crossings in accordance with the last section it shall be the duty of the board of railroad commissioners to serve notice in writing upon such companies, requiring them to construct and maintain such Y or other tracks and connections within sixty days from the date of the service of such notice. [R. C. 1899, § 3071j.]

§ 4394. Penalty for noncompliance. Any railroad company that shall fail to comply with such notice shall be subject to a fine of one hundred dollars for each day during which it fails to comply after the expiration of the time specified in the notice and it shall be the duty of the attorney general or the state's attorney of any county in which such Y or other tracks are to be constructed and maintained upon demand of the board of railroad commissioners to commence and prosecute all actions necessary for the recovery of such fine. [R. C. 1899, § 3071k.]

§ 4395. Maximum coal rate. All railroad companies doing business as common carriers within the state of North Dakota shall not charge for the transportation of coal within said state a greater rate per ton than the following:

For the first five miles or fractional part thereof, thirty cents per ton.

For any distance over five miles and not to exceed fifteen miles, forty cents per ton.

For any distance over fifteen miles and not to exceed twenty-five miles, fifty cents per ton.

For any distance over twenty-five miles and not to exceed forty miles, sixty cents per ton.

For any distance over forty miles and not to exceed sixty miles, seventy cents per ton.

For any distance over sixty miles and not to exceed one hundred miles, seventy-five cents per ton.

For any distance over one hundred miles and not to exceed one hundred and fifty miles, eighty cents per ton.

For any distance over one hundred and fifty miles and not to exceed two hundred miles, ninety cents per ton.

For any distance over two hundred miles and not to exceed two hundred fifty miles, one dollar per ton.

For any distance over two hundred fifty miles and not to exceed three hundred miles, one dollar and ten cents per ton.

For any distance over three hundred miles and not to exceed three hundred fifty miles, one dollar and twenty cents per ton.

For any distance over three hundred fifty miles and not to exceed four hundred miles, one dollar and twenty-five cents per ton.

For any distance over four hundred miles and not to exceed four hundred fifty miles, one dollar and thirty cents per ton.

For any distance over four hundred fifty miles and not to exceed five hundred miles, one dollar and thirty-five cents per ton.

Provided, that the above mentioned rates shall be for carload lots only. [1893, ch. 101, § 1; 1895, ch. 93, § 1; R. C. 1899, § 3071l; 1903, ch. 146.]

§ **4396. Penalty for violation.** Any railroad company violating any of the provisions of the last section shall be subject to a fine of not less than twenty-five dollars per day for each and every day during which such violation shall continue, to be recovered by any person prejudiced or suffering loss or damage by such violation. [1893, ch. 101, § 2; 1895, ch. 93, § 2; R. C. 1899, § 3071m.]

§ **4397. Duty of attorney general.** It shall be the duty of the attorney general or of the state's attorney of any county in which an action arises against any railroad company for a violation of any of the provisions of section 4395, upon demand of the board of railroad commissioners to commence and prosecute all actions necessary for the enforcement of the provisions of such section. [1895, ch. 93, § 3; R. C. 1899, § 3071n.]

Article 11.—Transportation of Live Stock.

§ **4398. Minimum speed to be maintained.** It shall be the duty of every railroad, railroad corporation, railway company, express company, car company and of every common carrier other than by water, by whatever name it may be called or by whomsoever operated and which is wholly or in part engaged in the transportation of any kind of live stock by railroad within or to or from any point in this state, to transport any and all such live stock so by it being transported, with the utmost diligence, and to maintain within this state in all trains so transporting any such live stock an average minimum rate of speed of not less than twenty miles per hour from the time any such live stock is loaded upon or into its cars until such train reaches its destination, deducting only in the computation of such average minimum rate of speed such reasonable time as any such live stock may be necessarily delayed in unloading to feed, water and rest and in feeding, watering and resting and in reloading. [1903, ch. 144, § 1.]

§ **4399. Penalty for violation.** Every railroad, railroad corporation, railway company, express company, car company or common carrier other than by water, and the person or persons operating such common carrier as receiver, lessee or trustee violating any of the provisions of section 4398, shall be liable to the owner or owners of any live stock so being transported, in the sum of five dollars per car for each and every hour any car, wholly or in part loaded with any live stock, is detained beyond the time provided in said section, and, in addition thereto, every such railroad, railroad corporation, railroad company, express company, car company or common carrier, or the person or persons operating any such common carrier as receiver, lessee or trustee, shall be liable to such owner or owners of said live stock for all damages sustained on account of any such delay, to be collected in an action by such owner or owners in any court of competent jurisdiction in this state. [1903, ch. 144, § 2.]

Article 12.—Personal Injury.

§ **4400. Railroads liable for damages to employes.** Every railroad company organized or doing business in this state shall be liable for all damages done to any employe of such company, in consequence of any negligence of its agents, or by any mismanagement of its engineers, or other employes, to any person sustaining such damage; and no contract which restricts such liability shall be legal or binding. [1903, ch. 131.]

Article 13.—Miscellaneous.

§ **4401. Unlawful rides on cars.** It shall be, and is hereby declared unlawful for any person to enter upon, ride upon, or secure passage upon a railroad car or engine of any description other than a car commonly used exclusively for the carriage of passengers, with intent thereby to obtain a ride without payment therefor or fraudulently obtain carriage upon any such engine or car. It shall be, and is hereby declared unlawful for any person, excepting railway employes in the performance of their duty, to take passage or ride upon, or enter for the purpose of taking passage or riding upon the trucks, rods, brakebeams or any part of any car, locomotive engine or tender, not ordinarily and customarily used or intended for the resting place of a person riding upon and operating the same. [1899, ch. 127, §§ 1, 2; R. C. 1899, § 3072a.]

§ **4402. Penalty.** Any person violating any of the provisions of section 4401 shall be punished by imprisonment in the county jail for not less than ten days nor more than thirty days at hard labor, or by a fine of not less than ten dollars nor more than seventy-five dollars. [1899, ch. 127, § 3; R. C. 1899, § 3072a.]

§ **4403. Employes made peace officers.** All conductors, engineers, brakemen and other persons engaged or employed in the operation of cars and trains upon a railroad, are hereby constituted peace officers for the one purpose of enforcing the provisions of the preceding section; and all such persons are hereby given full authority, when so engaged or employed, to arrest any person violating any of the provisions of this article. Every person arrested by a conductor, brakeman, or other person exercising authority herein conferred, must be thereafter proceeded with in all respects as is or may be required by the law in cases of arrests made by other peace officers of the state, except that any person hereby authorized to make arrests may cause the person so arrested by him to be delivered to any sheriff or other peace officer within the state to be dealt with as provided by law; and the person so arrested may be taken before any magistrate of the county where the offense is committed. Nothing herein contained shall be construed to restrict,

in any way, any right, authority or privilege conferred by law, upon any other peace officer of the state within his lawful jurisdiction. [1899, ch. 127, §§ 4, 5, 6; R. C. 1899, § 3072b.]

§ **4404. No fees allowed.** No person authorized by the provisions of the preceding section to make arrests, except regular peace officers of the state, shall receive or be allowed any fees or expenses for so doing. [1899, ch. 127, § 7; R. C. 1899, § 3072c.]

CHAPTER 13.

WAGON ROAD CORPORATIONS.

§ **4405. How wagon road laid out.** When a corporation is formed for the construction and maintenance of a wagon road the road must be laid out as follows: Three commissioners must act in conjunction with the surveyor of the corporation, two to be appointed by the board of commissioners of the county through which the road is to run, and one by the corporation, who must lay out the proposed road and report their proceedings together with a map of the road to the board of commissioners of the county as provided in the succeeding section. [Civ. C. 1877, § 486; R. C. 1899, § 3073.]

Evidence of substantial compliance with statute and construction and maintenance for fifteen years prima facie evidence of ownership. Lawrence Co. v. D. & G. Toll-Road Co., 11 S. D. 74, 75 N. W. 817.

§ **4406. Map filed. Record of approval.** When the route is surveyed a map thereof must be submitted to and filed with the board of commissioners of each county through or into which the road runs, giving its general course, and the principal points to or by which it runs and its width, which must in no case exceed one hundred feet, and the board of county commissioners must either approve or reject the survey. If approved, it must be entered of record on the journal of the board; but the board of county commissioners must require the corporation, at its own expense, and the corporation must so change and open the highways so taken and used as to make the same as good as they were before the appropriation thereof; and must so construct all crossings of public highways over and by its road and its toll gates as not to hinder or obstruct the use of the same. [Civ. C. 1877, § 487; R. C. 1899, § 3074.]

§ **4407. Bridges and ferries. Tolls.** All wagon road corporations may bridge or keep ferries on streams on the line of their road and must do all things necessary to keep the same in repair. They may take such tolls only on their roads, ferries or bridges as are fixed by the board of commissioners of the proper county through which the road passes or in which the ferry or bridge is situated, subject, however, to the limitation of rates of ferriage prescribed in the general law upon ferries; but in no case must the tolls be more than sufficient to pay fifteen per cent per annum on the cost of construction after paying for repairs and other expenses for attending to the roads, bridges and ferries. If tolls, other than as herein provided are charged or demanded, the corporation forfeits its franchise and must pay to the party so charged one hundred dollars as liquidated damages. [Civ. C. 1877, § 488; R. C. 1899, § 3075.]

§ **4408. No tolls where public highway used.** When any highway or public road is taken and used by any wagon road corporation as a part of its road, the corporation must not place a tollgate on or take tolls for the use of such highway or public road by teamsters, travelers, drovers, or any one transporting property over the same. [Civ. C. 1877, § 489; R. C. 1899, § 3076.]

§ **4409. Toll rates posted.** The corporation must affix and keep up at or over each gate or in some conspicuous place so as to be conveniently read a printed list of the rates of toll levied and demanded. [Civ. C. 1877, § 490; R. C. 1899, § 3077.]

§ **4410. Passage prevented until tolls paid.** Each toll gatherer may prevent from passing through his gate persons leading or driving animals or vehicles subject to toll, until they shall have paid respectively, the tolls authorized to be collected. [Civ. C. 1877, § 491; R. C. 1899, § 3078.]

§ **4411. Penalty for receiving illegal toll.** Every toll gatherer who at any gate unreasonably hinders or delays any traveler or passenger liable to the payment of toll, or demands or receives from any person more than he is authorized to collect, for each offense forfeits the sum of twenty-five dollars to the person aggrieved. [Civ. C. 1877, § 492; R. C. 1899, § 3079.]

§ **4412. Passing around gate. Penalty.** Every person who, to avoid the payment of the legal toll, with his team, vehicle or horse turns out of a wagon, turnpike or plank road, or passes any gate thereon on the ground adjacent thereto, and again enters upon such road, for each offense forfeits the sum of five dollars to the corporation injured. [Civ. C. 1877, § 493; R. C. 1899, § 3080.]

§ **4413. Penalty for injuring road.** Every person who:

1. Willfully breaks, cuts down, defaces or injures any milestone or post on any wagon, turnpike or plank road; or,

2. Willfully breaks or throws down any gate on such road; or,

3. Digs up or injures any part of such road or anything thereunto belonging; or,

4. Forcibly or fraudulently passes any gate thereon without having paid the legal toll;

For each offense forfeits to the corporation injured the sum of twenty-five dollars in addition to the damages resulting from his wrongful act. [Civ. C. 1877, § 494; R. C. 1899, § 3081.]

§ **4414. How revenue applied.** The entire revenue from the road shall be appropriated:

1. To repayment to the corporation of the costs of its construction together with the incidental expenses incurred in collecting tolls and keeping the road in repair; and,

2. To the payment of the dividend among its stockholders, as provided in section 4407. When the repayment of the costs of construction is completed, the tolls must be so reduced as to raise no more than an amount sufficient to pay a dividend of twelve per cent per annum and incidental expenses and to keep the road in good repair. [Civ. C. 1877, § 495; R. C. 1899, § 3082.]

§ **4415. When mortgage valid.** The corporation may mortgage or hypothecate its road and other property for funds with which to construct or repair its roads, but no mortgage or hypothecation is valid or binding unless at least twenty-five per cent of the capital stock subscribed has been paid in and invested in the construction of the road and appurtenances and then only after an affirmative vote of two-thirds of the capital stock subscribed. [Civ. C. 1877, § 496; R. C. 1899, § 3083.]

§ **4416. Natural person like corporation.** When a wagon, turnpike or plank road is constructed, owned or operated by any natural person, this chapter is applicable to such persons in like manner as it is applicable to corporations. [Civ. C. 1877, § 497; R. C. 1899, § 3084.]

CHAPTER 14.

INSURANCE CORPORATIONS.

ARTICLE 1.—GENERAL PROVISIONS.

§ **4417. Terms defined.** When consistent with the context and not obviously used in a different sense the term "company" or "insurance company," as used herein, includes all corporations, associations, partnerships or individuals engaged as principals in the business of insurance; the word "domestic" designates those companies incorporated or formed in this state and the word "foreign" when used without limitation includes all those formed by authority of any other state or government. [R. C. 1899, § 3085.]

ARTICLE 2.—PROVISIONS COMMON TO ALL DOMESTIC INSURANCE COMPANIES.

§ **4418. Subject to what provisions of law.** All insurance companies now or hereafter incorporated or formed by authority of any law of this state, except when otherwise expressly provided, may exercise the powers and shall be subject to the duties and liabilities provided by this chapter. The general provisions of law relating to the powers, duties and liabilities of corporations shall apply to all incorporated domestic insurance companies, so far as such provisions are pertinent and not in conflict with other provisions of law relating to such companies. [R. C. 1895, § 3086.]

§ **4419. How and for what purpose formed.** Any number of persons, not less than seven, may form a corporation to carry on the business of insurance, either upon the stock or mutual plan, against loss or damage by fire, lightning, cyclone, tornado or hail, or the risks of inland navigation and transportation, or to make insurance upon the lives of persons and every insurance pertaining thereto, and against accidental injuries including the granting, purchasing and paying of annuities and indemnities and to transact fidelity insurance and corporate suretyship. An insurance company incorporated under the provisions of this chapter shall have power to make insurance of any of the kinds hereinbefore mentioned which shall have been expressed in its articles of incorporation. [1895, ch. 69, § 1; 1891, ch. 73, § 1; R. C. 1895, § 3087.]

§ **4420. Articles. Contents.** The articles of incorporation shall set forth in addition to what is required to be set forth in section 4173 the kind of insurance proposed to be made and whether on the stock or mutual plan, the period for the commencement and termination of its fiscal year and the period for which it is incorporated, not to exceed thirty years, and shall be filed in the office of the commissioner of insurance. Any name not previously in use by an existing corporation may be adopted, but the words "insurance company," or, if the business is to be conducted upon the mutual principle, the words "mutual insurance company" shall constitute a part of such name. No certificate shall be granted by the insurance commissioner, as hereinafter provided, if, in his judgment, the name adopted too closely resembles the name of an existing corporation, or is liable to mislead the public. [1885, ch. 69, § 4; R. C. 1895, § 3038.]

§ **4421. Qualification of directors. Residence.** One-third of the directors and all of the executive officers of a domestic insurance company must be residents of this state and each of the directors of such a company, if it has a capital stock, must be the owner in his own right of stock of such company worth at par at least five hundred dollars. [1885, ch. 69, § 4; R. C. 1895, § 3089.]

§ 4422. Examination of articles by attorney general. Examination by commissioner of insurance. Certificate. The articles of incorporation shall be examined by the attorney general and if found conformable to this article and not inconsistent with the constitution and laws of this state, shall be certified by him to the commissioner of insurance, who shall thereupon make an examination to ascertain whether the company has in all respects complied with the requirements of law, according to the nature of the business proposed to be transacted by it and if satisfied by such examination that the corporation has complied with the law he shall deliver to such corporation a certified copy of the articles of incorporation and a certificate to the effect that such corporation has complied with all requirements of law, which, on being filed in the office of the register of deeds of the county where the principal office of the corporation is located, shall be its authority to commence business and issue policies; and such certified copy of the articles of incorporation and of such certificate may be used for or against such company with the same effect as the originals, and shall be conclusive evidence of the fact of the organization of such corporation. [1885, ch. 69, § 11; R. C. 1895, § 3090.]

Applications are required before certificate to do business can issue. Montgomery v. Harker, 9 N. D. 527, 84 N. W. 369.

§ 4423. Reinsurance. Any domestic insurance company shall have power to effect reinsurance of any risks taken by it. [1885, ch. 69, § 2; 1889, ch. 69, § 1; R. C. 1895, § 3091.]

§ 4424. Limitation on trade. No company organized under this chapter shall, directly or indirectly, deal or trade in buying or selling any goods, wares, merchandise or other commodities whatever, except such as may have been insured by such company and are claimed to be damaged by reason of the risk insured against. [1885, ch. 69, § 5; R. C. 1895, § 3092.]

§ 4425. Limitation on purchase and conveyance of real estate. No domestic insurance company shall purchase, hold or convey real estate except for the purpose and in the manner herein set forth, to wit:

1. Such as shall be requisite for its convenient accommodation in the transaction of its business; or,
2. Such as shall have been mortgaged to it in good faith as security for loans previously contracted, or for money due; or,
3. Such as shall have been conveyed to it in satisfaction of debts previously contracted in legitimate business, or for money due; or,
4. Such as shall have been purchased at sales upon judgment or mortgage foreclosures obtained or made for such debts. [1885, ch. 69, § 10; 1889, ch. 69, § 3; R. C. 1895, § 3093.]

§ 4426. Capital and surplus invested. A domestic insurance company may invest its capital, and the funds accumulated in the course of its business, or any part thereof, in bonds or mortgages on improved unincumbered real estate within this state, or within any state in which such company is or becomes duly authorized and licensed to transact business, worth double the sum loaned thereon, exclusive of buildings, unless such buildings are insured and the policies made payable to the company as its interest may appear, and also in the bonds of the state, or bonds or treasury notes of the United States, and also in the bonds of any county or incorporated city or school district in this state, or within any state in which said company is or becomes duly authorized and licensed to transact business, authorized to be issued by legal authority, and loan such capital and funds, or any part thereof, on the security of such bonds, treasury notes, or upon bonds or mortgages as aforesaid, and change and re-invest the same in like securities as occasion may from time to time require; but the surplus money over and above the capital stock of such insurance company may be invested in or loaned upon the pledge of bonds of the United States or any of the states, or stocks, bonds,

or other evidence of indebtedness of any solvent dividend paying institution incorporated under the laws of this state, or of any state in which such company is or becomes duly authorized and licensed to transact business, or of the United States, except its own stock; provided, always, that the market value of such stock, bonds or other evidence of indebtedness shall be at all times during the continuance of such loan at least ten per cent more than the amount loaned thereon. No domestic insurance company shall invest or loan its capital, or the funds accumulated in the course of its business, or any part thereof, except as provided in this section. [1885, ch. 69, § 9; 1889, ch. 69, § 2; R. C. 1895, § 3094; 1905, ch. 122.]

§ **4427. Dividends only from surplus profits. Profits, how estimated.** No domestic insurance company shall make any dividends except from the surplus profits arising from its business; and in estimating such profits there shall be reserved therefrom a sum equal to forty per cent of the amount of premiums on all unexpired risks and policies, which amount so reserved, is hereby declared to be unearned premiums; and there shall also be reserved all sums due the company on bonds, mortgages, stocks and book accounts of which no part of the principal or interest thereon has been paid during the year preceding such estimate of the profits, and upon which suit for foreclosure or collection has been commenced, or which after judgment has been obtained thereon shall have remained more than one year unsatisfied and on which interest shall not have been paid. [1885, ch. 69, § 13; R. C. 1895, § 3095.]

§ **4428. Penalty for violation of section 4426.** Any director or officer making or authorizing an investment or loan in violation of section 4426 shall be personally liable to the stockholders for any loss occasioned thereby. If a company is under liability for losses equal to its net assets and the president and directors, knowing it, make or assent to further insurance, they shall be personally liable for any loss under such insurance. If the directors allow to be insured on a single risk a larger sum than the law permits they shall be liable for any loss thereon above the amount they might lawfully insure, unless the excess is reinsured as required in section 4464. [R. C. 1895, § 3096.]

ARTICLE 3.—PROVISIONS PECULIAR TO DOMESTIC STOCK INSURANCE COMPANIES.

§ **4429. Capital stock required.** No stock company shall be incorporated under this chapter unless it has a capital stock of at least one hundred thousand dollars, twenty-five per cent of which must be paid in previous to the issuance of any policy and the residue within twelve months from the time of filing the articles of incorporation. No fire, cyclone, tornado, hail, marine, life or accident insurance company of any other state, territory or nation shall do business in this state unless it has a paid up capital stock of at least two hundred thousand dollars in available cash assets, over and above all liabilities for losses reported, expenses, taxes and reinsurance of all outstanding risks. [1885, ch. 69, § 6; R. C. 1895, § 3097.]

§ **4430. Opening book for subscriptions.** The individuals associated for the purpose of organizing an insurance company under this article, after having filed the articles of incorporation as required by section 4420, may open books for subscriptions to the capital stock of such corporation and keep the same open until the full amount specified in the articles of incorporation is subscribed. [1885, ch. 69, § 8; R. C. 1895, § 3098.]

§ **4431. Notice to company when capital stock is impaired.** Whenever it appears to the commissioner of insurance that the capital of a domestic insurance company is impaired to the extent of one-fourth or more on the basis fixed in section 4427 he shall notify the company that its capital is legally subject to be made good in the mode provided by section 4432, and if such company shall not within three months after such notice satisfy him

that it has fully repaired its capital or reduced its capital as provided in section 4433, he shall institute proceedings against it in accordance with section 4476. [R. C. 1895, § 3099.]

§ **4432. How capital made good. Forfeiture of shares.** Whenever the net assets of the company do not amount to more than three-fourths of its original capital, it may make good its original capital to the original amount by assessment of its stock. Shares on which such an assessment is not paid within sixty days after demand shall be forfeitable and may be canceled by a vote of the directors and new shares issued to make up the deficiency. If such company shall not within three months after notice from the commissioner of insurance to that effect make good its capital as aforesaid, or reduce the same as allowed by the next section, its authority to transact new business of insurance shall cease. [R. C. 1895, § 3100.]

§ **4433. Capital stock reduced. Examination and certificate of commissioner.** When the capital stock of a company is impaired, such company may upon a vote of a majority of the stock represented at a meeting legally called for that purpose, reduce its capital stock and the number of shares thereof to an amount not less than the minimum sum required by law. But no part of its assets and property shall be distributed to its stockholders. Within ten days after such meeting the company shall submit to the insurance commissioner a certificate setting forth the proceedings thereof and the amount of such reduction and the assets and liabilities of the company, signed and sworn to by its president, secretary and a majority of its directors. The commissioner shall examine the facts in the case, and if the same conform to law, and in his judgment the proposed reduction may be made without prejudice to the public he shall indorse his approval upon the certificate. Upon filing the certificate so indorsed the company may transact business upon the basis of such reduced capital, as though the same was its original capital, and its articles of incorporation shall be deemed to be amended to conform thereto; and the commissioner of insurance shall issue his certificate to that effect. Such company may by a majority vote of its directors after such reduction require the return of the original certificates of stock held by each stockholder in exchange for new certificates in lieu thereof for such number of shares as each stockholder is entitled to in the proportion that the reduced capital bears to the original capital. [1885, ch. 69, § 36; R. C. 1895, § 3101.]

§ **4434. Capital less than liabilities. Notice not to issue policies.** When the actual funds of a domestic life insurance company exclusive of its capital, are not of a net cash value equal to its liabilities the commissioner of insurance shall notify such company and its agents to issue no new policies until its funds become equal to its liabilities. [R. C. 1895, § 3102.]

§ **4435. Transfer of stock pending examination does not release liabilities.** No transfer of the stock of any domestic insurance company made during the pendency of any examination will release the party making the transfer from his liability for loss which may have occurred previous to the transfer. [1885, ch. 69, § 32; 1889, ch. 69, § 7; R. C. 1895, § 3103.]

Article 4.—Provisions Peculiar to Domestic Mutual Insurance Companies.

§ **4436. Amount of subscribed insurance required.** No policy shall be issued by a purely mutual insurance company until not less than two hundred thousand dollars of insurance in not less than one hundred separate risks have been subscribed for and entered on its books; but the provisions of this section shall not apply to county mutual insurance companies. [1885, ch. 69, § 41; R. C. 1899, § 3104.]

§ **4437. Insured a member. Notice of meetings.** Every person insured by a domestic mutual insurance company, other than life, shall be a member while his policy is in force, entitled to one vote for each policy he holds, and shall be notified of the time and place of holding its meetings by a written notice or by an imprint upon the back of each policy, receipt or certificate of renewal as follows, to wit:

The assured is hereby notified that by virtue of this policy he is a member of the.....mutual insurance company, and that the annual meetings of such company are held at its home office on the.....day of .....in each year at.....o'clock.

The blanks shall be duly filled and the same shall be deemed a sufficient notice. [R. C. 1895, § 3105.]

§ **4438. Same.** Every person insured by a domestic mutual life insurance company shall be a member entitled to one vote and one vote additional for each five thousand dollars of insurance in excess of the first five thousand dollars, and shall be notified of its annual meetings in the manner provided in the last section. [R. C. 1895, § 3106.]

§ **4439. Manner of voting by proxy.** Members may vote by proxy dated and executed within three months and returned and recorded on the books of the company three days or more before the meeting at which they are to be used; but no person shall be allowed as proxy or otherwise to cast more than fifty votes, and no officer shall himself, or by another, ask for, receive, procure to be obtained or use a proxy vote; provided, that this section shall not apply to state mutual hail insurance companies. [R. C. 1895, § 3107.]

§ **4440. Premium. Contingent liability stated on policy.** Mutual insurance companies shall charge and collect upon their policies the full mutual premium in cash or notes absolutely payable and may in their by-laws fix the contingent mutual liability of its members for the payment of losses and expenses not provided for by their cash funds; provided, that such contingent liability of a member shall not be less than a sum equal to and in addition to the cash premium written in his policy. The total amount of the liability of a policy holder shall be plainly and legibly stated upon the back of each policy. [R. C. 1895, § 3108.]

Policies issued before incorporation do not bind company. Statutory requirements must be complied with. Members not estopped to show ultre vires against illegal contract. Montgomery v. Whitbeck, 12 N. D. 385, 96 N. W. 327.

§ **4441. Reserve fund, how used.** Any mutual insurance company may at a meeting called for that purpose provide for the accumulation of a permanent fund by reserving a portion of the net profits to be invested and be a reserve for the security of the insured. Such reservation shall not exceed twenty per cent of said net profits and when the fund so accumulated amounts to two per cent of the sum insured by all policies in force the whole of the net profits shall be divided among the insured at the expiration of their policies. The permanent fund so accumulated shall be used for the payment of losses and expenses, whenever the cash funds of the company in excess of an amount equal to its liabilities are exhausted; and whenever the said fund is drawn upon, reservation of profits as aforesaid shall be renewed or continued until the limit of accumulation as herein provided is reached. [R. C. 1895, § 3109.]

§ **4442. Members entitled to share of net profits.** Every member of a mutual insurance company, except a mutual life insurance company, when his policy expires shall be entitled to be paid in cash his share of the net profits or surplus accrued while his policy was in force; and shall in like manner be liable to pay his proportionate part of any assessments, which may be laid by the company in accordance with law and his contract on account of losses and expenses incurred while he was a member. [R. C. 1895, § 3110.]

§ 4443. Distribution of surplus on life policies. Every domestic mutual life insurance company shall annually, or once in every two, three, four or five years, as it shall determine, and as may be conditioned in its policies make distribution of all surplus it may have accumulated since its last dividend of surplus. By such surplus is here intended all accumulations since its last distribution of surplus above its debts and reserve computed as provided in section 4427. The distribution shall be upon what is known as the contribution plan and each member upon whose policy no premium is overdue and unpaid shall be entitled to the amount contributed by his policy to such surplus. Policies which have become payable before the time when such distribution is made and after the date of the last previous distribution shall share in the same equitably and proportionally. [R. C. 1895, § 3111.]

§ 4444. Assessments, when and how made. Whenever a mutual insurance company other than life, is not possessed of cash funds above its reinsurance reserve sufficient for the payment of incurred losses and expenses it shall make an assessment for the amount needed to pay such losses and expenses upon its members liable to assessment therefor in proportion to their several liability. The company shall cause to be recorded in a book kept for that purpose the order for such assessment together with a statement which shall set forth the condition of the company at the date of the order, the amount of its cash assets and of the notes of its policy holders, or other contingent funds liable to the assessment, the amount the assessment calls for and the particular losses or other liabilities it is made to provide for. Such record shall be made and signed by the directors who voted for the order before any part of the assessment is collected and any person liable to the assessment may inspect and take a copy of the same. [R. C. 1895, § 3112.]

§ 4445. Making premium reserve good. Single assessment. Cancellation of policies. Double assessments. Reinsurance. When by reason of depreciation or loss of its funds, or otherwise, the cash assets of such a company after providing for its other debts are less than the required premium reserve upon its policies it shall make good the deficiency by assessment in the mode provided in the last section; or if the directors are of the opinion that the company is likely to become insolvent they may, instead of such assessment, make two assessments, the first determining what each policy holder must equitably pay or receive in case of withdrawal from the company and having his policy canceled, the second what further sum each must pay in order to reinsure the unexpired term of his policy at the same rate as the whole was insured at first. Each policy holder shall pay or receive according to the first assessment and his policy shall then be canceled, unless he pays the further sum determined by the second assessment, in which case his policy shall continue in force; but in neither case shall a policy holder receive or have credited to him more than he would have received on having his policy canceled by a vote of the directors under the by-laws. If within two months after such alternative assessments have become collectible the amount of the policies whose holders have settled for both assessments is less than two hundred thousand dollars, the company shall cease to issue policies; and all policies whose holders have not settled for both assessments shall be void and the company shall continue only for the purpose of adjusting the deficiency or excess of premiums among the members and settling outstanding claims. No assessment shall be valid against a person who has not been duly notified thereof, within two years after the expiration or cancellation of his policy. [R. C. 1895, § 3113.]

§ 4446. Directors personally liable for not making and collecting assessments. If the directors of any mutual insurance company shall neglect or omit for the space of six months to lay and use reasonable diligence to collect any assessment they are required to make, they shall be personally liable for all debts and claims then outstanding against the company, or that may accrue

until such assessment is laid and put in process of collection. If the treasurer of such company unreasonably neglects to collect an assessment made by order of the directors and to apply the same to the payment of the claims for which it was made, he shall be personally liable to the party having such claims for the amount of the assessment; and he may repay himself out of any money afterwards received for the company on account of said assessment. [R. C. 1895, § 3114.]

ARTICLE 5.—PROVISIONS PECULIAR TO MUTUAL HAIL INSURANCE COMPANIES.

§ 4447. **Foreign mutuals prohibited. Contracts void. Penalty.** No foreign insurance company incorporated upon the mutual plan shall directly, or indirectly, take any hail risk, or transact the business of hail insurance in this state. All contracts, notes, mortgages and other evidence of indebtedness made or taken in violation of this section are hereby declared void. [1903, ch. 109, §§ 1, 2.]

§ 4448. **Penalty.** Any person who violates any of the provisions of section 4447 or who procures or induces another to do so is guilty of a misdemeanor. [1903, ch. 109, § 3.]

§ 4449. **Mutual insurance companies engage in hail insurance, when.** No mutual insurance company hereafter organized under the laws of this state, or now or hereafter organized under the laws of any state or country, shall engage in the business of hail insurance in this state without first depositing and thereafter keeping on deposit with the treasurer of this state, the sum of twenty-five thousand dollars in money, or in lieu thereof bonds of this state or of the United States, of the par value of twenty-five thousand dollars. [1903, ch. 114, § 1.]

§ 4450. **Duties of state treasurer.** Said money or securities so deposited shall be and remain in the hands of the treasurer of this state as a fund to secure the payment of all losses occurring under all policies or contracts for hail insurance, made by such company in this state, or covering property situated within the state. And the treasurer of this state shall not permit said deposit or any part thereof to be withdrawn by said company from his custody except as hereinafter provided. [1903, ch. 114, § 2.]

§ 4451. **Penalty.** If any such company hereafter organized under the laws of this state shall violate any of the provisions of this article, the charter of said company or association shall thereupon be forfeited and it shall be the duty of the attorney general, on complaint of the commissioner of insurance, to take all legal proceedings necessary to have such forfeiture enforced and such company dissolved and its affairs wound up. [1903, ch. 114, § 3.]

§ 4452. **Relinquish business, how.** When any such company or corporation, having made the deposit as herein provided, desires to relinquish the transaction of the business of hail insurance in this state and withdraw such deposit, and shall file with the commissioner of insurance an application, under the oath of its officers, stating that all its liabilities arising under the contracts or policies above mentioned are paid, the commissioner of insurance shall thereupon publish notice of such application in a newspaper published at the capital of the state, twice a week for a period of three months, and after such publication, on his being satisfied by the exhibition of the books and papers of such company, and on examination by himself or a person appointed by him, that all liabilities under the policies or contracts herein mentioned have been fully paid and extinguished, the commissioner of insurance shall thereupon file a certificate to that effect with the treasurer of this state, who shall thereupon deliver such deposit to said company, or its assigns. If it shall appear from such application and examination that all the liabilities of such company have not been paid and extinguished, and that the amount of such deposit is more than equal to twice the amount

of such remaining liabilities, the treasurer shall thereupon pay to such company, or its assigns, a part of such deposit, retaining an amount equal to twice the amount of the liabilities so remaining. [1903, ch. 114, § 4.]

§ **4453. Companies collect interest.** So long as any deposit required by this article is kept good, and the depositing company is solvent, the state treasurer may permit the company to collect the interest on the securities so deposited, and from time to time to withdraw any such securities on depositing with him others of the value and character required by this article. [1903, ch. 114, § 5.]

§ **4454. Proceedings, who institute.** Any insurance company which has made such deposit, or the commissioner of insurance in the name of the state, or any person entitled to the benefit of such deposit, may at any time institute in the district court of Burleigh county legal proceedings against this state and other parties properly joined therein to enforce, administer or terminate the trust created by such deposit. The process in such suits shall be served upon the insurance commissioner of this state, who shall appear and answer in its behalf, and he and the treasurer of this state shall perform such orders and decrees as the court may make therein. [1903, ch. 114, § 6.]

ARTICLE 6.—PROVISIONS PECULIAR TO FIDELITY INSURANCE COMPANIES.

§ **4455. Fidelity insurance and corporate suretyship. Sole surety.** Any corporation organized under the laws of the state of North Dakota, or of any state of the United States, or of any foreign country, to transact the business of fidelity insurance and corporate suretyship, and authorized to do business in this state, as hereinafter provided, may make contracts of insurance to guarantee the fidelity of persons holding positions of trust in private or public employment or responsibility, and may, if accepted and approved by the court, magistrate, obligee or person competent to approve such bond act as surety upon the official bond or undertaking of any person or corporation, to the United States, to the state of North Dakota, or to any county, city, town, school district, court, judge, magistrate or public officer, or to any corporation or association, public or private; and may also act as surety upon any bond or undertaking to any person or corporation conditioned upon the performance of any duty or trust, or for the doing or not doing of anything in such bond specified, and to indemnify against loss any person who is responsible as surety upon a written instrument or otherwise, for the performance of the officers of any office, employment, contract or trust. When by law two or more sureties are required upon any obligation, any corporation qualified as herein provided is authorized to insure, and it may act as sole surety thereon, and may be accepted as such by the court, magistrate or other officer or person authorized to approve of the sufficiency of such bond or undertaking. [R. C. 1895, § 3115; 1903, ch. 113, § 1.]

§ **4456. Acceptance of such bond.** Whenever any bond, undertaking, recognizance or other obligation is, by law, or the charter, ordinance, rules or regulations of any municipality, board, body, organization, court, judge, or public officer, required or permitted to be made, given, tendered or filed with any surety or sureties, and whenever the performance of any act, duty or obligation or the refraining from any act, is required or permitted to be guaranteed, such bond, undertaking, obligation, recognizance or guaranty may be executed by a surety company, qualified under this chapter; provided, that such execution by such company of such bond, undertaking, obligation, recognizance or guaranty, shall be in all respects a full and complete compliance with every requirement of every law, charter, ordinance, rule or regulation; and such bond shall be valid and shall be accepted notwithstanding any requirement of law that such bond, undertaking, obligation, recognizance or guaranty shall be executed by one or more sureties, or that such sureties shall be residents or householders or freeholders, or either or

both, or possess any other qualifications, and all courts, judges, heads of departments, boards, bodies, municipalities and public officers of every character, shall accept and treat such bond, undertaking, obligation, recognizance or guaranty when so executed by such company, as conforming to and fully and completely complying with every such requirement, and every such law, charter, ordinance, rule or regulation. [1897, ch. 135, § 1; R. C. 1899, § 3115b; 1903, ch. 113, § 2.]

§ **4457. Expense of bond, how paid.** Any receiver, assignee, guardian, trustee, committee, executor, administrator or other fiduciary required by law or ordered by any court or judge to give a bond or other obligation as such, may include as a part of the lawful expense of executing his trust, such reasonable sum paid to a corporation authorized under the laws of this state so to do, for acting as surety on such bond, as may be allowed by the court in which the judge before whom he is required to account, not exceeding one per cent per annum, or fraction thereof, on the amount of such bond, and in all actions and proceedings a party entitled to recover disbursements therein shall be allowed, and may tax and recover such sum paid such corporation for executing any bond, recognizance or undertaking therein, not less than five dollars, nor more than one per cent per year, or fraction thereof, on the amount of the penalty or liability in such bond, recognizance or undertaking specified, while the same has been in force. [1897, ch. 36; R. C. 1899, § 3115a; 1903, ch. 113, § 3.]

§ **4458. Must comply with laws of state.** Every corporation not organized under the laws of the state of North Dakota, to be qualified to act as surety or guarantor, must comply with the requirements of every law of this state applicable to such company, and to foreign insurance companies doing business, thereunder; must be authorized under the laws of the state wherein incorporated, and under its charter to be surety upon such bond, undertaking, recognizance or obligation, must have fully paid up and safely invested an unimpaired capital of at least two hundred thousand dollars; must have good and available assets exeeding its liabilities, which liabilities, for the purpose of this article, shall be taken to be its capital stock, debts outstanding, and a premium reserve at the rate of fifty per centum of the current annual premiums on each outstanding bond or obligation of like character in force; must file with the commissioner of insurance a certified copy of its certificate of incorporation, a written application to be authorized to do business in this state, also with such application, and in each year thereafter, a statement, verified under oath, made up to December thirty-first preceding, stating the amount of its paid up cash capital, particularizing each item of investment, the amount of premiums upon existing bonds, undertakings and obligations of like character in force upon which it is surety, the amount of liability for unearned portion thereof, estimated at the rate of fifty per centum of the current annual premiums on such bond, undertaking, recognizance and obligation in force, stating also the amount of debts outstanding, obligations of all kinds, and such further facts as may be by the laws of this state required of such company in transacting business therein; and if such company be organized under the laws of any other state than this state, it must have on deposit with a state officer of one of the states of the United States not less than one hundred thousand dollars in securities prescribed by law, deposited with and held by such officer for the benefit of the holders of its obligations. It must also, by a duly executed instrument, filed in his office, constitute and appoint the commissioner of insurance of this state and his successors, its true and lawful attorney, upon whom all process in any action or proceeding against it may be served, and therein must agree that any process which may be served upon its attorney shall be of the same force and validity as if served upon the corporation, and that the authority thereof shall continue in force irrevocable, so long as any liability of the company remains out-

standing in this state. Service upon such attorney shall be deemed sufficient service upon the corporation. [1897, ch. 135, § 2; R. C. 1899, § 3115c; 1903, ch. 113, § 4.]

§ **4459. Domestic surety companies.** Every corporation organized under the laws of this state, and for the purpose in whole or in part of transacting the business of fidelity or corporate suretyship, must comply with the provisions of chapter 22 of the civil code and section 4480, and upon such corporation filing in the office of the commissioner of insurance a certificate issued by the state treasurer, to the effect that such corporation has complied with the provisions of section 4679, together with a certified copy of its articles of incorporation, and the payment of the proper fees therefor, the commissioner of insurance shall issue to such corporation a certificate, and shall issue to its agents certificates as provided in section 4171, which certificate shall be issued yearly on the filing by such corporation of a statement of its condition as of December thirty-first of the year last ending. [1897, ch. 135, § 3; R. C. 1899, § 3115d; 1903, ch. 113, § 5.]

§ **4460. Concurrent undertakings.** Whenever any bond, undertaking or other obligation is by law, or the charter, ordinances, rules and regulations of any municipality, board, body, organization, court or public officer, required or permitted to be made, given or filed as hereinbefore provided, and whenever the amount thereof is fixed by law or by the charter, ordinances, rules or regulations of any municipality, board, body, organization, court, judge or public officer, then two or more such bonds executed by corporations qualified under the laws of this state, and aggregating the amount so fixed or determined, may be accepted and shall be in all things treated as one bond or obligation, and in case of loss or liability thereunder, the amount of such loss or liability, chargeable against each such bond or undertaking, shall be the same proportion of the entire loss or liability, as such bond or obligation bears to the aggregate amount of the penalty or liability specified in all of such bonds, whether such proportion be stated therein or not. [1903, ch. 113, § 6.]

§ **4461. Relief from liability.** The surety, or the representative of any surety upon a bond of any officer or fiduciary, may apply by petition to the court wherein said bond is directed to be filed or which may have jurisdiction of the beneficiary thereunder, praying to be relieved from further liability thereon, and to require said officer or fiduciary to show cause why he should not account and said surety be relieved from such further liability as aforesaid, and the said principal be required to give a new bond, and thereupon and upon the filing of said petition, said court shall issue an order returnable at such time and place, and to be served in such manner as said court shall direct, and may restrain such officer or fiduciary from acting except in such manner as it may direct therein, to preserve the trust estate, and upon the return of such order to show cause, if the principal in the bond account in due form of law and file a new bond, duly approved; then said court must make an order releasing said surety filing the petition aforesaid from further liability upon the bond for any subsequent act or default of the principal, and in default of said principal this accounting and filing said new bond, the said court shall make an order directing such officer and fiduciary to account in due form of law within thirty days, and that if the trust fund or estate shall be found or made good, or properly secured in the manner directed by the court, such company shall be discharged from any and all further liabilities as such for the subsequent acts or omissions of the said officer or fiduciary after the date of the said surety being so relieved or discharged, and discharging said trustee, officer or other fiduciary. [1897, ch. 135, § 4; R. C. 1899, § 3115e; 1903, ch. 113, § 7.]

§ **4462. Report of taxes.** Every foreign corporation doing business in this state, under the provisions of this article, shall, at the time of making

the annual statement of business done as required by law, pay to the commissioner of insurance two and one-half per cent of the gross premiums, fees or charges received in this state during the preceding year upon all bonds or undertakings written by it, for or in behalf of any person in this state, and only upon and after the payment of such sum, the commissioner of insurance shall issue the annual certificate provided by law. [1903, ch. 113, § 8.]

ARTICLE 7.—PROVISIONS PECULIAR TO FOREIGN INSURANCE COMPANIES.

§ **4463. Conditions of admission. Articles and statement filed. Must be legally organized. Appoint commissioner its attorney for service. Resident agents.** No foreign insurance company shall directly or indirectly take any risk or transact the business of insurance in this state until:

1. It shall deposit with the insurance commissioner a certified copy of its articles of incorporation and a statement of its financial condition and business in such form and detail as he may require, signed and sworn to by its president and secretary or other proper officers.

2. It shall satisfy the insurance commissioner that it is fully and legally organized under the laws of its state or government to do the business it proposes to transact; that it has a fully paid up and unimpaired capital, exclusive of stockholders' obligations of any description, of an amount not less than is required by section 4429 and, if a mutual company, that its assets are not less than is required by section 4436, that such capital or net assets are well invested and immediately available for the payment of losses in this state; and that it insures on any single hazard a sum no larger than one-tenth of its net assets.

3. It shall by a duly executed instrument, filed in his office, constitute and appoint the commissioner of insurance and his successors its true and lawful attorney upon whom all process in any action or proceeding against it may be served and therein shall agree that any process which may be served upon its said attorney shall be of the same force and validity as if served on the company and that the authority thereof shall continue in force irrevocable so long as any liability of the company remains outstanding in this state. Service upon such attorney shall be deemed sufficient service upon the company. Whenever process against any foreign insurance company, doing business in this state, shall be served upon the commissioner of insurance, he shall forthwith mail a copy of such process, postage prepaid, and directed to such company at its principal place of business, or if it is a foreign company, to its resident manager in the United States, or to such other person as may have been previously designated by it by written notice filed in the office of the commissioner of insurance. As a condition of valid and effectual service the plaintiff shall pay to the commissioner of insurance at the time of service the sum of two dollars, which the plaintiff shall recover as taxable costs if he shall prevail in his action. The commissioner shall keep a record of all such process which shall show the time and hour of service.

4. It shall appoint as its agents in this state only residents thereof. [R. C. 1895, § 3116.]

ARTICLE 8.—PROVISIONS COMMON TO ALL INSURANCE COMPANIES.

§ **4464. Limit of risk.** No company organized under this chapter, or transacting business in this state shall expose itself to loss on any one risk or hazard to an amount exceeding ten per cent of its paid up capital, exclusive of any guarantee, surplus, or special reserve fund, unless the excess shall be reinsured in some other good reliable company. [1885, ch. 69, § 7; R. C. 1895, § 3117.]

§ **4465. Limit of risk in single city.** No fire insurance company shall insure in any one town or city, property, other than dwelling houses, to an amount exceeding its net assets, and when from any cause the company has at risk in any town or city an amount as aforesaid in excess of its net assets it shall forthwith by reinsurance or by cancellation of policies and return of unearned premiums thereon to the insured reduce the amount of the insurance to the authorized limit. But no policy shall be canceled under the provisions of this section until after notice to the holder. [R. C. 1895, § 3118.]

§ **4466. Annual statement. Publication thereof.** Every insurance company doing business in this state must transmit to the commissioner of insurance a statement of its condition and business for the year ending on the preceding thirty-first day of December, which shall be rendered not later than the first Monday of February in each year. Foreign insurance companies shall have until the following first day of December to transmit their statements of business, other than that taken in the United States. Such statements must be published at least three times in a newspaper of general circulation printed and published in each judicial district of the state in which such insurance company shall have an agency. Statements for publication shall be made out on blanks furnished by the commissioner of insurance and the certificate of authority of the commissioner of insurance for the company to do business in this state shall be published in connection with such statement. Proof of publication shall be filed with the commissioner of insurance in all cases within four months from the time of the filing of the annual statement. Such publications shall be made at the authorized rate for publishing legal notices. The commissioner of insurance shall select three newspapers of general circulation, published in each of the judicial districts, from which such companies shall select one in which such statements shall be published. [1899, ch. 102; R. C. 1899, § 3119.]

§ **4467. Contents of annual statement.** The annual statement required by the last section must be in form and state particulars as follows:

1. The name of the company and where located.
2. The amount of capital stock actually paid in cash.
3. The property or assets of the company, specifying:

(a) The value, as nearly as may be, of the real estate owned by the company.

(b) The amount of cash on hand in the office.

(c) The amount of cash on deposit in banks.

(d) The amount of cash in the hands of agents and in course of transmission.

(e) The amount of loans secured by bonds and mortgages, being first lien on real estate worth double the amount of the sum loaned thereon.

(f) The amount of stocks and bonds owned by the company, specifying the amount, number of shares, and the market value of each kind of stock on the day of making the statement.

(g) The amount of stock held by it as collateral security for loans with the amount loaned on each kind of stock, the par value and market value thereof on the day the statement is made.

(h) The amount of all other sums due the company.

4. The liabilities of such company, specifying:

(a) The amount of losses unpaid.

(b) The amount of claims for losses resisted by the company.

(c) The whole amount of unearned premiums on outstanding risks.

(d) The amount of dividends declared and due and remaining unpaid.

(e) The amount of dividends, if any, declared and not yet due.

(f) The amount of money borrowed and remaining unpaid, and the security, if any, given for the payment thereof.

(g) The amount of all other existing claims.

5. The income of the company during the preceding year, specifying:
(a) The whole amount of interest received, stating separately the amount of interest received on loans in the state of North Dakota.
(b) The whole amount of cash premiums received, stating separately the amount of premiums received on policies written in the state.
(c) The whole amount of income received from all sources.
6. Expenditures during the preceding year, specifying:
(a) The whole amount of losses paid during the preceding year stating how much of the same accrued prior and how much subsequent to the date of the preceding statement; also stating separately the amount of losses paid upon risks taken in this state and how much accrued prior and how much subsequent to the preceding statement.
(b) The amount of dividends paid during the preceding year.
(c) The whole amount of fees and commissions paid to officers and agents during the preceding year.
(d) The amount of taxes paid during the preceding year, stating separately the amount paid in this state.
(e) The amount of fees paid the commissioner of insurance of this state.
(f) The whole amount paid for salaries for officers and agents during the preceding year.
(g) The whole amount of all other expenditures.
7. Such statement shall further specify:
(a) The gross amount of risks taken during the preceding year, stating the amount in this state separately.
(b) The whole amount of risks outstanding.
(c) The whole amount of losses incurred during the year, including those claims not yet due, stating separately those incurred in this state.
(d) The number of agents in this state. [1885, ch. 69, § 17; R. C. 1895, § 3120.]

§ **4468. Statements verified. Duty of commissioner.** Such statements must be verified by the signature and oath of the president or vice president and of the secretary of a domestic insurance company, and by the manager or general agent of a foreign company doing business in this state; and it shall be the duty of the commissioner of insurance to cause the information contained in such statements to be arranged in a tabular form and printed annually for distribution to the companies doing business in this state and for transmission to the legislative assembly with his biennial report. [1885, ch. 69, § 19; R. C. 1895, § 3121.]

§ **4469. Statements of receivers.** It shall be the duty of all receivers of insurance companies on or before the thirtieth day of June of each year and at any other time, when required by the commissioner of insurance, to make and file annually statements of their assets and liabilities and of their income and expenditures in the same manner and form as the officers of such companies are required by law to make, and for refusal or neglect to make and file the same they shall be subject to the same penalty. [1885, ch. 69, § 27; R. C. 1895, § 3122.]

§ **4470. Inquiry into condition of companies.** The commissioner of insurance is authorized and empowered to address any inquiries to any insurance company doing or applying for permission to do business in this state in relation to its doings or condition or any other matter connected with its transactions and it shall be the duty of any such company so addressed to reply promptly in writing to any such inquiries. [1891, ch. 73, § 15; R. C. 1895, § 3123.]

§ **4471. Agents must not act without certificate.** No agent shall act for any insurance company directly or indirectly in taking risks or transacting the business of insurance without procuring from the commissioner of insurance a certificate of authority, stating that such corporation or company

has complied with all the requisites of this chapter. The statements and evidences of investment required by this chapter shall be renewed from year to year in such manner and form as are required by this chapter and the commissioner of insurance on being satisfied that the capital, securities and investments remain secure as hereinbefore provided shall furnish a renewal of the certificate as aforesaid. [1885, ch. 69, § 25; R. C. 1895, § 3124.]

Granting or revoking certificate discretionary with insurance commissioner. Such discretion cannot be controlled or reviewed by mandamus. State ex rel Dakota Hail Ass'n v. Carey, 2 N. D. 36, 49 N. W. 164.

Agent must have certificate of authority. State v. Hogan, 8 N. D. 301, 58 N. W. 1051.

Taking of applications necessary to formation of mutual insurance companies not violation. Montgomery v. Harker, 9 N. D. 527, 84 N. W. 369.

§ **4472. Examination before granting certificates. When domestic companies examined. Examination of foreign companies. Expenses.** Before granting certificates of authority to an insurance company to issue policies or make contracts of insurance the commissioner of insurance shall be satisfied by such examination and evidence as he sees fit to make and require that such company is duly qualified under the laws of the state to transact business therein. As often as once in two years he shall personally, or by his deputy or chief clerk, visit each domestic insurance company and thoroughly inspect and examine its affairs, especially as to its financial condition and ability to fulfill its obligations and whether it has complied with the law. He shall also make an examination of any such company whenever he deems it prudent to do so or upon the request of five or more of the stockholders, creditors, policy holders or persons pecuniarily interested therein who shall make affidavit of their belief, with specifications of their reasons therefor, that such company is in an unsound condition. Whenever he deems it prudent for the protection of policy holders in this state he shall in like manner visit and examine, or cause to be visited and examined by some competent person appointed by him for that purpose any foreign insurance company applying for admission, or already admitted, to do business by agencies in this state and such company shall pay the proper charges incurred in such examination, including the expenses of the commissioner or his deputy. For the purposes aforesaid the commissioner or person making the examination shall have free access to all books and papers of an insurance company that relate to its business and to the books and papers kept by any of its agents and may summon as witnesses and examine under oath the directors, officers, agents and trustees of any such company and any other persons in relation to its affairs, transactions and condition. [R. C. 1895, § 3125.]

§ **4473. Authority revoked for false statement. When revocation set aside.** If the commissioner of insurance has, or shall have at any time after examination, reason to believe that any annual statement or other report, required or authorized by this article made or to be made out by an officer or agent of any insurance company is false, it shall be the duty of said commissioner of insurance immediately to revoke the certificate of authority of such company and mail a copy of such revocation to such company, and to the agents thereof in this state and such company and its agents after such notice shall discontinue the issuance of any new policies or the renewal of any policy previously issued; and such revocation shall not be set aside nor any new certificate of authority be given until satisfactory evidence shall have been furnished to said commissioner of insurance that such company is in substance and in fact in the condition set forth in such statement or report and that all requirements of this article have been fully complied with. [1885, ch. 69, § 28; R. C. 1895, § 3126.]

§ **4474. Commissioner must ascertain net cash value of life policies.** The commissioner of insurance shall, at the expense of the company, as soon as practicable after statements are filed, proceed to ascertain the net cash

value of all life insurance policies in force. The commissioner of insurance may, however, accept such valuation from the proper officer of the company or the insurance officer of the state in which such company is located, should he deem it expedient so to do. When the actual funds of any life or accident insurance company doing business in this state are not of a net value equal to the net value of its policies according to the combined experience or actuaries' rate of mortality, with interest at four per cent per annum, it shall be the duty of the commissioner of insurance to give notice to such company and its agents to discontinue the issuance of new policies in this state until its funds have become equal to its liabilities, valuing its policies as aforesaid. Any officer or agent, who after such notice has been given issues or delivers a new policy from and in behalf of such company before its funds have become equal to its liabilities as aforesaid shall forfeit for each offense a sum not exceeding one thousand dollars. [1891, ch. 73, § 12; R. C. 1895, § 3127.]

§ **4475. Tax, how levied.** Every insurance company doing business in this state, except joint stock and mutual companies, organized under the laws of this state, shall at the time of making the annual statement of business done, as required by law, pay to the commissioner of insurance two and one-half per cent of the gross amount of premiums received in this state during the preceding year. Upon payment of such sum the commissioner of insurance shall issue the annual certificates provided by law. [1897, ch. 94; R. C. 1899, § 3127a.]

§ **4476. Authority of foreign or domestic company revoked, how.** If the commissioner of insurance is of opinion upon examination or other evidence that a foreign insurance company is in an unsound condition, or if it has failed to comply with the law, or if it, its officers or agents, refuse to submit to examination, or to perform any legal obligation in relation thereto, or if a life insurance company, that its actual funds, exclusive of its capital, are less than its liabilities, he shall revoke or suspend all certificates of authority granted to it or to its agents, and shall cause notifications thereof to be published three times, once in each week for three successive weeks, in some newspaper published at the seat of government and no new business shall thereafter be done by it or its agents in this state while such default or disability continues, nor until its authority to do business is restored by the commissioner; provided, further, that if any insurance corporation organized under the laws of any other state or country and having been authorized to transact business in this state, shall remove or make application to remove into any court of the United States any action or proceeding begun in any court of this state upon a claim or cause of action arising out of any business or transaction done in this state, or upon any contract made, executed or to be performed herein, the commissioner of insurance shall revoke all certificates of authority granted to such insurance corporation, or to its agents, and shall cause notifications thereof to be published three times, once in each week for three successive weeks, in some newspaper published at the seat of government, and no new business shall thereafter be done by it or its agents in this state until after the expiration of three years from the date of such last publication. If upon examination he is of the opinion that any domestic insurance company is insolvent, or has exceeded its powers or has failed to comply with any provisions of law, or that its condition is such as to render its further proceedings hazardous to the public or its policy holders, he shall apply to the district court of the county in which the principal office of the company is located to issue an injunction restraining it in whole or in part from further proceeding with its business. The court or judge may, in its discretion, issue an injunction forthwith or upon notice and hearing thereon, and after a full hearing of the matter may dissolve or modify such injunction or make it perpetual, and may make all orders and decrees needful in the premises and may appoint agents or receivers to take

possession of the property and effects of the company and to settle its affairs according to the course of proceedings in equity. [R. C. 1895, § 3128; 1905, ch. 124.]

§ **4477. Insurance by resident agents only.** No insurance company shall do business in this state, except through its authorized agents who must be residents of and have their office or place of business in this state. All policies not written in accordance with the foregoing provisions shall be deemed a violation of this article. [1890, ch. 76; §§ 1, 2; R. C. 1895, § 3129.]

§ **4478. Penalty for not making statement. For false statement.** Any insurance company doing business in this state that neglects to make the statements in the manner and within the time in this article required shall forfeit one hundred dollars for each day's neglect, and upon notice by the insurance commissioner to that effect, its authority to do new business shall cease while such default continues and every such company that willfully makes false statements shall be liable to a fine of not less than five hundred dollars nor more than one thousand dollars. Any new business done by the insurance company after neglect to make the required statements shall be deemed to be done in violation of law. [R. C. 1895, § 3130.]

§ **4479. Penalty when there is no specific provision.** For violation of any provision of this chapter when no penalty is specifically provided for herein the offender shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars. [R. C. 1895, § 3131.]

§ **4480. Fees.** There shall be paid by every company doing business in this state, except county mutual insurance companies, the following fees:

Upon filing articles of incorporation, or copies thereof, twenty-five dollars.

Upon filing the annual statement, ten dollars.

For each certificate of authority and certified copy thereof, two dollars.

For every copy of any paper filed in the insurance department, the sum of twenty cents per folio; and for affixing the official seal on such copy and certifying the same, the sum of one dollar.

For official examination of companies under this article the actual expense incurred, not to exceed ten dollars per day. [1885, ch. 69, § 39; R. C. 1895, § 3132.]

§ **4481. Same conditions imposed on companies of other states as they impose on domestic companies.** Whenever the laws of any other state of the United States or foreign country shall require of insurance companies incorporated under the laws of this state, or of the agent thereof, any deposits of securities in such state for the protection of policy holders or otherwise, or any payment for taxes, fines, penalties, certificate of authority, license or fees greater than the amount required for such purposes from similar companies of other states by the then existing laws of this state, then and in every such case, all insurance companies of such states establishing or having heretofore established an agency in this state, shall be and are hereby required to make the same deposit for a like purpose with the state treasurer of this state, and to pay to the commissioner of insurance an amount equal to the amount of such charges and payment imposed by the laws of such other states upon the companies of this state and the agents thereof. [1891, ch. 73, § 20; R. C. 1895, § 3133.]

Article 9.—County Mutual Companies.

§ **4482. Organization of.** Any number of persons not less than fifty, residing in not more than ten counties in this state, who collectively own property of not less than one hundred thousand dollars in value which they desire to insure, or any number of persons not less than twenty-five, residing in any one county, owning property of not less than twenty-five thousand dollars in value which they desire to insure, may form a corporation for mutual insurance against loss or damage by fire, lightning, hail and cyclone, which

shall possess the powers and be subject to the duties and liabilities of other insurance companies, except as herein otherwise provided. The principal office of the company must be located within the limits of the county or counties in which the incorporators reside. The name of the county together with the word "county" shall be embraced in the corporate name of the company when organized by the residents of a single county. [1887, ch. 67, § 1; 1890, ch. 77, § 1; R. C. 1895, § 3134; 1905, ch. 121.]

§ 4483. **Management in board of directors. Term of office.** The general management of the business of such company shall be vested in a board of not less than five nor more than thirteen directors, each of whom shall during his term of office be a policy holder in the company. Such directors shall be elected annually and shall hold their office for one year and until their successors are elected and qualified. [1887, ch. 67, § 2; R. C. 1895, § 3135.]

§ 4484. **Separate funds for hail and other insurance.** In all cases of insurance against loss or damage by hail, it shall be the duty of such company to keep a separate and distinct record of all interest, premiums and policies of insurance relating to such hail insurance and no note, premium, undertaking, or policy of insurance which shall be received, issued or delivered for any insurance against loss by hail shall be used in any connection with insurance against loss or damage by reason of any other cause, and no moneys, premiums or funds arising out of or received for insurance against loss or damage by hail shall be used in the payment of any loss or damage by reason of fire, lightning, or cyclone, and no moneys, premiums or funds arising out of or received for insurance against loss or damage by fire, lightning and cyclone shall be used in the payment of any loss or damage by hail. [1887, ch. 67, § 5; R. C. 1895, § 3136.]

§ 4485. **Cash premium or note given in hail insurance. Conditions of policy.** Every person insuring grain against loss or damage by hail shall, except when a cash premium is paid, execute and deliver to such company his promissory note, bearing even date with the policy issued to him therefor, which note shall be secured by real or chattel mortgage security on property located in the county where the insured resides, of double the value of such note, which note, or cash shall not be a limit to the liability of the person so insured. In case of insurance against loss or damage by hail, the directors of such company may issue policies, signed by the president and secretary, agreeing in the name of the company to pay all losses or damages by hail, or such pro rata share of such loss or damage as can be paid out of the highest limit of the liabilities of the members, which liabilities shall be established by the by-laws of such company before the issuing of any policy of insurance against loss or damage by hail, which limit shall not be less than that prescribed by law. [1887, ch. 67, § 6; R. C. 1899, § 3137; 1901, ch. 109.]

§ 4486. **Adjusters of hail losses. Notice of loss. Disagreement of adjuster and insured.** It shall be the duty of the board of directors to appoint one or more adjusters, prescribe their duties and fix their compensation, requiring them to report to the president or secretary upon all losses or damage by hail adjusted by them. Upon any loss or damage by hail, the party sustaining the same shall immediately notify the secretary or a duly appointed adjuster of such loss or damage. In case the adjuster and party sustaining the loss cannot agree the claimant may then appeal as provided for in section 4489 and notice of loss or damage by hail shall be the same as is prescribed in said section. [1887, ch. 67, § 7; R. C. 1899, 3138.]

§ 4487. **By-laws provide a sinking fund for the different departments.** Any company organized under this article may provide in its by-laws for creating a fund of not to exceed fifteen thousand dollars in the hail department, and of not to exceed three thousand dollars in the fire, lightning and cyclone department; provided, that when the total amount of insurance in the fire, lightning and cyclone department aggregates or exceeds three hun-

dred thousand dollars the fund herein provided for may be increased to one per cent of the total amount of insurance actually in force in the fire, lightning and cyclone department; and provided, further, that in no case shall the loss fund in the fire, lightning and cyclone department exceed ten thousand dollars, the by-laws to set forth the manner in which such funds shall be created and the purpose to which they shall be applied. [1887, ch. 67, § 8; R. C. 1899, § 3139; 1901, ch. 55.]

§ 4488. Undertaking given, if other than hail insurance. Cash payment. Every person insured against loss or damage by fire, lightning and cyclone shall give his undertaking, bearing even date with the policy so issued to him, binding himself, his heirs and assigns, to pay his pro rata share to the company of all losses or damages by fires, lightning and cyclone, which may be sustained by any member thereof and every such undertaking shall within five days after the execution thereof be filed with the secretary in the office of the company and shall remain on file in the office, except when required to be produced in court as evidence. He shall also at the time of receiving such insurance pay such percentage in cash, or such reasonable sum named in the policy as may be required by the rules and by-laws of the company. [1887, ch. 67, § 9; R. C. 1895, § 3140.]

§ 4489. Notice of loss. Contents. Adjustment. Arbitration. Every member of such company who may sustain loss or damage by fire, lightning or cyclone shall immediately notify the secretary of such company, or in case of his absence, the president thereof, specifying the property destroyed, the damage and cause thereof, which officer shall forthwith ascertain and adjust the amount of such loss or damage or forthwith convene the directors of such company whose duty it shall be to appoint a committee of not more than three members of such company to ascertain the amount of such loss and in case of the inability of the parties to agree upon the amount of such damage the claimant shall choose a disinterested party and the company shall choose a disinterested party who shall constitute a board of arbitration to settle such loss and in case these parties cannot agree they shall choose a third party to act with them and such board of arbitration shall have power to examine witnesses and to determine all matters in dispute and the decision of such board shall be final. [1887, ch. 67, § 10; R. C. 1895, § 3141.]

Insurer failing to appoint appraiser upon request, and agreeing to a submission not in accordance with policy, waives benefit of statute. Schouweiler v. Merchants Mutual Ins. Ass'n., 11 S. D. 401, 78 N. W. 356.

§ 4490. Assessments, basis of. When made. Whenever the amount of any loss shall have been ascertained, if it exceed the amount of the cash funds of the company applicable to the payment of such loss, the president shall convene the directors of the company, who shall make an assessment sufficient at least to pay such loss, from all members of the company, in proportion to the amount of insurance carried. In case any assessment so made shall not be collected at the time same is due and the amount collected is insufficient to pay the losses or expenses of the company, then a second assessment shall be made in the manner above provided, upon the policy holders who have paid their assessment for an amount that shall be sufficient to pay all losses and expense in full. Such assessments shall be made from time to time in the manner herein provided until a sufficient amount is collected to pay all losses and expenses in full. In case any such delinquent assessment is collected after other assessments have been made and collected, then such assessment so collected shall be applied towards repaying the policy holders who have paid more than their just share in proportion to the amount of insurance carried by each. No assessment for loss or damage shall be made prior to the first day of September of the year the loss occurred. [1887, ch. 67, § 11; R. C. 1895, § 3142; 1901, ch. 109.]

§ **4491. Secretary to give notice of and collect assessments.** It shall be the duty of the secretary, whenever such assessments shall have been completed, to notify every person composing such company by letter sent to his post office address of the amount of such loss and the sum due from him as his share thereof and the time when and to whom such payment is to be made and such time shall not be less than thirty days nor more than sixty days from the time of such notice. And no company organized under the provisions of this article shall be liable in any action at law or otherwise for the recovery of any loss or damage by hail before the fifteenth day of November of the year in which such loss occurred. [1887, ch. 67, § 12; R. C. 1899, § 3143.]

§ **4492. Suits for assessments. Individual liability of directors.** Suits at law may be brought against any member of such company who shall refuse or neglect to pay any assessment made upon him under the provisions of this article, and the directors of such company who shall willfully neglect to perform the duties imposed upon them under the provisions of this article shall be liable in their individual capacity to the person sustaining such loss. [1887, ch. 67, § 13; R. C. 1895, § 3144.]

§ **4493. What may be insured.** No company formed under the provisions of this article shall insure any property beyond the limits of the district comprised in the formation of the company, nor shall it insure any property other than detached dwellings and their contents, farm buildings and their contents, school houses and school furniture therein, church buildings and furniture therein, live stock only on the premises or running at large and hay or grain in bin or stack, or growing grain against damage by hail, nor shall they insure any property within the limits of any incorporated city or village in this state. [1887, ch. 67, § 14; R. C. 1895, § 3145.]

§ **4494. Election of directors.** The directors of each company so formed, shall be chosen by a vote at the annual election thereof, which shall be held on the last Tuesday in June of each year, and every member shall have one vote, but no person shall vote by proxy at such election; provided, that in any company organized under the provisions of this article, whose policies of insurance shall not run for a longer period than one year, all persons holding policies of insurance therein during the year immediately preceding the annual election, shall be considered as members of said company and shall be entitled to vote at such election. [1887, ch. 67, § 15; R. C. 1895, § 3146; 1903, ch. 110.]

§ **4495. How member may withdraw.** Any member of the company may withdraw therefrom at any time by giving ten days' notice in writing to the president or secretary thereof and by paying his share of all claims existing against the company at the expiration of the ten days. [1887, ch. 67, § 17; R. C. 1895, § 3147.]

§ **4496. When nonresidents may become members. Cannot be directors.** Nonresidents of any county in this state, owning property therein, may become members of any company incorporated under this article and shall be entitled to all rights and privileges pertaining thereto, except that they cannot become directors of such company. [1887, ch. 67, § 18; R. C. 1895, § 3148.]

§ **4497. Term of existence.** No company formed under this article shall continue for a longer term than thirty years. [1887, ch. 67, § 20; R. C. 1899, § 3149.]

§ **4498. Annual statement submitted to members.** The secretary of the company shall prepare and submit to the members thereof at each annual meeting a copy of the annual statement required to be filed with the commissioner of insurance as provided in section 4466. [R. C. 1895, § 3150.]

§ **4499. Subject to preceding articles.** In all other respects companies organized under this article shall be subject to the provisions of the preceding articles of this chapter. [R. C. 1895, § 3151.]

ARTICLE 10.—LIVE STOCK.

§ 4500. **General laws govern.** Companies organized under this article shall be subject to the general statutes of this state relating to domestic mutual insurance companies, in so far as the same are applicable and not in conflict with the express provisions of this article. [1905, ch. 123, § 1.]

§ 4501. **Live stock insurance companies, how organized.** Any number of persons not less than ten, of whom at least five shall be residents of this state, may form a corporation for mutual insurance against loss or damage to pure bred live stock occasioned by the death of the property insured by fire, lightning, accident or disease, which shall possess the powers and be subject to the duties and liabilities of other insurance companies, except as herein otherwise provided. The term "pure bred live stock," as used in this article includes horses, cattle, sheep and swine of either sex and any breed; provided, that the animals insured must be duly registered in the recognized stud or herd book of such breed; and provided, further, that corporations may be organized under this article for the purpose of insuring either or all of said live stock, against loss or damage to the property insured by reason of fire, lightning, accident or disease, or any or all of them. [1905, ch. 123, § 2.]

§ 4502. **Management.** The general management of the business of such company shall be vested in a board of directors of not less than five nor more than nine directors, each of whom shall during his term of office be a policy holder in the company. Such directors shall be elected annually and shall hold their offices for one year and until their successors are elected and qualified. [1905, ch. 123, § 3.]

§ 4503. **Board of directors to elect officers and fix bonds.** It shall be the duty of the board of directors to annually elect such officers of the corporation as may be provided in the articles of incorporation and by-laws of the company. It shall also be the duty of the said board of directors to fix the amount of the bonds required of the treasurer and other officers having or likely to have control of any funds belonging to the company, which bonds, in the case of the treasurer, shall not be less than ten thousand dollars, and in the case of the secretary, not less than two thousand five hundred dollars, and as near as may be shall equal twice the amount of money likely at any one time to be in the hands of the respective officers. [1905, ch. 123, § 4.]

§ 4504. **Members may vote by proxy.** Members may vote by proxy dated and executed within three months and returned and recorded on the books of the company three days or more before the meeting at which they are to be used. [1905, ch. 123, § 5.]

§ 4505. **Amount of subscribed insurance required.** No policy shall be issued by an insurance company organized under this article until not less than thirty thousand dollars of insurance in not less than fifteen separate risks have been subscribed for and entered on its books. [1905, ch. 123, § 6.]

ARTICLE 11.—CHATTEL MORTGAGES IN APPLICATIONS.

§ 4506. **Chattel mortgage void unless on separate paper.** It shall be unlawful for any insurance company, or any agent or solicitor therefor within this state, to take or procure to be taken upon the property to be insured, or any other property, a chattel mortgage, securing the payment of the premium due or to become due, including policy fees, or any part thereof, unless such chattel mortgage shall be printed or written upon a separate and distinct paper from the application, and no mortgage given in violation of the provisions of this section shall be valid or binding upon the party executing the same, but shall in all things be null and void. [1887, ch. 19, § 1; R. C. 1899, § 3152.]

§ 4507. **Penalty for violating last section.** Any insurance company, or any agent or solicitor thereof, violating the provisions of the last section shall be deemed guilty of a misdemeanor; and such company shall forfeit all its rights and privileges under its articles of incorporation. [1887, ch. 19, § 2; R. C. 1895, § 3153.]

ARTICLE 12.—LICENSING INSURANCE AGENTS.

§ 4508. **Agents defined.** Whoever solicits insurance on behalf of any insurance corporation or person desiring insurance of any kind, or transmits an application for a policy of insurance, other than for himself, to or from any such corporation, or who makes any contract for insurance, or collects any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business of like nature for any insurance corporation, or advertising to do any such thing, shall be held to be an agent of such corporation to all intents and purposes, unless it can be shown that he receives no compensation for such services. This section shall not apply to fraternal, assessment or beneficiary associations. [1903, ch. 112, § 1.]

§ 4509. **Must have license. Penalty for noncompliance.** No officer or broker, agent or sub-agent of any insurance corporation of any kind, except county mutual insurance corporations of this state, shall act or aid in any manner in transacting the business of or with such corporation, in placing risks or effecting insurance therein, without first procuring from the commissioner of insurance a certificate of authority as provided by law, nor after the period named in such certificate shall have expired. Every person violating the provisions of this and the previous section shall be guilty of a misdemeanor and be punished by a fine of not less than fifty dollars nor more than five hundred dollars for each offense. [1903, ch. 112, § 2.]

§ 4510. **Agents must be residents of the state.** No insurance company or association, not incorporated under the laws of this state, authorized to transact business herein, shall make, write, place or cause to be made, written or placed, any policy, duplicate policy or contract of insurance of any kind or character, or any general or floating policy, upon property situated or located in this state except after the said risk has been approved in writing, by an agent who is a resident of this state, regularly commissioned and licensed to transact insurance business therein, who shall countersign all policies so issued and make a record of the same on books provided for that purpose and receive the commission thereon when the premium is paid, to the end that the state may receive the taxes required by law to be paid on the premiums collected for insurance on all property located in the state, and the agents be paid the commission thereon. Nothing herein shall be construed to prevent any such insurance company or association, authorized to transact business in this state, from issuing policies at its principal or department offices, covering property in this state, provided that such policies are issued upon applications procured and submitted to such company by agents who are residents of this state, and licensed to transact the business of insurance herein, and who shall countersign all policies so issued and receive the commission thereon when paid; provided, no provision of this section is intended to or shall apply to direct insurance covering the rolling stock of railroad corporations or property in transit, while in the possession and custody of railroad corporations or other common carriers nor to movable property of such common carrier used or employed by them in their business as common carriers of freight, merchandise or passengers. [1901, ch. 100, § 1.]

§ 4511. **Cannot reinsure.** No fire insurance company or association shall reinsure, or assume as a reinsuring company or otherwise in any manner or form whatever, the whole or any part of any risk or liability, covering property located in this state, of any insurance company or association not authorized to transact business in this state. [1901, ch. 100, § 2.]

§ 4512. **Insurance commissioner. Examine records, books, etc.** Whenever the commissioner of insurance shall have or receive information that any fire insurance company or association, not incorporated under the laws of this state, has violated any of the provisions of section 4510, he is authorized, at the expense of such company or association, to examine, by himself or his accredited representative at the principal office, or offices of such company or association, located in the United States of America, and also at such other offices or agencies of such company or association as he may deem proper, all books, records and papers of such company or association and may examine under oath, the officers and managers and agents of such company or association as to such violation or violations. The refusal of any such company or association to submit to such examination or to exhibit its books and records for inspection shall be presumptive evidence that it is violating the provisions of section 4510, and shall subject it to the penalties prescribed and imposed in section 4513. [1901, ch. 100, § 3.]

§ 4513. **Penalty for violation.** Any insurance company or association violating or failing to observe and comply with any of the provisions of sections applicable thereto, shall be subject to and liable to pay a penalty of five hundred dollars for each violation thereof and for each failure to observe and comply with any provisions of the three previous sections mentioned. Such penalty may be collected and recovered in an action brought in the name of the state in any court having jurisdiction thereof. Any insurance company or association which shall neglect and refuse for thirty days after judgment in any such action to pay and discharge the amount of such judgment shall have its authority to transact business in this state revoked by the commissioner of insurance and such revocation shall continue for at least one year from the date thereof, nor shall any insurance company or association whose authority to transact business in this state shall have been so revoked be again authorized or permitted to transact business herein until it shall have paid the amount of any such judgment, and shall have filed in the office of the commissioner of insurance a certificate signed by its president or other chief officer to the effect that the terms and obligations of the provisions herein are accepted by it as a part of the conditions of its right and authority to transact business in this state. [1901, ch. 100, § 4.]

CHAPTER 15.

MINING AND MANUFACTURING CORPORATIONS, ETC.

§ 4514. **How formed. Term of existence.** Corporations for mining, manufacturing and other industrial pursuits may be formed as provided in chapter 11; and such corporations have all the rights and are subject to all the duties, restrictions and liabilities therein mentioned, so far as the same apply or relate to such corporations, but the term of existence of any such corporation shall not exceed twenty years. [Civ. C. 1877, § 511; R. C. 1899, § 3154.]

§ 4515. **Purpose must be stated. Cannot loan to stockholder. Penalty.** The purposes for which any such corporation shall be formed must be distinctly and definitely specified in the articles of incorporation, and it must not appropriate its funds to any other purpose nor must it loan any of its money to any stockholder therein; and if any such loan or misappropriation is made, the officers who shall make it, or who shall assent thereto, shall be jointly and severally liable to the extent of such loan or misappropriation and interest and for all the debts of the corporation contracted before the repayment of the sum so loaned or misappropriated. [Civ. C. 1877, § 512; R. C. 1895, § 3155.]

§ **4516. Accounts. Publicity. Statement.** Regular books of accounts of all the business of such corporation must be kept, which with the vouchers shall be at all reasonable times open for the inspection of any of the stockholders; and as often as once in each year a statement of such accounts shall be made by order of the directors and laid before the stockholders. [Civ. C. 1877, § 513; R. C. 1899, § 3156.]

§ **4517. Stockholders liable for labor.** The stockholders of any corporation formed for the purposes mentioned in this chapter shall be jointly and severally liable in their individual capacities for all debts due to mechanics, workmen and laborers employed by such corporation, which said liability may be enforced against any stockholders by an action at any time after an execution against such corporation shall be returned not satisfied; provided, such action is commenced within four months; and provided always, that if any stockholder shall be compelled by any such action to pay the debts of any creditor, or any part thereof, he shall have the right to call upon all the stockholders to contribute their part of the sum so paid by him as aforesaid, and may sue them jointly or severally or any number of them and recover in such action the ratable amount due from the person or persons so sued. [Civ. C. 1877, § 514; R. C. 1899, § 3157.]

§ **4518. Annual report. Contents. How verified.** Every such corporation shall annually within twenty days from the first day of January make a report which must be published in some newspaper published at or nearest to the place where the business of said corporation is carried on, which report must state the capital stock and the amount thereof actually paid in, the amount and nature of its indebtedness and the amounts due the corporation, the number and amount of dividends and when paid and the net amount of profits. The said report must be signed by the president and a majority of the directors and be verified by the oath of the president or secretary of the corporation and filed in the office of the register of deeds of the county where the business of the corporation is carried on; any person who willfully neglects, fails or refuses to make, sign or publish the report as provided in this section shall be guilty of a misdemeanor. [Civ. C. 1877, § 515; R. C. 1899, § 3158.]

§ **4519. Demand for statement. Penalty for refusal.** Whenever any person or persons owning twenty per cent of the capital stock of any corporation formed for the purposes mentioned in this chapter shall present a written request to the treasurer thereof that they desire a written statement of the affairs of the corporation, he must make such statement under oath, embracing a particular account of all its assets and liabilities in detail and deliver the same to the persons presenting the written request within twenty days after such presentation; and such treasurer shall also at the same time place and keep on file in his office for six months thereafter a copy of such statement, which shall at all times during business hours be exhibited to any stockholder of such corporation demanding an examination thereof; the treasurer, however, shall not be required to make or deliver such statement in the manner aforesaid oftener than once in every six months. If such treasurer neglects or refuses to comply with the provisions of this section he shall forfeit and pay to the person presenting such written request the sum of fifty dollars and the further sum of ten dollars for every twenty-four hours thereafter until such statement shall be furnished, to be sued for and recovered in an action. [Civ. C. 1877, § 516; R. C. 1895, § 3159.]

§ **4520. Office out of state. Main office in state.** Any corporation formed for the purposes mentioned in this chapter may provide in the articles of incorporation for having a business office without this state at any place within the United States and to hold any meeting of the stockholders or directors of the corporation at such office so provided for; but every such corporation having a business office out of this state must have its main

office for the transaction of business within this state to be also designated in such articles. [Civ. C. 1877, § 517; R. C. 1899, § 3160.]

§ 4521. Directors liable for violating law resulting in insolvency. If any such corporation shall willfully violate any of the provisions of this chapter relating to or applying to such corporation and shall thereby become insolvent, the directors ordering or assenting to such violation shall jointly and severally be liable in an action founded upon this statute for all debts contracted after such violation. [Civ. C. 1877, § 518; R. C. 1899, § 3161.]

CHAPTER 16.

BRIDGE CORPORATIONS.

§ 4522. Articles. Contents. Filing. The term of existence of a bridge corporation shall not exceed twenty years; and in addition to the matters required in section 4309 every corporation formed for the purpose of constructing a bridge over any stream of water must in the articles of incorporation specify as follows: The place where such bridge is to be built and over what stream; that the banks on both sides of the stream where such bridge is to be built are owned by such corporation, or that it has obtained in writing the consent of the owners of the banks, where the bridge is to be built, to build the bridge or that the banks at such place are included within and part of a public highway, and in such case that the consent in writing of the board of county commissioners of the county or counties for the erection of such bridge by such corporation has been obtained and it must file a certified copy of its articles of incorporation in the office of the register of deeds of the county or counties in which its bridge or any part thereof is situated or to be located. [Civ. C. 1877, § 528; R. C. 1899, § 3162.]

§ 4523. No tolls without authority from county commissioners. No such corporation shall construct, or take tolls on, a bridge until authority is granted therefor by the board of county commissioners of the county or counties in which it is to be located. [Civ. C. 1877, § 529; R. C. 1899, § 3163.]

§ 4524. When franchise forfeited. Every such corporation also ceases to be a body corporate:

1. If within six months from the issue of its certificate by the secretary of state it has not obtained such authority from the board or boards of county commissioners as mentioned in the last section; and if within one year thereafter it has not commenced the construction of its bridge and actually expended thereon at least ten per cent of its capital stock.
2. If within three years from the issuing of its certificate of incorporation the bridge is not completed. [Civ. C. 1877, § 530; R. C. 1899, § 3164.]

§ 4525. Bridge must be in good condition. Every bridge corporation must at all times keep the bridge in good and safe condition for travel both night and day, unless it is rendered impassable by reason of floods or high water; and if it is destroyed by fire or other causes the corporation must rebuild within a period of one year from such destruction, or its corporate rights shall be forfeited and cease to exist. [Civ. C. 1877, § 531; R. C. 1899, § 3165.]

§ 4526. Toll rates posted. Penalty for excessive toll. Such corporation previous to receiving and as a condition precedent to the right to receive any toll upon the use of its bridge must set up and keep in a conspicuous place on the bridge a board on which must be written, painted or printed in a plain and legible manner the rates of toll which shall have been prescribed by the board of county commissioners; and if such corporation shall demand or receive any greater rate of toll than the rates so prescribed it shall be subject to a fine of ten dollars for each offense, to be recovered in an action by

the party aggrieved or by any public officer making the complaint. [Civ. C. 1877, § 532; R. C. 1899, § 3166.]

§ **4527. No tolls when bridge in bad condition. Penalty.** No such corporation shall demand or receive toll whenever said bridge is not in good and safe condition for use and any person having paid toll on such bridge and finding the same in a bad or unsafe condition for loaded wagons or teams shall have the right to make complaint before any justice of the peace in the county or counties in which the bridge is located, who shall thereupon summon the said corporation through its toll gatherer, officers or directors to appear before him to answer the complaint within not over five days from the date thereof, and if upon the hearing it is found that the bridge is not in a good and safe condition for use, or is in a bad condition and unsafe for loaded wagons or teams, the justice of the peace must impose a fine not less than ten dollars nor more than fifty dollars upon such corporation and he must thereupon enter judgment and issue his order that no toll be collected upon said bridge until it is put in good repair and safe condition. [Civ. C. 1877, § 533; R. C. 1899, § 3167.]

§ **4528. Passage prevented until toll paid. Unlawful interference.** Each toll gatherer may prevent from passing through his gate all persons, animals or vehicles subject to toll until he shall have received, respectively, the tolls authorized to be collected, and if he willfully or unreasonably hinders or delays any such persons, animals or vehicles from passing, when the lawful toll has been paid or tendered, he shall forfeit and pay for each offense a sum not less than five dollars nor more than twenty-five dollars, to be recovered in an action by the party aggrieved. [Civ. C. 1877, § 534; R. C. 1899, § 3168.]

§ **4529. Penalty for unlawful passing.** Every person who forcibly, willfully or fraudulently passes over such bridge without having paid or tendered the legal toll for himself and the property in his charge shall for each offense forfeit and pay to the corporation injured a sum not exceeding twenty-five dollars, to be recovered in an action in the name of such corporation. [Civ. C. 1877, § 535; R. C. 1899, § 3169.]

§ **4530. Annual report to county board.** The president and secretary of every bridge corporation must annually within twenty days from the first day of January report under oath to the board of county commissioners of the county in which the articles of incorporation are filed, specifying as follows: The costs of constructing and providing all necessary appendages and appurtenances of their bridge; the amount of all moneys expended thereon since its construction for repairs and incidental expenses; the capital stock, how much paid in and how much actually expended thereof; the amount received during the year for tolls and from all other sources, stating each separately; the amount of dividends made; the indebtedness of the corporation, specifying for what it was incurred; the net amount of profits; and such other facts and particulars respecting the business of the corporation as the board of county commissioners may require. [Civ. C. 1877, § 536; R. C. 1899, § 3170.]

§ **4531. Publication of report. Penalty for failure.** Such corporation must cause the report required in the preceding section to be published for four weeks in a newspaper published in the town or city nearest such bridge. A failure to make such report and to publish it as aforesaid subjects the corporation to a penalty of two hundred dollars; and for every week permitted to elapse after such failure an additional penalty of fifty dollars, payable in each case to the county or counties from which the authority to construct and take tolls is derived at the suit of such county or counties. All such cases must be reported by the boards of county commissioners to the state's attorney, who must commence an action therefor. [Civ. C. 1877, § 537; R. C. 1899, § 3171.]

CHAPTER 17.

RELIGIOUS, EDUCATIONAL AND BENEVOLENT CORPORATIONS.

ARTICLE 1.—GENERAL PROVISIONS.

§ 4532. How formed. A corporation for religious, educational, benevolent, charitable or scientific purposes may be formed in the manner provided in chapter 11. [Civ. C. 1877, § 538; 1891, ch. 48, § 2; R. C. 1895, § 3172.]

§ 4533. Annual report. The trustees or directors of all such corporations must annually make a full report of all their property, real and personal, including property held in trust by them, and of the condition thereof and of all their affairs to the members of the corporation for which they are acting. [Civ. C. 1877, § 541; R. C. 1899, § 3173.]

§ 4534. May acquire and sell property. All such corporations shall have power to acquire property, both real and personal, by purchase, devise or bequest and to hold the same and may sell, exchange or mortgage any or all property held or owned by them in the manner determined by their by-laws or by majority vote of their members at a meeting called for that purpose. [Civ. C. 1877, § 542; 1881, ch. 28, § 1; R. C. 1895, § 3174.]

§ 4535. Transferring cemetery lots. All religious corporations organized and existing under and by virtue of the laws of the state of North Dakota, and now owning, holding, controlling or operating, or who may own, hold, control or operate any land for cemetery purposes shall be subject to and governed by the provisions of article 6 of this chapter. [1901, ch. 50.]

§ 4536. By-laws. Such corporations may in their by-laws in addition to the provisions of section 4202 provide for:

1. The qualification of members, mode of election and terms of admission to membership.
2. The fees of admission and dues to be paid to their treasury by members.
3. The expulsion and suspension of members for misconduct or nonpayment of dues; also for restoration to membership.
4. Contracting, securing, paying and limiting the amount of their indebtedness.
5. Other regulations not repugnant to the law of the state and consonant with the objects of the corporation. [Civ. C. 1877, § 543; R. C. 1895, § 3175.]

§ 4537. Subsequent members have equal rights. Members admitted after incorporation have all the rights and privileges and are subject to the same responsibilities as members of the association prior thereto. [Civ. C. 1877, § 544; R. C. 1899, § 3176.]

§ 4538. Membership rights personal. No member, or his legal representative, must dispose of or transfer any right or privilege conferred on him by reason of his membership of such corporation, or be deprived thereof, except as herein provided. [Civ. C. 1877, § 545; R. C. 1899, § 3177.]

§ 4539. Title vests in successors in trust. All grants or deeds from private individuals, or acts of legislative bodies, transferring, conveying or granting real estate in this state to any bishop, dean, rector, vestryman, deacon, director, minister or any other officer or officers of any church or organized religious society in trust for the use and benefit of such society of which they are such officer or officers, which have been or may be made, done or executed shall vest in their successor or successors in office, or other officer which such society may at any time designate, all the legal or other title, to the same extent and in all respects the same, as trustee of such trust for the use and benefit of such society, which such bishop, dean, rector, vestryman, deacon, director, minister or other officer or officers had under such grant, deed or act; and all transfers or sales made by such officer or officers so acquiring title by virtue

of this section by succession in office shall have all the validity, force and effect that it would have had, had it been made by such bishop, dean, rector, vestryman, deacon, director, minister or other officer or officers, while holding under and by virtue of such grant, deed or act of such legislative body. [R. C. 1899, § 3178.]

ARTICLE 2.—PROVISIONS RELATING TO EDUCATIONAL CORPORATIONS.

§ 4540. **Donations for particular purposes.** All donations, devises or bequests made to an educational corporation for particular purposes, when accepted, shall be applied in conformity with the express condition of the donor or devisor. [Civ. C. 1877, § 549; R. C. 1899, § 3179.]

§ 4541. **Powers of corporation.** Educational corporations have power to appoint a president or principal for the institution and such professors, tutors and other agents and officers as may be necessary and to displace any of them as the interests of the institutions may require; to fill vacancies, to prescribe and direct the course of studies and the discipline to be pursued and observed in the institution and the rates of tuition in the same; and the president and professors shall constitute the faculty of such institution; and they have power to enforce the rules and regulations enacted for the government and discipline of the students and to suspend and expel offenders as may be deemed expedient. [Civ. C. 1877, § 550; R. C. 1895, § 3180.]

§ 4542. **Degrees conferred.** Every such corporation having the rank of a college or university has power to confer, on the recommendation of the faculty, all such degrees or honors as are usually conferred by colleges and universities in the United States and such others, having reference to the course of studies and the worth and accomplishment of the student, as may be deemed proper. [Civ. C. 1877, § 551; R. C. 1899, § 3181.]

§ 4543. **Mechanics and agriculture.** Such corporation may connect with its institution, to be used as a part of its course of education, any mechanical shops or machinery or lands for agricultural purposes, not exceeding three hundred and twenty acres, to which may be attached all necessary buildings for carrying on the mechanical and agricultural purposes of such institution. [Civ. C. 1877, § 552; R. C. 1899, § 3182.]

ARTICLE 3.—FRATERNAL CORPORATIONS.

§ 4544. **Who may form.** Lodges, chapters, posts, encampments, councils, commanderies, clubs or associations controlled by, or mainly composed of members of such fraternities or associations and other similar organizations, grand or subordinate, of the fraternities or associations commonly known as the Free and Accepted Masons, Independent Order of Odd Fellows, Grand Army of the Republic, Knights of Pythias, and other similar benevolent, social or charitable fraternities or associations not organized for fraternal insurance, may become corporations upon compliance with the provisions of this article. [1890, ch. 72, § 1; R. C. 1899, § 3183; 1901, ch. 91.]

§ 4545. **Contents of articles.** Any such lodge, chapter, post, encampment, council, commandery, club or association or other similar organization, desiring to avail itself of the provisions of this article, shall cause to be prepared articles of incorporation, which must set forth:

1. The corporate name by which said corporation shall be known.
2. The place where it shall be located.
3. The time during which it shall exist.
4. The number of its directors or trustees, and the names and residences of the members who shall serve as directors or trustees until the election and qualification of their successors in office.
5. Whether it shall be subject to any grand, supreme or sovereign lodge or other superior body or bodies.
6. The amount of property, not exceeding one hundred thousand dollars,

which it may hold, and the disposition to be made of the same in case of its dissolution.

7. Whether the private property of its members shall be liable for its corporate debts. [1890, ch. 72, § 2; 1901, ch. 91.]

§ **4546. Articles to be acknowledged.** The articles of incorporation must be subscribed and acknowledged by the trustees or directors therein named, who shall append thereto an affidavit duly subscribed and sworn to by each of them, setting forth that at a regularly called meeting of the lodge or body which it is proposed to incorporate, the date of which meeting shall be stated in such affidavit, it was voted by a majority of the members present at such meeting to incorporate such lodge or other body and that the affiants are the duly elected directors or trustees of such lodge or other body. [1890, ch. 72, § 3; R. C. 1899, § 3185.]

§ **4547. Member's liability.** The private property of the members of corporations formed under this article shall not be liable for its corporate debts, unless it is so provided in the articles of incorporation. [1890, ch. 72, § 4; R. C. 1899, § 3186.]

§ **4548. Term of existence.** The duration of corporations organized under this article may be perpetual if it is so stated in the articles of incorporation. [1890, ch. 72, § 5; R. C. 1899, § 3187.]

§ **4549. By-laws.** All corporations formed under this article shall have the power to enact by-laws not inconsistent with the laws of the United States or of the state of North Dakota and to amend and repeal the same in such manner as the members thereof shall determine. Every corporation formed under his article shall within three months after the filing of its articles of incorporation in the office of the secretary of state adopt by-laws and file a copy thereof within one month after the adoption thereof in the office of the secretary of state. The copy so filed shall be certified to by the directors or trustees of the corporation as being a true copy of the by-laws of such corporation. A copy of any by-law thereafter adopted, similarly certified to, shall be filed in the office of the secretary of state within one month after its adoption and in case of the repeal or amendment of any by-law the directors or trustees shall within one month after such amendment or repeal file with the secretary of state a certificate setting forth the fact of such amendment or repeal. [1890, ch. 72, § 6; R. C. 1899, § 3188.]

§ **4550. Corporations governed by by-laws.** All corporations formed under this article shall elect their directors or trustees and their officers and call and hold their meetings at the time and in the manner prescribed by their by-laws. The officers, other than directors or trustees, shall be such as the by-laws shall prescribe and shall perform such duties as may be designated by the by-laws. [1890, ch. 72, § 7; R. C. 1899, § 3189.]

§ **4551. Articles, what may contain. Dissolution.** It may be provided in the articles of incorporation of any corporation formed under this article that such corporation and the members thereof shall be subject to the jurisdiction of some grand, supreme or sovereign lodge or other body or bodies of the association or fraternity to which the lodge or other organization forming such corporation may belong and that in case such supreme, grand or sovereign lodge, or other superior body or bodies shall at any time revoke or suspend the charter granted by it to such subordinate lodge or other organization, or whenever by the laws and usages of the organization of which such subordinate body forms a part, the said subordinate body shall become defunct, then the corporate powers of such lodge or other subordinate organization shall cease and determine, except that such corporation as such shall have power to sell, convey and dispose of its property and collect debts due it; and all such property and debts shall be delivered up to the grand, supreme or sovereign lodge or other body or bodies of the association or fraternity to which such subordinate body forming such corporation may belong

or owe allegiance in accordance with the law and usages of said fraternity or association. [1890, ch. 72, § 8; 1891, ch. 49, § 1; R. C. 1899, § 3190.]

ARTICLE 4.—STATUS AND ORGANIZATION OF FRATERNAL CORPORATIONS.

§ **4552. Fraternities and associations.** Associations known as lodges, chapters, posts, encampments, councils, commandaries, consistories and other similar organizations, having a seal and working under a charter issued by some grand or sovereign body of a like character to themselves, of the fraternities or associations commonly known as the various organizations of Free Masons, Independent Order of Odd Fellows, Grand Army of the Republic, Knights of Pythias and other similar benevolent or charitable fraternities or associations, not organized for profit or for fraternal insurance, located in this state, shall, from and after the taking effect of this article, be deemed to be corporations, notwithstanding no articles of incorporation have been filed, and no charter granted by this state. [1901, ch. 89, § 1.]

§ **4553. Charter. Copy of to be filed with the secretary of state and register of deeds. Fees of.** Every such association now in existence shall, within thirty days of the taking effect of this article, and every association hereinafter organized shall, within thirty days after perfecting such organization and electing its officers, file with the secretary of state a copy of its charter under which it works, certified by the secretary of such organization, under the seal thereof, and shall likewise deposit a copy of such charter so certified in the office of the register of deeds of the county in which such body is located, and the secretary of state shall be paid a fee of five dollars therefor, and the register of deeds the same fee as for filing a chattel mortgage. At the same time, such association or organization shall cause to be deposited with the secretary of state a statement signed by the chief officer of such association and attested by its secretary, showing:

1. The name by which such association or organization shall be known, which shall correspond with the name given to it in its charter if there be one.
2. The place where it is, or shall be located.
3. The time during which it shall exist.
4. The names and designations of its elective officers, the names and number of its board of directors or trustees, the names and number of its finance committee, if any, then serving as such officers, trustees or finance committee, until the election or qualification of their successors in office.
5. The name of the grand, supreme or sovereign lodge, or other superior body or bodies to which it owes allegiance.
6. If the private property of its members is liable for its association debts, to what extent.
7. The maximum limit of its indebtedness, which in no case shall exceed one hundred thousand dollars. [1901, ch. 89, § 2.]

§ **4554. By-laws. Copy of to be filed with secretary of state.** Every such association shall within three months after the taking effect of this article, or within three months after the filing of certificate above mentioned, file in the office of the secretary of state a copy of such by-laws as pertain to the election of the directors or trustees, officers and the appointment of its finance committee, if any, and the management of its business affairs. Such copy so filed shall be certified by its directors, or trustees, as being a true copy of all such by-laws as relate to the subject above specified, and within one month after the adoption of any new by-law, or the repeal or amendment of any by-law, relating to such subject, a copy thereof, duly certified by the directors or trustees, shall be filed with the secretary of state. [1891, ch. 89, § 3.]

§ **4555. Failure to comply. Penalty.** Any such association failing to comply with either section 4553 or 4554 shall forfeit to the state the sum of five dollars to be collected by suit. [1901, ch. 89, § 4.]

§ 4556. **Duration.** The duration of such association shall be perpetual, or for such a length of time as is shown by the certificate filed as hereinbefore provided for. [1901, ch. 89, § 5.]

§ 4557. **Powers.** Any such association has power:

1. To have succession by its associate name.
2. To sue and be sued in any court.
3. To make and use a common seal and alter the same at pleasure.
4. In its associate name to purchase, hold and transfer and convey real and personal property.
5. To appoint such subordinate officers and agents as the business of the association may require and allow them suitable compensation.
6. To make by-laws, not inconsistent with the law of the land, for the management of its affairs and property.
7. To admit members and to suspend, reinstate or expel its members under the rules, by-laws and customs of such association.
8. To enter into any obligation or contract essential to the transaction of its affairs, or authorized by a vote of its members.
9. To apply its funds and property to charitable and benevolent objects pursuant to the purpose for which such association is organized. [1901, ch. 89, § 6.]

§ 4558. **Property, power to acquire.** Any such association shall have power to acquire property, both real and personal, by purchase, devise or bequest, to an amount not exceeding one hundred thousand dollars in value, and to hold the same, and may sell, exchange or mortgage any or all property held or owned by it, in the manner determined by its by-laws or by a majority vote of its members present at a meeting called for such purpose. [1901, ch. 89, § 7.]

§ 4559. **Contracts and investments.** Any such association may make contracts and invest its funds in the name of such association, contract debts, issue bonds or other evidence of its indebtedness for money, labor done, or money or property actually received, and to a total indebtedness not to exceed in amount the value of its corporate property, both real and personal, actually owned by such association. [1901, ch. 89, § 8.]

§ 4560. **Membership.** The membership of any such association shall be fixed and determined, each one according to its laws, rules, customs and usages. [1901, ch. 89, § 9.]

§ 4561. **Directors, trustees and officers.** Any such association under this article shall elect its directors or trustees and its officers and call and hold its meetings at the time, and in the manner, prescribed by its by-laws, or by the laws, rules, customs and usages of its supreme, grand or superior body. The elective officers, including directors or trustees, shall be such as its superior body may require or the by-laws shall prescribe, and shall perform such duties as may be designated by the by-laws. [1901, ch. 89, § 10.]

§ 4562. **Directors or trustees. Organization.** Such associations may have a board of directors or trustees consisting of one, and not more than eleven members, who shall perform the duties usually performed by the board of directors of business corporations, or as may be prescribed by the by-laws, and such board may organize and elect a president, vice president, secretary and treasurer thereof, and the secretary thereof shall preserve a record of all meetings and transactions of such board, which shall be at all times open to the inspection of any member of such association. [1901, ch. 89, § 11.]

§ 4563. **Property liable for debts.** The property of any such association, both real and personal, shall be liable for the debts thereof; provided, that this shall not be construed as applying to the properties or paraphernalia used in the initiatory or degree work of such lodge, chapter, post, encampment, council, commandery, consistory, or other similar organization, or to the rituals and other books pertaining to the written or unwritten work. [1901, ch. 89, § 12.]

§ 4564. **Private property not liable for corporation debts.** The private property of the members of such association shall not be liable for its corporate debts except by vote of its members, and then only the private property of such members as are present at a meeting and voting in the affirmative upon such a proposition, which vote shall be by yeas and nays, and the minutes of such meeting shall show the names of those voting in the affirmative and of those voting in the negative, which record shall be prima facie evidence of the facts therein contained; provided, however, that the property of each director, trustee or other officer incurring or authorizing an indebtedness in excess of the value of all the corporate property of such association, both real and personal, shall be liable for such excess expenditures, except of such officers as may file with the secretary of such association, at the time such excess indebtedness is authorized or incurred, a written objection thereto, or is absent from the meeting authorizing or incurring such excess indebtedness. [1901, ch. 89, § 13.]

§ 4565. **Association shall not issue stock.** Any such association shall not issue any stock, nor any member thereof have or acquire any divisional share in the property belonging to such association, nor the right to sell, transfer or convey, any right, property or membership therein; nor shall any estate in any property of such association vest in the heirs of any member at his death, but all of his right, title and interest in such association shall cease and determine at his death, or upon ceasing to be a member thereof. [1901, ch. 89, § 14.]

§ 4566. **Association shall not declare dividends or divide property.** No such association shall declare any dividends or divide its property among its members during the existence of such association, and upon its dissolution, its property shall be disposed of after all its just debts are paid, in a manner provided for by a majority vote of all the members of such association present at a meeting duly called for such purpose; provided, however, that before any such distribution is made, or division had, its elective officers shall file a certificate in the office of the register of deeds in the county in which such association is located, stating that all its debts are paid, and any officer signing such a certificate shall be personally liable in his private estate for any debt of such an association outstanding and unpaid; and provided, however, that all such property and debts due to such association shall be delivered up to the grand, supreme or sovereign lodge or other body, or bodies of the association or fraternity to which such subordinate body forming such association may belong or owe allegiance, if required by the law and usages of such fraternity or association. [1901, ch. 89, § 15.]

§ 4567. **Charter, when revoked or suspended.** Whenever the supreme, grand or sovereign lodge or other superior body or bodies, shall at any time revoke or suspend the charter granted by it to such subordinate lodge or other organization, or whenever by the laws and usages of the organization of which such subordinate body forms a part, or by operation of any law of this state, or by a vote of the majority of its members called for such purpose, when not in conflict with the laws of its superior body, the said subordinate body shall become defunct, then the corporate powers of such lodge, or other subordinate organization shall cease and determine, except that the directors or trustees last elected shall act as trustees to close up its affairs, and may collect the debts due such association, settle the debts contracted by such association, and to pay such debts, shall have power to sell, convey and dispose of its property, or sufficient thereof to do so, and the remainder of its property, both real and personal, shall then be disposed of as in this article; provided, that all rituals, books, properties and paraphernalia relating to, or used in, the secret work of such lodge, chapter, post, encampment, council, commandery, consistory, or other similar organization, shall be delivered by said directors or trustees to the supreme, grand or sovereign lodge, or other

superior body to which such lodge, chapter, post, encampment, council, commandery, consistory, or other similar organization is subordinate. [1901, ch. 89, § 16.]

§ 4568. **Service of process, how made.** Service of process against such association shall be made as provided for service of process upon other corporations, and conveyances of its real estate shall be signed by its chief officer, or person acting as such, and attested by its secretary, or other like officer under its association seal. [1901, ch. 89, § 17.]

§ 4569. This article shall not apply to such societies of this character as have already incorporated under provisions of law prior to the taking effect of this article, or which may elect to so incorporate. [1901, ch. 89, § 18.]

Article 5.—Fraternal Beneficiary Associations.

§ 4570. **Fraternal beneficiary societies.** A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association, formed, or organized and carried on, for the sole benefit of its members and their beneficiaries, and not for profit. Each association shall have a lodge system, with ritualistic form of work and representative form of government, and shall make provision for the payment of benefits in case of death, and may make provision for the payment of benefits in case of sickness, temporary or permanent physical disability, either as the result of disease, accident or old age, provided the period in life at which payment of physical disability benefits on account of old age commences, shall not be under seventy years, subject to their compliance with its constitution and laws. The fund from which the payment of such benefits shall be made, and the fund from which the expenses of such association shall be defrayed, shall be derived from assessments or dues collected from its members. Payment of death benefits shall be to the families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon the member. Such association shall be governed by this article and shall be exempt from the provisions of insurance laws of this state, and no law hereafter passed shall apply to them unless they be expressly designated therein. Any such fraternal beneficial association may create, maintain, disburse and apply a reserve or emergency fund in accordance with its constitution or by-laws. [1901, ch. 90, § 1.]

§ 4571. **How to proceed.** All such associations coming within the description, as set forth in section 4570, organized under the laws of this or any other state, province or territory, and now doing business in this state, may continue such business; provided, that they hereafter comply with the provisions of this article regulating annual reports and the designation of the commissioner of insurance as the person upon whom process may be served as hereinafter provided. [1901, ch. 90, § 2.]

§ 4572. **How to do business in this state.** Any such association coming within the description, as set forth in section 4570, organized under the laws of any other state, province or territory, and not now doing business in this state, shall be admitted to do business within this state when it shall have filed with the commissioner of insurance, a duly certified copy of its charter and articles of association, and a copy of its constitution or laws, certified to by its secretary or corresponding officer, together with the appointment of the commissioner of insurance of this state as a person upon whom process may be served as hereinafter provided; and, provided, that such association shall be shown to be authorized to do business in the state, province or territory in which it is incorporated or organized, in case the laws of such state, province or territory shall provide for such authorization; and in case the laws of such state, province or territory do not provide for any formal authorization to do business on the part of such association, then such association shall be shown to be conducting its business in accordance with the provisions of this article, for which purpose the commissioner of insurance of this state may

personally, or by some person to be designated by him, examine into the condition, affairs, character and business methods, accounts, books and investments of such association at its home office, which examination shall be at the expense of such association, and shall be made within thirty days after the demand thereof, and the expense of such examination shall be limited to one hundred dollars. [1901, ch. 90, § 3.]

§ 4573. **Must file certificate of authorization.** Any association doing business under this article shall be permitted to do business upon filing annually with the commissioner of insurance of this state, the certificate of authorization of the insurance department of the state, province or territory in which it is incorporated or organized; provided, however, in case of failure to file said certificate by any such association, or in case the commissioner of insurance shall deem it necessary, he shall have power to examine, either personally or by some person designated by him, into the condition, affairs, character, business methods, accounts, books and investments of such association, at its home office, which examination shall be at the expense of the association; the amount thereof shall not exceed one hundred dollars in associations with no reserve or emergency fund, and two hundred dollars for associations with a reserve or emergency fund. [1901, ch. 90, § 4.]

§ 4574. **Must make annual report.** Every such association doing business in this state shall, on or before the first day of March of each year, make and file with the commissioner of insurance of this state, a report of its affairs and operations during the year ending on the thirty-first day of December, immediately preceding, which annual report shall be in lieu of all other reports required by any other law. Such reports shall be upon blank forms, to be provided by the commissioner of insurance, or may be printed in pamphlet form, and shall be verified under oath by the duly authorized officers of such association, and shall contain answers to the following questions:

1. Number of certificates issued during the year, or members admitted.
2. Amount of indemnity effected thereby.
3. Number of losses or benefit liabilities incurred.
4. Number of losses or benefit liabilities paid.
5. The amount received from each assessment for the year.
6. Total amount paid members, beneficiaries, legal representatives or heirs.
7. Number and kind of claims for which assessments have been made.
8. Number and kind of claims compromised or resisted, and statement of reasons.
9. Does association charge annual or other periodical dues or admission fees?
10. How much on each one thousand dollars, annually or per capita, as the case may be.
11. Total amount received, from what source, and the disposition thereof.
12. Total amount of salaries paid to officers.
13. Does the association guarantee, in its certificate, fixed amounts to be paid, regardless of amount realized from assessments, dues, admission fees and donations?
14. If so, state amount guaranteed, and the security of such guaranty.
15. Has the association a reserve fund?
16. If so, how is it created, and for what purpose, the amount thereof, and how invested?
17. Has the association more than one class?
18. If so, how many, and the amount of indemnity in each?
19. Number of members in each class.
20. If voluntary, so state, and give date of organization.
21. If organized under the laws of this state, under what law, and at what time; giving chapter and year and date of the passage of the act.

22. If organized under the laws of any other state, province or territory, state such fact, and the date of organization, giving chapter and year and date of passage of the act.

23. Number of certificates of beneficiary membership lapsed during the year.

24. Number in force at beginning and end of year; if more than one class, number in each class.

25. Names and addresses of its president, secretary and treasurer, or corresponding officers.

The commissioner of insurance is authorized and empowered to address any additional inquiries to any such association, in relation to its doings or condition, or any other matter connected with its transaction, relative to the business contemplated by this article; and such officers of such association, as the commissioner of insurance may require, shall promptly reply in writing, under oath, to all such inquiries. [1901, ch. 90, § 5.]

§ 4575. **When principal office is not in the state.** Each such association now doing, or hereafter admitted to do, business within this state, and not having its principal office within this state, and not being organized under the laws of this state, shall appoint, in writing, the commissioner of insurance, and his successors in office, to be its true and lawful attorney, upon whom all lawful process in any action or proceeding against it must be served, and in such writing shall agree that any lawful process against it, which is served on said attorney, shall be of the same legal force and validity as if served upon the association, and that the authority shall continue in force so long as any liability remains outstanding in this state. Copies of such certificate, certified by said commissioner of insurance, shall be deemed sufficient evidence thereof, and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Service upon such attorney shall be deemed sufficient service upon such association. When legal process against any such association is served upon said commissioner of insurance, he shall immediately notify the association of such service by letter, prepaid and directed to its secretary or corresponding officer, and shall within two days after such service forward in the same manner a copy of the process served on him to such officer. The plaintiff in such process so served shall pay to the commissioner of insurance, at the time of such service, a fee of three dollars, which shall be recovered by him as a part of the taxable costs, if he prevails in the suit. The commissioner of insurance shall keep a record of all processes served upon him, which record shall show the day and hour when such service was made. [1901, ch. 90, § 6.]

§ 4576. **Insurance commissioner issues permit.** The commissioner of insurance of this state shall, upon application of any association having the right to do business within this state, as provided by this article, issue to such association annually a permit in writing authorizing such association to do business within this state, for which permit and all proceedings in connection therewith, such association shall pay to said commissioner the fee of fifteen dollars. [1901, ch. 90, § 7.]

§ 4577. **File articles of incorporation.** Every fraternal or beneficiary society or association which undertakes to furnish indemnity to its members or their families, which is not incorporated under the laws of another state, shall before doing business in this state, incorporate under the provisions of article 3 of this chapter, and in addition shall file with the commissioner of insurance a duly certified copy of its articles of incorporation, and a copy of its constitution and laws, duly certified by its secretary or corresponding officer, and shall in all respects comply with, and be subject to, the provisions of this article so far as the same are applicable. Such commissioner of insurance shall, before issuing a permit to such corporation to do business, examine

into its character and ascertain that it in all things has complied with the requirements of this article. [1901, ch. 90, § 8.]

§ 4578. Paid agents, when employed. Such association shall not employ paid agents in soliciting or procuring members, except in the organization or building up of subordinate bodies, or granting members inducements to procure new members. [1901, ch. 90, § 9.]

§ 4579. Contract not valid. No contract with any such association shall be valid when there is a contract, agreement or understanding between the member and the beneficiary that the beneficiary, or any person for him, shall pay such member's assessments or dues, or either of them. [1891, ch. 90, § 10.]

§ 4580. Benefit not liable to attachment. The money or other benefit, charity, relief or aid to be paid, provided or rendered by any association authorized to do business under this article, shall not be liable to attachment by trustee, garnishee or other process, and shall not be seized, taken, appropriated or applied by any legal or equitable process, or by operation of law, to pay any debt or liability of a certificate holder, or of any beneficiary named in a certificate, or any person who may have any right thereunder. [1901, ch. 90, § 11.]

§ 4581. Must show mortuary assessment rate. No association, not admitted to transact business within this state prior to the taking effect of this article, shall be incorporated, or given a permit, or certificate of authority to transact business within this state, as provided for by this article, unless it shall first be shown that the mortuary assessment rates, provided for in whatever plan or business it has adopted, are not lower than is indicated as necessary by the following mortality table:

FRATERNAL CONGRESS MORTALITY TABLE.

Age.	No. Living.	No. Dying.	Probability of Dying.
20	100,000	500	.005000
21	99,500	501	.005035
22	98,999	502	.005071
23	98,497	503	.005107
24	97,994	505	.005153
25	97,489	507	.005201
26	96,982	510	.005259
27	96,472	513	.005318
28	95,959	517	.005388
29	95,442	522	.005469
30	94,920	527	.005552
31	94,393	533	.005647
32	93,860	540	.005753
33	93,320	548	.005872
34	92,772	557	.006004
35	92,215	567	.006149
36	91,648	578	.006307
37	91,070	591	.006490
38	90,479	606	.006698
39	89,873	622	.006921
40	89,251	640	.007171
41	88,611	660	.007448
42	87,951	683	.007766
43	87,268	708	.008113
44	86,560	734	.008480
45	85,826	761	.008867
46	85,065	790	.009287
47	84,275	822	.009754
48	83,453	857	.0102693
49	82,596	894	.0108238

FRATERNAL CONGRESS MORTALITY TABLE—CONTINUED.

Age.	No. Living.	No. Dying.	Probability of Dying.
50	81,702	935	.0114440
51	80,767	980	.0121337
52	79,786	1,029	.0128970
53	78,757	1,083	.0137511
54	77,674	1,140	.0146767
55	76,534	1,202	.0157054
56	75,332	1,270	.0168587
57	74,062	1,342	.0181200
58	72,720	1,418	.0194994
59	71,302	1,501	.0210513
60	69,801	1,588	.0227504
61	68,213	1,681	.0246434
62	66,532	1,778	.0267240
63	64,754	1,880	.0290330
64	62,874	1,985	.0315711
65	60,889	2,094	.0343904
66	58,795	2,206	.0375206
67	56,589	2,318	.0409620
68	54,271	2,430	.0447753
69	51,841	2,539	.0489767
70	49,302	2,645	.0536489
71	46,657	2,744	.0588122
72	43,913	2,832	.0644912
73	41,081	2,909	.0708113
74	38,172	2,969	.0777795
75	35,203	3,009	.0854757
76	32,194	3,026	.0939927
77	29,168	3,016	.1034010
78	26,152	2,977	.1138345
79	23,175	2,905	.1253506
80	20,270	2,799	.1385163
81	17,471	2,659	.1521951
82	14,812	2,485	.1677694
83	12,327	2,280	.1849599
84	10,047	2,050	.1855707
85	7,997	1,800	.2250844
86	6,197	1,539	.2483460
87	4,658	1,277	.2741520
88	3,381	1,023	.3025732
89	2,358	788	.3341815
90	1,570	579	3687898
91	991	404	.4076690
92	587	264	.4497445
93	323	161	.4984520
94	162	89	.5493827
95	73	44	.6027397
96	29	19	.6551724
97	10	7	.7000000
98	3	3	1.0000000

[1901, ch. 90, § 12.]

§ **4582. How governed.** Any such association, organized under the laws of this state, may provide for the meetings of its legislative or governing body in any other state, province or territory, wherein such association shall have subordinate bodies, and all business transacted at such meetings shall be valid in all respects, as if such meetings were held within this state, and where

the laws of any such association provide for the election of its officers by votes to be cast in its subordinate bodies, the votes so cast in its subordinate bodies in any other state, province or territory, shall be valid as if cast within this state. [1901, ch. 90, § 13.]

§ 4583. **Fraudulent statements. Penalty.** Any person, officer, member or examining physician, who shall knowingly or willfully, make any false or fraudulent statement or representation, in or with reference to any application for membership, or for the purpose of obtaining any money or benefit in any association transacting business under this article, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars, or imprisonment in the county jail for not less than thirty days, nor more than one year, or both, in the discretion of the court; and any person who shall willfully make a false statement of any material fact or thing in a sworn statement as to the death or disability of a certificate holder in any such association, for the purpose of procuring payment of a benefit named in the certificate of such holder, and any person who shall willfully make any false statement in any verified report or declaration, under oath, required or authorized by this article, shall be guilty of perjury, and shall be proceeded against and punished as provided by the statutes of this state in relation to the crime of perjury. [1901, ch. 90, § 14.]

§ 4584. **Refusing to make statement. Penalty.** Any such association refusing or neglecting to make the report, as provided in this article, shall be excluded from doing business within this state. The commissioner of insurance must, within sixty days after failure to make such report, or in case any such association shall exceed its powers, or shall conduct its business fraudulently, or shall fail to comply with any of the provisions of this article, give notice in writing to the attorney general, who shall immediately commence an action against any such association to enjoin the same from carrying on any business. No injunction against any such association shall be granted by any court, except on application by the attorney general, at the request of the commissioner of insurance, whether the state, or a member, or other party, seeks relief. No association so enjoined shall have authority to continue business until such report shall be made, or overt act or violations complained of shall have been corrected, nor until the costs of such action be paid by it, provided the court shall find that such association was in default as charged, whereupon the commissioner of insurance shall reinstate such association, and not until then shall such association be allowed to again do business in this state. Any officer, agent or person acting for any association or subordinate body thereof within this state, while such association shall be so enjoined or prohibited from doing business pursuant to this article, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not less than twenty-five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court. [1901, ch. 90, § 15.]

§ 4585. **Penalty for failure to comply.** Any person who shall act within this state, as an officer, agent, or otherwise, for any association, which shall have failed, neglected or refused to comply with, or shall have violated any of the provisions of this article, or shall have failed or neglected to procure from the commissioner of insurance a proper certificate of authority to transact business, as provided for by this article, shall be subject to the penalty provided in the last preceding section for the misdemeanor therein specified. [1901, ch. 90, § 16.]

Article 6.—Cemetery Corporations.

§ 4586. **Real property limited. Uses.** Every cemetery corporation has power to purchase or take by gift, grant, or devise, and to hold real property,

not exceeding eighty acres for the sole use and purpose of a burial ground, and to lay out the same into blocks and lots with convenient avenues and walks and to sell the lots for the sole use and purpose of burying the dead; and it may hold all such personal property as the legitimate and necessary purposes of the corporation may require. [Civ. C. 1877, § 553; R. C. 1899, § 3191.]

§ 4587. Survey and plat. Record. Such corporation shall cause its land, or such portion thereof as may from time to time become necessary for that purpose, to be surveyed into lots, avenues and walks and platted and the plat of ground as surveyed shall be acknowledged and recorded in the office of the register of deeds of the county. Each lot shall be regularly numbered by the surveyor and such number shall be marked on the plat and recorded. [Civ. C. 1877, § 554; R. C. 1899, § 3192.]

§ 4588. Powers. Such corporation has power to inclose, improve and embellish its grounds, avenues and walks and to erect buildings or vaults for its use, and to prescribe in its by-laws rules for the sale, inclosure and ornamentation of lots and for erecting monuments or gravestones thereon; and to prohibit any use, division, improvement or ornamentation of any lot which the corporation may deem improper; and to make other by-laws and acts to the end that all the appliances, conveniences and benefits of a public and private cemetery may be obtained and secured. [Civ. C. 1877, § 555; R. C. 1899, § 3193.]

§ 4589. How proceeds from sale applied. The proceeds arising from the sale of lots, after deducting all expenses of purchasing, inclosing, laying out and improving the ground and of erecting buildings shall be exclusively applied, appropriated and used in protecting, preserving, improving and embellishing the cemetery and its appurtenances and to paying the necessary expenses of the corporation and must not be appropriated to any purposes of profit to the corporation or its members. [Civ. C. 1877, § 556; R. C. 1899, § 3194.]

§ 4590. Debts paid from proceeds. At least fifty per cent of the gross proceeds of sales of blocks, lots or graves must be applied as often as every six months to the payment of the debts and obligations of the corporation. [Civ. C. 1877, § 557; R. C. 1899, § 3195.]

§ 4591. Previous lot owners members. When grounds purchased or otherwise acquired for cemetery purposes have been previously used as a burial ground, those who are lot owners at the time of the purchase, continue to own the same and are members of the corporation, as hereinafter provided, with all the privileges the purchase of a corporation lot confers. [Civ. C. 1877, § 558; R. C. 1899, § 3196.]

§ 4592. Only lot owners entitled to vote. At each subsequent election of officers of any such corporation held after the first annual election the owner or owners of a lot in the cemetery, and none other, shall be entitled to one vote at such election or for any other purpose and no more than one vote; and shall by virtue of such proprietorship be a member of the corporation and eligible to any of its offices; but if there is more than one proprietor of any such lot then such one of the proprietors as the majority of them shall designate may cast the one vote as aforesaid; and each trustee or director shall be the sole proprietor of a lot in such cemetery. [Civ. C. 1877, § 559; R. C. 1899, § 3197.]

§ 4593. Interment makes lot inalienable. Whenever an interment is made in any lot transferred to individual owners by the corporation the same thereby, while any person is buried therein, becomes forever inalienable and descends in regular line of succession to the heirs at law of the owner; but any one or more of such heirs may release to any other of said heirs his or their interest in the same and any other joint owners may release to each other in like manner. [Civ. C. 1877, § 560; R. C. 1899, § 3198.]

§ **4594. Wholly exempt.** All the property of every such benevolent corporation and the lots sold by it to individual proprietors shall be exempt from taxation, assessment, lien, attachment and from levy and sale upon execution; and all such real property shall be exempt from appropriation for streets, roads or any other public uses or purposes. [Civ. C. 1877, § 561; R. C. 1899, § 3199.]

ARTICLE 7.—HOMES FOR ORPHANS.

§ **4595. Rules and regulations.** Whenever not less than twenty reputable citizens of the state of North Dakota have or shall associate themselves into a corporation under the laws of this state, for the purpose of securing homes for orphans or for homeless, abandoned and neglected or grossly ill-treated children, by adoption or otherwise, into private families, have or shall file with the secretary of state their articles of incorporation, together with a certificate signed by the governor and three or more members of the supreme court of the state of North Dakota, of their confidence in the trustworthiness of said corporation for said purposes, said corporation shall have power to receive such children for the purposes above expressed, in the manner herein specified; provided, that at the end of ten years said power shall cease, unless a new certificate as provided above, signed by at least three members of the supreme court of North Dakota, shall be filed as above, and such certificates shall be filed every ten years during the continuance of such society. Such society shall have a main office and adopt rules for the transaction of business, which shall be published, and its financial records shall be open to the inspection of the public. [1897, ch. 87, § 1; R. C. 1899, § 3199a.]

§ **4596. Powers of society.** Such society shall have the power to receive into its hands and under its control, and may become the legal guardian of any child under fourteen years of age without his consent, and over fourteen years and under eighteen years with his consent, of the state, who is grossly ill-treated by any person or persons exercising control over it, or who shall have been abandoned or is without a home, or is surrounded by bad or immoral influences, or whose living parent or parents, by written authority, shall assign the custody of the same to such society; and such society is hereby authorized and empowered to consent through its duly authorized agent in the courts of this state, in place of, instead of, and whenever it is by law permitted to the parent or guardian of a minor child, to consent to the adoption of such child in the court, under the laws and in the manner provided for the adoption of children, and such agent of said society shall have power to administer oaths of and acknowledge affidavits in all matters pertaining to the business of such society. Such society shall have the power and authority to enter into contracts with the persons taking the children, but not legally adopting them, as soon as possible after the period of ninety days' trial upon which the child may have been taken has elapsed; and this contract shall provide for the proper care of the child until the age of eighteen years in the case of a girl and twenty-one years in the case of a boy, and shall specify the amount to be paid to the ward at the expiration of the period of the contract; provided, that in no case shall such contract contain any provision of a sectarian or political nature regarding the care, custody or education of such children. [1897, ch. 87, § 2; 1899, ch. 98, § 2; R. C. 1899, § 3199b.]

§ **4597. Compensation.** The said society shall not in any case charge or receive from the person or persons adopting any child through said society, any compensation for the same, except the expense of taking the child to the home where the child is placed, and persons so taking a child shall not be authorized to require of the society compensation for the care, clothing or medical attendance of such child, if it is returned to the keeping of said society. [1897, ch. 87, § 3; R. C. 1899, § 3199c.]

§ 4598. **Society shall report condition.** It shall be the duty of such society to keep a careful supervision of all children so placed by them and require of all families who have taken, except those who have legally adopted them, a full report of the condition and welfare of the child, not less frequently than once a year. The authorized agents of the society shall have the right to visit such families and personally investigate the condition and welfare of the children as occasion may require; and if such agents shall become satisfied upon due investigation that the influence of the home is vicious or harmful to the child, or that the treatment is unduly severe or seriously lacking in wise and considerate care, then the superintendent of the society shall have authority to require the return of the child to the care of the society at its main office at the expense of the family having it. [1897, ch. 87, § 4; R. C. 1899, § 3199d.]

§ 4599. **In cases of complaints.** Whenever a complaint or a petition in writing of two of the commissioners of a county, or two of the town supervisors of any town, or two aldermen of any city, or two officers of any incorporated village or town, shall be made to the county judge, stating that any minor child or children under fourteen years of age, residing in such county, are in their opinion dependent upon the public for support or have been abandoned or neglected, or are in a state of vagrancy or mendicity, or are in a state of want or suffering, or are in peril of life, health or morality, by cruel or bad treatment, or by the habitual intemperance or grave misconduct of parents or guardians, it shall thereupon be the duty of such county judge to investigate the facts in such case and ascertain whether such child or children are dependent, neglected, abandoned or ill-treated, the residence and so far as possible the whereabouts of the parents, whether the condition and treatment of said children and general surroundings are such as to imperil the life, health or morality in consequence of their surroundings, or of the grave misconduct or habitual intemperance of their parents or guardian, and if said county judge shall so find he shall enter such finding in his office, certifying and directing that such child or children shall be and are turned over to the care and custody of said society for the purpose of adoption into private families or otherwise as to said society seems best, and shall order that it be taken in charge of at once or as soon as it can be conveniently done by said society, and shall deliver to said society a certified copy of such order, which order shall contain besides such finding a statement of the facts as far as ascertained as to the age of the child, name, nationality, residence, and occupation of the parents or either of them. Upon entering such order the parents of said child shall be released from all parental duties towards, and responsibility for such child, and shall thereafter have no rights over or to the custody, services or earnings of such child. In case any parent or other person having the custody of such child, shall refuse to surrender said child to said society or its agent, said county judge is hereby authorized and empowered to direct the sheriff of the county to take possession of said child; and if so directed, it shall be the duty of the said sheriff to deliver said child to said society or its agent. The said county judge is hereby authorized to compel the attendance of witnesses on such examination, and it shall be the duty of the county attorney, when requested by the county judge to attend any examination on behalf of the petitioners. Any friend of said child may appear in its behalf in said county court, and the said county judge may in his discretion request any county commissioner, town supervisor, alderman or other officer of the town or city, where such examination is held or where said child resides, to appear in behalf of the child, and the records of such proceedings shall show who, if any one, appeared in behalf of the petitioner or of the child on such examination. [1897, ch. 87, § 5; 1899, ch. 98, § 5; R. C. 1899, § 3199e.]

§ 4600. **Citations issued in certain cases.** Whenever a petition such as is provided for in section 4599, shall be presented, signed by the parties

as above provided, if it shall appear that one or both parents of the child reside in said county, the county judge shall issue a citation or notice, fixing the time and place for the hearing of said petition, which shall be served on one or both of said parents, if either can be found in the county, not less than two days before the time fixed for the hearing of said petition, requiring them to appear, if they so desire, on said day and hour, and show cause, if any, why such child should not be taken from them and delivered to the care and custody of said society for the purposes of adoption into a private family or otherwise as said society shall determine; provided, such citation or notice shall not be necessary if such parent or parents shall join in such petition. It shall be the duty of the county judge, in case such citation or notice has not been served upon said parents, before proceeding to hear and determine the petition, to require a certificate of the sheriff of the county that he has made diligent search to find and serve the same on one or both of the parents, but has been unable to find either of them; but, in case of such inability to give such notice, the proceedings shall be heard the same as though such notice had been given and such citation duly served. It is also herein expressly enacted that no provision of this article shall be construed as giving any claim to any society organized under it to an appropriation from the treasury of the state. [1899, ch. 87, §§ 6, 7; R. C. 1899, § 3199f.]

§ 4601. Unlawful to solicit for orphan's homes without a license. License, how obtained. Exceptions. It shall be unlawful for any person to solicit contributions for an orphan asylum, children's home, rescue home, hospital or such like charitable organization, organized or established in any other state, without having first obtained a license from the state examiner, until such time as a state board of charities shall have been established, when said license shall be issued by the secretary of such board of charities, as in this section provided. When any person desires to solicit aid for any charitable organization, as described in this section, they shall first file a statement with the state examiner, until there shall be a state board of charities established, duly verified under oath, giving a detailed history of the work and needs of the organization they represent. It shall then be the duty of the state examiner, or of the board of public charities when established, to investigate the case, and if satisfied that the cause is trustworthy, a permit shall be issued to such applicant, giving him or her the right to solicit within the state of North Dakota. Such permit shall be good for one year only and may be renewed from year to year, but shall be subject to revocation at any time for just cause. Any person receiving such a permit must at all times when soliciting, produce the same if called upon to do so, and a refusal shall be deemed prima facie evidence that the solicitor is violating the provisions of this section. This section shall not apply to sisters of charity, salvation army, deaconesses, who wear a distinct garb, nor to taking up collections in churches for organizations distinctly denominational in character and management. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and shall be subject to punishment as provided in section 8542. [1903, ch. 39.]

§ 4602. Foreign societies must give bonds. Before any association or society, incorporated in any other state, for the purpose of caring for orphans or dependent children, shall bring or send any child or children into the state of North Dakota, for the purpose of being placed in a family home, by adoption or otherwise, they shall first file a bond in favor of the state of North Dakota in the penal sum of two thousand dollars with the treasurer of the county where such child is to be placed, conditioned that such child has no contagious or incurable disease, or has no deformity, or is not of feeble mind, or of vicious character, and that said association or society will promptly receive and remove from the state of North Dakota such child if it shall become a public charge within the period of five years after being brought into the state; provided, that this article shall not be construed so as to pro-

hibit any person residing in the state of North Dakota from receiving and adopting into his family any child or children of relatives from another state. [1903, ch. 79, § 1.]

§ **4603. Bonds approved by county commissioners. Penalty.** Such bonds shall be furnished for each and every child to be placed in North Dakota by said association or societies, and must be signed by at least one freeholder of the state of North Dakota, and be approved by the board of county commissioners. Any agent of any association or society violating the provisions of this article, or any person receiving a child in violation of this article, shall be deemed guilty of a misdemeanor. [1903, ch. 79, §§ 2, 3.]

CHAPTER 18.

AGRICULTURAL FAIR CORPORATIONS.

§ **4604. Powers.** Agricultural fair corporations are authorized and empowered to make any and all regulations, rules and provisions, not inconsistent with law, which shall in their judgment be necessary or proper for the government, management and control of the premises used by them for the holding of fairs, and all expositions to be held thereon, and all such needful rules and regulations concerning the government and deportment of the public thereon, which may be requisite or proper. [1903, ch. 7, § 1.]

§ **4605. Board of directors.** The board of directors shall consist of not less than three, nor more than fifteen persons. The by-laws may provide that one or more persons not stockholders, may be elected directors. [1903, ch. 7, § 2.]

§ **4606. Liability of stockholders.** The liability of stockholders shall not be other or greater than that provided in section 4221 of this code. [1903, ch. 7, § 3.]

§ **4607. May hold real property. Limitation.** Agricultural fair corporations may purchase, hold or lease any quantity of land, not exceeding in the aggregate one hundred and sixty acres, with such buildings and improvements as may be erected thereon and may sell, lease or otherwise dispose of the same at pleasure. This real estate must be held for the purpose of erecting buildings and making other improvements thereon, to promote and encourage agriculture, horticulture, mechanics, manufactures, stock raising and general domestic industry. [Civ. C. 1877, § 562; R. C. 1899, § 3200.]

§ **4608. Debts limited.** Such corporation must not contract any debts or liabilities in excess of the amount of money in the treasury at the time of contract, except for the purchase of real property, for which it may create a debt not exceeding three thousand dollars, secured by mortgage on the property of the corporation. The directors who vote therefor are personally liable for any debt contracted or incurred in violation of this section. [Civ. C. 1877, § 564; R. C. 1899, § 3201.]

§ **4609. Income and expenses.** Agricultural fair corporations are not conducted for profit and have no capital stock or income other than that derived from charges to exhibitors and fees for membership and admissions, which charges, together with the term of membership and the mode of acquiring the same must be provided in their by-laws. Such charges and fees must never be greater than to raise sufficient money to discharge the debt for the real estate and the improvements thereon and to defray the current expenses of fairs; provided, that agricultural fair corporations may also be organized by three or more persons as in the case of other corporations, with all the rights, privileges and liabilities appertaining to such corporations under the corporation laws of this state, including such rights and privileges as are specified in this and the two preceding sections. [Civ. C. 1877, § 565; 1879, ch. 8, § 1; R. C. 1899, § 3202.]

CHAPTER 19.

BUILDING AND LOAN ASSOCIATIONS.

§ 4610. **How formed.** Any ten or more persons may form a corporation for the purpose of doing business as a building and loan association in the manner provided in this chapter and, except as otherwise provided, the provisions of articles 1 to 12, inclusive, of chapter 11, of this code, shall be applicable to such corporation. Such corporation may do business outside of this state if it shall have expressed its intention so to do in its articles of incorporation, and no foreign building and loan association, or corporation organized to do business as a building and loan association in any foreign state shall be authorized to transact any business as such corporation in the state of North Dakota until they shall have first deposited with the state treasurer lawful money of the United States or bonds, securities, or other evidences of indebtedness owned and held by such foreign corporation in the amount of twenty-five thousand dollars, the sufficiency of said bonds or mortgages so deposited to be approved by the state treasurer; and such moneys, bonds or securities so deposited shall be subject to assessment and the levy and collection of taxes against the same in the same manner as if said property was owned and controlled by a resident of the state of North Dakota, and no business shall be transacted in the state of North Dakota by any such foreign corporation until they shall have deposited with the state treasurer the moneys or securities hereinbefore mentioned and secured the treasurer's receipt for such deposit. The said moneys or securities so deposited shall be surrendered to the corporation depositing the same whenever they shall present the certificate of the public examiner that all liabilities on the part of such corporation to any citizen of the state have been fully discharged and not otherwise. [1899, ch. 31; R. C. 1899, § 3203.]

§ 4611. **When capital stock paid in. Lien on shares. Series. Withdrawals.** The capital stock of any corporation formed pursuant to this chapter shall be paid in at such times, in such amounts and at such places as the by-laws shall appoint; every share of stock shall be subject to a lien for the payment of unpaid installments and other charges incurred thereon under the provisions of the by-laws and the by-laws may prescribe the form and manner of enforcing such lien; new shares of stock may be issued in lieu of shares withdrawn or forfeited. The stock may be issued in one or more successive series in such amounts as the board of directors or stockholders may determine and any stockholder wishing to withdraw from the corporation shall have power to do so by giving thirty days' notice of his intention to withdraw, when he shall be entitled to receive the amount paid in by him and such proportion of the profit as the by-laws may determine, less all fines and other charges; provided, that at no time shall more than one-half of the funds in the treasury of the corporation be applicable to the demands of withdrawing stockholders without the consent of the board of directors; and that no stockholder shall be entitled to withdraw whose stock is held in pledge for security. Upon the death of the stockholder his legal representatives shall be entitled to receive the full amount paid in by him and legal interest thereon after deducting all charges that may be due on stock. No fine shall be charged to a deceased member's account after his decease, unless the legal representatives of such decedent assume the future payments on the stock. [1885, ch. 34, § 2; 1887, ch. 34, § 1; 1889, ch. 40, § 11; R. C. 1895, § 3204.]

§ 4612. **Loaning funds.** The officers may hold stated meetings at which the money in the treasury if equal to the amount of one share in stock in

such corporation shall be offered for loan in open meeting and the stockholder who shall bid the highest premium for the preference or priority of loan shall be entitled to receive a loan of the amount of the par value of one share of stock for each share of stock held by him. It is also further provided that any such corporation may loan any of the funds in its treasury, at such rates of premium and interest, and to any stockholder, at such times and in such manner, as shall be fixed or provided for by the terms of the articles of incorporation, charter or by-laws of such corporation, anything to the contrary herein contained, notwithstanding. Any loans that shall have heretofore been made by any building and loan association, organized under the laws of the state of North Dakota and pursuant to the terms of its articles of incorporation or by-laws, are hereby declared to be lawful and are not ultra vires or usurious; provided, that the provisions of this article shall not apply to foreign building and loan associations doing business within the state. [1885, ch. 34, § 4; 1887, ch. 34, § 3; 1899, ch. 32, § 1; R. C. 1899, § 3205.]

May fix minimum premium at which money may be loaned. Co-operative Savings & Loan Ass'n. v. Fawick, 11 S. D. 589, 79 N. W. 847. (See section 4617.)

§ 4613. Loans evidenced by note, secured by mortgage and pledge of shares. Conditions of mortgage. For every loan made a note secured by first mortgage of real estate shall be given, accompanied by a transfer and pledge of the shares of the borrower. The shares so pledged shall be held by the corporation as collateral security for the performance of the conditions of such note and mortgage. The note and mortgage shall recite the number of shares pledged and the amount of money advanced thereon and shall be conditioned for the payment of the dues on such shares and the interest and premium upon the loan, together with all fines and payments in arrears, until such shares reach the ultimate par value of the shares of stock of the corporation, or the loan is otherwise canceled and discharged; provided, that the shares without other security may in the discretion of the directors be pledged as security for loans to an amount not exceeding their value as adjusted at the last adjustment and valuation of shares before the time of the loan. If the borrower neglects to offer security satisfactory to the directors within the time prescribed by the by-laws his right to the loan shall be forfeited and he shall be charged with one month's interest and one month's premium at the rate bid by him, together with all expenses, if any, incurred; and the money appropriated for such loan may be reloaned at the next or any subsequent meeting. [R. C. 1895, § 3206.]

§ 4614. Loans may be repaid at any time. Option of borrower. A borrower may repay a loan at any time upon application to the corporation, whereupon, on settlement of his account, he shall be charged with the full amount of the original loan together with all installments of interest, premiums and fines in arrears, and shall be given credit for the withdrawing value of his shares pledged and transferred as security; and the balance shall be received by the corporation in full satisfaction and discharge of such loan; provided, that a borrower desiring to retain his shares and membership may, at his option, repay his loan without claiming credit for such shares, whereupon the shares shall be retransferred to him, and shall be free from any claim by reason of such canceled loan. If, however, the by-laws of the corporation prescribe a different manner and different terms upon which a loan may be repaid the repayment can only be made in accordance with such by-laws. [1885, ch. 34, § 5; 1887, ch. 34, § 4; R. C. 1895, § 3207.]

Monthly payments on stock cannot be applied on amount borrowed for which stock is pledged. United States Saving & Loan Co. v. Shain, 8 N. D. 136, 77 N. W. 1006; Hale v. Cairns, 8 N. D. 145, 77 N. W. 1010.

Discount of shares not a loan and monthly payments must be deducted. Clarke v. Olson, 9 N. D. 364, 83 N. W. 519.

Whole sum becomes due upon failure to make monthly payments of interest as agreed for period of six months. Yankton Bldg. & Loan Ass'n v. Dowling, 10 S. D. 535, 74 N. W. 436.

Amounts with which borrowing member is to be charged and credited on liquidation of association. Hale v. Gullick, 13 S. D. 637, 84 N. W. 196.

§ **4615. No premium deemed usurious.** No premiums, fines or interest on premiums that may accrue to the corporation according to the provisions of this chapter shall be deemed usurious. [1885, ch. 34, § 6; R. C. 1895, § 3208.]

Is constitutional. Legislature has right to except dealings between such associations and stockholders from provisions of general usury law. Payment of bonus not usury. Vermont Loan & Trust Co. v. Whithed, 2 N. D. 82, 49 N. W. 318.

§ **4616. May purchase real estate.** Every corporation may purchase at any sale, public or private, any real estate upon which it may have a mortgage, judgment lien or other incumbrance or ground rent, or in which it may have any interest, and may sell, convey, lease or mortgage at pleasure real estate so purchased, and may purchase and hold such real estate and buildings as may be necessary for its immediate accommodation in the transaction of its business. [1899, ch. 32, § 2; R. C. 1899, § 3209.]

§ **4617. Minimum premium.** Such corporation may in its by-laws fix a per cent premium at less than which it will not be obliged to accept loans. [1889, ch. 40, § 4; R. C. 1899, § 3210.]

§ **4618. Loan fund. Uses prohibited.** Not less than eighty-three per cent of all monthly dues collected from the share holders of such corporation shall be put into a fund to be known as the loan fund, no part of which shall be used by the corporation for the purpose of paying its expenses, or the expense of carrying on its business, excepting interest, taxes and insurance. [1889, ch. 40, § 5; R. C. 1895, § 3211.]

§ **4619. Investment of unloaned funds.** Any funds of such corporation, which shall remain unloaned for a period of more than thirty days and for which there is no sufficient demand, may be loaned or invested by the corporation under the provisions of its by-laws at any rate of interest allowed by law upon any security approved and accepted by the board of directors. [1889, ch. 40, § 7; R. C. 1895, § 3212.]

§ **4620. Power to borrow.** Such corporation shall have power to borrow money under such restrictions and regulations as its by-laws may provide. [1889, ch. 40, § 8; R. C. 1895, § 3213.]

§ **4621. Retirement of unpledged shares.** The board of directors of such corporation shall have power in its discretion to retire the unpledged shares of stock of such corporation at any time after the third year from the date of the issue of such stock and to enforce the withdrawal of the same in such manner and under such regulations as it may deem best for the interest of the corporation. It shall determine by lot or in any other impartial manner which shares shall be thus retired, but no unmatured stock shall be retired while any matured stock remains in force. [1889, ch. 40, § 9; R. C. 1895, § 3214.]

§ **4622. Voluntary withdrawals.** The by-laws of such corporation may provide for the voluntary withdrawal and cancellation at or before maturity of shares of stock not borrowed on; provided, that such withdrawal and cancellation shall be pro rata among the shares of the same series of stock. [1885, ch. 34, § 18; R. C. 1895, § 3215.]

§ **4623. Annual report. Contents.** Any building and loan association doing business in this state shall annually make a true and correct statement, verified by the oath of its president or secretary, setting forth its actual financial condition on the thirtieth day of June of the current year, which shall be forwarded to the state examiner not later than the first day of August of the same year and shall contain the following information:

1. The amount of authorized capital and the par value of each share of stock.
2. The number of shares sold during the year.

3. The number of shares canceled and withdrawn during the year.
4. The number of shares in force at the end of the year.
5. A detailed statement of the receipts and disbursements during the year.
6. A detailed statement of the assets and liabilities at the end of the year.

Such report shall also show the total amount received as dues on stock under each separate class or kind of stock and all deductions therefrom for expenses, withdrawals, cancellations, forfeitures, refunded or otherwise, and the amounts, if any, of profits credited to stock or subject to such credit, the number of shares in force of each issue or series and the amount expended during the year in payment of salaries of officers, clerks, agents and all other employes, the amount expended for traveling expenses, rent, postage, including telegraph and express charges, printing, books and stationery, office supplies, office furniture, advertising, commissions paid agents or other persons and all other items of expense. In addition such annual reports shall contain a statement of the business of the corporation for the preceding year, showing the amount of resources included in mortgage loans, the amount of loans on stock of the association, the amount of loans on other securities specifying the kind of such securities, the amount of unpaid dues, fines, premiums and interest, the amount due from agents, the amount due from banks, the amount invested in real estate and obtained on foreclosure, the amount invested in furniture and fixtures, the amount of cash on hand and the amount of all other resources of the association not enumerated heretofore; and shall state as its liabilities the amount received from stock subscriptions, the amount due from stock delinquent in each class or kind of stock and the unpaid fines on such stock, the amount set aside as an expense fund from each kind or class of stock, the amount of undivided profits at the beginning of the year, the amount received as interest, premiums, fees, fines or other sources as profits during the year, the amount of such interest and interest delinquent at the end of the year, the amount of all bills payable and the amount of all other liabilities at the close of the year. Within thirty days from the filing of the report a statement of the assets and liabilities shall be published at least once in some newspaper in the city or town in which the association has its principal place of business. All statements herein required to be made shall be uniform and in accordance with a form to be prescribed by the state examiner, and shall correctly show the proportion which the entire expenses of the association for the term reported bear to its gross earnings for that term. All reports required of building and loan associations organized under the laws of this state are also required of all foreign building and loan associations doing business in this state, and all the provisions of this chapter relating to such reports, the filing thereof and the fees therefor shall apply to such foreign building and loan associations. [R. C. 1895, § 3216.]

§ 4624. **Penalty for not making report. Certificate of authority.** If any such association shall fail to furnish to the state examiner the report required by this chapter at the time required, it shall forfeit the sum of twenty-five dollars for every day such report shall be delayed or withheld and the attorney general on the application of the state examiner shall bring an action to recover such penalty. After receiving such annual report the state examiner, if satisfied that such corporation has complied with all the provisions of this chapter and is entitled to do business in this state, shall issue his certificate, stating the compliance with such provisions, and that such corporation is entitled to do business in this state, which certificate shall be in force for the period of one year, unless sooner rescinded as provided in this chapter. The state examiner shall also issue such certificate to a domestic corporation, which commenced business at some intervening period in any year which has complied with the law in regard to its articles of incorporation and in all other respects except the filing of such report. [R. C. 1895, § 3217.]

§ 4625. **Examination by state examiner. Fee.** It shall be the duty of the state examiner, as often as he may deem necessary and at least once in each year, to examine every building and loan association incorporated under the laws of this state, and for that purpose he shall have and exercise over such corporation, its business, officers, directors and employes, all the power and authority conferred upon him by the laws of this state over banks and other moneyed corporations; provided, that he shall not have the power to suspend the operation of any such corporation, except in the manner provided in this chapter. The state examiner shall have the same supervision and control over the business within this state of foreign corporations of like kind, doing business in this state. Upon the completion of any examination of any association made by the state examiner or under his direction, the association so examined shall pay to the examiner a fee to be determined as follows, viz: For the first one hundred thousand dollars of assets, a fee of twenty dollars, and for each additional one hundred thousand dollars of assets, or major portion thereof, an additional fee of ten dollars. [R. C. 1895, § 3218; 1901, ch. 46; 1905, ch. 59.]

§ 4626. **Action against insolvent corporations.** If it shall appear to the state examiner from any examination made by him or from the annual report aforesaid, that any domestic or foreign building and loan association is violating the law, or that it is conducting business in an unsafe, unauthorized or dishonest manner, he shall by an order under his hand and seal of office addressed to such corporation direct compliance with the requirements of the law; and whenever such corporation shall refuse or neglect to make such report or account as may be lawfully required, or to comply with such order as aforesaid, the state examiner shall file a statement in writing with the attorney general, setting forth the facts or particulars in which such alleged violation or refusal consists, which statement shall be prima facie evidence of such violation or refusal, whereupon the attorney general shall institute such proceedings against such corporation as are provided by law in case of insolvent corporations, or such other proceedings as the occasion may require. It is further provided that in the event of the payment or foreclosure or redemption under foreclosure of any and all mortgages held by such insolvent foreign or domestic corporations, or their assignees, the amount paid for dues and premiums on stock pledged as security for such loan shall be credited on such mortgage and the obligation thereby secured. [1899, ch. 33; R. C. 1899, § 3219.]

§ 4627. **Conditions on which foreign corporations can do business in this state.** No foreign building and loan association or corporation shall do business in this state, until:

1. It shall have first complied with the provisions of sections 4695 and 4697.

2. It shall have obtained from the state examiner a certificate authorizing it to do business in this state.

Upon application by any foreign building and loan corporation or association to do business in this state, and thereafter whenever the state examiner shall deem it prudent for the public interest he shall examine into its financial condition and method of doing business and for that purpose, if he deems it necessary he may visit such corporation, or cause the same to be visited by a competent person appointed by him, and he may demand from such corporation or association, in advance, his fees and necessary expenses for making such examination and may refuse to make the same or to issue any certificate unless such fees and expenses are paid, and if a certificate has already been issued may rescind the same. For the purpose of making such examination the person making the same shall have free access to all the books and papers of the corporation that relate to its business and to the books and papers

kept by any of its agents and may summon as witnesses and examine under oath the directors, officers, agents and trustees of any such corporation and any other person in relation to its affairs, transactions and condition. [R. C. 1895, § 3220.]

§ **4628. Certificate to foreign corporation.** If he is satisfied from such examination that such corporation is solvent and its method of doing business is such as is likely to be beneficial to all of its members alike, he shall issue a certificate, authorizing it to do business in this state, if one is not already in force, which certificate shall be in force for one year, or until the time required for the filing of the annual report unless sooner rescinded. [R. C. 1895, § 3221.]

§ **4629. Revocation of authority.** If the state examiner is of opinion upon examination or other evidence that a foreign building and loan association doing business in this state is in an unsound condition, or if it has failed to comply with the law, or if it, its officers or agents, refuse to submit to examination, or to perform any legal obligation in relation thereto, he shall revoke or suspend its certificate of authority and shall cause notification thereof to be published three times, once in each week, for three successive weeks, in some newspaper published at the seat of government and shall mail a copy to such association or corporation at its home office and no new business shall thereafter be done by it, or its agents in this state while such default or disability continues, nor until its authority to do business is restored by the examiner. [R. C. 1895, § 3222.]

§ **4630. Selling stock of foreign corporation without authority, a misdemeanor.** Any officer, director or agent of any foreign building and loan association, or any person whatever, who shall in this state solicit subscriptions to the stock of such association, or who shall sell or issue, or knowingly cause to be sold or issued to a resident of this state any stock of such association, while such association shall not hold the certificate of the state examiner, authorizing it to do business in this state as herein prescribed, or before such association has complied with all the provisions of this chapter or when such association shall have been notified that its authority to do business in this state has been revoked, as hereinbefore provided, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars, or by imprisonment of not less than ten days nor more than six months or by both such fine and imprisonment, in the discretion of the court. [R. C. 1895, § 3223.]

§ **4631. Same. Domestic corporation.** Any officer, director or agent of any building and loan association incorporated under the laws of this state, or any other person whatever, who shall sell or issue, or knowingly cause to be sold or issued to any person any stock of such association, while such association shall not have a certificate of the state examiner authorizing it to do business as herein prescribed shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars, or by imprisonment of not less than ten days nor more than six months, or by both such fine and imprisonment in the discretion of the court. [R. C. 1895, § 3224.]

§ **4632. Reincorporation not necessary.** All corporations heretofore organized in this state and doing business as building and loan associations shall comply with and be subject to all the provisions of this chapter and shall be entitled to all the privileges and benefits thereof without reincorporating. [R. C. 1895, § 3225.]

CHAPTER 20.

RIGHT OF WAY FOR TELEPHONE AND ELECTRIC LINES.

§ 4633. **Right of way for telephone lines.** The board of county commissioners of any county, board of supervisors of any township, board of aldermen of any incorporated city, or board of trustees of any town or village in this state, may, when deemed for the best interest of their respective municipal corporations, grant to any person, who is a resident of this state, or to any company or corporation, organized under the laws of this state, or to any company or corporation duly licensed to do business within this state, the right of way for the erection of a telephone line over or upon any public grounds, streets, alleys or highways under the care or supervision of such board granting such right of way. Such right of way shall be granted subject to such conditions, restrictions and regulations as may be prescribed by the board granting the same, as to what grounds, streets, alleys or highways said lines shall run upon, over or across, and as to the places where the poles to support the wires shall be located, and all grants of right of way for the construction of telephone lines heretofore made, in accordance herewith, by any board above mentioned, are hereby made valid. [1899, ch. 156; R. C. 1899, § 3225a; 1903, ch. 196.]

§ 4634. **Right of way for electric railways.** The board of county commissioners of any county, board of supervisors of any township, or board of trustees of any town or village in this state may, when deemed for the best interest of their respective municipal corporations, grant to any person, persons, company or corporation the right of way for the construction and operation of an electric or other railway in, over or upon any public grounds, streets, alleys or highways under the care or supervision of such board granting such right of way. [1905, ch. 153.]

CHAPTER 21.

BANKING CORPORATIONS.

§ 4635. **Creation, organization and duties of banking board.** The governor, secretary of state and attorney general shall be and they are hereby made a board which shall be known as the state banking board. The governor shall be chairman of said board, the state examiner shall be ex-officio the secretary, and the attorney general shall be ex-officio the attorney for said board. A majority of the members of said board shall constitute a quorum. Said board shall hold regular meetings on the first Wednesday of each month at the executive offices in the state capitol at Bismarck, and special meetings at the call of the governor. Said board shall have charge and control of any and all associations organized for the purpose of carrying on the business of banking, and of all savings banks and trust companies organized under the laws of the state of North Dakota. Said board shall make such rules for the government of such corporations as in its judgment may seem wise and expedient, which rules shall not conflict with any laws of the state of North Dakota, or of the United States. It shall be the duty of the said board at each regular meeting to examine all reports made by said banking associations, savings banks, and trust companies, of their condition, and all reports of regular and special examinations of such institutions made by the state examiner and filed with said board during the preceding

month, or such period as shall have elapsed since the last meeting of said board, and to approve or disapprove the same. Said board shall have the power to subpena witnesses, administer oaths, make orders and generally to do and perform any and all acts and things necessary to a complete performance of the duty herein imposed and to enforce all of the provisions of this article, and for the purpose of enabling such board to perform the duties imposed upon it, the provisions of section 7572 of the revised codes shall be held to be applicable to its proceedings. Any and all orders made by said board shall immediately become operative and remain in full force until modified, amended or annulled by such board or a court of competent jurisdiction in an action to be commenced by the party against whom such order may have been issued. The said examiner shall file all reports of such banking associations, savings banks and trust companies made to or by him with the said board. Said board shall keep a full and complete record of all its proceedings and of all orders made by it. The records of said board and any and all reports filed with it, shall, under proper restrictions, during regular business hours, be open to inspection and examination by stockholders, depositors, creditors and sureties on any bonds of said corporations, or on the bonds of any officer or employe thereof. [1905, ch. 165, § 1.]

State banking law is a proper exercise of the internal police power of the state. State ex rel Goodsill v. Woodmansee, 1 N. D. 246, 46 N. W. 970.

§ 4636. Who may form. Associations for carrying on the business of banking under this chapter may be formed by any number of natural persons, not less than three, two-thirds of whom shall be residents of this state. They shall enter into articles of association which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed and acknowledged by the persons uniting to form the association and shall be filed in the office of the secretary of state. [1890, ch. 23, § 1; 1893, ch. 27, § 1; R. C. 1899, § 3226; 1905, ch. 165, § 2.]

§ 4637. Organization certificate. Contents. The persons uniting to form such an organization shall, under their hands, make an organization certificate which shall specifically state:

1. The name assumed by such association, which name shall not be the name of any other bank in the state, nor of any bank heretofore incorporated in the state of North Dakota or in the territory of Dakota.

2. The place where the business of discount and deposit is to be carried on.

3. The amount of the capital stock and the number of shares into which the same shall be divided.

4. The names and places of residence of the shareholders and the number of shares held by each of them.

5. The period at which such bank shall commence and terminate business. [1890, ch. 23, § 2; 1893, ch. 27, § 2; R. C. 1895, § 3227; 1905, ch. 165, § 3.]

§ 4638. Acknowledgment and record. The organization certificate shall be acknowledged before a clerk of some court of record, or a notary public, and shall be, together with the acknowledgment thereof, authenticated by the seal of such court or notary, recorded in the office of the register of deeds in the county where such bank may be established, and such certificate thus authenticated shall be transmitted to the secretary of state who shall record and carefully preserve the same in his office, certify the facts to the state examiner and issue a certificate of authority to the corporation. [1890, ch. 23, § 3; 1893, ch. 27, § 3; R. C. 1899, § 3228; 1905, ch. 165, § 4.]

§ 4639. Powers. Upon making and filing articles of association and an organization certificate, the association shall become as from the date of the

execution of the same, a body corporate, and as such and in the name designated in the certificate, it shall have the power:

1. To adopt and use a corporate seal.
2. To have succession for a period of twenty-five years from its organization, unless it is sooner dissolved according to the provisions of this chapter, or unless its franchise becomes forfeited by some violation of law.
3. To make contracts.
4. To sue and be sued.
5. To elect or appoint directors, two-thirds of whom must be residents of this state, and by its board of directors to appoint a president and vice-president, who shall be members of said board, a cashier and assistant cashier and such other employes as may be required; define their duties, require bonds of them and fix the penalty thereof; dismiss such officers or any of them, and appoint others to fill their places.
6. To provide by its board of directors by-laws, not inconsistent with the laws of this state, to regulate the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its business conducted and the privileges granted it by law exercised and enjoyed.
7. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, bills of exchange, drafts and other evidences of debt, by receiving deposits, by buying and selling exchange, coin and bullion, by loaning money upon real or personal security, or both; but no association shall transact any business, except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the secretary of state to commence the business of banking, and the secretary of state may withhold from any association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than legitimate objects as contemplated by this chapter.
8. No such association shall have or carry among its assets at any one time loans dependent wholly upon real estate security, (and they shall only be upon first mortgages) in an amount exceeding one-half of its capital stock and surplus, and in selling or disposing of said loans so made upon real estate security, no such association shall have power to guarantee the payment or collection thereof, and any such guaranty made in violation of this provision shall not be binding upon such association, but shall be upon the person or officer making the same. [1899, ch. 28, § 1; R. C. 1899, § 3229; 1905, ch. 165, § 5.]

§ **4640. Power as to real estate.** Banking corporations formed under this chapter shall have power to purchase, hold and convey real estate for the following purposes and no other:

1. Such as may be necessary for its immediate accomodation in the transaction of its business, not exceeding twenty-five per cent of its capital stock, if over ten thousand dollars, and thirty per cent if the capital stock is ten thousand dollars or less, and any bank now doing business in this state and owning real estate within the meaning of this subdivision in excess of said amount, shall reduce the same by converting the excess into cash, or other bankable assets, within six months after the taking effect of this chapter.
2. Such as shall be mortgaged to it in good faith by way of security for loans, or for debts previously contracted.
3. Such as shall be conveyed to it in good faith in satisfaction of debts previously contracted in the course of its dealings.
4. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it; but no association shall hold the possession of any real estate under mortgage, or

the title and possession of any real estate purchased to secure an indebtedness, for a longer period than five years from the date of acquiring title thereto. And all real estate heretofore or hereafter conveyed by any such banking association shall be deemed to have been acquired, held and disposed of in conformity with the provisions of this chapter. [1899, ch. 28, § 2; R. C. 1899, § 3230; 1905, ch. 165, § 6.]

§ 4641. Capital proportionate to inhabitants. Hereafter no association shall be organized under this chapter in cities, towns or villages containing one thousand inhabitants or less with a capital of less than ten thousand dollars; in cities, towns or villages of over one thousand, and not exceeding two thousand, with a capital less than twenty thousand dollars; in cities, towns or villages of over two thousand, and not exceeding three thousand inhabitants, with a capital less than thirty thousand dollars; in cities, towns or villages of over three thousand, and not exceeding four thousand inhabitants, with a capital of less than thirty-five thousand dollars; in cities, towns or villages of over four thousand, and not exceeding five thousand inhabitants, with a capital less than forty thousand dollars; and in cities, towns or villages of over five thousand inhabitants, with a capital less than fifty thousand dollars. At least fifty per cent of the capital stock of every association shall be paid in before it shall be authorized to commence business, the balance of which shall be paid in by installments of not less than ten per cent of the capital stock, at the end of each succeeding month from the time it is authorized to commence business. The payment of each installment shall be certified to the secretary of state under oath of the president or cashier of the association, a copy of which certificate shall be filed with the state banking board. For the purpose of this section, the population of the city, town or village shall be determined by multiplying by four the total vote cast for member of congress at the last general election held in such city, town or village. The result shall be taken as the population of such city, town or village. No such association having been organized to transact business in a certain city, town or village, and which may have sold or converted its business to a national bank, or other banking business which is continued at the same place, shall be allowed to remove its charter or articles of incorporation to and recommence business at another place; but where it can be clearly shown that a banking association which has not changed, sold or converted its business as hereinbefore recited, is located at a place where there is not sufficient business for the profitable conduct of a bank, such association may apply to the secretary of state for authority to remove its business to some other place within the state and to change its name if desired: and upon the approval of such application by the state banking board, the secretary of state may issue authority for such removal and change; provided, that no such association shall be allowed to remove its business to any city, town or village without having the full amount of capital stock required by this chapter for a new organization in such city, town or village. [1897, ch. 31; R. C. 1899, § 3231; 1901, ch. 29; 1905, ch. 165, § 7.]

§ 4642. Certificate and authorization published. The association shall cause the organization certificate and the certificate of authority of the secretary of state, issued under this chapter, to be published in some newspaper in the city or county where the association is located, for at least four consecutive weeks next after the issuing thereof, and proof of such publication to be filed with the state banking board. [1890, ch. 23, § 7; 1893, ch. 27, § 7; R. C. 1899, § 3232; 1905, ch. 165, § 8.]

§ 4643. Articles as evidence. A certified copy of the articles of incorporation of any banking association, organized under the provisions of this chapter, may be used as evidence in all courts for or against any person or such banking association for or against whom such evidence is necessary, whether on

civil or criminal trials. [1890, ch. 23, § 8; 1893, ch. 27, § 8; R. C. 1899, § 3233; 1905, ch. 165, § 9.]

§ **4644. Delinquent stock, how sold.** Whenever any shareholder or his assignee fails to pay any installment on the stock when the same is required to be paid, the directors of such association may sell the stock of the delinquent shareholder, or as much thereof as is necessary to satisfy the debt, at public auction after having given three weeks' previous notice thereof in a newspaper published and in general circulation in the city or county where the association is located to any person who will pay the highest price therefor, to be not less than the amount due thereon, with the expenses of the advertisement and sale, and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the costs of advertisment and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order within three months from the time of such forfeiture, and if not so sold it shall be cancelled and deducted from the capital stock of the association. [1890, ch. 23, § 9; 1893, ch. 27, § 9; R. C. 1899, § 3234; 1905, ch. 165, § 10.]

§ **4645. Shares. Value. Liability of shareholders.** The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property and transferable on the books of the association in such manner as may be prescribed by the by-laws or articles of such associations; but no transfer of such stock shall be valid against a bank or any creditor thereof, so long as the registered holder of such stock shall be liable as principal debtor, surety or otherwise to the bank for any debt which shall be due and unpaid; nor in any case shall any divided, interest or profit be paid on such stock so long as such liability continues, but such dividend, interest or profit shall be retained by such bank and applied to the discharge of such liabilities. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all rights and liabilities of prior holders of such shares, and no change shall be made in the articles of association by which the rights, remedies or security of the existing creditors of the association shall be impaired. [1890, ch. 23, § 10; 1893, ch. 27, § 10; R. C. 1899, § 3235; 1905, ch. 165, § 11.]

§ **4646. Capital stock, how increased or reduced.** Any association formed under this chapter, may by its articles of association, or by subsequent resolution or written agreement of holders of a majority of its stock, provide for an increase of its capital stock from time to time as may be deemed expedient, subject to the rules and limitations of this chapter, and upon approval of the state banking board. But no increase of capital stock shall be valid until the whole amount shall be paid in cash, and such payment certified under oath by the president or cashier of such association to the secretary of state, who shall give his certificate that the provisions of this section have been complied with and specifying therein the amount of such increase in capital stock, and that it has been duly paid in as part of the capital thereof and file a copy of such certificate with the state banking board. Any association formed under this chapter may, by vote of its shareholders owning two-thirds of its stock, reduce its capital to any sum, not below the amount required by this chapter to authorize the formation of the association, but no such reduction shall be made until the amount of the proposed reduction is reported to the state banking board and their approval thereof obtained in writing, and no such reduction shall be construed as affecting the liability of shareholders for any debts of the association incurred prior to such reduction, and every such reduction before the same shall become valid must be certified to in the same manner as an increase of capital stock. [1890, ch. 23, § 11; 1893, ch. 27, § 11; R. C. 1899, § 3236; 1905, ch. 165, § 12.]

§ 4647. How dissolved. Duties of state examiner. Any association organized under the provisions of this chapter, may be dissolved by the district court of the county where its office or principal place of business is situated upon its voluntary application for that purpose. The application must be in writing, and must set forth that at a meeting of the stockholders or members called for that purpose, the dissolution was resolved upon by a two-thirds vote of all the stockholders or members, and that all claims and demands against the association have been satisfied and discharged. The application must be signed by a majority of the board of directors, or other officers having the management of the affairs of the association, and must be verified in the same manner as a complaint in a civil action. A certified copy of the application shall be filed with the state examiner, or such state officer as is by law authorized to examine such association, within ten days after the filing of such application with the district court. If the court is satisfied that the application is in conformity with this chapter, it must order the application to be filed, and that the clerk give not less than thirty nor more than sixty days' notice of the application by publication in some newspaper published in the county, and if there are none such, then by advertisement posted in five of the principal public places in the county. At any time before the expiration of the time of publication, any person may file his objections to the application. Before the final hearing and determination of the application, the state examiner shall make a thorough examination of the affairs of such association, and file a certified statement of such examination with the clerk of court of the county where such application is made, which statement shall be a part of the papers in the case. After the time of publication has expired the court may, upon five days' notice to the persons who have filed objections or without further notice if no objections have been filed, proceed to hear and determine the application, and if all the statements therein made are shown to be true, the court must declare the association dissolved. No stockholder or officer of such association shall be allowed to withdraw from such association, or surrender or dispose of his shares of stock after the filing or making of such application for dissolution and prior to the final determination of the case. Upon the dissolution of such association by the district court, the clerk of said court shall forthwith notify the secretary of state of such dissolution, by sending a copy of the order of the court, and said order and notice shall be filed by the secretary of state with the original certificate of organization. The application, notices and proof of publication, objections, if any, and declaration of dissolution, constitute the judgment roll, and from the judgment an appeal may be taken in the same manner as in other actions. The secretary of state shall immediately certify such dissolution to the state examiner. [1890, ch. 23, § 12; 1893, ch. 27, § 12; R. C. 1899, § 3237; 1905, ch. 165, § 13.]

§ 4648. Dividends. Surplus fund. The directors of any association organized under this chapter may, semi-annually or annually declare a dividend of so much of the net profits of the association as they shall deem expedient, but each association shall, before the declaration of a dividend, carry one-tenth of its net profits to its surplus fund until the same shall amount to twenty per cent of its capital stock. [1890, ch. 23, § 13; 1893, ch. 27, § 13; R. C. 1899, § 3238; 1905, ch. 165, § 14.]

§ 4649. Qualification of directors. Every director must own in his own right and retain in his possession and control free from hypothecation or pledge for any debt, at least ten shares of the capital stock of the association for which he is a director; any director who ceases to be the owner and in possession of ten shares of the stock free and non-hypothecated, or who becomes in any manner disqualified, shall thereby vacate his place. Every such director when elected or appointed shall take an oath that he will, so far as the duty devolves upon him, diligently and honestly administer the affairs

of such association, and will not knowingly violate or willingly permit to be violated, any of the provisions of this chapter, and that he is a bona fide owner of the number of shares of stock required by this chapter to become a director, standing in his own name on the books of the association, and that said stock is in his possession and control and not hypothecated or in way pledged as security for any debt. Such oath, subscribed by the director making it, and certified by the officer before whom it was taken, shall at once be transmitted to the state examiner to be filed in his office. [1890, ch. 23, § 14; 1893, ch. 27, § 14; R. C. 1899, § 3239; 1905, ch. 165, § 15.]

§ **4650. No dividends, when. Bad debts.** No association shall nor shall any member thereof, during the time it shall continue its banking operations, withdraw or permit to be withdrawn, either in form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by such association, equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividends shall be made by any association while it continues its banking business to an amount greater than its net profits on hand, deducting therefrom its losses and bad debts. All debts due to an association made or continued in violation of any of the provisions of this article, shall be considered bad debts within the meaning of this section, and the state banking board is empowered, and it is made the duty of such board, to ascertain and designate such bad debts, to make and enforce such orders and to institute such proceedings as may be deemed necessary to dispose of the same or to convert them into good assets. [1890, ch. 23, § 15; 1893, ch. 27, § 15; R. C. 1899, § 3240; 1905, ch. 165, § 16.]

§ **4651. Rate of interest.** Such association may demand and receive for loans on personal security, or for notes, bills or other evidences of debt, discounted, such rate of interest as may be agreed upon, not exceeding the amount authorized by law to be contracted for, and it shall be lawful to receive such interest according to the ordinary usage of banking associations and for not more than one year in advance. [1890, ch. 23, § 16; 1893, ch. 27; § 16; R. C. 1899, § 3241; 1905, ch. 165, § 17.]

§ **4652. Regular and special reports. Penalties for failure to make.** Every banking association, savings bank and trust company organized under this chapter, shall make at least five reports each year to the state examiner, in such form as the state banking board shall prescribe; such forms to be as nearly as possible like those prescribed by the comptroller of the currency for similar reports for national banks. Such report shall exhibit in detail, under appropriate heads, the resources and liabilities of the association at the close of the business on a past day by him specified, which shall, if practicable, be the same day for which similar reports are required from national banking associations within the state by the comptroller of the currency of the United States. Each report must be verified by the oath of the president or the cashier and attested as correct by at least two of the directors, and must be transmitted to the examiner within seven days after receipt of the request for the same, and an abstract of the same in a form prescribed by the board shall be published, at the expense of the association, in some newspaper in the city, town or village where such bank is located, and in case there is no such newspaper, then in any other newspaper in the county in which such association is located. The state banking board shall also call for a special report from any association whenever in their judgment the same is necessary, in order to obtain full and complete knowledge of its condition. Every association which fails to make and transmit any report required in pursuance of this section, shall forfeit and pay to the state a penalty of two hundred dollars for each delinquency. [1897, ch. 31; R. C. 1899, § 3242; 1905, ch. 165, § 18.]

§ **4653. Responsibility of shareholders.** The shareholders of every association organized under this chapter shall be individually responsible, equally

and ratably, and not one for another, for all contracts, debts and engagements of such association made or entered into to the extent of the amount of his stock therein at the par value thereof, in addition to the amount invested in and due on such shares. Such individual liability shall continue for one year after any transfer or sale of stock by any stockholder or stockholders. [1890, ch. 23, § 18; 1893, ch. 27, § 18; R. C. 1899, § 3243; 1905, ch. 165, § 19.]

§ 4654. **Loans on shares prohibited.** No association shall make any loan or discount on the security of the shares of its own stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, and stock so purchased or acquired shall within six months be sold or disposed of at public or private sale. If such stock is not sold within the period last herein provided, the same shall be canceled and deducted from the capital stock of said association. [1890, ch. 23, § 19; 1893, ch. 27, § 19; R. C. 1899, § 3244; 1905, ch. 165, § 20.]

§ 4655. **Reserve fund.** Each association shall at all times have on hand in available funds an amount which, after deducting therefrom the amount due to other banks, shall equal twenty per cent of its total deposits; three-fifths of this amount may consist of balances due to the association from good solvent state or national banks or trust companies, which carry sufficient reserve to entitle them to act as such depositary banks, and are located in such commercial centers as will facilitate the purposes of banking exchanges, and which depositary banks shall have been first approved by the state banking board, and the remaining two-fifths of such reserve shall consist of actual cash on hand; cash items shall not be included in computing reserve, and no association shall carry as cash or cash items, any paper or other matter except legitimate bank exchange, which will be cleared on the same or next succeeding business day. Whenever the available funds, within the meaning of this section, shall be below twenty per cent of its deposits, such association shall not increase its liabilities by making any new loans or discounts other than by discounting or purchasing bills of exchange, payable at sight, nor make any dividend of its profits, until the required proportion between the aggregate amount of the deposits and its lawful money reserve has been restored; and the state banking board must notify any association whose lawful money reserve shall be below the amount required to be kept on hand, to make good such reserve, and if such association shall fail to do so for a period of thirty days after such notice, the state banking board may impose a penalty of not less than one hundred dollars, or more than five hundred dollars, which shall be collected in the same manner as other penalties prescribed in this chapter. [1890, ch. 23, § 20; 1893, ch. 27, § 20; R. C. 1899, § 3245; 1905, ch. 165, § 21.]

§ 4656. **Penalties, how recovered.** All fines and penalties herein provided for, to which any association under this chapter may become subject, shall be recovered on complaint of the state examiner, before any court having competent jurisdiction, and all fines and penalties so established shall be paid into the state treasury. [1890, ch. 23, § 21; 1893, ch. 27, § 21; R. C. 1899, § 3246; 1905, ch. 165, § 22.]

§ 4657. **Limit of loan to one concern.** The total liability to any association of any person, corporation, company or firm including in the liabilities of a corporation or firm the liabilities of the several members stockholders or directors thereof, for money borrowed, and paper of the same parties as makers thereof, purchased, shall not at any time exceed fifteen per cent of the capital stock of such association actually paid in, but the discount of bills of exchange drawn in good faith against actual existing values, or loans upon produce in transit or actually in store as collateral security; provided, that all paper relating to such transactions be made payable to and such paper and the security therefor, be and remain in the pos-

session and control of such association until the advance or debt be paid, shall not be considered as money borrowed, and such association may discount commercial or business paper actually owned by the person negotiating the same without it being deemed an addition to the loans to said negotiator. [1890, ch. 23, § 22; 1893, ch. 27, § 22; R. C. 1899, § 3247; 1905, ch. 165, § 23.]

§ **4658. Penalty for violations.** Any officer of any banking association, savings bank or trust company violating or knowingly permitting to be violated, the provisions of this chapter, not herein specially provided for shall upon conviction thereof, pay a fine of not less than fifty dollars nor more than five hundred dollars for each offense, to be recovered before any court having competent jurisdiction, and all fines and penalties so recovered shall be paid into the state treasury. [1890, ch. 23, § 23; 1893, ch. 27, § 23; R. C. 1899, § 3248; 1905, ch. 165, § 24.]

§ **4659. Penalty for false statements or entries.** Every officer, agent or clerk of any association organized under this chapter, who willfully and knowingly subscribes or makes any false statements or entries in the books of such association, or knowingly subscribes or exhibits any false paper with intent to deceive any person authorized to examine as to the condition of such association, or willfully subscribes or makes any false report, shall be guilty of forgery as defined in the penal code of the state of North Dakota and punished accordingly. [1890, ch. 23, § 24; 1893, ch. 27, § 24; R. C. 1899, § 3249; 1905, ch. 165, § 25.]

§ **4660. Insolvent bank not to receive deposit.** No banking association shall accept or receive on deposit with or without interest, any money, bank bills or notes, or United States treasury notes or currency, or other notes, bills or drafts circulating as money or currency, when such banking association is insolvent. [1890, ch. 23, § 25; 1893, ch. 27, § 25; R. C. 1899, § 3250; 1905, ch. 165, § 26.]

§ **4661. Penalty for violating last section.** If any such banking association shall receive or accept on deposit any such deposits as aforesaid when insolvent, any officer, director, cashier, manager, member, party or managing party thereof, who shall knowingly receive or accept, be accessory or permit or connive at the receiving or accepting on deposit therein or thereby of any such deposits as aforesaid, shall be guilty of a felony, and upon conviction thereof, shall be punished by a fine not exceeding ten thousand dollars or by imprisonment in the penitentiary not exceeding five years, or by both such fine and imprisonment. [1890, ch. 23, § 26; 1893, ch. 27, § 26; R. C. 1899, § 3251; 1905, ch. 165, § 27.]

§ **4662. Banking must be done in compliance with this chapter. Penalty.** No person excepting national banking corporations shall transact a banking business nor use the words bank, banking company or banker in any sign, advertisement, letter head or envelope or in any corporate or firm name, without complying with and organizing under the provisions of this chapter. Any person violating the provisions of this section, either individually or as an interested party in any association or corporation, is guilty of a misdemeanor, and on conviction thereof shall be fined not less than five hundred nor more than one thousand dollars, or imprisoned in the county jail not less than ninety days, or both, in the discretion of the court. [1890, ch. 23, § 27; 1893, ch. 27, § 27; R. C. 1895, § 3252; 1905, ch. 165, § 28.]

§ **4663. Forfeiture of franchise.** Every association organized under this chapter which shall refuse or neglect to comply with any requirements, lawfully made upon it by the state banking board, or by the state examiner, pursuant to this chapter, for a period of ninety days (or for a lesser period if specified in the order) after demand in writing by such board or examiner is made, shall be deemed to have forfeited its franchise and any failure on the part of such association to comply with, or any violation of any of the provisions of this chapter, shall work a forfeiture of its franchise, and in either

case the attorney general, upon demand of the state banking board, must commence an action for the purpose of anulling the existence of said association. [1890, ch. 23, § 28; 1893, ch. 27, § 28; R. C. 1899, § 3253; 1905, ch. 165, § 29.]

§ 4664. Examination of banks. Fees. Report to state banking board. The state examiner shall be ex-officio superintendent of banks. He shall, as often as shall be deemed necessary and proper by the state banking board, and at least once a year, duly examine every banking association, savings bank and trust company organized under this law, or the law of the state of North Dakota, for which he shall charge the association so examined a fee for each annual examination only and turn the same into the state treasury as follows: Associations of ten thousand dollars capital or less, a fee of twenty dollars; associations with a capital from twenty thousand dollars to thirty thousand dollars, twenty-five dollars; associations with capital from thirty thousand dollars to forty thousand dollars, thirty dollars; associations with capital from forty thousand dollars to fifty thousand dollars, thirty-five dollars; associations with capital from fifty thousand to sixty thousand dollars, forty dollars; and all associations having a capital of sixty thousand dollars or over, fifty dollars. He shall have power to make a thorough examination into the affairs of the association, and in so doing may examine any of the officers, agents, or clerks thereof, under oath, and he shall ascertain what are the proper assets and accounts for such association to carry, and shall direct to be disposed of or charged off any stock, bonds, notes, accounts or any assets of whatever nature which he deems to be improper or not for the best interest of said association. And he shall make a full and detailed report in writing of the conditions of the association so examined, including therein a statement of any direction or recommendation made in conformity herewith, and of all matters and things relating to the general conduct of the association, and shall forthwith transmit the same to the state banking board. The state examiner shall not be directly or indirectly interested in any association organized under this chapter. [1897, ch. 31; R. C. 1899, § 3254; 1901, ch. 94; 1905, ch. 165, § 30.]

§ 4665. Oath of officers. Every active officer of any bank organized under this chapter shall, before entering upon the duties of his office, take and subscribe an oath that he will so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and that he will not knowingly violate, or willingly permit to be violated any of the provisions of this chapter. All such oaths shall be presented to the board of directors and a synopsis thereof recorded in the director's record and then filed with the state banking board. [1897, ch. 31; R. C. 1899, § 3255; 1905, ch. 165, § 31.]

§ 4666. Bonds of officers and employes. All officers and employes of any banking association, savings bank or trust company shall, before entering upon their duties, furnish a good and sufficient bond to the association in such sum and upon such conditions as may be required by the board of directors. All such bonds shall be approved by the board of directors of such association and shall be subject to the approval of the state banking board. A record of the approval of such bonds by the board of directors of such association shall be made on the records of the bank, and then such bonds shall be filed with the state banking board. Stockholders of such banks shall not be eligible as bondsmen for such officers. [1897, ch. 31; R. C. 1899, § 3256; 1905, ch. 165, § 32.]

§ 4667. Examination by directors. Report. It shall be the duty of the board of directors in January and July of each year to make a careful and thorough examination of the assets of the bank, examine stocks, checks, certificates of deposit and cashier's checks, count cash, examine loans and discounts of every nature, with the securities and collaterals belonging thereto, compare the aggregate with the records and make a complete report of such

examination in such form as may be designated by the state banking board, with suggestions and criticisms, if in their judgment such are necessary, which report shall be spread on the records of the bank the same as the minutes of a regular meeting of the board of directors, and a duplicate thereof transmitted to the state banking board. [R. C. 1895, § 3257; 1905, ch. 165, § 83.]

§ 4668. **Action against insolvent banks.** The state banking board on being satisfied of the insolvency of any banking association organized under the provisions of this chapter, or of the violation of any of the provisions of this chapter by any such association, after an examination of the same, shall forthwith take charge of such insolvent bank pending the action of the court. For that purpose it is made the duty of the board to appoint a temporary receiver, who shall qualify in such manner as may be directed in the order appointing him. Immediately upon taking charge the receiver shall prepare and submit a statement of the condition of the banking association to the state banking board, who shall thereupon institute an action against the association in accordance with the provisions of chapter 27 of the code of civil procedure. [1897, ch. 31; R. C. 1899, § 3258; 1905, ch. 165, § 34.]

§ 4669. **Overdrafts.** Any bank officer or employe who shall pay out the funds of any bank upon the check, order or draft of any individual firm, corporation or association, which has not on deposit with such bank a sum equal to such check, order or draft, shall be personally liable to such bank for the amount so paid. [1905, ch. 165, § 35.]

§ 4670. **List of shareholders to be kept and filed.** The president and cashier of every bank formed pursuant to the provisions of this chapter, shall at all times keep a true and correct list of the names of all the shareholders of such bank, with the amount of stock held by each, the time of transfer and to whom transferred, and shall file a copy of such list in the office of the county auditor and in the office of the state examiner on the first Monday of January and July in each year. [1905, ch. 165, § 36.]

§ 4671. **Impairment of capital.** If any portion of the capital of any banking association is reduced without the approval of the state banking board or impaired for any purpose whatever, while any debts of the association remain unsatisfied, no dividend or profit on the shares of the capital stock of the association shall thereafter be made until the deficit of the capital is made good, either by subscription of the stockholders or out of the subsequently accruing profits of the association. And, if at any time, it shall appear that the capital stock of any banking association has become impaired, the state banking board must immediately issue and enforce the necessary order restraining the declaring of dividends and requiring the deficit to be made good. [1905, ch. 165, § 37.]

§ 4672. **Assets not to be used in other business.** No bank shall as principal employ its money or other of its assets, directly or indirectly, in trade or commerce, nor employ or invest any of its assets or funds in the stock of any corporation, bank, partnership, firm or association, nor shall it invest any of its assets in speculative margins of stocks, bonds, grain, provisions, produce or other commodities, except that it shall be lawful for banks to make advances for grain or other products in store or in transit to market. [1905, ch. 165, § 38.]

§ 4673. **Banks exempt from attachment and execution.** Every banking association in this state shall be exempt from the legal process of attachment and execution. But if any bank fails, neglects or refuses to pay any valid final judgment or decree that may be rendered against it by any court of competent jurisdiction, not properly stayed by an appeal bond within the time prescribed by statute or order of court after rendition thereof, the state banking board shall declare such bank insolvent or in failing circumstances and shall forthwith cause a receiver to be appointed to wind up its affairs. [1905, ch. 165, § 39.]

§ **4674. Insolvent, when.** A bank shall be deemed insolvent:

1. When the actual cash market value of its assets is insufficient to pay its liabilities.
2. When it is unable to meet the demands of its creditors in the usual and customary manner.
3. When it shall fail to make good its reserve as required by law.
4. When it shall fail to comply with any lawful order of the state banking board within any time specified therein. [1905, ch. 165, § 40.]

§ **4675. Secretary to keep bank record.** It shall be the duty of the secretary of the state banking board to keep a "bank record" wherein shall be recorded the name and location of each bank in the state, its capitalization and changes thereof, its officers, and its reserve agents, and changes of the same, and in docket form such other proceedings as may have been had relative to the same, by the state banking board, and by the state examiner. [1905, ch. 165, § 41.]

§ **4676. Repeal and saving clause.** This chapter repeals all laws repugnant to and inconsistent herewith; provided, that this article shall not affect any offense committed or right accruing prior to July 1, 1905, but all such offenses or rights of action shall remain and be prosecuted under the law existing at the time such offense was committed or such right of action accrued. [1905, ch. 165, § 42.]

CHAPTER 22.

ORGANIZATION AND MANAGEMENT OF ANNUITY, SAFE DEPOSIT AND TRUST COMPANIES.

§ **4677. Formation.** Any number of persons, not less than nine, not less than three of whom must be residents of this state, may associate themselves, and become incorporated for the purpose of transacting business as an annuity, safe deposit, surety and trust company, upon complying with the provisions of this chapter, and any company so formed, and its successors, shall be entitled to the rights and privileges, and subject to the duties and obligations herein provided, and shall have perpetual succession. The provisions of chapter 11 of the civil code shall be applied to and be observed by persons organizing under this chapter, except as herein otherwise provided, and except as to provisions thereof inconsistent with the provisions of this chapter. [1897, ch. 143, §§ 1, 2; R. C. 1899, § 3258a.]

§ **4678. Capital stock. Minimum amount. Shares.** The amount of capital stock of any such corporation hereafter organized shall not be less than one hundred thousand dollars, and the same shall be divided into shares of one hundred dollars each. No such corporation hereafter organized shall be authorized to transact any business or exercise any powers as such until the aforesaid minimum amount of capital stock shall have been subscribed for, and not less than fifty thousand dollars thereof shall have been actually paid in, invested and deposited as hereinafter provided. Said fifty thousand dollars shall be invested in bonds of the United States, or of the state of North Dakota, or in the bonds of other states, which shall have the approval of the state auditor, and state examiner, or in the bonds or obligations of townships, school districts, cities, villages and counties within the state of North Dakota, which bonds or obligations have not been issued as a bonus for, or purchase of, or subscription to any railroad or other private enterprise, and whose total bonded indebtedness does not exceed five per centum of the then assessed valuation thereof; or in bonds or promissory notes, secured by

first mortgages or deeds of trust, upon unincumbered real estate, situated within the state of North Dakota, worth three times the amount of the obligation so secured, and the deposit of such corporation shall not be permitted, at any time, to be less than fifty thousand dollars in amount, and not less than one-sixth of its capital stock. [1897, ch. 143, §§ 3, 4; R. C. 1899, § 3258b.]

§ 4679. **Certificate of deposit. State treasurer's duties.** Whenever any such corporation shall have so invested fifty thousand dollars of its paid-in capital, and shall assign, transfer and deliver to the state treasurer the said securities and all evidences of such investment so made, he shall execute and deliver a certificate of such deposit; and thereupon the said corporation may commence and carry on business under the provisions of this chapter. The state treasurer and his successors in office shall hold the said securities so deposited with him as collateral security for the depositors and creditors of said corporation, and for the faithful execution of any trusts which may lawfully be imposed upon or accepted by such corporation; such corporation may from time to time withdraw the said securities from said state treasurer, or any part thereof, upon depositing with him other securities of equal amount and value and of the kinds specified in section 4668, and until otherwise ordered by a court of competent jurisdiction, the said state treasurer shall pay over to such corporation, the interest dividends which he shall collect upon such securities, and any such corporation having a larger deposit with the state treasurer than fifty thousand dollars shall be allowed at any time to withdraw its deposits in excess of said sum; provided its whole deposit shall at no time be less than one-sixth of its capital stock. [1897, ch. 143, § 5; R. C. 1899, § 3258c; 1903, ch. 202.]

§ 4680. **Directors. Qualifications. Terms of office.** All the corporate powers of such corporation shall be exercised by a board of directors of not less than nine nor more than fifteen in number, and such officers and agents as they shall elect or appoint. A majority of such directors must be citizens of the state of North Dakota, and each director must own at least ten shares of the capital stock. The articles of association must state the names and residences of the first board of directors, of whom the first named one-third shall serve for a period of three years, the second one-third for a period of two years and the balance thereof shall serve for a period of one year from the date fixed for the commencment of such corporation. In case any of the persons so named shall not become stockholders to the amount required to qualify, or if they fail or refuse to qualify from any cause, the directors who shall qualify may elect qualified stockholders to fill such vacancies, and thereafter, at each annual meeting of the stockholders, directors shall be elected to serve three years in place of those whose terms shall then expire. [1897, ch. 143, § 6; R. C. 1899, § 3258d.]

§ 4681. **Election of directors. Officers. Bonds.** An annual election shall be held at the principal office or place of business of the company, which must be within this state, upon a day to be fixed by the articles of the association, and notice of which election shall be given by publication at least ten days prior to such date, in a newspaper printed and published at the county seat of the county in which such company has its principal place of business, at which the directors provided for in section 4679 shall be elected, and in case of a failure to elect on that day or on a day to which such annual meeting may be adjourned, the directors whose regular terms do not then expire shall proceed to elect such number of directors, as shall have failed of election, and any vacancy in the office of director may be filled by the board until the next annual meeting. The board of directors at their next meeting following the election of directors and after such directors have qualified, shall elect from their own number a president and vice president and such other officers as may be necessary to the transaction of their business. They shall define the powers, authority and duties of such officers

and employes by by-laws or resolutions, fix the conditions, form and amount of their bonds, and approve the same, but no such officer or employe shall enter upon the discharge of his duties until such bond shall have been so approved and shall have been filed with the state examiner, and by him approved. [1897, ch. 143, § 7; R. C. 1899, § 3258e.]

§ 4682. Corporate powers. Every corporation organized under the provisions of this chapter, and qualified as provided by section 4679, shall have all the general powers and privileges of corporations generally as heretofore or hereafter provided by the general laws of the state of North Dakota, and in addition thereto, and without being required to further qualify under the laws relating to banking and insurance corporations, except as in this chapter provided, shall have special power and authority:

1. To acquire, lease, purchase, own, hold, use and improve, mortgage, lease, sell and convey such real estate and personal property as may be necessary for the convenient transaction of its business, and for the use and occupation of its officers, agents and employes, and the safe keeping and investment of its assets, deposits and property held in trust. Any estate or interest in real estate which such corporation shall acquire under and by virtue of the foreclosure of any deed of trust, mortgage, or other security, or by the compromise, compounding or settlement of any obligation or security, or otherwise, in the course of its legitimate business, whether as owner or trustee, it may continue to own, hold, use, occupy, lease, bargain, sell and convey the same, as the directors may deem best for the interests of such company, or of the particular estate or trust to which the same belongs; and to that end, it may become a purchaser at any foreclosure sale, or sale under decree or judgment, to which it is a party, as trustee or otherwise. But no part of its capital, accumulations, deposits, trust funds, property or security owned or held by such company, in trust or otherwise, shall be invested in real estate, except as herein authorized, unless the same is done under and by virtue of a particular contract, agreement or instrument, or order, judgment or decree of court, which shall confer a special power or authority so to do, and then only with or to the extent of the moneys or funds thereby provided, and belonging to such particular trust; and for the general transaction of its business, to make and deliver, and in like manner accept and receive all necessary and proper deeds, conveyances, mortgages, leases and other contracts and writings obligatory, and to have and exercise all necessary rights, franchises, muniments, estates, powers and privileges necessary to that end; and such corporation is authorized to loan money and funds and secure such loans by mortgage; and shall have the power to purchase notes, bonds, mortgages and other evidences of indebtedness, and other securities, and to convert the same into cash and into other securities.

2. To take, accept and hold by the order, judgment and decree of any court of record in this state, or of any other state, or of the United States, or by gift, grant, assignment, transfer, devise, legacy or bequest from or with any public or private corporation, or persons whomsoever, any real estate or personal property upon trusts created in accordance with, or which shall not conflict with the laws of this state, or of the United States, and to execute and perform any and all such legal and lawful trusts in regard to the same, upon the terms, conditions, limitations and restrictions, which may be declared, imposed, established by or agreed upon, in or by such order, judgment, decree, gift, grant, assignment, transfer, contract, devise, legacy or bequest. To accept from and execute for, or in behalf of, trusts for minors, and married women, in respect to their separate property, real or personal, and ante-nuptial settlements, or otherwise, to act for the purposes of transferring, issuing, registering, or countersigning the certificates of stocks, bonds, coupons, or other evidences of debt of any corporation, association, person, city, town, township, school district, state or other authority, or to receive or to

pay out moneys in redemption of the bonds, coupons or other evidences of indebtedness of such public or private corporations or persons.

3. To take, accept and hold on deposit, for savings account or for safe keeping, or in escrow, any and all moneys, bonds, stocks, and other securities, or personal property whatsoever, which any state, county, city, town, township or school district officer, or any corporation, public or private, person or persons, shall be authorized, permitted or required by law or otherwise to deposit in a bank or other safe deposit, or to pay into or deposit in any court of record in this state. And when any officer, corporation, public or private, or any executor, administrator, guardian, assignee, receiver, trustee, or any person acting in a trust capacity of whatsoever nature, or any individual, shall be authorized, required or permitted by law or otherwise, to pay into or deposit in any court of record in this state any moneys, bonds, instruments in writing, stock or other securities, or personal property whatsoever, the same instead thereof may be paid into or deposited with any corporation organized and acting under this chapter, which shall be designated for that purpose by the court having jurisdiction of the subject matter, or by the person, corporation, tribunal or body owning or controlling the same. Whenever any executor, administrator, guardian, assignee, receiver, trustee, or any person acting in any trust capacity whatsoever, shall deposit any moneys, bonds, instruments in writing, stocks, or other securities, or any personal property whatsoever, belonging to his trust, with any corporation qualified and acting under this chapter, and shall take a receipt of such corporation therefor, he and his sureties shall thereafter be relieved from all liability therefor until the same shall again be delivered to him by such corporation; provided, that any corporation organized under chapter 22, having a savings department, shall make the same reports and be subject to the same examinations and be under the same restrictions as to their savings department as now provided by law for banks.

4. To act as trustee, assignee or receiver, in all cases where it shall be lawful for any court, officer, corporation or person to appoint a trustee, assignee or receiver, and to be appointed, commissioned and act as administrator of any estate, executor of any last will or testament of any deceased person, or estate of any minor, or of the estate of any lunatic, imbecile, spendthrift, habitual drunkard, or other person disqualified to manage an estate. And it shall be lawful for any court in this state, having jurisdiction of the estates or wills of such persons, either within or without this state, to appoint or commission any such corporation organized and acting under, and having qualified with all the provisions of this chapter, as such administrator, executor, guardian, trustee, assignee or receiver in all cases where, under the laws of this state, such court could lawfully so appoint and commission any natural person; and in such cases no bond or other security or oath or other qualification shall be necessary to enable such corporation to accept such apopintment and trusts.

5. To accept and receive deposits of money for general savings account, for safe keeping, or for investment, and to provide by its by-laws and regulations for the payment of interest or dividends thereon, for the investment thereof, and conditions for repaying or withdrawing the same, and when any such deposit may have been received from a minor the repayment of same to such minor or his order shall be a complete discharge of such corporation from any further liability therefor. To loan money upon such securities as may be deemed advisable by its board of directors, and to borrow money in like manner upon the security of its own property or credit.

6. To act as attorney in fact for any public or private corporation, or person, in the management or control of real estate or personal property, its sale or conveyance, in the negotiation of and sale of mortgages or other securities, the satisfaction of and discharge of record of mortgages or other securities, the collection of rents, payments of taxes, and generally to act for and rep-

resent corporations and persons under powers and letters of attorney, in all respects as a natural person could do.

7. To make, compile and certify to abstracts of title of real estate, upon such conditions and subject to such liability as may now exist or be hereafter created, by or under the laws of this state relating to abstractors, and under such conditions and restrictions as may be prescribed by its by-laws or by resolutions of its board of directors, to insure the validity and genuineness of titles to real property.

8. To insure and guarantee the fidelity and faithful performance of the duties of state, county, township, city, town and school district officers and employes; of the depositaries of public or other funds, and all persons, firms, companies or corporations who may require or are permitted to make, execute or give bonds or undertakings with security, for the faithful performance of any duty, and any court, board of auditors, board of commissioners, or trustees, or any person or persons who are now or shall hereafter be required to approve the sufficiency of any such bond or undertaking may accept such bond or undertaking and approve the same, when the conditions of such bond or undertaking are guaranteed by a corporation duly organized, qualified and acting under the provisions of this chapter, and all such corporations are vested with full power and authority to guarantee such bonds and undertakings, and the certificate provided for in section 4679 shall, until revoked, be conclusive evidence of the qualification of such corporation, and of its authority to become and be accepted as such surety; provided, that nothing herein contained shall apply to bonds given in criminal actions.

9. Whenever any sum or sums of money, or any real or personal property shall have been received by, deposited with or conveyed to be held by such corporation, for savings or investment account, or in trust under any of the provisions of subdivisions 1, 2, 3, 4 or 5 of this section, such moneys or property and all evidences of the investment of the same, and their accretions, must be kept by such corporation, separate and apart and readily identified from similar property of its own or of other persons, and the same shall not be liable for any debt or claim against said corporation, except for debts or claims accruing to and in favor of the person or persons making such deposits or creating such trusts, or the beneficiaries thereunder. [1897, ch. 143, § 8; R. C. 1899, § 3258f; 1903, ch. 195, § 1.]

§ 4683. **Discretionary powers.** The directors of any such corporation shall have discretionary power to invest all moneys received by it on deposit or in trust, and the investment or deposit of which shall not be otherwise limited or directed, in such securities as are not hereinafter expressly prohibited and it shall be held responsible to the owners, or cestui que trust of such moneys, for the validity, regularity, quality, value and genuineness of all such investments and securities at the time said investments are so made, and for the safe keeping of the evidences and securities thereof. But if any special direction, limitation, agreement or trust is imposed upon, made or conferred in and by the order, judgment, decree, will or other document, contract, deed, conveyance or other written instrument, as to the particular manner in which or the particular class or kinds of securities, funds or property, whether real or personal, the same shall be invested in, then the said corporation shall follow and carry out such order, judgment, decree, contract, deed or written instrument or instruction, and in case of such special direction or limitation, such corporation shall not be held liable or responsible for any loss, damage or injury which may occur to or be incurred by any person or cestui que trust by reason of its proper performance of such trust as aforesaid. [1897, ch. 143, § 8; R. C. 1899, § 3258g.]

§ 4684. **Power to accept trusts.** It shall be lawful for any such corporation organized, qualified and acting under the provisions of this chapter, to become the assignee under any assignment for the benefit of creditors,

or to act as receiver, or to accept any other trust which it is authorized to accept under this chapter, whether conferred by any person, corporation or court, without giving any bond or other security which would be otherwise necessary under the laws of this state, to enable a natural person to execute such trust. It shall be lawful for any such trust company to become the sole surety upon any bond or undertaking for or on behalf of any person, persons or corporation, in any suit, action or special proceeding, in any court in this state, where bond or undertaking shall be necessary under the laws of this state, or in any other matter, municipal or otherwise, where a bond or undertaking shall be required, without any other bondsman or surety, and without justification or qualification. In case where a bond or new sureties to a bond may be required by a judge of any court of this state, or by the provisions of any statute of this state, from any person, persons or corporation, acting in any trust capacity whatever, if the value of the estate or fund is so great that the judge of the court having jurisdiction of the proceedings deems it inexpedient to require security in the full amount prescribed by law, he may direct that any securities for the payment of moneys belonging to the estate or fund be deposited, subject to the order of such person acting in such trust capacity, countersigned by a judge of said court, with any trust company organized and qualified to do business under the provisions of this chapter. After such deposit has been made, said judge may fix the amount of the bond, with respect to the value of the remainder only of such estate or fund. [1897, ch. 143, § 8; R. C. 1899, § 3258h.]

§ 4685. **When bond not required.** Any such corporation, organized and incorporated under the provisions of this chapter, having made the deposit and received the certificate of the state auditor as provided in section 4678, which shall hereafter be appointed to excute any trust, or to act as herein authorized in any capacity, by any court, or by any public or private corporation, or by any person, and which shall accept and enter upon the duties of any such trust, shall thereafter be fully qualified to fully discharge and perform such trust, without entering into or giving any sale bond, replevin bond, attachment bond, injunction or appeal bond, or other bond, undertaking, or security whatsoever, which a natural person would be required to furnish or enter into, in the progress of the execution of any trust, or in any suit, action or special proceeding, during the performance of any such trust, in any court in this state. [1897, ch. 143, § 8; R. C. 1899, § 3258i.]

§ 4686. **Transfer of trust.** Any executor, administrator, guardian, trustee, assignee or receiver, now or hereafter to be appointed, may resign his trust in favor of a corporation organized, acting and qualified under this chapter, and thereupon such corporation may be appointed, by any court having jurisdiction of the subject matter of such trust, upon such terms and conditions as such court may prescribe. [1897, ch. 143, § 8; R. C. 1899, § 3258j.]

§ 4687. **Compensation.** For the faithful performance of any trust, duty, obligation or service so imposed upon, conferred or accepted by any such corporation, it shall be entitled to ask, demand, and receive such reasonable compensation therefor as the same shall be worth, or such compensation as may have been or may be fixed by the contract or agreement of the parties, as well as any and all advances necessarily paid out and expended in the discharge and performance thereof, and to charge legal interest upon such advances unless otherwise agreed upon, and any compensation or commission paid, or agreed to be paid, for the negotiation of any loan, or the execution of any trust by any such company shall not be deemed interest within the meaning of the laws of this state. Nor shall any excess thereof, over any rate of interest permitted by law be decreed or held in any court of law or equity to be usury; and such company shall have a lien upon all moneys, securities and all property of every description which may come into its possession while in the performance of such trust for the payment of all sums

due or to become due to it for services, expenses and advances, and the costs and expenses of enforcing such payment. [1897, ch. 143, § 8; R. C. 1899, § 3258k.]

§ 4688. Investment of trust funds. Any sum of money not less than one hundred dollars, which shall be collected or received by any such corporation in its trust capacity, and which money shall not be required for the purpose of such trust, or is not to be accounted for within one year from the date of such collection, receipt or deposit, shall be invested by such corporation, as soon as practicable, and in such securities as are mentioned in section 4678, and the net interest and profits of such investments, less the reasonable charges and disbursements of said company in the premises, shall be accounted for and paid over as a part of such trust; and the net accumulations of such interest and profits thereon shall likewise be invested and reinvested as a part of such principal; and such investments shall be received and allowed in the settlement of such trust. [1897, ch. 143, § 9; R. C. 1899, § 3258l.]

§ 4689. Prohibited dealings. Indebtedness of agents. Such corporation shall not loan its funds, moneys, capital, trust funds or other property whatsoever to any director, officer, agent or other employe thereof, nor shall any such director, officer, agent or other employe become in any manner indebted to said company by means of any overdraft, promissory note, account, indorsement, guaranty or other contract whatsoever unless such indebtedness shall have been first approved or authorized by the board of directors, or an investment committee created by it, and such approval entered in the minutes of the proceedings of such board or committee, and any such director, agent or employe who shall become so indebted to said company, contrary to the provisions hereof, shall be deemed guilty of the crime of embezzlement to the amount of such indebtedness, from the time such indebtedness shall be created, and upon conviction thereof shall be punished in the manner prescribed by the laws of this state for embezzlement of like amount. The execution and delivery of the official bond of such officer, agent or employe, or his indorsement of commercial paper, however, shall not be considered as an indebtedness for the purpose of this section, [1897, ch. 143, § 10; R. C. 1899, § 3258m; 1903, ch. 195, § 2.]

§ 4690. Powers of court. Annual report. Any such corporation shall be subject at all times to the further orders, judgments and decrees of any court of record from which or under which it shall have accepted any trust, appointment or commission as to such trust, and shall render to such court such itemized and verified accounts, statements and reports as may be required by law, or as such courts shall order in relation to such particular trust. It shall also be subject to the general jurisdiction of the district court of the county in which its principal place of business is located. It shall render to the state examiner, a full and detailed verified account of its condition, on the first day of June, in each year and such further accounts, either total or partial, or in relation to any particular investments, trusts, funds or other business as the said state examiner may from time to time direct and request; and a condensed statement of such annual report, approved by the state examiner, shall be published by the said corporation in a public newspaper, printed and published in the county in which its principal place of business is located, and if none, then in such newspaper as the state examiner shall direct. [1897, ch. 143, § 11; R. C. 1899, § 3258n.]

§ 4691. Capital. Increase of capital stock. Increase of deposit. Re-insurance. Every such corporation, organized under the provisions of this chapter, shall have the full amount of its subscribed capital stock paid in, within two years after commencement of business, and such payment may be made in such installments as may be prescribed in its by-laws, or by resolution of its board of directors, and such capital stock may be increased from time to time by a majority vote of all the stockholders of such corporation, voting at any regu-

larly called general or special election, in the notice of which election, the object thereof is fully set out, but no such increase of capital stock shall be valid unless paid in in cash, and certified to the state auditor in writing, and under oath by the president or secretary, or managing officer of such corporation. Whenever it shall appear to the satisfaction of the state examiner, from an examination of the business of such company, that the deposit made by it with the state auditor, as hereinbefore provided, is insufficient to insure the safety of its deposits, trust and contingent liabilities, and he shall make an order, as hereinafter provided, requiring an increase of such deposit, then such company may deposit with the state auditor, other and further securities of the kind, class and value designated in section 4678, in an amount sufficient to comply with said order. [1897, ch. 143, § 13; R. C. 1899, § 3258o.]

§ **4692. Duty of public examiner.** It shall be the duty of the public examiner, once in every six months, or oftener if required by the written, verified information filed with him by any person interested in any trust with which such corporation may be charged, and without notice to the officers of such company, to make a full, true, complete and accurate examination and investigation of the affairs of such corporation and to assume and exercise over such corporation, its business, officers, directors and employes, all the power and authority conferred upon him over banking and other financial or moneyed corporations. If it shall appear to the state examiner from any examination made by him that said corporation has committed a violation of the law or that it is conducting business in an unsafe or unauthorized manner, or that the deposit made by it with the state auditor as hereinbefore provided, is insufficient to protect the interests of all concerned, then the state examiner shall, by an order under his hand and the seal of his office, and addressed to such corporation, direct the discontinuance of such illegal or unsafe practice, and to conform with the requirements of the law, or to make a further deposit with the state auditor in an amount sufficient to insure the safety of its trusts, deposits and liabilities. And whenever such corporation shall refuse to comply with any such order as aforesaid, or whenever it shall appear to the said state examiner that it is unsafe or inexpedient for any such corporation to continue to transact business, he shall communicate the facts to the attorney general, and thereupon he shall be authorized to institute such proceedings against any such corporation, as is now, or may hereafter be provided by law, in case of insolvent corporations or such other proceedings as the case may require. [1897, ch. 143, §§ 12, 14; R. C. 1899, § 3258p; 1903, ch. 195, § 3.]

CHAPTER 23.

EXISTING CORPORATIONS ELECTING TO CONTINUE UNDER THIS CHAPTER.

§ **4693. Proceedings when existing corporations elect to continue.** Any corporation existing at the time of the taking effect of this chapter formed under the laws of this state, may elect to continue its existence under the provisions of the preceding chapters applicable thereto and it may at any time thereafter make such choice or election at any meeting of the stockholders or members, or at any meeting called by the directors or trustees expressly for considering the subject, if voted for by stockholders representing a majority of the capital stock or by a majority of its members; or it may be made by the directors or trustees upon the written consent of that number of such stockholders or members. A certificate of the action of the directors or trustees, signed by them and their secretary, with the seal of the corporation, when the election is made upon such written consent, or a certificate of the

proceedings of the meeting of the stockholders or members, when such election is so made, signed by the chairman and secretary of the meeting and a majority of the directors and trustees must be filed in the office of the secretary of state and thereafter the corporation shall continue its existence under the provisions of the preceding chapters which are applicable thereto and shall possess all the rights and powers and be subject to all the obligations, restrictions and limitations prescribed thereby. [Civ. C. 1877, § 566; R. C. 1899, § 3259.]

§ 4694. When individuals must comply with law on corporations. Any person or association of persons now engaged in or that may hereafter engage in the construction of any railroad, street railway, telegraph or telephone lines, ditch for conveying water, or other like work of internal improvement shall be required to comply strictly with all the provisions of the preceding chapters in the same manner as corporations, so far as the same can be done. A failure of any such person or association of persons to comply as aforesaid shall work a forfeiture of any and all rights he or they may have acquired in accordance with law. [1879, ch. 10, § 4; R. C. 1895, § 3260.

Persons obtaining credit as association not being so organized are individually liable for debts contracted. Winona Lumber Co. v. Church, 6 S. D. 498, 62 N. W. 107.

CHAPTER 24.

FOREIGN CORPORATIONS.

ARTICLE 1.—FILE COPY OF CHARTER.

§ 4695. Foreign corporations can do business in this state, when. No foreign corporation, association or joint stock company, except an insurance company, shall transact any business within this state, or acquire, hold or dispose of property, real or personal within this state, until such corporation shall have filed in the office of the secretary of state a duly authenticated copy of its charter or articles of incorporation, and shall have complied with the provisions of this chapter; provided, that the provisions of this chapter shall not apply to corporations created for religious or charitable purposes solely nor to the holding and disposing of such real estate as may be acquired only by foreclosure or otherwise, in liquidation of mortgages or other securities by corporations which may not have complied with the provisions of this article. [Civ. C. 1877, § 567; R. C. 1895, § 3261; 1905, ch. 68.]

Contracts entered into before compliance with statute not unenforceable and void: corporation may maintain action. Washburn Mill Co. v. Bartlett, 3 N. D. 138, 54 N. W. 544; United States Savings & Loan Ass'n v. Shain, 8 N. D. 136, 77 N. W. 1006; National Cash Register Co. v. Wilson, 9 N. D. 112, 81 N. W. 285; Lumber Co. v. Children of Israel, 7 N. D. 46, 73 N. W. 203; American Buttonhole Co. v. Moore, 2 Dak. 291, 8 N. W. 131; Fuller & Johnson Mfg. Co. v. Foster, 4 Dak. 329, 30 N. W. 166; Wright v. Lee, 2 S. D. 596, 51 N. W. 706; Root v. Sweeny, 12 S. D. 43, 80 N. W. 149. (See section 4699.)

§ 4696. Record. Such charter or articles of incorporation shall be recorded in a book to be kept by the secretary of state for that purpose. [Civ. C. 1877, § 568; R. C. 1899, § 3262.]

§ 4697. Appoint secretary of state attorney for service. Such corporation, association or joint stock company shall by a duly executed instrument filed in the office of the secretary of state constitute and appoint the secretary of state and his successors its true and lawful attorney upon whom all process in any action or proceeding against it may be served and therein shall agree that any process which may be served upon its said attorney shall be of the same force and validity as if served upon it personally in this state and that such appointment shall continue in force irrevocable so long as any liability

of the corporation, association or joint stock company remains outstanding in this state. Service upon such attorney shall be deemed sufficient service upon the corporation, association or joint stock company. Whenever process against any foreign corporation, association or joint stock company, doing business in this state, shall be served upon the secretary of state he shall forthwith mail a copy of such process, postage prepaid, and directed to such corporation, association or joint stock company at its principal place of business, or if it is a corporation, association or joint stock company of a foreign country, to its resident manager in the United States, or to such other person as may have been previously designated by it by written notice filed in the office of the secretary of state. As a condition of valid and effectual service the plaintiff shall pay to the secretary of state at the time of the service the sum of two dollars which the plaintiff shall recover as taxable costs if he prevails in his action. The secretary of state shall keep a record of all such process which shall show the time and hour of service. [Civ. C. 1877, § 560; 1885, ch. 36, § 1; R. C. 1895, § 3263.]

Attachment may issue against it. Finch v. Armstrong, 9 S. D. 255, 68 N. W. 740.

§ **4698. Liability of officers, etc., for failure to comply.** Any failure to comply with the provisions of the last three sections and with section 3116 of this code shall render each and every officer, agent or stockholder of any corporation, association or joint stock company failing to comply therewith, jointly and severally liable on any and all contracts of such corporation, association or joint stock company made within this state during the time such corporation, association or joint stock company is so in default. [1890, ch. 193, § 1; R. C. 1895, § 3264.]

§ **4699. Failure to comply renders all contracts void.** Every contract made by or on behalf of any corporation, association or joint stock company, doing business in this state, without first having complied with the provisions of section 4463, if an insurance company, or with the provisions of section 4695 and 4697, if other than an insurance company, shall be wholly void on behalf of such corporation, association or joint stock company and its assigns, but any contract so made in violation of the provisions of this section may be enforced against such corporation, association or joint stock company. [R. C. 1895, § 3265.]

May be prevented from exercising franchise by state. Wright v. Lee, 2 S. D. 596, 51 N. W. 706.

Right to do business cannot be raised or determined collaterally. Wright v. Lee, 4 S. D. 237, 55 N. W. 931.

Failure to comply with statute cannot be taken advantage of by corporation. Foster v. Lumber Co., 5 S. D. 57, 58 N. W. 9.

Attachment by foreign corporation will be dissolved. Bradley, Metcalf & Co. v. Armstrong, 9 S. D. 267, 68 N. W. 733.

ARTICLE 2.—DUTIES OF DOMESTIC CORPORATIONS.

§ **4700. Regulating domestic corporations.** Whenever any corporation organized under the laws of the territory of Dakota or state of North Dakota shall fail or neglect for one year to transact its usual and corporate business within this state, or shall fail or neglect for one year to keep and maintain a public office at its principal place of business within this state for the transaction of its usual and regular business, and shall not within such year by a duly executed instrument filed in the office of the secretary of state constitute and appoint the secretary of state and his successors, its true and lawful agent and attorney, upon whom all process in any action or proceeding against it may be served, and agree therein that any process which may be served on its said agent and attorney shall be of the same force and validity as if served upon it personally within this state, and provide therein that such appointment shall continue in force irrevocable so long as any liability of the corporation remains outstanding in this state, such corporation shall be deemed

to have abandoned and forfeited its franchise, and shall not thereafter commence or maintain any action in any of the courts of this state; provided, that any such corporation may file such instrument within thirty days after this article shall take effect and be in force. [1897, ch. 73, § 1; R. C. 1899, § 3265a.]

§ 4701. Secretary shall keep record. Upon the filing of such instrument in the office of the secretary of state, service on such secretary as the agent and attorney of the corporation shall be deemed sufficient service on the corporation, and such secretary shall forthwith mail the process so served to some officer or director of the corporation if he shall know the post office address of any such officer or director, or to such person as may have been previously designated by the corporation, by written notice filed in the office of the secretary of state, and the secretary shall keep a record of all such process, which shall show the day and hour of such service. As a condition of valid service, the plaintiff shall pay to the secretary of state at the time of service the sum of two dollars, which shall be taxed as costs and recovered by him if he prevail in the action. [1897, ch. 73, § 2; R. C. 1899, § 3265b.]

CHAPTER 25.

NATURE OF PROPERTY.

§ 4702. Ownership defined. The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this code the thing of which there may be ownership is called property. [Civ. C. 1877, § 159; R. C. 1899, § 3266.]

§ 4703. What may be owned. There may be ownership of all inanimate things which are capable of appropriation or of manual delivery, of all domestic animals, including dogs, of all obligations, of such products of labor or skill, as the composition of an author, the good will of a business, trade-marks and signs and of rights created or granted by statute. [Civ. C. 1877, § 160; 1891, ch. 101, § 1; R. C. 1899, § 3267.]

Good will of business, property which may be transferred. **Mapes v. Metcalf, 10** N. D. 601, 88 N. W. 713.

Secret code property which may be owned. **Simmons Hardware Co. v. Waibel,** 1 S. D. 488, 47 N. W. 814.

§ 4704. Wild animals. Animals, wild by nature, are the subjects of ownership while living, only when on the land of the person claiming them, or when tamed, or taken and held in possession, or disabled and immediately pursued. [Civ. C. 1877, § 161; R. C. 1899, § 3268.]

§ 4705. Property classified. Property is either:

1. Real or immovable; or,
2. Personal or movable. [Civ. C. 1877, § 162; R. C. 1899, § 3269.]

§ 4706. Real defined. Real or immovable property consists of:

1. Land.
2. That which is affixed to land.
3. That which is incidental or appurtenant to land.
4. That which is immovable by law. [Civ. C. 1877, § 163; R. C. 1899, § 3270.]

§ 4707. Land defined. Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock or other substance. [Civ. C. 1877, § 164; R. C. 1899, § 3271.]

§ 4708. Fixtures. A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls, or permanently resting upon it, as in the case of

buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts or screws. [Civ. C. 1877, § 165; R. C. 1899, § 3272.]

Tenant may not remove articles of property affixed to demised realty after expiration of lease. Sweet v. Myers, 3 S. D. 324, 53 N. W. 187.

Articles affixed to realty by tenant become property of owner of realty if not removed before expiration of lease. Ibid.

Fixtures may be given legal character of realty or personalty by agreement. Myrich v. Bill, 3 Dak, 284, 17 N. W. 268.

§ 4709. **Appurtenances.** A thing is deemed to be incidental or appurtenant to land, when it is by right used with the land for its benefit, as in the case of a way or water course, or of a passage for light, air or heat from or across the land of another. Sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills and all other machinery or tools used in working or developing a mine are to be deemed affixed to the mine. [Civ. C. 1877, § 166; R. C. 1899, § 3273.]

§ 4710. **Personal property defined.** Every kind of property that is not real is personal. [Civ. C. 1877, § 167; R. C. 1899, § 3274.]

Choses in action personal property. Sykes v. Hannawalt, 5 N. D. 335, 65 N. W. 682.

CHAPTER 26.

OWNERSHIP.

ARTICLE 1.—OWNERS.

§ 4711. **Ownership. Limitation.** The legislative assembly can pass no law interfering with the primary disposal of the soil. All property in this state has an owner, whether that owner is the United States or the state, and the property public; or the owner an individual, and the property private. The state may also hold property as a private proprietor. [Civ. C. 1877, § 168; R. C. 1899, § 3275.]

§ 4712. **Land below high water mark.** The ownership of land below ordinary high water mark and of land below the water of a navigable lake or stream is regulated by the laws of the United States or by such laws as under authority thereof, the legislative assembly may enact. The state is the owner of all property lawfully appropriated or dedicated to its own use; and of all property of which there is no other owner. [Civ. C. 1877, § 169; R. C. 1899, § 3276.]

§ 4713. **Who may convey.** Any person, whether citizen or alien, may take, hold and dispose of property, real or personal, within this state. [Civ. C. 1877, § 170; R. C. 1899, § 3277.]

Alien may hold mining property. Gorman Mining Co. v. Alexander, 2 S. D. 557, 51 N. W. 346.

ARTICLE 2.—INTERESTS IN PROPERTY.

§ 4714. **Ownership classified.** The ownership of property is either:

1. Absolute; or,
2. Qualified. [Civ. C. 1877, § 171; R. C. 1899, § 3278.]

§ 4715. **Absolute ownership.** The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws. [Civ. C. 1877, § 172; R. C. 1899, § 3279,]

§ 4716. **Qualified ownership.** The ownership of property is qualified:

1. When it is shared with one or more persons.
2. When the time of enjoyment is deferred or limited; or,

3. When the use is restricted. [Civ. C. 1877, § 173; R. C. 1899, § 3280.]

City purchasing property for pecuniary consideration named in deed, takes absolute title although deed recites it is understood premises are for city hall purposes only. City of Huron v. Wilcox, 17 S. D. 625, 98 N. W. 88.

§ 4717. **Sole ownership.** The ownership of property by a single person is designated as a sole or several ownership. [Civ. C. 1877, § 174; R. C. 1899, § 3281.]

§ 4718. **Ownership by several.** The ownership of property by several persons is either:

1. Of joint interests.
2. Of partnership interests; or,
3. Of interests in common. [Civ. C. 1877, § 175; R. C. 1899, § 3282.]

§ 4719. **Joint tenancy.** A joint interest is one owned by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. [Civ. C. 1877, § 176; R. C. 1899, § 3283.]

§ 4720. **Partnership.** A partnership interest is one owned by several persons in partnership for partnership purposes. [Civ. C. 1877, § 177; R. C. 1899, § 3284.]

§ 4721. **Common tenancy.** An interest in common is one owned by several persons not in joint ownership or partnership. [Civ. C. 1877, § 178; R. C. 1899, § 3285.]

§ 4722. **Definition.** Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership for partnership purposes, or unless declared in its creation to be a joint interest as provided in section 4719. [Civ. C. 1877, § 179; R. C. 1899, § 3286.]

§ 4723. **Commencement and duration.** In respect to the time of enjoyment an interest in property is either:

1. Present or future; and.
2. Perpetual or limited. [Civ. C. 1877, § 180; R. C. 1899, § 3287.]

§ 4724. **Present.** A present interest entitles the owner to the immediate possession of the property. [Civ. C. 1877, § 181; R. C. 1899, § 3288.]

§ 4725. **Future.** A future interest entitles the owner to the possession of the property only at a future period. [Civ. C. 1877, § 182; R. C. 1899, § 3289.]

§ 4726. **Perpetual.** A perpetual interest has a duration equal to that of the property. [Civ. C. 1877, § 183; R. C. 1899, § 3290.]

§ 4727. **Limited.** A limited interest has a duration less than that of the property. [Civ. C. 1877, § 184; R. C. 1899, § 3291.]

§ 4728. **Future estates classified.** A future interest is either:

1. Vested; or.
2. Contingent. [Civ. C. 1877, § 185; R. C. 1899, § 3292.]

§ 4729. **When they vest.** A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property upon the ceasing of the immediate or precedent interest. [Civ. C. 1877, § 186; R. C. 1899, § 3293.]

§ 4730. **How contingent.** A future interest is contingent while the person in whom or the event upon which it is limited to take effect, remains uncertain. [Civ. C. 1877, § 187; R. C. 1899, § 3294.]

§ 4731. **Alternative contingencies.** Two or more future interests may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it and take effect accordingly. [Civ. C. 1877, § 188; R. C. 1899, § 3295.]

§ 4732. **Not void.** A future interest is not void merely because of the improbability of the contingency on which it is limited to take effect. [Civ. C. 1877, § 189; R. C. 1899, § 3296.]

§ 4733. **Posthumous heir.** When a future interest is limited to successors, heirs, issue or children, posthumous children are entitled to take in the same manner as if living at the death of their parent. [Civ. C. 1877, § 190; R. C. 1899, § 3297.]

§ 4734. **Future estates pass.** Future interests pass by succession, will and transfer in the same manner as present interests. [Civ. C. 1877, § 191; R. C. 1899, § 3298.]

§ 4735. **Possibilities.** A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind. [Civ. C. 1877, § 192; R. C. 1899, § 3299.]

§ 4736. **Estates of realty.** In respect to real or immovable property, the interests mentioned in this chapter are denominated estates, and are specially named and classified in chapter 28 of this code. [Civ. C. 1877, § 193; R. C. 1899, § 3300.]

§ 4737. **Classification.** The names and classifications of interests in real property have only such application to interests in personal property as in this chapter and the succeeding seventeen chapters of this code is expressly provided. [Civ. C. 1877, § 194; R. C. 1899, § 3301.]

§ 4738. **Future interests limited.** No future interest in property is recognized by the law, except such as is defined in this code. [Civ. C. 1877, § 195; R. C. 1899, § 3302.]

Article 3.—Conditions of Ownership.

§ 4739. **Conditions defined.** The time when the enjoyment of property is to begin or end may be determined by computation, or be made to depend on events. In the latter case, the enjoyment is said to be upon condition. [Civ. C. 1877, § 196; R. C. 1899, § 3303.]

§ 4740. **Classified.** Conditions are precedent or subsequent. The former fix the beginning, the latter the ending of the right. [Civ. C. 1877, § 197; R. C. 1899, § 3304.]

§ 4741. **Illegal conditions void.** If a condition precedent requires the performance of an act wrong of itself, the instrument containing it is so far void and the right cannot exist. If it requires the preformance of an act not wrong of itself, but otherwise unlawful the instrument takes effect and the condition is void. [Civ. C. 1877, § 198; R. C. 1899, § 3305.]

§ 4742. **Restraints upon marriage.** Conditions imposing restraints upon marriage, except upon the marriage of a minor, or of the widow of the person by whom the condition is imposed are void; but this does not affect limitations when the intent was not to forbid marriage, but only to give the use until marriage. [Civ. C. 1877, § 199; R. C. 1899, § 3306.]

§ 4743. **Restraints on alienation.** Conditions restraining alienation, when repugnant to the interest created, are void. [Civ. C. 1877, § 200; R. C. 1899, § 3307.]

Article 4.—Restraints Upon Alienation.

§ 4744. **Power of alienation. How long may be suspended.** The absolute power of alienation cannot be suspended by any limitation or condition whatever for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except in the single case mentioned in section 4772. [Civ. C. 1877, § 201; R. C. 1899, § 3308.]

Trust suspending power of alienation for longer period than lives in being at time of testator's death, is void. Penfield v. Tower, 1 N. D. 216, 46 N. W. 413.

§ 4745. **When future interest void.** Every future interest is void in its creation, which by any possibility may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute

interest in possession can be conveyed. [Civ. C. 1877, § 202; R. C. 1899, § 3309.]

§ 4746. **Leases limited.** No lease or grant of agricultural land for a longer period than ten years, in which shall be reseved any rent or service of any kind, shall be valid. No lease or grant of any town or city for a longer period than ninety-nine years, in which shall be reserved any rent or service of any kind, shall be valid. [Civ. C. 1877, § 203; R. C. 1899, § 3310; 1903, ch. 151.]

Term "rent" to be construed in its original and technical sense as **profit arising** out of land and payable periodically. Gross sum paid for life lease **of agricultural** land is not "rent."

Where no selection of homestead from large body of land is made **wife's failure** to join in lease not fatal thereto. Wegner v. Lubenow, 12 N. D. 95, 95 N. W. 442.

Article 5.—Accumulations.

§ 4747. **Income. Future interest.** Dispositions of the income of property to accrue and to be received at any time subsequent to the execution of the instrument creating such dispositions are governed by the rules prescribed in this chapter in relation to future interests. [Civ. C. 1877, § 204; R. C. 1899, § 3311.]

§ 4748. **Illegal accumulation.** All directions for the accumulation of the income of property, except such as are allowed by this chapter are void. [Civ. C. 1877, § 205; R. C. 1899, § 3312.]

§ 4749. **Income, how directed.** An accumulation of the income of property for the benefit of one or more persons may be directed by **any will or** transfer in writing. sufficient to pass the property out of which the fund is to arise as follows:

1. If such accumulation is directed to commence on the **creation of the** interest out of which the income is to arise, it must be made for **the benefit** of one or more minors then in being, and terminate at the **expiration of** their minority; or,

2. If such accumulation is directed to commence at any time subsequent to the creation of the interest out of which the income is to **arise, it must** commence within the time in this chapter permitted for the vesting **of future** interests and during the minority of the beneficiaries. and **terminate at the** expiration of such minority. [Civ. C. 1877, § 206; R. C. 1899, § 3313.]

§ 4750. **Void beyond minority.** If in either of the cases mentioned in the last section the direction for an accumulation is for a longer **term than dur**ing the minority of the beneficiaries. the direction only. whether **separable** or not from other provisions of the instrument, is void as respects **the time** beyond such minority. [Civ. C. 1877. § 207; R. C. 1899, § 3314.]

§ 4751. **Allowance to minor from accumulations.** When a minor, for whose benefit an accumulation has been directed. is destitute of other **sufficient means** of support and education. the county court upon application **may direct a** suitable sum to be applied thereto out of the fund. [Civ. C. 1877, § 208; R. C. 1899. § 3315.]

Article 6.—Rights of Owners.

§ 4752. **Owner owns product and accessions.** The owner of a thing owns also all its products and accessions. [Civ. C. 1877, § 209; R. C. 1899, § 3316.]

§ 4753. **To whom undirected income belongs.** When. in **consequence of** a valid limitation of a future interest. there is a suspension of **the power of** alienation or of the ownership. during the continuation of which **the income** is undisposed of. and no valid direction for its accumulation **is given, such** income belongs to the persons presumptively entitled to the **next eventual** interest. [Civ. C. 1877. § 210; R. C. 1899. § 3317.]

ARTICLE 7.—TERMINATION OF OWNERSHIP.

§ 4754. **When future interest dependent on death is defeated.** A future interest, depending on the contingency of the death of any person without successors, heirs, issue or children is defeated by the birth of a posthumous child of such person capable of taking by succession. [Civ. C. 1877, § 211; R. C. 1899, § 3318.]

§ 4755. **How future interest defeated.** A future interest may be defeated in any manner, or by any act or means, which the party creating such interest provided for or authorized in the creation thereof; nor is a future interest thus liable to be defeated to be on that ground adjudged void in its creation. [Civ. C. 1877, § 212; R. C. 1899, § 3319.]

§ 4756. **When not defeated.** No future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent interest, nor by any destruction of such precedent interest by forfeiture, surrender, merger or otherwise, except as provided by the next section or when a forfeiture is imposed by statute as a penalty for the violation thereof. [Civ. C. 1877, § 213; R. C. 1899, § 3320.]

§ 4757. **Same.** No future interest, valid in its creation, is defeated by the determination of the precedent interest before the happening of the contingency on which the future interest is limited to take effect; but should such contingency afterwards happen, the future interest takes effect in the same manner and to the same extent as if the precedent interest had continued to the same period. [Civ. C. 1877, § 214; R. C. 1899, § 3321.]

CHAPTER 27.

GENERAL DEFINITIONS.

§ 4758. **Income includes what.** The income of property, as the term is used in the two preceding chapters, includes the rents and profits of real property, the interest of money, dividends upon stock and other produce of personal property. [Civ. C. 1877, § 215; R. C. 1899, § 3322.]

§ 4759. **When limitation deemed created.** The delivery of the grant, when a limitation, condition or future interest is created by grant, and the death of the testator, when it is created by will, is to be deemed the time of the creation of the limitation, condition or interest within the meaning of this code. [Civ. C. 1877, § 216; R. C. 1899, § 3323.]

CHAPTER 28.

REAL OR IMMOVABLE PROPERTY.

ARTICLE 1.—GENERAL PROVISIONS.

§ 4760. **Law governing real property.** Real property within this state is governed by the law of this state, except when the title is in the United States. [Civ. C. 1877, § 217; R. C. 1899, § 3324.]

ARTICLE 2.—ESTATES IN GENERAL.

§ 4761. **Estates classified as to duration.** Estates in real property, in respect to the duration of their enjoyment are either:

1. Estates of inheritance, or perpetual estates.
2. Estates for life.

3. Estates for years; or
4. Estates at will.

[Civ. C. 1877, § 218; R. C. 1899, § 3325.]

§ 4762. **Estate in fee defined.** Every estate of inheritance is a fee, and every such estate. when not defeasible or conditional, is a fee simple or an absolute fee. [Civ. C. 1877, § 219; R. C. 1899, § 3326.]

§ 4763. **Estates tail declared fees.** Estates tail are abolished; and every estate which would be at common law adjudged to be a fee tail is a fee simple, and if no valid remainder is limited thereon, is a fee simple absolute. [Civ. C. 1877, § 220; R. C. 1899, § 3327.]

§ 4764. **Fee tail valid as contingent limitation upon a fee.** When a remainder in fee is limited upon any estate which would by the common law be adjudged a fee tail, such remainder is valid as a contingent limitation upon a fee and vests in possession on the death of the first taker without issue living at the time of his death. [Civ. C. 1877, § 221; R. C. 1899, § 3328.]

§ 4765. **Estate of freehold.** Estates of inheritance and for life are called estates of freehold; estates for years are chattels real; and estates at will are chattel interests. but are not liable as such to sale on execution. [Civ. C. 1877, § 222; R. C. 1899, § 3329.]

§ 4766. **Same.** An estate during the life of a third person, whether limited to heirs or otherwise, is a freehold. [Civ. C. 1877, § 223; R. C. 1899, § 3330.]

§ 4767. **Future, how limited.** A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination by lapse of time or otherwise of a precedent estate created at the same time. [Civ. C. 1877, § 224; R. C. 1899, § 3331.]

§ 4768. **Reversion defined.** A reversion is the residue of an estate left by operation of law in the grantor or his successors. or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised. [Civ. C. 1877, § 225; R. C. 1899, § 3332.]

§ 4769. **Remainder.** When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder and may be created and transferred by that name. [Civ. C. 1877, § 226; R. C. 1899, § 3333.]

§ 4770. **Limitation of suspension of absolute ownership.** The absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect to fee. [Civ. C. 1877, § 227; R. C. 1899, § 3334.]

§ 4771. **Further defined.** The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust is a suspension of the power of alienation within the meaning of section 4744. [Civ. C. 1877, § 228; R. C. 1899, § 3335.]

§ 4772. **Creation of a remainder on prior remainder.** A contingent remainder in fee may be created on a prior remainder in fee to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years or upon any other contingency by which the estate of such persons may be determined before they attain majority. [Civ. C. 1877, § 229; R. C. 1899, § 3336.]

§ 4773. **Creation of future freehold estates, etc.** Subject to the rules of this chapter and of chapters 25, 26 and 27 a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years; and a fee may be limited on a fee upon a contingency which, if it should occur, must happen

within the period prescribed in this chapter. [Civ. C. 1877, § 230; R. C. 1899, § 3337.]

§ 4774. What life estates void. Successive estates for life cannot be limited except to persons in being at the creation thereof, and all life estates subsequent to those of persons in being are void; and upon the death of those persons the remainder, if valid in its creation, takes effect in the same manner as if no other life estate had been created. [Civ. C. 1877, § 231; R. C. 1899, § 3338.]

§ 4775. Remainder upon successive life estates. No remainder can be created upon successive estates for life, provided for in the preceding section, unless such remainder is in fee: nor can a remainder be created upon such estate in a term for years unless it is for the whole residue of such term. [Civ. C. 1877, § 232; R. C. 1899, § 3339.]

§ 4776. Contingent remainder on term of years. A contingent remainder cannot be created on a term of years, unless the nature of the contingency on which it is limited is such that the remainder must vest in interest during the continuance or at the termination of lives in being at the creation of such remainder. [Civ. C. 1877, § 233; R. C. 1899, § 3340.]

§ 4777. Estate for life as remainder on term of years. No estate for life can be limited as a remainder on a term of years, except to a person in being at the creation of such estate. [Civ. C. 1877, § 234; R. C. 1899, § 3341.]

§ 4778. Conditional limitation. A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation. [Civ. C. 1877, § 235; R. C. 1899, § 3342.]

§ 4779. To heirs of body. When a remainder is limited to the heirs or heirs of the body, of a person to whom a life estate in the same property is given the persons who on the termination of the life estate are the successors or heirs of the body of the owner for life are entitled to take by virtue of the remainder so limited to them and not as mere successors of the owner for life. [Civ. C. 1877, § 236; R. C. 1899, § 3343.]

§ 4780. On death of first taker. When a remainder on an estate for life or for years is not limited on a contingency defeating or avoiding such precedent estate it is to be deemed intended to take effect only on the death of the first taker or the expiration by lapse of time of such term of years. [Civ. C. 1877, § 237; R. C. 1899, § 3344.]

§ 4781. Unexecuted power. A general or special power of appointment does not prevent the vesting of a future estate, limited to take effect in case such power is not executed. [Civ. C. 1877, § 238; R. C. 1899, § 3345.]

Article 3.—Termination of Estates.

§ 4782. Of estate at will. A tenancy or other estate at will, however created, may be terminated by the landlord's giving notice to the tenant in the manner prescribed by the next section to remove from the premises within a period specified in the notice of not less than one month. [Civ. Co 1877, § 239; R. C. 1899, § 3346.]

§ 4783. Requisites of notice. Service. The notice prescribed by the last section must be in writing and must be served by delivering the same to the tenant or to some person of discretion residing on the premises, or, if neither can with reasonable diligence be found, the notice may be served by affixing it on a conspicuous part of the premises where it may be conveniently read. [Civ. C. 1877, § 240; R. C. 1899, § 3347.]

§ 4784. Subsequent action. After the notice prescribed by sections 4782 and 4783 has been served in the manner therein directed and the period specified by such notice has expired, but not before, the landlord may reenter or proceed according to law to recover possession. [Civ. C. 1877, § 241; R. C. 1899, § 3348.]

§ 4785. **Three days' notice.** Whenever the right of re-entry is given to a grantor or lessor in any grant or lease, or otherwise, such re-entry may be made at any time after the right has accrued upon three days' previous written notice of intention to re-enter served in the mode prescribed by section 4783. [Civ. C. 1877, § 242; R. C. 1899, § 3349.]

§ 4786. **Without notice.** An action for the possession of real property, leased or granted with a right of re-entry, may be maintained at any time after the right to re-enter has accrued without the notice prescribed in section 4785. [Civ. C. 1877, § 243; R. C. 1899, § 3350.]

ARTICLE 4.—SERVITUDES.

§ 4787. **Easements attached to other lands.** The following land burdens or servitudes upon land may be attached to other lands as incidents or appurtenances, and are then called easements:

1. The right of pasturage.
2. The right of fishing.
3. The right of taking game.
4. The right of way.
5. The right of taking water, wood, minerals and other things.
6. The right of transacting business upon land.
7. The right of conducting lawful sports upon land.
8. The right of receiving air, light or heat from or over, or discharging the same upon or over land.
9. The right of receiving water from or discharging the same upon land.
10. The right of flooding land.
11. The right of having water flow without diminution or disturbance of any kind.
12. The right of using a wall as a party wall.
13. The right of receiving more than natural support from adjacent land or things affixed thereto.
14. The right of having the whole of a division fence maintained by a coterminous owner.
15. The right of having public conveyances stopped, or of stopping the same on land.
16. The right of a seat in church.
17. The right of burial.

[Civ. C. 1877, § 244; R. C. 1899, § 3351.]

Telephone poles an additional servitude entitling owner to compensation. Donovan v. Allert, 11 N. D. 289, 91 N. W. 441.

Right of riparian owner to use water of creek flowing over his land not easement, but an incident to the land. Right limited to actual amount used. Stenger v. Tharp et al, 17 S. D. 13, 94 N. W. 402.

The construction of a telephone line not an additional servitude so as to entitle the abutting property owner to compensation. Kirby v. Citizens Telephone Co., 17 S. D. 362, 97 N. W. 3.

§ 4788. **Others not attached may be granted.** The following land burdens or servitudes upon land may be granted and held, though not attached to land:

1. The right to pasture, and of fishing and taking game.
2. The right of a seat in church.
3. The right of burial.
4. The right of taking rents and tolls.
5. The right of way.
6. The right of taking water, wood, minerals or other things.

[Civ. C. 1877, § 245; R. C. 1899, § 3352.]

Easement may be acquired by prescription. Scott v. Toomey, 8 S. D. 639, 67 N. W. 838.

§ **4789. Dominant tenement.** The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement. [Civ. C. 1877, § 246; R. C. 1899, § 3353.]

§ **4790. Who can create servitude.** A servitude can be created only by one who has a vested estate in the servient tenement. [Civ. C. 1877, § 247; R. C. 1899, § 3354.]

§ **4791. Who cannot hold.** A servitude thereon cannot be held by the owner of the servient tenement. [Civ. C. 1877, § 248; R. C. 1899, § 3355.]

§ **4792. Extent of.** The extent of a sevitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired. [Civ. C. 1877, § 249; R. C. 1899, § 3356.]

§ **4793. Partition of. Burden apportioned.** In case of partition of the dominant tenement the burden must be apportioned according to the division of the dominant tenement, but not in such a way as to increase the burden upon the servient tenement. [Civ. C. 1877, § 250; R. C. 1899, § 3357.]

§ **4794. Right of future owner.** The owner of a future estate in a dominant tenement may use easements attached thereto for the purpose of viewing waste, demanding rent or removing an obstruction to the enjoyment of such easement, although such tenement is occupied by a tenant. [Civ. C. 1877, § 251; R. C. 1899, § 3358.]

§ **4795. Right of action.** The owner of any estate in a dominant tenement, or the occupant of such tenement, may maintain an action for the enforcement of an easement attached thereto. [Civ. C. 1877, § 252; R. C. 1899, § 3359.]

§ **4796. Same.** The owner in fee of a servient tenement may maintain an action for the possession of the land against any one unlawfully possessed thereof, though a servitude exists thereon in favor of the public. [Civ. C. 1877, § 253; R. C. 1899, § 3360.]

Erection of building on street invasion of rights of both public and fee owner. Fee owner may maintain ejectment. Railway Co. v. Lake, 10 N. D. 541, 88 N. W. 461.

§ **4797. Extinguishment.** A servitude is extinguished:

1. By the vesting of the right to the servitude and the right to the servient tenement in the same person.
2. By the destruction of the servient tenement.
3. By the performance of an act upon either tenement by the owner of the servitude or with his assent which is incompatible with its nature or exercise; or,
4. When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment. [Civ. C. 1877, § 254; R. C. 1899, § 3361.]

CHAPTER 29.

RIGHTS OF OWNERS.

ARTICLE 1.—INCIDENTS OF OWNERSHIP.

§ **4798. Land includes water.** The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream formed by nature over or under the surface may be used by him as long as it remains there; but he may not prevent the natural flow of the stream or of the natural spring from which it commences its definite course, nor pursue nor pollute the same. [Civ. C. 1877, § 255; R. C. 1899, § 3362.]

Homestead settler has superior right over subsequent miner's claim. Sturr v. Beck, 6 Dak. 71, 50 N. W. 486, 133 U. S. 541.

Riparian owner's rights in stream is such property as may be condemned for railroad purposes; also see note at end of decision. Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570.

Spring belongs to owner of soil. Metcalf v. Nelson, 8 S. D. 87, 65 N. W. 911.

Underground water found in gravel or just above bed rock, with no fissure in bed rock and no well defined banks does not constitute a running stream. Deadwood Central Railroad Co. v. Barker, 14 S. D. 558, 86 N. W. 619.

Riparian owner may use reasonable quantity of water for irrigation purposes. Appropriator who acquires subsequent rights cannot complain of use made of water by upper riparian owner. Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 519, 91 N. W. 352.

§ 4799. Rights of owner of life estate. The owner of a life estate may use the land in the same manner as the owner of a fee simple, except that he must do no act to the injury of the inheritance. [Civ. C. 1877, § 256; R. C. 1899, § 3363.]

§ 4800. Rights of tenant. A tenant for years or at will, unless he is a wrongdoer by holding over, may occupy the buildings, take the annual products of the soil, work mines and quarries open at the commencement of his tenancy and cultivate and harvest the crops growing at the end of his tenancy. [Civ. C. 1877, § 257; R. C. 1899, § 3364.]

§ 4801. Same. How determined. A tenant for years or at will has no other rights to the property than such as are given to him by the agreement or instrument by which his tenancy is acquired or by the last section. [Civ. C. 1877, § 258; R. C. 1899, § 3365.]

§ 4802. Succession to rights. A person to whom any real property is transferred or devised upon which rent has been reserved, or to whom any such rent is transferred, is entitled to the same remedies for recovery of rent, for nonperformance of any of the terms of the lease or for any waste or cause of forfeiture as his grantor or devisor might have had. [Civ. C. 1877, § 259; R. C. 1899, § 3366.]

§ 4803. Assignees of lessor or lessee. Whatever remedies the lessor of any real property has against his immediate lessee for the breach of an agreement in the lease or for recovery of the possession, he has against the assignees of the lessee for any cause of action accruing while they are such assignees, except when the assignment is made by way of security for a loan and is not accompanied by possession of the premises. Whatever remedies the lessee of any real property may have against his immediate lessor for the breach of any agreement in the lease he may have against the assigns of the lessor and the assigns of the lessee may have against the lessor and his assigns, except upon covenants against incumbrances or relating to the title or possession of the premises. [Civ. C. 1877, § 260; R. C. 1899, § 3367.]

Effect of the statute is to cause covenants to run with land. **N. P. Ry. Co. v.** McClure, 9 N. D. 73, 81 N. W. 52.

§ 4804. Notice to change terms. In all leases of lands or tenements, or of any interest therein, from month to month the landlord may, upon giving notice in writing at least fifteen days before the expiration of the month, change the terms of the lease to take effect at the expiration of the month. The notice, when served upon the tenant, shall of itself operate and be effectual to create and establish as a part of the lease the terms, rent and conditions specified in the notice, if the tenant shall continue to hold the premises after the expiration of the month. [Civ. C. 1877, § 261; R. C. 1899, § 3368.]

§ 4805. Life lease rent. Rent due upon a lease for life may be recovered in the same manner as upon a lease for years. [Civ. C. 1877, § 262; R. C. 1899, § 3369.]

§ 4806. After death. Rent dependent on the life of a person may be recovered after as well as before his death. [Civ. C. 1877, § 263; R. C. 1899, § 3370.]

§ 4807. Right of action. A person having an estate in fee, in remainder or reversion, may maintain an action for an injury done to the inheritance,

notwithstanding an intervening estate for life or years and although after its commission his estate is transferred and he has no interest in the property at the commencement of the action. [Civ. C. 1877, § 264; R. C. 1899, § 3371.]

Owner of real estate in actual possession of tenant may maintain action for permanent injury. If possession only is disturbed tenant may bring action. Arneson v. Spawn, 2 S. D. 269, 49 N. W. 1064.

ARTICLE 2.—BOUNDARIES.

§ 4808. **Above and below surface.** The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it. [Civ. C. 1877, § 265; R. C. 1899, § 3372.]

§ 4809. **Banks and beds of streams.** Except when the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on a navigable lake or stream, takes to the edge of the lake or stream at low water mark, and all navigable rivers shall remain and be deemed public highways. In all cases when the opposite banks of any stream not navigable belong to different persons the stream and the bed thereof shall become common to both. [Civ. C. 1877, § 266; R. C. 1899, § 3373.]

Where land abuts on stream, shore line is boundary and not meander line. Heald v. Yumisko, 7 N. D. 422, 75 N. W. 807.

Meander lines along non-navigable lakes not run for purpose of limiting title. Riparian owner takes to center of non-navigable lake. Olson v. Huntamer, 6 S. D. 364, 61 N. W. 479.

§ 4810. **To center of highway.** An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown. [Civ. C. 1877, § 267; R. C. 1899, § 3374.]

Fee of highway is in abutting owners. Railway Co. v. Lake, 10 N. D. 541, 88 N. W. 461; Donovan v. Allert, 11 N. D. 289, 91 N. W. 441; Edmison v. Lowry, 3 S. D. 77, 52 N. W. 583; Dell Rapids Mer. Co. v. City of Dell Rapids, 11 S. D. 116, 75 N. W. 898; Meek v. Meade County, 12 S. D. 162, 80 N. W. 182.

Right to use street subject to public easement. Dell Rapids Mer. Co. v. City of Dell Rapids, 11 S. D. 116, 75 N. W. 898; Donovan v. Allert, 11 N. D. 289, 91 N. W. 441.

City cannot authorize telephone company to set poles on street against owner's consent. Donovan v. Allert, 11 N. D. 289, 91 N. W. 441.

Owner of abutting property may maintain action for unlawful encroachment upon street. Right of such owner distinct and separate from easement of general public. Edmison v. Lowry, 3 S. D. 77, 52 N. W. 583.

Transfer of land bounded by highway passes land to center of highway, unless different intent appears.

Conveyance describing a triangular piece as commencing at northwest corner of L and S streets, thence along S street, etc., passed title to center of street and did not show intent to limit to line of street. Sweatman v. Bathrick, 17 S. D. 138.

§ 4811. **Lateral support from adjoining land.** Each coterminous owner is entitled to the lateral and adjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction on using ordinary care and skill and taking reasonable precautions to sustain the land of the other and giving previous reasonable notice to the other of his intention to make such excavations. [Civ. C. 1877, § 268; R. C. 1899, § 3375.]

Right limited to land itself. Notice does not relieve from liability for negligence. Ulrich v. Dakota Loan & Trust Co., 2 S. D. 285, 49 N. W. 1054.

Notice not required when adjoining owner has knowledge in fact of intended excavation. Must use ordinary care. Noyoting v. Danforth, 9 S. D. 301, 68 N. W. 749.

§ 4812. **Trees on land of one owner.** Trees whose trunks stand wholly upon the land of one owner belong exclusively to him although their roots grow into the land of another. [Civ. C. 1877, § 269; R. C. 1899, § 3376.]

§ 4813. **Same on line.** Trees whose trunks stand partly on the land of two or more coterminous owners belong to them in common. [Civ. C. 1877, § 270; R. C. 1899, § 3377.]

ARTICLE 3.—OBLIGATIONS OF OWNERS.

§ 4814. Repairs and taxes. The owner of a life estate must keep the buildings and fences in repair from ordinary waste and must pay the taxes and other annual charges and a just proportion of extraordinary assessments benefiting the whole inheritance. [Civ. C. 1877, § 271; R. C. 1899, § 3378.]

§ 4815. Boundaries. Fences. Coterminous owners are mutually bound equally to maintain:

1. The boundaries and monuments between them.
2. The fences between them, unless one of them chooses to let his land lie open as a public common, in which case, if he afterwards incloses it, he must refund to the other a just proportion of the value at that time of any division fence made by the latter. [Civ. C. 1877, § 272; R. C. 1899, § 3379.]

CHAPTER 30.

USES AND TRUSTS.

§ 4816. What are. Uses and trusts in relation to real property are those only which are specified in this chapter. [Civ. C. 1877, § 273; R. C. 1899, § 3380.]

Sections 4816 to 4819 construed in Smith v. Security Loan & Trust Co., S N. D. 451, 79 N. W. 981.

§ 4817. Who deemed to have legal estate. Every person who by virtue of any transfer or devise is entitled to the actual possession of real property and the receipt of the rents and profits thereof is deemed to have a legal estate therein of the same quality and duration and subject to the same conditions as his beneficial interest. [Civ. C. 1877, § 275; R. C. 1899, § 3381.]

Beneficial owner of land may sue to quiet title. Dalrymple v. Security Loan & Trust Co., 9 N. D. 306, 83 N. W. 245.

§ 4818. Trust valid, if connected with power. The last section does not divest the estate of any trustee in a trust heretofore existing, when the title of such trustee is not merely nominal, but is connected with some power of actual disposition or management in relation to the real property which is the subject of the trust. [Civ. C. 1877, § 276; R. C. 1899, § 3382.]

§ 4819. Transfer must be direct. Every disposition of real property whether by transfer or will, must be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to any other, to the use of or in trust for such person; and if made to any person to the use of or in trust for another no estate or interest vests in the trustee; but he must execute a release of the property to the beneficiary on demand, the latter paying the expense thereof. [Civ. C. 1877, § 277; R. C. 1899, § 3383.]

§ 4820. Qualification of preceding sections. The preceding sections of this chapter do not extend to trusts arising or resulting by implication of law, nor prevent or affect the creation of such express trusts as are hereinafter authorized and defined. [Civ. C. 1877, § 278; R. C. 1899, § 3384.]

§ 4821. Requisites of trusts. No trust in relation to real property is valid unless created or declared:

1. By a written instrument, subscribed by the trustee or by his agent thereto authorized in writing,
2. By the instrument under which the trustee claims the estate affected; or,
3. By operation of law. [Civ. C. 1877, § 279; R. C. 1899, § 3385.]

Agreement to locate mining claim in trust for others, made prior to location is valid, although not in writing. If made after location cannot be enforced. Reagan v. McKibben, 11 S. D. 270, 76 N. W. 943.

§ 4822. When trust presumed. When a transfer of real property is made to one person and the consideration therefor is paid by or for another a trust is presumed to result in favor of the person by or for whom such payment is made. [Civ. C. 1877, § 280; R. C. 1899, § 3386.]

Deed vests title, both legal and equitable in beneficiary. Smith v. Security Loan Loan & Trust Co., 8 N. D. 451, 79 N. W. 981.

Beneficiary under deed seized of entire title. May maintain an action to quiet title. Deed vests entire title and estate in beneficiary. Dalrymple v. Security Loan & Trust Co., 8 N. D. 451, 79 N. W. 981.

Must be established by substantial proof. Graham v. Selbie, 8 S. D. 604, 67 N. W. 831.

§ 4823. Innocent purchaser. No implied or resulting trust can prejudice the right of a purchaser or incumbrancer of real property for value and without notice of the trust. [Civ. C. 1877, § 281; R. C. 1899, § 3387.]

§ 4824. For what trusts may be created. Express trusts may be created for any of the following purposes:

1. To sell real property and apply or dispose of the proceeds in accordance with the instrument creating the trust.

2. To mortgage or lease real property for the benefit of annuitants or other legatees or for the purpose of satisfying any charge thereon.

3. To receive the rents and profits of real property and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family during the life of such person or for any shorter term, subject to the rules of chapter 28 of this code; or,

4. To receive the rents and profits of real property and to accumulate the same for the purposes and within the limits prescribed by the same chapter. [Civ. C. 1877, § 282; R. C. 1899, § 3388.]

A power of sale dependent on a void trust falls with the trust. Penfield v. Tower, 1 N. D. 216, 46 N. W. 413.

The written contract is controlling. Its terms cannot be changed by warranties relating to the quality of the goods. Dowagiac Mfg. Co. v. Mahon & Robinson, 13 N. D. 517, 101 N. W. 903.

Trust deed to one as assignee, where no evidence of appointment as assignee, and where no purpose declared is void. Murphy v. Cook, 11 S. D. 47, 75 N. W. 387.

Trust deed, absolute in form, presumed to take effect immediately in absence of provision to contrary. Brace v. Van Epps, 12 S. D. 191, 80 N. W. 197.

§ 4825. When devise valid as power in trust. A devise of real property to executors or other trustees to be sold or mortgaged, when the trustees are not also empowered to receive the rents and profits, vests no estate in them; but the trust is valid as a power in trust. [Civ. C. 1877, § 283; R. C. 1899, § 3389.]

§ 4826. When surplus subject to creditors' claims. When a trust is created to receive the rents and profits of real property and no valid direction for accumulation is given the surplus of such rents and profits beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created is liable to the claims of the creditors of such person in the same manner as personal property which cannot be reached by execution. [Civ. C. 1877, § 284; R. C. 1899, § 3390.]

§ 4827. When trust valid as power. When an express trust in relation to real property is created for any purpose not enumerated in the preceding section, such trust vests no estate in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, is valid as a power in trust, subject to the provisions in relation to such powers contained in chapter 31 of this code. [Civ. C. 1877, § 285; R. C. 1899, § 3391.]

§ 4828. **Power in trust not prohibited.** Nothing in this chapter prevents the creation of a power in trust for any of the purposes for which an express trust may be created. [Civ. C. 1877, § 286; R. C. 1899, § 3392.]

§ 4829. **Realty passes when trust valid as power.** In every case when a trust is valid as a power in trust the real property to which the trust relates remains in or passes by succession to the person otherwise entitled, subject to the execution of the trust as a power in trust. [Civ. C. 1877, § 287; R. C. 1899. § 3393.]

§ 4830. **Whole estate vests in trustees.** Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust. [Civ. C. 1877, § 288; R. C. 1899, § 3394.]

Beneficiary may enforce performance of a trust in equity. **Penfield v. Tower,** 1 N. D. 216, 46 N. W. 413.

Validity of transfer of property under trust deed can only be attacked by beneficiary. Brace v. Van Epps, 12 S. D. 191, 80 N. W. 197.

§ 4831. **Contingent trust.** Notwithstanding anything contained in the last section. the author of a trust may in its creation prescribe to whom the real property to which the trust relates shall belong in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust. [Civ. C. 1877, § 289; R. C. 1899. § 3395.]

§ 4832. **Legal estate.** The grantee or devisee of real property subject to a trust acquires a legal estate in the property as against all persons except the trustees and those lawfully claiming under them. [Civ. C. 1877, § 290; R. C. 1899, § 3396.]

§ 4833. **Undisposed estates.** When an express trust is created in relation to real property every estate not embraced in the trust and not otherwise disposed of is left in the author of the trust or his successors. [Civ. C. 1877, § 291; R. C. 1899, § 3397.]

§ 4834. **Limited disposal.** The beneficiary of a trust for the receipt of the rents and profits of real property or for the payment of an annuity out of such rents and profits may be restrained from disposing of his interest in such trust during his life or for a term of years by the instrument creating the trust. [Civ. C. 1877, § 292; R. C. 1899, § 3398.]

§ 4835. **Grant separate from trust. When absolute.** When an express trust is created in relation to real property, but is not contained or declared in the grant to the trustee or in an instrument signed by him and recorded in the same office with the grant to the trustee. such grant must be deemed absolute in favor of the subsequent creditors of the trustee not having notice of the trust and in favor of purchasers from such trustee without notice and for a valuable consideration. [Civ. C. 1877, § 293; R. C. 1899, § 3399.]

§ 4836. **When transfer of trustees void.** When a trust in relation to real property is expressed in the instrument creating the estate, every transfer or other act of the trustees in contravention of the trust is absolutely void. [Civ. C. 1877, § 294; R. C. 1899, § 3400.]

§ 4837. **When trust ceases.** When the purpose for which an express trust was created ceases. the estate of the trustees also ceases. [Civ. C. 1877, § 295; R. C. 1899. § 3401.]

Sections 4810 to 4837 not qualified by section 5707. Murphey v. Cook, **11 S. D. 47,** 75 N. W. 387.

CHAPTER 31.

POWERS.

§ **4838. What powers permitted.** Powers in relation to real property are those only which are specified in this chapter. [Civ. C. 1877, § 296; R. C. 1899, § 3402.]

§ **4839. Power of attorney excluded.** The provisions of this chapter do not extend to a simple power of attorney to convey real property in the name of the owner and for his benefit. [Civ. C. 1877, § 297; R. C. 1899, § 3403.]

§ **4840. Power defined.** A power as the term is used in this chapter is an authority to do some act in relation to real property, or to the creation or revocation of an estate therein or a charge thereon which the owner granting or reserving such power might himself perform for any purpose. [Civ. C. 1877, § 298; R. C. 1899, § 3404.]

Must be interest in thing itself to constitute power coupled with interest. Wambole v. Foote, 2 Dak. 1, 2 N. W. 239.

Power of sale in real estate mortgage is power coupled with an interest and not terminated by death of mortgagor. Reilly v. Phillips, 4 S. D. 604, 57 N. W. 780; Grandin v. Emmons, 10 N. D. 223, 86 N. W. 723.

Instrument creating invalid trust not providing for doing of any act or creation of any charge or revocation on any estate in land conveyed not valid as a power in trust. Murphy v. Cook, 11 S. D. 47, 75 N. W. 387.

§ **4841. Author defined.** The author of a power as the term is used in this chapter is the person by whom a power is created, whether by grant or devise; and the holder of a power is the person in whom a power is vested, whether by grant, devise or reservation. [Civ. C. 1877, § 299; R. C. 1899, § 3405.]

§ **4842. Powers classified.** Powers are general or special and beneficial or in trust. [Civ. C. 1877, § 300; R. C. 1899, § 3406.]

§ **4843. General.** A power is general when it authorizes the alienation or incumbrance of a fee in the property embraced therein by a grant, will or charge, or any of them, in favor of any person whatever. [Civ. C. 1877, § 301; R. C. 1899, § 3407.]

§ **4844. Special.** A power is special:

1. When a person or class of persons is designated to whom the disposition of property under the power is to be made; or,
2. When it authorizes the alienation or incumbrance by means of a grant, will or charge of only an estate less than a fee. [Civ. C. 1877, § 302; R. C. 1899, § 3408.]

§ **4845. Beneficial.** A power is beneficial when no person other than its holder has by the terms of its creation any interest in its execution. [Civ. C. 1877, § 303; 1899, § 3409.]

§ **4846. In trust.** A power is in trust when any person or class of persons, other than its holder, has by the terms of its creation an interest in its execution. [Civ. C. 1877, § 304; R. C. 1899, § 3410.]

§ **4847. General power. When in trust.** A general power is in trust when any person or class of persons, other than its holder, is designated as entitled to the proceeds or the disposition, or charge authorized by the power or to any portion of the proceeds or other benefits to result from its execution. [Civ. C. 1877, § 305; R. C. 1899, § 3411.]

§ **4848. Special. Same.** A special power is in trust:

1. When the disposition or charge which it authorizes is limited to be made to any person or class of persons other than the holder of the power; or,
2. When any person or class of persons, other than the holder, is designated as entitled to any benefit from the disposition or charge authorized by the power. [Civ. C. 1877, § 306; R. C. 1899, § 3412.]

§ 4849. **Capacity to create.** No person is capable of creating a power who is not at the same time capable of granting some estate in the property to which the power relates. [Civ. C. 1877, § 307; R. C. 1899, § 3413.]

§ 4850. **In whom vested.** A power may be vested in any person. [Civ. C. 1877, § 308; R. C. 1899, § 3414.]

§ 4851. **How created.** A power may be created only:

1. By a suitable clause contained in a grant of some estate in the real property to which the power relates or in an agreement to execute such a grant; or,
2. By a devise contained in a will. [Civ. C. 1877, § 309; R. C. 1899, § 3415.]

Power of sale in mortgage authorizes foreclosure by **advertisement. Male v.** Longstaff, 9 S. D. 389, 69 N. W. 577.

§ 4852. **Power reserved.** The grantor in any conveyance may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another; and every power thus reserved is subject to the provisions of this chapter in the same manner as if granted to another. [Civ. C. 1877, § 310; R. C. 1899, § 3416.]

§ 4853. **When irrevocable.** Every power, beneficial or in trust, is irrevocable unless an authority to revoke it is given or reserved in the instrument creating the power. [Civ. C. 1877, § 311; R. C. 1899, § 3417.]

§ 4854. **When power is a lien.** A power is a lien upon the real property which it embraces from the time the instrument in which it is contained takes effect, except that against creditors, purchasers and incumbrancers in good faith and without notice from any person having an estate in such real property, the power is a lien only from the time the instrument in which it is contained is duly recorded. [Civ. C. 1877, § 312; R. C. 1899, § 3418.]

§ 4855. **When power deemed part of security.** When a power to sell real property is given to a mortgagee or other incumbrancer in an instrument intended to secure the payment of money, the power is to be deemed a part of the security and vests in any person who by assignment becomes entitled to the money so secured to be paid and may be executed by him whenever the assignment is duly acknowledged and recorded. [Civ. C. 1877, § 313; R. C. 1899, § 3419.]

Assignee cannot foreclose by advertisement until assignment **has been duly executed**, acknowledged and recorded. Hickey v. Richards, 3 **Dak. 345, 20 N. W.** 428.

Power of sale vests in person entitled to security and is not **suspended by death** or disability. Grandin v. Emmons, 10 N. D. 223, 86 N. W. 723; **Reilly v. Phillips,** 4 S. D. 604, 57 N. W. 780.

Assignee for benefit of creditors has power to foreclose. **Thompson v. Browne,** 10 S. D. 344, 73 N. W. 194.

§ 4856. **Who cannot execute power.** A power cannot be executed by any person not capable of disposing of real property. [Civ. C. 1877, § 314; R. C. 1899, § 3420.]

Minor cannot execute power. Wambole v. Foote, 2 Dak. 1, **2 N. W. 239.**

§ 4857. **Married woman.** A married woman may execute the power during her marriage without the concurrence of her husband, unless otherwise prescribed by the terms of the power. [Civ. C. 1877, § 315; R. C. 1899, § 3421.]

§ 4858. **Married woman cannot execute before majority.** No power can be executed by a married woman before she attains her majority. [Civ. C. 1877, § 316; R. C. 1895, § 3422.]

§ 4859. **How power executed.** A power can be executed only by a written instrument which would be sufficient to pass the estate or interest intended to pass under the power, if the person executing the power was the actual owner. [Civ. C. 1877, § 317; R. C. 1899, § 3423.]

§ 4860. **Execution. By all of several. By survivors, if one dies.** When a power is vested in several persons all must unite in its execution; but in case any one or more of them is dead the power may be executed by the survivor

or survivors, unless otherwise prescribed by the terms of the power. [Civ. C. 1877, § 318; R. C. 1899, § 3424.]

§ **4861. How executed by will.** When a power to dispose of real property is confined to a disposition by devise or will the instrument of execution must be a will duly executed according to the provisions of chapter 42. [Civ. C. 1877, § 319; R. C. 1899, § 3425.]

§ **4862. How by grant.** When a power is confined to a disposition by grant, it cannot be executed by will even though the disposition is not intended to take effect until after the death of the person executing the power. [Civ. C. 1877, § 320; R. C. 1899, § 3426.]

§ **4863. When directed by insufficient instrument.** When the author of a power has directed or authorized it to be executed by an instrument which would not be sufficient in law to pass the estate the power is not void, but its execution is to be governed by the rules before prescribed in this chapter. [Civ. C. 1877, § 321; R. C. 1899, § 3427.]

§ **4864. Formalities unnecessary.** When the author of a power has directed any formalities to be observed in its execution, in addition to those which would be sufficient to pass the estate, the observance of such additional formalities is not necessary to a valid execution of the power. [Civ. C. 1877, § 322; R. C. 1899, § 3428.]

§ **4865. Trivial conditions disregarded.** When the conditions annexed to a power are merely nominal and evince no intention of actual benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded in the execution of the power. [Civ. C. 1877, § 323; R. C. 1899, § 3429.]

§ **4866. Binding conditions.** With the exceptions contained in the preceding sections the intentions of the author of a power as to the mode, time and conditions of its execution must be observed, subject to the power of a district court to supply a defective execution in the cases provided in sections 4875 and 4899. [Civ. C. 1877, § 324; R. C. 1899, § 3430.]

§ **4867. Consent, how expressed.** When the consent of a third person to the execution of a power is requisite, such consent must be expressed in the instrument by which the power is executed or be certified in writing thereon. In the first case the instrument of execution, in the second, the certificate must be subscribed by the party whose consent is required and to entitle the instrument to be recorded such signature must be duly approved or acknowledged according to the chapter on recording transfers. [Civ. C. 1877, § 325; R. C. 1899, § 3431.]

§ **4868. Consent of all survivors.** When the consent of several persons to the execution of a power is requisite all must consent thereto; but in case any one or more of them is dead the consent of the survivors is sufficient, unless otherwise prescribed by the terms of the power. [Civ. C. 1877, § 326; R. C. 1899, § 3432.]

§ **4869. Valid without recital.** Every instrument executed by the holder of a power, conveying an estate or creating a charge which such holder would have no right to convey or create except by virtue of his power, is to be deemed a valid execution of the power, even though not recited or referred to therein. [Civ. C. 1877, § 327; R. C. 1899, § 3433.]

§ **4870. When to be deemed conveyance.** Every instrument except a will in execution of a power, even though the power is one of revocation only is to be deemed a conveyance within the meaning of the chapter on recording transfers. [Civ. C. 1877, § 328; R. C. 1899, § 3434.]

§ **4871. Disposition beyond authority.** A disposition or charge by virtue of a power more extensive than was authorized thereby is not therefore void; but every estate or interest so created so far as it is embraced by the terms of the power is valid. [Civ. C. 1877, § 329; R. C. 1899, § 3435.]

§ 4872. Time runs from creation of power. The period during which the absolute right of alienation may be suspended by an instrument in execution of a power must be computed, not from the date of the instrument, but from the time of the creation of the power. [Civ. C. 1877, § 330; R. C. 1899, § 3436.]

§ 4873. Conditions at creation determine legality. No estate or interest can be given or limited to any person, by an instrument in execution of a power which could not have been given or limited at the time of the creation of the power. [Civ. C. 1877, § 331; R. C. 1899, § 3437.]

§ 4874. Married woman's power. When a married woman, entitled to an estate in fee, is authorized by a power to dispose of such estate during her marriage, she may by virtue of such power create any estate which she might create if unmarried. [Civ. C. 1877, § 332; R. C. 1899, § 3438.]

§ 4875. Relief of purchasers from defects. Purchasers for a valuable consideration, claiming under a defective execution of a power are entitled to the same relief as similar purchasers claiming under a defective conveyance from an actual owner. [Civ. C. 1877, § 333; R. C. 1899, § 3439.]

§ 4876. Fraud. Instruments in execution of a power are affected by fraud in the same manner as like instruments executed by owners or trustees. [Civ. C. 1877, § 334; R. C. 1899, § 3440.]

§ 4877. Power to married woman. A general and beneficial power is valid which gives to a married woman power to dispose, during her marriage and without the concurrence of her husband, of a present or future estate in real property conveyed or devised to her in fee. [Civ. C. 1877, § 335; R. C. 1899, § 3441.]

§ 4878. Estates changed into fee. When an absolute power of disposition not accompanied by any trust is given to the owner of a particular estate for life or years, such estate is changed into a fee, absolute in favor of creditors, purchasers and incumbrancers, but subject to any future estates limited thereon, in case the power should not be executed or the property should not be sold for the satisfaction of debts. [Civ. C. 1877, § 336; R. C. 1899, § 3442.]

§ 4879. Same. When an absolute power of disposition not accompanied by any trust, is given to any person to whom no particular estate is limited, such person also takes a fee, subject to any future estate that may be limited thereon, but absolute in favor of creditors, purchasers and incumbrancers. [Civ. C. 1877, § 337; R. C. 1899, § 3443.]

§ 4880. Same. In all cases when an absolute power of disposition is given, not accompanied by any trust, and no remainder is limited on the estate of the holder of the power, he is entitled to an absolute fee. [Civ. C. 1877, § 338; R. C. 1899, § 3444.]

§ 4881. Same. When a general and beneficial order to devise the inheritance is given to the owner of an estate for life or for years, he is deemed to possess an absolute power of disposition within the meaning of the last three sections. [Civ. C. 1877, § 339; R. C. 1899, § 3445.]

§ 4882. When power deemed absolute. Every power of disposition is deemed absolute by means of which the holder is enabled in his lifetime to dispose of the entire fee in possession or in expectancy for his own benefit. [Civ. C. 1877, § 340; R. C. 1899, § 3446.]

§ 4883. Grantor deemed owner. When power of revocation reserved. When the grantor in any conveyance reserves to himself for his own benefit an absolute power of revocation, such grantor is still to be deemed the absolute owner of the estate conveyed so far as the rights of creditors and purchasers are concerned. [Civ. C. 1877, § 341; R. C. 1899, § 3447.]

§ 4884. When special and beneficial power valid. A special and beneficial power is valid which is granted:

1. To a married woman to dispose, during the marriage, of any estate less than a fee belonging to her in the property to which the power relates; or,

2. To the owner of a life estate in the property embraced in the power to make leases, commencing in possession during his life. [Civ. C. 1877, § 342; R. C. 1899, § 3448.]

§ 4885. **How far power to lease void.** A special and beneficial power to make leases of agricultural land for more than ten years or of town or city lots for more than twenty years is void only as to the time beyond ten or twenty years, and authorizes leases for those terms or less. [Civ. C. 1877, § 343; 1899, § 3449.]

§ 4886. **When power to lease transferable.** The power of the owner of a life estate to make leases is not transferable as a separate interest, but is annexed to his estate and will pass, unless specially excepted, by any grant of such estate. If specially excepted in any such grant it is extinguished. [Civ. C. 1877, § 344; R. C. 1899, § 3450.]

§ 4887. **Power to lease released.** The power of the owner of a life estate to make leases may be released by him to any person entitled to a future estate in the property and is thereupon extinguished. [Civ. C. 1877, § 345; R. C. 1899, § 3451.]

§ 4888. **Mortgage does not extinguish power.** A mortgage executed by the owner of a life estate having a power to make leases or by a married woman by virtue of any beneficial power does not extinguish or suspend the power, but the power is bound by the mortgage in the same manner as the real property embraced therein. [Civ. C. 1877, § 346; R. C. 1899, § 3452.]

§ 4889. **Effects of same.** The effects on the power of a lien by mortgage, such as is mentioned in the last section, are:

1. That the mortgagee is entitled to an execution of the power so far as the satisfaction of his lien may require it; and,

2. That any subsequent estate created by the owner in execution of the power becomes subject to the mortgage in the same manner as if in terms embraced therein. [Civ. C. 1877, § 347; R. C. 1899, § 3453.]

§ 4890. **When power subject to creditors' claims.** Every special and beneficial power is liable to the claims of creditors in the same manner as other interests that cannot be reached by execution and the execution of the power may be adjudged for the benefit of the creditors entitled. [Civ. C. 1877, § 348; R. C. 1899, § 3454.]

§ 4891. **Other powers void.** No beneficial power, general or special, not already specified and defined in this chapter can hereafter be created. [Civ. C. 1877, § 349; R. C. 1899, § 3455.]

§ 4892. **Powers enforceable for parties interested.** Every trust power unless its execution is made expressly to depend on the will of the trustees is imperative and imposes a duty on the trustee, the performance of which may be compelled for the benefit of the parties interested. [Civ. C. 1877, § 350; R. C. 1899, § 3456.]

§ 4893. **Same.** A trust power does not cease to be imperative when the trustee has the right to select any and exclude others of the persons designated as the beneficiaries of the trust. [Civ. C. 1877, § 351; R. C. 1899, § 3457.]

§ 4894. **Equal shares.** When a disposition under a power is directed to be made to, among or between several persons, without any specification of the share or sum to be allotted to each, all the persons designated are entitled to equal proportions. [Civ. C. 1877, § 352; R. C. 1899, § 3458.]

§ 4895. **Discretionary power.** When the terms of a power import that the estate or fund is to be distributed among several persons designated in such manner or proportions as the trustee of the power may think proper, the trustee may allot the whole to any one or more of such prsons in exclusion of the others. [Civ. C. 1877, § 353; R. C. 1899, § 3459.]

§ 4896. **Death of trustee.** If the trustee of a power with the right of selection dies, leaving the power unexecuted, its execution must be adjudged

for the benefit equally of all the persons designated as objects of the trust. [Civ. C. 1877, § 354; R. C. 1899, § 3460.]

§ 4897. Execution by district court. When a power in trust is created by will and the testator has omitted to designate, expressly or by necessary implication, by whom the power is to be executed its execution devolves on the district court. [Civ. C. 1877, § 355; R. C. 1899, § 3461.]

§ 4898. Execution for benefit of creditors. The execution in whole or in part of any trust power may be adjudged for the benefit of the creditors or assignees of any person entitled as one of the beneficiaries of the trust to compel its execution when his interest is transferable. [Civ. C. 1877, § 356; R. C. 1899, § 3462.]

§ 4899. Defects cured. When the execution of a power in trust is defective in whole or in part under the provisions of this chapter, its proper execution may be adjudged in favor of the persons designated as the objects of the trust. [Civ. C. 1877, § 357; R. C. 1899, § 3463.]

§ 4900. Certain other laws apply. The provisions of chapters 59 and 60, saving the rights of other persons from prejudice by the misconduct of trustees and authorizing the court to remove and appoint trustees; the provisions of chapter 43, devolving express trusts upon the court on the death of the trustee; and the provisons of section 4837 apply equally to powers in trust and the trustees of such powers. [Civ. C. 1877, § 358; R. C. 1899, § 3464.]

CHAPTER 32.

PERSONAL OR MOVABLE PROPERTY.

Article 1.—Personal Property in General.

§ 4901. Governed by law of domicile. If there is no law to the contrary in the place where personal property is situated it is deemed to follow the person of its owner and is governed by the law of his domicile. [Civ. C. 1877, § 359; R. C. 1899, § 3465.]

Article 2.—Things in Action.

§ 4902. Defined. A thing in action is a right to recover money or other personal property by a judicial proceeding. [Civ. C. 1877, § 360; R. C. 1899, § 3466.]

A chose in action is worth prima facie what apperas due upon it. **Anderson v.** Bank, 6 N. D. 497, 72 N. W. 916.

§ 4903. Transferable. A thing in action, arising out of the violation of a right of property or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except when in the cases provided by law it passes to his devisees or successor in office. [Civ. C. 1877, § 361; R. C. 1899, § 3467.]

Article 3.—Shipping.

§ 4904. Ship defined. The term "ship" or "shipping," when used in this code, includes steamboats, sailing vessels, canal boats, barges and every structure adapted to be navigated from place to place for the transportation of merchandise or persons. [Civ. C. 1877, § 362; R. C. 1899, § 3468.]

§ 4905. Appurtenances. All things belonging to the owners which are on board a ship and are connected with its proper use for the objects of the voyage and adventure in which the ship is engaged are deemed its appurtenances. [Civ. C. 1877, § 363; R. C. 1899, § 3469.]

§ 4906. Navigation classified. Ships are engaged either in foreign or domestic navigation. Ships are engaged in foreign navigation when passing

to or from a foreign country, and in domestic navigation when passing from place to place within the United States. [Civ. C. 1877, § 364; R. C. 1899, § 3470.]

§ **4907. Domestic and foreign ships.** A ship in the port of the state or territory to which it belongs is called a domestic ship; in another port it is called a foreign ship. [Civ. C. 1877, § 365; R. C. 1899, § 3471.]

§ **4908. Power of court.** If a ship belongs to several persons, not partners, and they differ as to its use or repair the controversy may be determined by any court of competent jurisdiction. [Civ. C. 1877, § 366; R. C. 1899, § 3472.]

§ **4909. Possessor liable.** If the owner of a ship commits its possession and navigation to another, that other and not the owner is responsible for its repairs and supplies. [Civ. C. 1877, § 367; R. C. 1899, § 3473.]

§ **4910. Congress regulates.** The registry, enrollment and license of ships are regulated by acts of congress. [Civ. C. 1877, § 368; R. C. 1899, § 3474.]

Article 4.—Rules of Navigation.

§ **4911. Meeting ships. Limitation.** In case of ships meeting the following rules must be observed in addition to those prescribed by any statutes of this state, which relate to navigation:

1. Whenever any ship proceeding in one direction meets another ship proceeding in another direction so that if both ships were to continue their respective courses they would pass so near as to involve the risk of a collision, the helms of both ships must be put to port so as to pass on the port side of each other, except when the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger and subject also to a due regard to the dangers of navigation.

2. A steamer navigating a narrow channel must, whenever it is safe and practicable, keep to that side of that fair way or mid-channel which lies on the starboard side of the steamer. A steamer when passing another steamer in such channel must always leave the other upon the larboard side.

3. When steamers must inevitably or necessarily cross so near that by continuing their respective courses there would be a risk of collision each vessel must put her helm to port so as always to pass on the larboard side of each other.

The rules of this section do not apply to any case for which a different rule is provided by the regulations for the government of pilots of steamers approaching each other within sound of the steam whistle, or by the regulations concerning lights upon steamers, or other matters prescribed under authority of any act of congress. [Civ. C. 1877, § 369; R. C. 1899, § 3475.]

§ **4912. Infringement. Damages.** If it appears that a collision was occasioned by failure to observe any rule of the foregoing section the owner of the ship by which such rule is infringed cannot recover compensation for damages sustained by the ship in such collision, unless it appears that the circumstances of the case made a departure from the rule necessary. [Civ. C. 1877, § 370; R. C. 1899, § 3476.]

§ **4913. Damage presumed from default.** Damage to person or property arising from the failure of a ship to observe any rule of section 4911 must be deemed to have been occasioned by the willful default of the person in charge of the deck of such ship at the time, unless it appears that the circumstances of the case made a departure from the rule necessary. [Civ. C. 1877, § 371; R. C. 1899, § 3477.]

§ **4914. Liability defined.** Losses caused by collision are to be borne as follows:

1. If either party was exclusively in fault he must bear his own loss and compensate the other for any loss he has sustained.

2. If neither party was in fault the loss must be borne by him on whom it falls.

3. If both were in fault the loss is to be equally divided, unless it appears that there was a great disparity in fault, in which case the loss must be equitably apportioned; or,

4. If it cannot be ascertained where the fault lies the loss must be equally divided. [Civ. C. 1877, § 372; R. C. 1899, § 3478.]

CHAPTER 33.

PRODUCTS OF THE MIND.

§ **4915. Ownership of.** The author of any product of the mind, whether it is an invention, or a composition in letters or art, or a design, with or without delineation, or other graphical representation, has an exclusive ownership therein and in the representation or expression thereof, which continues so long as the product and the representations or expressions thereof made by him remain in his possession. [Civ. C. 1877, § 570; R. C. 1899, § 3479.]

§ **4916. Ownership of joint products.** Unless otherwise agreed, a product of the mind in the production of which several persons are jointly concerned is owned by them as follows:

1. If the product is single, in equal proportions; or,

2. If it is not single, in proportion to the contribution of each. [Civ. C. 1877, § 571; R. C. 1899, § 3480.]

§ **4917. Transfer.** The owner of any product of the mind, or of any representation or expression thereof, may transfer his property in the same. [Civ. C. 1877, § 572; R. C. 1899, § 3481.]

§ **4918. Publication.** If the owner of a product of the mind intentionally makes it public a copy or reproduction may be made public by any person without responsibility to the owner so far as the law of this state is concerned [Civ. C. 1877, § 573; R. C. 1899, § 3482.]

§ **4919. Subsequent production of same thing.** If the owner of a product of the mind does not make it public, any other person subsequently and originally producing the same thing, has the same right therein as the prior author, which is exclusive to the same extent against all persons except the prior author, or those claiming under him. [Civ. C. 1877, § 574; R. C. 1899, 3483.]

§ **4920. Ownership of private communications.** Letters and other private communications in writing belong to the person to whom they are addressed and delivered; but they cannot be published against the will of the writer, except by authority of law. [Civ. C. 1877, § 575; R. C. 1899, § 3484.]

CHAPTER 34.

OTHER KINDS OF PERSONAL PROPERTY.

§ **4921. Trade-marks.** One who produces or deals in a particular thing or conducts a particular business may appropriate to his exclusive use as a trademark any form, symbol or name which has not been so appropriated by another to designate the origin or ownership thereof; but he cannot exclusively appropriate any designation, or part of a designation, which relates only to the name, quality, or the description of the thing or business, or the place where the thing is produced or the business carried on. [Civ. C. 1877, § 576; R. C. 1899, § 3485.]

§ **4922. Good will.** The good will of a business is the expectation of continued public patronage, but it does not include a right to use the name of any person from whom it was acquired. [Civ. C. 1877, § 577; R. C. 1899, § 3486.]

§ **4923. Is property. Transferable.** The good will of a business is property, transferable like any other. [Civ. C. 1877, § 578; R. C. 1899, § 3487.]

Contract to refrain from conducting similar business must be collateral to sale of good will. Mapes v. Metcalf, 10 N. D. 601, 88 N. W. 713.

§ **4924. Title deeds.** Instruments essential to the title of real property and which are not kept in a public office as a record pursuant to law belong to the person in whom for the time being such title may be vested and pass with the title. [Civ. C. 1877, § 579; R. C. 1899, § 3488.]

CHAPTER 35.

ACQUISITION OF PROPERTY.

ARTICLE 1.—MODES IN WHICH PPOPERTY MAY BE ACQUIRED.

§ **4925. How property acquired.** Property is acquired by:
1. Occupancy.
2. Accession.
3. Transfer.
4. Will; or,
5. Succession.

[Civ. C. 1877, § 580; R. C. 1899, § 3489.]

ARTICLE 2.—OCCUPANCY.

§ **4926. Title by occupancy.** Occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will or succession. [Civ. C. 1877, § 581; R. C. 1899, § 3490.]

§ **4927. Prescription.** Occupancy for the period prescribed by the code of civil procedure or any law of this state as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all. [Civ. C. 1877, § 582; R. C. 1899, § 3491.]

§ **4928. Titles to real property.** All titles to real property vested in any person or persons who have been or hereafter may be in actual open adverse and undisputed possession of the land under such title for a period of ten years and shall have paid all taxes and assessments legally levied thereon, shall be and the same are declared good and valid in law, any law to the contrary notwithstanding. [1899, ch. 158; R. C. 1899; 3491a.]

Statutory limitation may be shortened by the legislature. Osborne v. Lindstrom, 9 N. D. 1, 81 N. W. 72.

Claim of title sufficient if occupant claims title and ownership in good faith under instrument, which constitutes color of title within meaning of the law. When tax deed sufficient. Power v. Kitching, 10 N. D. 255, 86 N. W. 737.

Doctrine of tacking not applicable. Streeter v. Frederickson, 11 N. D. 300, 91 N. W. 692.

ARTICLE 3.—ACCESSION TO REAL PROPERTY.

§ **4929. Fixtures, when tenant may remove.** When a person affixes his property to the land of another without an agreement permitting him to remove it, the thing affixed belongs to the owner of the land, unless he chooses to require the former to remove it; provided, that a tenant may remove from the demised premises any time during the continuance of his term anything affixed thereto for the purpose of trade, manufacture, ornament or domestic use, if the removal can be effected without injury to the premises, unless the thing has by the manner in which it is affixed become an integral part of the premises. [Civ. C. 1877, § 583; R. C. 1899, § 3492.]

Fixtures may become personal property by agreement. Myrick v. Bill, 3 Dak. 284, 17 N. W. 268.

Tenant may not remove after expiration of lease. Become property of owner of demised premises, in absence of agreement to the contrary. Sweet v. Myers, 3 S. D. 324, 53 N. W. 187.

§ **4930. Riparian accretions.** When from natural causes land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank. [Civ. C. 1877, § 584; R. C. 1899, § 3493.]

Grantee of real property takes title together with any reliction to center of non-navigable lake occasioned by recession on drying up of its waters. Riparian owner takes to center of non-navigable lake ratably with other riparian owners. Olson v. Huntamer, 6 S. D. 364, 61 N. W. 479.

§ **4931. Land removed by stream reclaimed, when.** If a river or stream, navigable or not navigable, carries away by sudden violence a considerable and distinguishable part of a bank and bears it to the opposite bank or to another part of the same bank, the owner of the part carried away may reclaim it within a year after the owner of the land to which it has been united takes possession thereof. [Civ. C. 1877, § 585; R. C. 1899, § 3494.]

§ **4932. Islands in navigable streams.** Islands and accumulations of land formed in the beds of streams which are navigable, belong to the state, if there is no title or prescription to the contrary. [Civ. C. 1877, § 586; R. C. 1899, § 3495.]

§ **4933. In other streams.** An island or accumulation of land formed in a stream which is not navigable belongs to the owner of the shore on that side where the island or accumulation is formed, or if not formed on one side only, to the owners of the shore on the two sides, divided by an imaginary line drawn through the middle of the river. [Civ. C. 1877, § 587. § R. C. 1899, § 3496.]

§ **4934. Island formed by new channel.** If a stream, navigable or not navigable, in forming itself a new arm divides itself and surrounds land belonging to the owner of the shore and thereby forms an island, the island belongs to such owner. [Civ. C. 1877, § 588; R. C. 1899, § 3497.]

§ **4935. When ancient bed taken as indemnity.** If a stream, navigable or not navigable, forms a new course, abandoning its ancient bed, the owners of the land newly occupied take by way of indemnity the ancient bed abandoned, each in proportion to the land of which he has been deprived. [Civ. C. 1877, § 589; R. C. 1899, § 3498.]

Article 4.—Accession to Personal Property.

§ **4936. Things inseparably united.** When things belonging to different owners have been united so as to form a single thing and cannot be separated without injury the whole belongs to the owner of the thing which forms the principal part, who must, however, reimburse the value of the residue to the other owner or surrender the whole to him. [Civ. C. 1877, § 590; R. C. 1899, § 3499.]

Inventor of secret cost and selling marks, copied in catalogue, has property therein which law will protect. Secret code principal part of catalogue. Simmons Hardware Co. v. Waibel, 1 S. D. 488, 47 N. W. 814.

§ **4937. Principal part defined.** That part is to be deemed the principal part to which the other has been united only for the use, ornament or completion of the former, unless the latter is the more valuable and has been united without the knowledge of its owner, who may in the latter case require it to be separated and returned to him, although some injury should result to the thing to which it has been united. [Civ. C. 1877, § 591; R. C. 1899, § 3500.]

§ **4938. Further defined.** If neither part can be considered the principal within the rule prescribed by the last section, the more valuable, or if the values are nearly equal, the more considerable in bulk is to be deemed the principal part. [Civ. C. 1877, § 592; R. C. 1899, § 3501.]

§ **4939. Thing made from another's materials.** If one makes a thing from materials belonging to another the latter may claim the thing on reimbursing the value of the workmanship unless the value of the workmanship exceeds

the value of the materials, in which case the thing belongs to the maker on reimbursing the value of the materials. [Civ. C. 1877, § 593; R. C. 1899, § 3502.]

§ **4940. Blended materials.** When one has made use of materials which in part belong to him and in part to another in order to form a thing of a new description without having destroyed any of the materials, but in such a way that they cannot be separated without inconvenience, the thing formed is common to both proprietors in proportion, as respects the one, of the materials belonging to him, and as respects the other, of the materials belonging to him and the price of his workmanship. [Civ. C. 1877, § 594; R. C. 1899, § 3503.]

§ **4941. Admixtures of materials.** When a thing has been formed by the admixture of several materials of different owners and neither can be considered the principal substance, an owner, without whose consent the admixture was made, may require separation if the materials can be separated without inconvenience. If they cannot be thus separated the owners acquire the thing in common in proportion to the quantity, quality and value of their materials; but if the materials of one were far superior to those of the others, both in quantity and value, he may claim the thing on reimbursing to the others the value of their materials. [Civ. C. 1877, § 595; R. C. 1899, § 3504.]

§ **4942. Foregoing sections not applicable to willful use.** The foregoing sections of this chapter are not applicable to cases in which one willfully uses the materials of another without his consent; but in such cases the product belongs to the owner of the material if its identity can be traced. [Civ. C. 1877, § 596; R. C. 1899, § 3505.]

§ **4943. Material restored in kind or value paid.** In all cases when one whose material has been used without his knowledge in order to form a product of a different description, can claim an interest in such product, he has an option to demand either restitution of his material in kind in the same quantity, weight, measure and quality, or the value thereof; or when he is entitled to the product, the value thereof in place of the product. [Civ. C. 1877, § 597; R. C. 1899, § 3506.]

§ **4944. Damages.** One who wrongfully employs materials belonging to another is liable to him in damages, as well as under the foregoing provisions of this chapter. [Civ. C. 1877, § 598; R. C. 1899, § 3507.]

CHAPTER 36.

TRANSFER.

ARTICLE 1.—DEFINITION OF TRANSFER.

§ **4945. Transfer defined.** Transfer is an act of the parties or of the law by which the title to property is conveyed from one living person to another. [Civ. C. 1877, § 599; R. C. 1899, § 3508.]

Conveyance without consideration valid as between parties. Bernardy v. Colonial Mortgage Co., 17 S. D. 637, 98 N. W. 166.

Interest in stock of corporation may be sold on execution and title passed. Van Cise v. Bank, 4 Dak. 485, 33 N. W. 897.

§ **4946. Consideration unnecessary to validity.** A voluntary transfer is an executed contract, subject to all rules of law, concerning contracts in general except that a consideration is not necessary to its validity. [Civ. C. 1877, § 600; R. C. 1899, § 3509.]

ARTICLE 2.—WHAT MAY BE TRANSFERRED.

§ 4947. What may be transferred. Property of any kind may be transferred except as otherwise provided, by this article. [Civ. C. 1877, § 601; R. C. 1899, § 3510.]

§ 4948. Possibility not transferable. A mere possibility, not coupled with an interest, cannot be transferred. [Civ. C. 1877, § 602; 1899, § 3511.]

§ 4949. Right of re-entry not transferable. A mere right of re-entry or of repossession for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby. [Civ. C. 1877, § 603; R. C. 1899, § 3512.]

ARTICLE 3.—MODE OF TRANSFER.

§ 4950. How made. A transfer may be made without writing in every case in which a writing is not expressly required by statute. [Civ. C. 1877, § 604; R. C. 1899, § 3513.]

A chose in action may be transferred either by parol or by written assignment. Roberts v. Bank, 8 N. D. 474, 79 N. W. 993.

§ 4951. Written transfers named. A transfer in writing is called a grant, or conveyance, or bill of sale. The term "grant" in this and the next two articles includes all these instruments unless it is especially applied to real property. [Civ. C. 1877, § 605; R. C. 1899, § 3514.]

§ 4952. Grant effectual only on delivery. A grant takes effect so as to vest the interest intended to be transferred only upon its delivery by the grantor. [Civ. C. 1877, § 606; 1899, § 3515.]

Where there is neither actual nor constructive delivery of deed no title passes. McManus v. Commow, 10 N. D. 340, 87 N. W. 8.

§ 4953. Delivery presumed at its date. A grant duly executed is presumed to have been delivered at its date. [Civ. C. 1877, § 607; R. C. 1899, § 3516.]

§ 4954. Delivery is absolute. A grant cannot be delivered to the grantee conditionally. Delivery to him or to his agent as such is necessarily absolute; and the instrument takes effect thereupon, discharged of any condition on which the delivery was made. [Civ. C. 1877, § 608; R. C. 1899, § 3517.]

Collusion between grantor and agent of grantee does not affect validity of delivery to such agent. Holt v. Colton, 4 Dak. 67, 22 N. W. 495.

Delivery of duplicate draft not conditional delivery of new contract, where original contract delivered and lost. Bank of Gilby v. Farnsworth, 7 N. D. 6, 72 N. W. 901.

Case reviewed and held not to be conditional delivery. Parol evidence inadmissable to show deed or mortgage was to take effect upon condition. Sargent v. Cooley and Clifford, 12 N. D. 1, 94 N. W. 576.

Delivery to president of corporation, acting officially, is delivery to corporation. Merrill v. Hurley, 6 S. D. 592, 62 N. W. 958.

§ 4955. Delivery in escrow. A grant may be deposited by the grantor with a third person to be delivered on the performance of a condition and on delivery by the depositary it will take effect. While in the possession of the third person and subject to condition it is called an escrow. [Civ. C. 1877, § 609; R. C. 1899, § 3518.]

What constitutes escrow. Nichols & Shepard Co. v. Bank, 6 N. D. 404, 71 N. W. 135.

§ 4956. Redelivery does not retransfer. Redelivering a grant of real property to the grantor or canceling it does not operate to retransfer the title. [Civ. C. 1877, § 610; R. C. 1899, § 3519.]

Offer to redeliver deed not offer to restore property. Johnson v. Burnside, 3 S. D. 230, 52 N. W. 1057.

Return and cancellation of deed will not revest grantor with legal title. Parszyk v. Mach, 10 S. D. 555, 74 N. W. 1027.

§ 4957. **When deemed constructively delivered.** Though a grant is not actually delivered into the possession of the grantee it is yet to be deemed constructively delivered in the following cases:

1. When the instrument is by the agreement of the parties at the time of execution understood to be delivered and under such circumstances that the grantee is entitled to immediate delivery; or,

2. When it is delivered to a stranger for the benefit of a grantee and his assent is shown or may be presumed. Civ. C. 1877, § 611; R. C. 1899, § 3520.]

Subsequent acceptance of deed delivered to stranger relates back to time of original delivery, where rights of third persons have not intervened. Arnegaard v. Arnegaard, 7 N. D. 475, 75 N. W. 797.

Deed recorded by grantor seven years after execution without delivery to grantee not constructively delivered. McManus v. Commow, 10 N. D. 340, 87 N. W. 8.

Article 4.—Interpretation of Grants.

§ 4958. **Interpreted same as contracts.** Grants are to be interpreted in like manner with contracts in general except so far as is otherwise provided by this article. [Civ. C. 1877, § 612; R. C. 1899, § 3521.]

§ 4959. **Limitation not controlled by words less clear.** A clear and distinct limitation in a grant is not controlled by other words less clear and distinct. [Civ. C. 1877, § 613; R. C. 1899, § 3522.]

§ 4960. **When recourse had to recitals.** If the operative words of a grant are doubtful recourse may be had to its recitals to assist the construction. [Civ. C. 1877, § 614; R. C. 1899, § 3523.]

§ 4961. **In favor of grantee except public grants.** A grant is to be interpreted in favor of the grantee, except that a reservation in any grant and every grant by a public officer or body, as such, to a private party is to be interpreted in favor of the grantor. [Civ. C. 1877, § 615; R. C. 1899, § 3524.]

§ 4962. **Former part prevails.** If several parts of a grant are absolutely irreconcilable the former part prevails. [Civ. C. 1877, § 616; R. C. 1899, § 3525.]

In grant containing correct description of land followed by incorrect description by metes and bounds, first description prevails. Novotny v. Danforth, 9 S. D. 301, 68 N. W. 749.

§ 4963. **Without issue defined.** When a future interest is limited by a grant to take effect on the death of any person without heirs, or heirs of his body, or without issue, or in equivalent words such words must be taken to mean successors or issue living at the death of the person named as ancestor. [Civ. C. 1877, § 617; R. C. 1899, § 3526.]

§ 4964. **Words unnecessary to fee.** Words of inheritance or succession are not requisite to transfer a fee in real property. [Civ. C. 1877, § 618; R. C. 1899, § 3527.]

Failure to insert does not impair validity of deed in writing. Evenson v. Webster, 3 S. D. 382, 53 N. W. 747.

Article 5.—Effect of Transfer.

§ 4965. **Vests actual title.** A transfer vests in the transferee all the actual title to the thing transferred which the transferrer then has unless a different intention is expressed or is necessarily implied. [Civ. C. 1877, § 619; R. C. 1899, § 3528.]

A conveyance of right, title and interest conveys no estate not possessed by grantor. Rosenbaum v. Foss, 7 S. D. 83, 63 N. W. 538.

§ 4966. **Thing includes incidents.** The transfer of a thing transfers also all its incidents unless expressly excepted; but the transfer of an incident

to a thing does not transfer the thing itself. [Civ. C. 1877, § 620; R. C. 1899, § 3529.]

Transfer of note secured by mortgage carries mortgage with it. **Parker v.** Randolph, 5 S. D. 549, 59 N. W. 722.

§ 4967. **Benefit taken though unnamed.** A present interest and the benefit of a condition or covenant respecting property may be taken by any natural person under a grant, although not named a party thereto. [Civ. C. 1877, § 621; R. C. 1899, § 3530.]

CHAPTER 37.

TRANSFER OF REAL PROPERTY.

ARTICLE 1.—MODE OF TRANSFER.

§ 4968. **Only by law or writing.** An estate in real property other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law or by an instrument in writing, subscribed by the party disposing of the same or by his agent thereunto authorized by writing. [Civ. C. 1877, § 622; R. C. 1899, § 3531.]

Power of attorney to sell and convey does not authorize mortgage. **Morris v.** Ewing, 8 N. D. 99, 76 N. W. 1047.

Words indicating an intention to transfer sufficient. Evenson v. Webster, 3 S. D. 382, 53 N. W. 747.

Lease for season not lease for more than one year and not required to be in writing. Pitts Agricultural Works v. Young, 6 S. D. 557, 62 N. W. 432.

Does not apply to contract to reconvey land held as security. Phillips **v. Swenson**, 16 S. D. 357, 92 N. W. 1065.

§ 4969. **By-laws empowering officers to execute.** Any foreign or domestic corporation may in its by-laws empower any one or more of its officers severally or conjointly to execute and acknowledge in its behalf conveyances, transfers, assignments, releases, satisfactions or other instruments affecting liens upon, titles to or interests in real estate. [1893, ch. 42, § 1; R. C. 1899, § 3532.]

§ 4970. **Who executes if not so empowered.** In the absence of any by-laws the president or secretary of any corporation, and the president, secretary, treasurer or cashier of any loan, trust or banking corporation may execute and acknowledge such instuments when authorized by resolution of the board of directors. [1893, ch. 42, § 5; R. C. 1899, § 3533.]

§ 4971. **Prior instruments legalized.** All instruments affecting liens upon, titles to or interests in real estate heretofore executed and acknowledged in good faith by the treasurer or cashier in behalf of any loan, trust or banking corporation are declared valid and effectual to the same extent as they would have been had the last two sections been in force at the time of their execution. [1893, ch. 42, § 3; 1895, § 3534.]

§ 4972. **Form of corporation signature.** The signature of a corporation to any instrument mentioned in section 4969 shall be as follows:

..... (full name of corporation.)

By (some officer authorized by resolution or the by-laws of the corporation to execute and acknowledge such instrument.)

.....(official designation of person signing.)

Attest:

[Seal.] ..... Secretary.

[R. C. 1895, § 3535.]

§ **4973. Proved by subscribing witness. Seal unnecessary. Form of grant.** The execution of a grant of such estate in real property, if it is not duly acknowledged must, to entitle the grant to be recorded, be proved by a subscribing witness or as otherwise provided in sections 5019 and 5020. The absence of the seal of any grantor or his agent from any grant of an estate in real property heretofore or hereafter made shall not invalidate or in any manner impair the same. A grant of an estate in real property may be made in substance as follows:

This grant made the ..... day of ..... in the year ....., between A. B., of ....., of the first part, and C. D., of ....., of the second part, witnesseth: That the party of the first part hereby grants to the party of the second part in consideration of ..... dollars, now received, all the real property situated in ....., and bounded (or described) as follows: .....

Witness the hand of the party of the first part. A. B.

[Civ. C. 1877, §§ 623, 624; R. C. 1899, §§ 3536, 3537.]

§ **4974. Separate deeds of husband and wife to same property legalized.** In all cases where a married man has heretofore conveyed real property belonging to him, which may have been the homestead of himself or family, by a deed duly signed and acknowledged but not signed by his wife, and his wife has either before or afterwards conveyed the same real estate by a deed duly signed and acknowledged but not signed by her husband, to the grantee named in her husband's deed or a subsequent grantee from him, the conveyance by such separate deeds shall be valid and effectual to pass the title to such grantee, the same as if the conveyance had been made by a single instrument duly executed and acknowledged by both husband and wife. [1905, ch. 156.]

Article 2.—Effect of Transfer.

§ **4975. Passes easements. Creates an easement.** A transfer of real property passes all easements attached thereto and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred for the benefit thereof at the time when the transfer was agreed upon or completed. [Civ. C. 1877, § 627; R. C. 1899, § 3538.]

§ **4976. Covenants implied from use of word "grant."** From the use of the word "grant" in any conveyance by which an estate of inheritance or fee simple is to be passed the following covenant and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs and assigns, are implied unless restrained by express terms contained in such conveyance:

1. That previous to the time of the execution of such conveyance the grantor has not conveyed the same estate, or any right, title or interest therein to any person other than the grantee.

2. That such estate is at the time of the execution of such conveyance free from incumbrances done, made or suffered by the grantor, or any person claiming under him. Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance. [Civ. C. 1877, § 628; R. C. 1899, § 3539.]

Word "grant" limited by express covenants. Wife joining for no other purpose than to release homestead right not bound by implied covenant arising from use of word "grant." Dunn v. Dietrich, 3 N. D. 3, 53 N. W. 81.

Quit claim deed transfers only such interest as grantor has. Has no application to bill of sale of personalty given and intended as a mortgage. Rosenbaum v. Foss, 4 S. D. 184, 56 N. W. 114.

Granting clause in deed that grantors do convey, grant, remise, release and quit claim all their right, title estate, interest, property and equity, does not convey fee simple title. State v. Kemmerer, 14 S. D. 169, 84 N. W. 771.

Deed containing word "grant" not quit claim in absence of qualifying words. Citizens Bank v. Shaw, 14 S. D. 197, 84 N. W. 779.

§ 4977. **Grant conclusive against whom.** Every grant of an estate in real property is conclusive against the grantor and every one subsequently claiming under him, except a purchaser or incumbrancer who in good faith and for a valuable consideration, acquires a title or lien by an instrument that is first duly recorded. [Civ. C. 1877, § 629; R. C. 1899, § 3540.]

Where before receiving patent, entryman conveyed by deed duly recorded, and after patent received, mortgaged it mortgagee bound to take notice of deed and acquired no interest. Bernardy v. Colonial Mortgage Co., 17 S. D. 637, 98 N. W. 166.

§ 4978. **Grant valid pro tanto.** A grant made by the owner of an estate for life or years, purporting to transfer a greater estate than he could lawfully transfer, does not work a forfeiture of his estate, but passes to the grantee all the estate which the grantor could lawfully transfer. [Civ. C. 1877, § 630; R. C. 1899, § 3541.]

§ 4979. **Title to highway.** A transfer of land bounded by a highway passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof unless a different intent appears from the grant. [Civ. C. 1877, § 631; R. C. 1899, § 3542.]

§ 4980. **Attornment not necessary.** Grants of rents or of reversions or of remainders are good and effectual without attornments of the tenants, but no tenant who before notice of grant shall have paid rent to the grantor must suffer any damage thereby. [Civ. C. 1877, § 632; R. C. 1899, § 3543.]

§ 4981. **Lineal and collateral warranties abolished.** Lineal and collateral warranties with all their incidents are abolished; but the heirs and devisees of any person who has made any covenant or agreement in reference to the title of, in or to any real property are answerable upon such covenant or agreement to the extent of the land descended or devised to them in the cases and in the manner prescribed by law. [Civ. C. 1877, § 633; R. C. 1899, § 3544.]

Does not create new and independent cause of action against heirs. Heir liable only to extent of value of land. Woods v. Ely, 7 S. D. 471, 64 N. W. 531.

§ 4982. **Grant presumes fee simple title.** A fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended. [Civ. C. 1877, § 633; R. C. 1899, § 3545.]

§ 4983. **Grant takes effect on performance of condition.** An instrument purporting to be a grant of real property to take effect upon a condition precedent passes the estate upon the performance of the condition. [Civ. C. 1877, § 633; R. C. 1899, § 3546.]

§ 4984. **After acquired title.** When a person purports by proper instrument to grant property in fee simple and subsequently acquires any title or claim of title thereto the same passes by operation of law to the grantee or his successors. [Civ. C. 1877, § 633; R. C. 1899, § 3547.]

Subsequent acquired tax title based on certificate acquired prior to sale inures to benefit of vendee. Zerfing v. Seelig, 12 S. D. 25, 80 N. W. 140.

Instrument not purporting to convey fee simple not within statute. Wife joining husband in such instrument not estopped to assert subsequently acquired title. State v. Kemmerer, 14 S. D. 169, 84 N. W. 771; see also 15 S. D. 504, 90 N. W. 150.

§ 4985. **Reconveyance when estate defeated by nonperformance of condition subsequent.** When a grant is made upon condition subsequent and is subsequently defeated by the nonperformance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors by grant duly acknowledged for record. [Civ. C. 1877, § 633; R. C. 1899, § 3548.]

§ 4986. **Incumbrances defined.** The term "incumbrances" includes taxes, assessments and all liens upon real property. [Civ. C. 1877, § 633; 1899, ch. 89; R. C. 1899, § 3549.]

§ 4987. Liability of grantor. Whoever conveys real estate by deed or mortgage containing a covenant that it is free from all incumbrances, when an incumbrance appears of record to exist thereon whether known or unknown to him shall be liable in an action of contract, to the grantee, his heirs, executors, administrators, successors, grantees or assigns, for all damages sustained in removing the same. [Civ. C. 1877, § 633; 1899, ch. 89; R. C. 1899, § 3549.]

CHAPTER 38.

TRANSFERS OF PERSONAL PROPERTY.

ARTICLE 1.—MODE OF TRANSFER.

§ 4988. Ships and trusts. An interest in a ship or in an existing trust can be transferred only by operation of law or by a written instrument subscribed by the person making the transfer or by his agent. [Civ. C. 1877, § 634; R. C. 1899, § 3550.]

§ 4989. Other personalty. The mode of transferring other personal property by sale is regulated by the chapter on that subject in this code. [Civ. C. 1877, § 635; R. C. 1899, § 3551.]

ARTICLE 2.—WHAT OPERATES AS A TRANSFER.

§ 4990. When title passes. The title to personal property sold or exchanged passes to the buyer whenever the parties agree upon a present transfer and the thing itself is identified, whether it is separated from other things or not. [Civ. C. 1877, § 636; R. C. 1899, § 3552.]

A bona fide purchaser for value of personal property obtains good title even though vendor's title obtained by fraud. Tetrault v. O'Connor, 8 N. D. 15, 76 N. W. 225.

Implied notice of transfer of negotiable paper chargeable to maker. Otherwise as to ordinary debt. Hollinshead v. Stuart & Co., 8 N. D. 35, 77 N. W. 89.

§ 4991. When transfer by executory agreement operative. Title is transferred by an executory agreement for the sale or exchange of personal property, only when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery and offered it to the buyer, with intent to transfer the title thereto in the manner prescribed by the second subdivision of article 4 of chapter 44. [Civ. C. 1877, § 637; R. C. 1899, § 3553.]

Property not in esse may be subject of executory agreement of sale. (Lien of mortgage attaches when property comes into existence.) Sykes v. Hannawalt, 5 N. D. 335, 65 N. W. 982.

In executory contract of sale, title passes upon delivery. Nichols & Shepard Co. v. Paulson & Bro., 6 N. D. 400, 71 N. W. 136.

Title does not pass when there is no offer of delivery under contract and buyer does not accept. Nichols & Shepard Co. v. Paulson & Bro., 6 N. D. 400, 71 N. W. 136.

Title vests in buyer, where without excuse he refuses to accept it, upon proper tender by seller. Dowagiac Mfg. Co. v. Higinbotham, 15 S. D. 547, 91 N. W. 330.

§ 4992. Transfer by agent. When the possession of personal property together with the power to dispose thereof is transferred by its owner to another person an executed sale by the latter, while in possession to a buyer in good faith and in the ordinary course of business for value, transfers to such buyer the title of the former owner, though he may be entitled to rescind and does rescind the transfer made by him. [Civ. C. 1877, § 638; R. C. 1899, § 3554.]

Delivery of goods for sale on commission does not constitute sale. Gilman v. Gilby Township, 8 N. D. 627, 80 N. W. 889.

ARTICLE 3.—GIFTS.

§ **4993. Gift defined.** A gift is a transfer of personal property made voluntarily and without consideration. [Civ. C. 1877, § 639; R. C. 1899, § 3555.]

Execution and delivery of written assignment delivery of property itself. Luther v. Hunter, 7 N. D. 544, 75 N. W. 916.

Delivery must clearly appear. Luther v. Hunter, 7 N. D. 544, 75 N. W. 916.

Where husband takes property in name of wife that fact alone and unexplained, raises presumption of gift; presumption may be overcome by evidence to contrary. Bem v. Bem, 4 S. D. 138, 55 N. W. 1102.

§ **4994. Requisites of valid verbal gift.** A verbal gift is not valid unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee. [Civ. C. 1877, § 640; R. C. 1899, § 3556.]

Evidence of delivery must be clear. Delivery to third person without instructions not sufficient to constitute delivery. Luther v. Hunter, 7 N. D. 544, 75 N. W. 916.

§ **4995. Irrevocable. Exception.** A gift, other than a gift in view of death, cannot be revoked by the giver. [Civ. C. 1877, § 641; R. C. 1899, § 3557.]

§ **4996. In view of death defined.** A gift in view of death is one which is made in contemplation, fear or peril of death and with intent that it shall take effect only in case of the death of the giver. [Civ. C. 1877, § 642; R. C. 1899, § 3558.]

§ **4997. When presumed.** A gift made during the last illness of the giver or under circumstances which would naturally impress him with an expectation of speedy death is presumed to be a gift in view of death. [Civ. C. 1877, § 643; R. C. 1899, § 3559.]

§ **4998. Revocable. Rights of purchaser.** A gift in view of death may be revoked by the giver at any time and is revoked by his recovery from the illness or escape from the peril under the presence of which it was made or by the occurrence of any event which would operate as a revocation of a will made at the same time; but when the gift has been delivered to the donee the rights of a bona fide purchaser from the donee before the revocation shall not be affected by the revocation. [Civ. C. 1877, § 644; R. C. 1899, § 3560.]

§ **4999. Not affected by will.** A gift in view of death is not affected by a previous will; nor by a subsequent will unless it expresses an intent to revoke the gift. [Civ. C. 1877, § 645; R. C. 1899, § 3561.]

§ **5000. Treated as a legacy as to creditors.** A gift in view of death must be treated as a legacy so far as relates only to the creditors of the giver. [Civ. C. 1877, § 646; R. C. 1899, § 3562.]

Such a gift is not a legacy as to the administrator. Seybold v. Bank, 5 N. D. 460, 67 N. W. 682.

Title vests in donee in lifetime of donor, subject to revocation and not dependent upon will of personal representative. Is no part of estate, except for payment of debts in case of necessity. Seybold v. Bank, 5 N. D. 460, 67 N. W. 682.

Administrator must show that there are unpaid claims duly presented and allowed and that there is no other property than that in possession of donee. Bright v. Ecker, 9 S. D. 192, 68 N. W. 326.

CHAPTER 39.

RECORDING TRANSFERS.

ARTICLE 1.—WHAT MAY BE RECORDED.

§ **5001. What may be recorded.** 1. Any instrument or judgment affecting the title to or possession of real property may be recorded under this chapter.

2. Judgments affecting the title to or the possession of real property, authenticated by the certificate of the clerk of court in which such judgments were rendered, may be recorded without acknowledgments or further proof.

3. Letters patent from the United States, final receivers' receipts from the United States land offices, contracts between the state and purchasers of school and institution lands for the purchase and sale of such lands and assignments of such contracts, when such assignments have been approved by the board of university and school lands, may be recorded without acknowledgment or further proof; and certified copies of such patents and receivers' receipts, certified and proved according to the laws of the United States and of this state in such manner as to entitle them to admission as evidence in the courts of this state are likewise entitled to be recorded without acknowledgment or further proof, and when so recorded shall be notice in like manner and to the same extent as the originals thereof would have been if the same had been recorded, and the record of all such instruments, or copies thereof, heretofore recorded which are certified in accordance therewith, is hereby validated, and from the taking effect of this article such record shall operate as notice to the same extent as hereinbefore provided for such certified copies of such instruments to be hereafter recorded. [Civ. C. 1877, § 647; 1879, ch. 47, § 1; R. C. 1899, § 3563; 1905, ch. 159.]

Bond for deed may be recorded and operates as constructive notice to the public of its contents. Shelly v. Mikkelson, 5 N. D. 22, 63 N. W. 210.

§ 5002. **Prerequisites to record.** Before an instrument can be recorded unless it belongs to a class provided for in either section 5001 or 5032 its execution must be acknowledged by the person executing the same, or if executed by a corporation, by the person authorized to execute it by sections 4969 and 4970, or proved by a subscribing witness, or as provided in sections 5019 and 5020, and the acknowledgment or proof certified in the manner prescribed by article 3 of this chapter. [Civ. C. 1877, § 648; R. C. 1895, § 3564.]

Does not require acknowledgment by husband and wife except for purpose of recording. First National Bank v. Prior, 10 N. D. 146, 86 N. W. 362.

Instrument not acknowledged as prescribed by statute not entitled to record. When recorded in fact, not constructive notice. Cannon v. Deming, 3 S. D. 421, 53 N. W. 863; American Mortgage Co. v. Mouse River Live Stock Co., 10 N. D. 290, 86 N. W. 965; Wambole v. Foote, 2 Dak. 1, 2 N. W. 239.

Mortgages must be acknowledged. Northwestern Loan & Banking Co. v. Jonasen, 11 S. D. 566, 79 N. W. 840.

§ 5003. **When proved instrument recorded.** An instrument proved and certified pursuant to sections 5019 and 5020 may be recorded in the proper office if the original is at the same time deposited therein to remain for public inspection, but not otherwise. [Civ. C. 1877, § 649; R. C. 1899, § 3565.]

§ 5004. **Transfers by way of mortgage.** Transfers of or liens on property by way of mortgage are required to be recorded in the cases specified in the chapter on mortgages. [Civ. C. 1877, § 650; R. C. 1895, § 3566.]

Article 2.—Mode of Recording.

§ 5005. **Where recorded. Fee indorsed.** Instruments entitled to be recorded must be recorded by the register of deeds of the county in which the real property affected thereby is situated. The register must in all cases indorse the amount of his fee for the recording on the instruments recorded. [Civ. C. 1877, § 651; R. C. 1899, § 3567.]

§ 5006. **When deemed recorded.** An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the register's office with the proper officer for record. [Civ. C. 1877, § 651; R. C. 1899, § 3568.]

Public officer presumed to perform such duties as law expressly imposes. Instrument delivered to register of deeds and placed by him in file box presumed to

have been filed though no filing mark on instrument. Coler v. Rhoda School Township, 6 S. D. 640, 63 N. W. 158.

Where grantee's agent had delivered a deed for record, his subsequent, unauthorized act in directing its return did not affect its operation as a recorded instrument. Parrish v. Mahany, 10 S. D. 276, 73 N. W. 97.

Grantee regarded as having discharged his entire duty when instrument delivered for record, and subsequent mistake of register of deeds, which does not actually mislead, does not affect operation as recorded instrument. Citizens Bank v. Shaw, 14 S. D. 197, 84 N. W. 779.

§ 5007. **Instruments in unorganized counties, where recorded.** The unorganized counties of the state in any judicial subdivision are hereby attached to and made a part of the county where the court is held for such subdivision for the purpose of filing and recording all deeds, mortgages and other instruments, so long as such counties remain unorganized and the filing and record of all such deeds, mortgages and other instruments heretofore made in the manner herein provided for are hereby declared to be legal and valid. [1881, ch. 121, § 1; R. C. 1899, § 3569.]

§ 5008. **Separate books for grants and mortgages.** Grants, absolute in terms, are to be recorded in one set of books and mortgages in another. [Civ. C. 1877, § 652; R. C. 1899, § 3570.]

§ 5009. **Duty of register.** The duties of registers of deeds in respect to recording instruments are prescribed by statute. [Civ. C. 1877, § 653; R. C. 1899, § 3571.]

§ 5010. **Transfers of vessels.** The mode of recording transfers of vessels registered under the laws of the United States is regulated by acts of congress. [Civ. C. 1877, § 654; R. C. 1899, § 3572.]

Article 3.—Proof and Acknowledgment of Instruments.

§ 5011. **At any place in state, before whom.** The proof or acknowledgment of an instrument may be made at any place within this state before a justice or clerk of the supreme court, or notary public. [Civ. C. 1877, § 655; R. C. 1899, § 3573.]

§ 5012. **Within district in state, before whom.** The proof or acknowledgment of an instrument may be made in this state within the judicial district, county, subdivision or city for which the officer was elected or appointed, before either:

1. A judge or clerk of a court of record; or,
2. A mayor of a city; or,
3. A register of deeds; or,
4. A justice of the peace; or,
5. A United States circuit or district court commissioner; or,
6. A county auditor.

[Civ. C. 1877, § 656; 1885, ch. 1, § 1; R. C. 1895, § 3574.]

§ 5013. **Without state, but within United States, before whom.** The proof or acknowledgment of an instrument may be made without the state, but within the United States and within the jurisdiction of the officer, before either:

1. A justice, judge or clerk of any court of record of the United States.
2. A justice, judge or clerk of any court of record of any state or territory: or,
3. A notary public; or,
4. Any other officer of the state or territory where the acknowledgment is made, authorized by its laws to take such proof or acknowledgment.
5. A commissioner appointed for the purpose by the governor of this state, pursuant to the political code. [Civ. C. 1877, § 657; R. C. 1899, § 3575.]

§ 5014. **Without the United States, before whom.** The proof or acknowledgment of an instrument may be made without the United States before either:

1. A minister, commissioner or charge d'affairs of the United States, resident and accredited in the country where the proof or acknowledgment is made; or,
2. A secretary of legation, consul, vice consul or consular agent of the United States, resident in the country where the proof or acknowledgment is made; or,
3. A judge, clerk, register or commissioner of a court of record of the country where the proof or acknowledgment is made; or
4. A notary public of such country; or
5. An officer authorized by the laws of the country where the proof or acknowledgment is taken, to take proof or acknowledgments; or,
6. When any of the officers mentioned in this article are authorized by law to appoint a deputy, the acknowledgment or proof may be taken by such deputy in the name of his principal, as deputy or by such deputy as deputy.

All proofs or acknowledgments taken according to the provisions of this chapter prior to the taking effect of this section are hereby declared to be sufficiently authenticated and to be entitled to record, and all such records hereafter made shall be notice of the contents of the instruments so recorded. [Civ. C. 1877, § 658; 1889, ch. 4, § 1; R. C. 1895, § 3576; 1901, ch. 3; 1903, ch. 1.]

§ 5015. **What knowledge officer taking acknowledgment must have.** The acknowledgment of an instrument must not be taken, unless the officer taking it knows or has satisfactory evidence on the oath or affirmation of a credible witness that the person making such acknowledgment is the individual who is described in and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is authorized to make it as provided in sections 4969 and 4970. [Civ. C. 1877, § 659; R. C. 1895, § 3577.]

Requirements of acknowledgment of instrument executed by married woman. Wambole v. Foote, 2 Dak. 1, 2 N. W. 239.

Deputy may acknowledge for principal. Certificate must show fact. Wilson v. Russell, 4 Dak. 376, 31 N. W. 645.

Certificate of acknowledgment must show such knowledge on part of officer. Cannon v. Deming, 3 S. D. 421, 53 N. W. 863.

Certificate insufficient which does not recite that officers executing instrument were known to be officers of corporation. Holt v. Metropolitan Trust Co., 11 S. D. 456, 78 N. W. 947.

§ 5016. **Conveyance by married woman.** A conveyance or other instrument executed by a married woman has the same effect as if she was unmarried and may be acknowledged in the same manner. [Civ. C. 1877, § 661; 1881, ch. 2, § 2; R. C. 1895, § 3578.]

§ 5017. **How proof made, when not acknowledged.** Proof of the execution of an instrument, when not acknowledged may be made either:

1. By the party executing it, or either of them; or,
2. By a subscribing witness; or,
3. By other witnesses in cases mentioned in sections. 5019 and 5020. [Civ. C. 1877, § 662; R. C. 1899, § 3579.]

§ 5018. **Knowledge required by officer taking proof.** If, by a subscribing witness, such witness must be personally known to the officer taking the proof to be the person whose name is subscribed to the instrument as a witness, or must be proved to be such by the oath of a credible witness. The subscribing witness must prove that the person whose name is subscribed to the instrument as a party is the person described in it, and that such person executed it, and that the witness subscribed his name thereto as a witness. [Civ. C. 1877, § 662; R. C. 1899, § 3580.]

§ 5019. **When other proof received.** The execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness, if there is one, in the following cases:

1. When the parties and all the subscribing witnesses are dead; or,
2. When the parties and all the subscribing witnesses are nonresidents of the state; or,
3. When the place of their residence is unknown to the party desiring the proof, and cannot be ascertained by the exercise of due diligence; or,
4. When the subscribing witness conceals himself, or cannot be found by the officer by the exercise of due diligence in attempting to serve a subpena or attachment; or,
5. In case of the continued failure or refusal of the witness to testify for the space of one hour after his appearance. [Civ. C. 1877, § 663; R. C. 1899, § 3581.]

§ **5020. What proof must show.** The evidence taken under the preceding section must satisfactorily prove to the officer the following facts:

1. The existence of one or more of the conditions mentioned therein; and,
2. That the witness testifying knew the person whose name purports to be subscribed to the instrument as a party, and is well acquainted with his signature and that it is genuine; and,
3. That the witness testifying personally knew the person who subscribed the instrument as a witness, and is well acquainted with his signature and that it is genuine; and,
4. The place of residence of the witness. [Civ. C. 1877, § 664; R. C. 1899, § 3582.]

§ **5021. Contents of certificate.** An officer taking proof of the execution of an instrument must, in his certificate indorsed thereon or attached thereto, set forth all the matters required by law to be done or known by him or proved before him on the proceeding, together with the names of all the witnesses examined before him, their places of residence respectively, and the substance of their evidence. [Civ. C. 1877, § 665; R. C. 1899, § 3583.]

§ **5022. Forms of certificates.** An officer taking the acknowledgment of an instrument must indorse thereon or attach thereto a certificate substantially in the forms hereinafter prescribed.

1. Such certificate of acknowledgment, unless it is otherwise in this article provided, must be in substantially the following form:

State of .. ..}
County of .. ..} ss.

On this day ..... day of ..... in the year .... before me personally appeared ....., known to me (or proved to me on the oath of .....) to be the person who is described in and who executed the within instrument, and acknowledged to me that he (or they) executed the same.

2. The certificate of acknowledgment of an instrument executed by a corporation must be substantially in the following form:

State of .. ..}
County of .. ..} ss.

On this .....day of....., in the year....., before me (here insert the name and quality of the officer), personally appeared ....., known to me (or proved to me on the oath of .....) to be the president (or the secretary) of the corporation that is described in and that executed the within instrument, and acknowledged to me that such corporation executed the same.

3. The certificate of acknowledgment by an attorney in fact must be substantially in the following form:

State of .. ..}
County of .. ..} ss.

On this ..... day of ....., in the year ..... before me (here insert the name and quality of the officer), personally appeared ...., known to me (or proved to me on the oath of .....) to

be the person who is described in and whose name is subscribed to the within instrument as the attorney in fact of ..... and acknowledged to me that he subscribed the name of ..... thereto as principal and his own name as attorney in fact.

4. All acknowledgments of deeds or other instruments in writing made by any deputy sheriff of this state shall be made substantially according to the following form:

State of .. ..)
County of .. ..) ss.

On this ..... day of ....., in the year ..... before me, a ....., in and for said county, personally appeared ....., known to me to be the person who is described in and whose name is subscribed to the within instrument as deputy sheriff of said county and acknowledged to me that he subscribed the name of ..... thereto as sheriff of said county and his own name as deputy sheriff. [Civ. C. 1877, § 666; 1887, ch. 2, § 1; R. C. 1899, § 3584.]

Deputy sheriff acknowledges for himself personally in behalf of sheriff. Defective acknowledgments legalized. McCardia v. Billings, 10 N. D. 373, 87 N. W. 1008.

Language must approximately meet the requirements of statute. Cannon v. Deming, 3 S. D. 421, 53 N. W. 863.

Notary's certificate prima facie evidence of every necessary recital. Northwestern Loan & Banking Co. v. Jonasen, 11 S. D. 566, 79 N. W. 840.

§ 5023. **Legalizing former acknowledgments.** All acknowledgments heretofore made by any deputy sheriff of the several counties of this state, either by or for himself as such deputy, or in the name of or for his principal, to any sheriff's certificate of sale, certificate of redemption, or sheriff's deed, or other instrument appertaining to the sale, redemption or conveyance of any real estate sold at sheriff's sale upon execution or by foreclosure, either by action or advertisement shall be and the same is hereby declared to be legal and of binding force and effect. The acknowledgments of all deeds, mortgages or other instruments in writing, taken and certified by any township or city clerk, or auditor of any city, recorder of any town or village in this state, and which have been duly recorded in the proper counties in this state, be, and the same hereby are declared to be legal and valid; and in all courts of law and equity in this state and elsewhere, they shall be so taken; and in such courts all instruments so acknowledged, and the record of such instruments shall have the same force and evidentiary value as instruments, the acknowledgment of which was taken before any officer qualified to take such acknowledgments and certified by him; provided, that nothing herein contained shall in any manner affect the right or title of a bona fide purchaser, without notice, of such instrument or the record thereof, for a valuable consideration, of any property or real estate; provided, further, that a purchaser on execution at foreclosure sale of any lands affected by this section shall be considered a bona fide purchaser. [1897, ch. 2, § 2; 1899, ch. 1; R. C. 1899, § 3585.]

Acknowledgment of deputy sheriff but not for himself and in behalf of sheriff, legalized. McCardia v. Billings, 10 N. D. 373, 87 N. W. 1008.

§ 5024. **Defective acknowledgments.** The acknowledgments of all deeds, mortgages or other instruments in writing, taken and certified previous to January 1, 1901, and which have been duly recorded in the proper counties in this state, are hereby declared to be legal and valid in all courts of law and equity in this state or elsewhere, anything in the laws of this state in regard to acknowledgments to the contrary, notwithstanding; provided, that nothing herein contained shall in any manner affect the right or title of any bona fide purchaser without notice of such instrument or record thereof, for a valuable consideration, of any such property prior to said January 1, 1901; provided, further, that a purchaser at any execution or

foreclosure sale of any lands affected by this article, shall be considered a bona fide purchaser. [1901, ch. 2.]

§ 5025. **Execution, acknowledgment, filing and recording legalized.** The execution, acknowledgment, filing and recording of all deeds, mortgages and other instruments in writing, affecting the title to real property in this state, in good faith made, taken or certified to prior to the first day of January, 1905, and which have been filed or recorded in the proper counties of this state, are hereby declared to be legal and valid for all purposes; anything in the laws of the territory of Dakota or the state of North Dakota, or of any other state, territory or country at the time of such execution, acknowledgment, witnessing, filing or recording, to the contrary notwithstanding. [1905, ch. 155, § 1.]

§ 5026. **Acts of executors, administrators, deputies, officers or attorneys in fact legalized.** The acts of all properly appointed and constituted executors, administrators, officers of corporation, deputy public officials, and attorneys in fact, done in good faith, in the execution and acknowledgment of such instruments, are hereby declared to be legal and valid for all purposes, notwithstanding the fact that such executor, administrator, officer, deputy officer, or attorney in fact may not have signed the same in the form provided by laws in force at the time, or that the same was not sealed or stamped as required by laws in force at the time of such execution, and notwithstanding the fact that the certificate of acknowledgment thereon may not be in the form required or sealed as required by any laws in force at the time of making the same. [1905, ch. 155, § 2.]

§ 5027. **Acknowledgments legalized.** The acts of all notaries public or other officers, done in good faith in taking and certifying to the acknowledgment of such instruments, whether such officers were qualified or authorized by law at the time to do so or not, are hereby declared legal and valid for all purposes. Good faith shall be presumed on the part of all persons and officers in the execution, acknowledgment, filing and recording of such instruments. [1905, ch. 155, §§ 3, 4.]

§ 5028. **How officer's certificate authenticated.** Officers taking and certifying acknowledgments or proof of instruments for record must authenticate their certificates by affixing thereto their signatures followed by the name of their offices; also their seals of office, if by the laws of the territory, state or country where the acknowledgment or proof is taken, or by authority of which they are acting, they are required to have official seals. Judges and clerks of courts of record must authenticate their certificates as aforesaid by affixing thereto the seal of their proper court; and mayors of cities by the seal thereof. [Civ. C. 1877, § 666; R. C. 1899, § 3586.]

§ 5029. **Certificate of clerk. Acknowledgment before justice.** The certificate of proof or acknowledgment, if made before a justice of the peace, when used in any county other than that in which he resides must be accompanied by a certificate under the hand and seal of the clerk of the district court, or of any other county court of record of the county in which the justice resides, setting forth that such justice at the time of taking such proof or acknowledgment was authorized to take the same and that the clerk is acquainted with his handwriting and believes that the signature to the original certificate is genuine. [Civ. C. 1877, § 666; R. C. 1899, § 3587.]

§ 5030. **Action to correct certificate.** When the acknowledgment or proof of execution of an instrument is properly made, but defectively certified, any party interested may have an action in the district court to obtain a judgment correcting the certificate. [Civ. C. 1877, § 667; R. C. 1899, § 3588.]

Duty of court to reform certificate in accordance with the truth. Cannon v. Deming, 3 S. D. 421, 53 N. W. 863.

§ 5031. **Action to prove instrument.** Any person interested under an instrument entitled to be proved for record may institute an action in the

district court against the proper parties to obtain a judgment proving such instrument. [Civ. C. 1877, § 667; R. C. 1899, § 3589.]

§ 5032. **What entitles judgment to record.** A certified copy of the judgment in a proceeding instituted under either of the two preceding sections, showing the proof of the instrument, and attached thereto, entitles the instrument to record with like effect as if acknowledged. [Civ. C. 1877, § 667; R. C. 1899, § 3590.]

§ 5033. **Authority of officers in taking proof.** Officers authorized to take the proof of instruments are authorized in such proceedings:

1. To administer oaths or affirmations.
2. To employ and swear interpreters.
3. To issue subpenas, obedience to which may be enforced as provided in the code of civil procedure. [Civ. C. 1877, § 668; R. C. 1895, § 3591.]

§ 5034. **Code does not affect former instruments.** The legality of the execution, acknowledgment, proof, form or record of any conveyance or other instrument made before this amended code goes into effect, executed, acknowledged, proved or recorded is not affected by anything contained in this chapter, but depends for its validity and legality except as to seals, upon the laws in force when the act was performed. [Civ. C. 1877, § 669; R. C. 1899, § 3592.]

§ 5035. **Force and record of former instruments.** All conveyances of real property made before this amended code goes into effect and acknowledged or proved according to the laws in force at the time of such making and acknowledgment or proof have the same force as evidence and may be recorded in the same manner and with like effect as conveyances executed and acknowledged in pursuance of this chapter. [Civ. C. 1877, § 670; R. C. 1899, § 3593.]

§ 5036. **Certain instruments legalized.** Any officer of any foreign or domestic corporation may execute and acknowledge in its behalf assignments of, release of, satisfaction of, or other instruments affecting liens upon real estate. All assignments of, releases of, satisfactions of, or other instruments affecting liens upon real estate heretofore executed and acknowledged in good faith by any officer of any foreign or domestic corporation in its behalf, are declared valid and effectual to the same extent as they would have been had this section been in force at the time of their execution. [1903, ch. 150.]

§ 5037. **Who shall not execute acknowledgments.** No person heretofore or hereafter authorized by law to take or receive the proof or acknowledgment of the execution of an instrument or affidavit, and to certify thereto, shall take or receive such proof or acknowledgment or affidavit or certify to the same, if he shall be a party to such instrument, or a member of any partnersinp which partnership shall or may be a party to such instrument, nor if the husband or wife of such person or officer shall be a party to such instrument. Nothing herein contained, nor in the laws of the state of North Dakota, heretofore enacted, relating to the proof and acknowledgment of instruments, and taking of affidavits, shall be construed to invalidate or affect the proof or acknowledgment, affidavit, or the certificate thereof, of any instrument to which a corporation may be a party, and which instrument shall have been or may be proven or acknowledged or sworn to before, or certified to by an officer or person authorized by law, who may be an officer, director, employe or stockholder of such corporation, and no person otherwise qualified or authorized by law to take and receive the proof or acknowledgment of instruments or affidavits, and to certify thereto, shall be disqualified by reason of being an officer, director, employe or stockholder of any corporation, a party to such instrument, and such proof, acknowledgments, and certificates thereof shall be and are hereby declared valid for all purposes. All officers and persons authorized by law to take the proof or acknowledgment of instruments and affidavits and to certify thereto, may take such proof or acknowledgment and certify to the same, in all cases not prohibited by this section. [1899, ch. 2; R. C. 1899, § 3593a.]

ARTICLE 4.—EFFECT OF RECORDING OR THE WANT THEREOF.

§ 5038. **Recording, effect.** Every conveyance by deed, mortgage or otherwise, of real estate within this state, shall be recorded in the office of the register of deeds of the county where such real estate is situated, and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any part or portion thereof, whose conveyance, whether in the form of a warranty deed, or deed of bargain and sale, deed of quit claim and release, of the form in common use, or otherwise, is first duly recorded; or as against any attachment levied thereon, or any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record, prior to the recording of such conveyance. Every conveyance aforesaid heretofore executed, and not so recorded, and which shall not be so recorded within three months from the taking effect of this article, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any portion thereof, claiming under or through a deed of quit claim and release, of the form in common use, heretofore so recorded, or which may be recorded before such prior conveyance. The fact that such first recorded conveyance of such subsequent purchaser for a valuable consideration is in the form, or contains the terms of a deed of quit claim and release aforesaid, shall not affect the question of good faith of subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof; provided, however, that all deeds, mortgages, and other instruments affecting real estate, situated in any unorganized county, may be recorded in the county to which such unorganized county is attached for judicial purposes; and records of such instruments which have been or shall be so made, shall have the same effect as if recorded in a county where the premises are situated. [Civ. C. 1877, § 671; R. C. 1899, § 3594; 1903, ch. 152, § 1.]

Recording of mortgage or deed not constructive notice to prior mortgagee or purchaser. Sarles v. McGee, 1 N. D. 365, 48 N. W. 231.

Assignment of mortgage is a conveyance and void as to subsequent purchasers if not recorded, when. Hennings v. Paschke, 9 N. D. 489, 84 N. W. 350.

Actual notice of prior unrecorded conveyance impeaches good faith of subsequent purchaser. Betts v. Letcher, 1 S. D. 182, 46 N. W. 193; Gress v. Evans, 1 Dak. 383, 46 N. W. 1132.

Open and notorious possession prima facie notice. Protection of registry laws not to be overthrown except upon clear evidence showing want of good faith on part of subsequent purchaser. Betts v. Letcher, 1 S. D. 182, 46 N. W. 193.

Recording of a deed not entitled to record because of defective acknowledgment not constructive notice of contents, Deed good between the parties. Banbury v. Sherin, 4 S. D. 88, 55 N. W. 723.

Unauthorized withdrawal of deed does not affect its operation as recorded instrument from date of delivery where grantee immediately files it for record a second time. Parrish v. Mahany, 10 S. D. 276, 73 N. W. 97.

Unrecorded deed or mortgage good against attaching creditor, when. Kohn v. Lapham, 13 S. D. 78, 82 N. W. 408. Murphy v. Bank, 13 S. D. 501, 83 N. W. 575.

§ 5039. **Conveyance defined.** The term "conveyance" as used in the last section, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged or encumbered, or by which the title to any real property may be affected, except wills, and powers of attorney. [Civ. C. 1877, § 672; R. C. 1899, § 3595; 1903, ch. 152, § 2.]

Assignments of real estate mortgages are conveyances. Hennings v. Paschke, 9 N. D. 489, 84 N. W. 350.

Mortgages and assignments thereof are conveyances. Merrill v. Luce, 6 S. D. 354, 61 N. W. 43.

§ 5040. **Requisites of instrument to revoke power to convey.** No instrument containing a power to convey or execute instruments affecting real property which has been recorded is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also ac-

knowledged or proved, certified and recorded in the same office in which the instrument containing the power was recorded. [Civ. C. 1877, § 673; R. C. 1899, § 3596.]

Power of attorney, though irrevocable during life of party, becomes extinct by his death, except where coupled with an interest. Brown v. Skotland, 12 N. D. 450, 97 N. W. 543.

§ 5041. **Record constructive notice. Admissible in evidence without further proof.** The recording and deposit of an instrument approved and certified according to the provisions of sections 5003, 5017, 5018, 5019 and 5020 are constructive notice of the execution of such instrument to all purchasers and incumbrancers subsequent to the recording; and all instruments entitled to record, the record thereof, or a duly certified transcript of such record, or copy of such instrument, shall be admissible in evidence in all the courts of this state, and may be read in evidence without further proof. [Civ. C. 1877, § 674; R. C. 1899, § 3597; 1901, ch. 145.]

§ 5042. **Unrecorded instruments valid as to whom.** An unrecorded instrument is valid as between the parties thereto and those who have notice thereof; but knowledge of the record of an instrument out of the chain of title does not constitute such notice. [1899, ch. 167; R. C. 1899, § 3598.]

Note:—Doran v. Dazey, 5 N. D. 167, 64 N. W. 1023, decided previous to amendment of 1899.

Unrecorded instrument valid between parties thereto and those having knowledge. Mack v. Blanchard, 15 S. D. 432, 90 N. W. 1042.

CHAPTER 40.

UNLAWFUL TRANSFERS.

§ 5043. **Instruments made with intent to defraud void.** Every instrument other than a will affecting an estate in real property, including every charge upon real property or upon its rents or profits, made with intent to defraud prior or subsequent purchasers thereof or incumbrancers thereon is void as against every purchaser or incumbrancer for value of the same property, or the rents or profits thereof. [Civ. C. 1877, § 676; R. C. 1899, § 3599.]

That mortgagee and mortgagor are brothers is not, in absence of other facts and circumstances, evidence of fraudulent intent. Lane v. Starr, 1 S. D. 107, 45 N. W. 212.

Conveyance by husband to wife will not be defeated by fraudulent intent on part of husband unless wife has knowledge. Williams v. Harris, 4 S. D. 22, 54 N. W. 926.

Transfer of land by husband to wife, while deeply in debt, not fraudulent per se. First State Bank v. O'Leary, 13 S. D. 204, 83 N. W. 45.

§ 5044. **Privity to fraud cures it.** No instrument is to be avoided under the last preceding section in favor of a subsequent purchaser or incumbrancer having notice thereof at the time his purchase was made or his lien acquired, unless the person in whose favor the instrument was made was privy to the fraud intended. [Civ. C. 1877, § 677; R. C. 1899, § 3600.]

§ 5045. **If power to revoke reserved, subsequent grant is revocation.** When a power to revoke or modify an instrument affecting the title to or the enjoyment of an estate in real property is reserved to the grantor or given to any other person, a subsequent grant of or charge upon the estate by the person having the power of revocation in favor of a purchaser or incumbrancer for value operates as a revocation of the original instrument to the extent of the power in favor of such purchaser or incumbrancer. [Civ. C. 1877, § 678; R. C. 1899, § 3601.]

§ 5046. **When power deemed executed.** When a person having a power of revocation within the provisions of the last section is not entitled to execute it until after the time at which he makes such a grant or charge as is described

in that section, the power is deemed to be executed as soon as he is entitled to execute it. [Civ. C. 1877, § 679; R. C. 1899, § 3602.]

§ **5047. Good faith of purchaser protected.** The rights of a purchaser or incumbrancer in good faith and for value are not to be impaired by any of the foregoing provisions of this chapter. [Civ. C. 1877, § 680; R. C. 1899, § 3603.

§ **5048. Other unlawful transfers.** Other provisions concerning unlawful transfers are contained in chapter 98 of this code concerning the special relations of debtor and creditor. [Civ. C. 1877, § 682; R. C. 1899, § 3604.]

CHAPTER 41.

HOMESTEAD.

§ **5049. Homestead defined. Exempt.** The homestead of every head of a family residing in this state, not exceeding in value five thousand dollars, and if within a town plat, not exceeding two acres in extent, and if not within a town plat, not exceeding in the aggregate more than one hundred and sixty acres, and consisting of a dwelling house in which the homestead claimant resides and all its appurtenances and the land on which the same is situated shall be exempt from judgment lien and from execution or forced sale except as provided in this chapter. [1891, ch. 67, § 1; R. C. 1895, § 3605.]

Contract to purchase land in possession gives right. Myrick v. Bill, 5 Dak. 167, 17 N. W. 268.

Cannot determine right on affidavit and motion. Dorsey v. Hall, 5 Dak. 505, 41 N. W. 471; Froelick v. Aylward, 11 S. D. 635, 80 N. W. 131.

Any interest in land that could be sold on execution can be claimed as homestead. Oswold v. McCauley, 6 Dak. 289, 42 N. W. 769.

Absence from homestead by wife for three years while husband remains on homestead not abandonment. In divorce proceedings, unless otherwise directed by decree, homestead remains in party holding legal title. Rosholt v. Mehus, 3 N. D. 513, 57 N. W. 783; Brady v. Kruger, 8 S. D. 464, 66 N. W. 1083.

Abandonment of homestead, what is. Kuhnert v. Conrad, 6 N. D. 215, 69 N. W. 185.

Under territorial laws as they existed in 1888 a single person who had never been married was not entitled to homestead exemption. McCanna v. Anderson, 6 N. D. 482, 71 N. W. 769.

Secret deed of homestead on eve of marriage void. Arnegaard v. Arnegaard, 7 N. D. 475, 75 N. W. 797.

A tract of land does not necessarily cease to be a homestead because at a particular time there is no house fit to live in. Edmonson v. White, 8 N. D. 75, 76 N. W. 986.

Extent and value. How selected. Presumptions from failure to assist. How may waive right. Estopped by laches. Foogman v. Pattison, 9 N. D. 254, 83 N. W. 15.

Before homestead rights attach there must be actual or constructive residence. Mere intention to occupy not sufficient. Brokken v. Bauman, 10 N. D. 453, 88 N. W. 84.

Alienation or incumbrance of a homestead does not constitute a fraud upon the judgment creditors of the holder of the title. Dalyrymple v. Improvement Co., 11 N. D. 65, 88 N. W. 1033.

Judgments are not liens against homestead. Dalrymple v. Improvement Co., 11 N. D. 65, 88 N. W. 1033.

Sale of homestead under execution conveys no estate or title to the purchaser. Officer not liable for damages except costs. Johnson v. Twichell, 13 N. D. 426, 101 N. W. 318.

Party owning no other homestead who purchased lot and begins erection of house he intends to occupy as dwelling when complete impresses thereon homestead rights. Kingman v. O'Callaghan, 4 S. D. 628, 57 N. W. 915; Brown v. Edmunds, 9 S. D. 273, 68 N. W. 734.

One holding unpatented government claim as homestead cannot acquire homestead in other lands. Hesnard v. Plunkett, 6 S. D. 73, 60 N. W. 159.

Homestead rights in partnership property not acquired against partner. Brady v. Kreuger, 8 S. D. 464, 66 N. W. 1083.

§ 5050. **How selected.** If the homestead claimant is married the homestead may be selected from the separate property of the husband or, with the consent of the wife, from her separate property. When the homestead claimant is not married, but is the head of a family within the meaning of section 5070, the homestead may be selected from any of his or her property; provided, that the homestead so selected must in no case embrace different lots or tracts of land unless they are contiguous. [1891, ch. 67, § 2; R. C. 1899, § 3606.]

Party owning more than quarter section of land may select, how. Foogman v. Patterson, 9 N. D. 254, 83 N. W. 15.

§ 5051. **When subject to execution.** The homestead is subject to execution or forced sale in satisfaction of judgments obtained:

1. On debts secured by mechanic's or laborer's liens for work or labor done or material furnished exclusively for the improvement of the same.
2. On debts secured by mortgage on the premises executed and acknowledged by both husband and wife, or an unmarried claimant.
3. On debts created for the purchase thereof and for all taxes accruing and levied thereon. [1891, ch. 67, § 3; R. C. 1899, § 3607.]

Mortgage by wife for purchase money is valid though not signed by husband. Roby v. National Bank, 4 N. D. 156, 59 N. W. 719.

Mortgage, homestead subsequently acquired subject to. Kuhnert v. Conrad, 6 N. D. 215, 69 N. W. 185.

§ 5052. **How conveyed.** The homestead of a married person cannot be conveyed or incumbered, unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife. [1891, ch. 67, § 4; R. C. 1899, § 3608.]

Husband alone cannot revive paid mortgage on homestead to secure other indebtedness. Luce v. American Mortgage Co., 6 Dak. 122, 50 N. W. 621.

Wife joining husband in deed only for purpose of releasing homestead rights, not bound by implied covenants arising from use of word "grant." Dun v. Dietrich, 3 N. D. 3, 53 N. W. 81.

Mortgage for purchase money valid though not joined in by husband and wife. Roby v. Bank, 4 N. D. 156, 59 N. W. 719.

Residence of some kind is necessary prerequisite to obtaining homestead rights to land. Wife's signature not necessary on land not homestead. Brokken v. Baumann, 10 N. D. 453, 88 N. W. 84.

Provisions of statute to be liberally construed. Kingman v. O'Callaghan, 4 S. D. 628, 57 N. W. 912.

Wife has no interest in husband's homestead after divorce except as fixed by decree. Brady v. Kreuger, 8 S. D. 464, 66 N. W. 1080.

Homestead is exempt from sale for mechanic's lien, when. Morgan v. Benthein, 10 S. D. 650, 75 N. W. 204; Falliher v. Wittmayer, 9 S. D. 479, 70 N. W. 642.

Notary public may sign wife's name to mortgage with her acquiescence. N. W. Loan & Banking Co. v. Jonasen, 11 S. D. 566, 79 N. W. 840.

§ 5053. **Statute of limitations.** No action, defense or counterclaim founded upon a right of homestead in property heretofore conveyed or incumbered, otherwise than as provided by the law in force at the time of the execution of such conveyance or incumbrance, and for which no declaration of homestead shall have been filed previous to the taking effect of this section shall be effectual or maintainable, unless such action is commenced or such defense or counterclaim interposed on or before the first day of January, 1900; provided, nevertheless, that such limitation shall not apply if the homestead claimant was at the time of the execution of such conveyance or incumbrance in the actual possession of the property claimed and had not quit such possession previous to the commencement of such action or the interposing of such defense or counterclaim. [R. C. 1895, § 3609.]

§ 5054. **Actions may be commenced against homestead, when.** No action, defense or counterclaim founded upon a right of homestead in property conveyed or incumbered prior to the taking effect of this article and since the taking effect of section 5053, otherwise than is provided by the law in force at the

time of the execution of such conveyance or incumbrance, and for which no declaration of homestead shall have been filed previous to the taking effect of this article, shall be effectual or maintainable, unless such action is commenced, or such defense or counterclaim interposed on or before the first day of January, 1906; and no action, defense or counterclaim founded upon a right of homestead in property hereafter conveyed or incumbered, otherwise than as provided by the law in force at the time of the execution of such conveyance or incumbrance, and for which no declaration of homestead shall have been filed previous to the execution of such conveyance or incumbrance, shall be effectual or maintainable, unless such action is commenced, or such defense or counterclaim interposed within two years after the execution of such conveyance or incumbrance; provided, nevertheless, that such limitation shall not apply, if the homestead claimant was, at the time of the execution of such conveyance or incumbrance, in the actual possession of the property claimed and had not quit such possession previous to the commencement of such action, or the interposing of such defense or counterclaim; and provided, further, that this section shall not in any way affect claims to the homestead which may have become barred under the provisions of said section 5053. [1905, ch. 3.]

§ **5055. When appraised.** When an execution for the enforcement of a judgment obtained in a case not within the classes enumerated in section 5051 is levied upon the homestead the judgment creditor may apply to the district court in the county in which such homestead is situated for the appointment of persons to appraise the value thereof. [1891, ch. 67, § 5; R. C. 1895, § 3610.]

§ **5056. Application for appraisers.** The application for appraisers must be made upon a verified petition showing:

1. The fact that an execution has been levied upon the homestead.
2. The name of the claimant.
3. That the value of the homestead exceeds the amount of the homestead exemption. [1891, ch. 67, § 6; R. C. 1895, § 3611.]

§ **5057. Petition filed.** The petition must be filed with the clerk of the district court and a copy thereof with notice of the time and place of hearing served on the claimant at least ten days before the hearing. [1891, ch. 67, § 7; R. C. 1899, § 3612.]

§ **5058. Appointment of appraisers. Oath and duties.** At the hearing the court upon proof of the service of such notice and petition and of the facts stated in the petition may appoint three disinterested residents of the county to appraise the value of the homestead, who must take an oath impartially to appraise the same. They must view the premises and appraise the value thereof and if the appraised value exceeds the homestead exemption they must determine whether the real property claimed can be divided without material injury. [1891, ch. 67, § 8; R. C. 1895, § 3613.]

§ **5059. Report to judge.** Within fifteen days after their appointment the appraisers must present to the judge a report in writing, which report must show the appraised value of the homestead and their determination upon the matter of a division of the real property claimed. [R. C. 1895, § 3614.]

§ **5060. Homestead, how divided.** If from the appraisers' report it appears that the real property claimed as a homestead can be divided without material injury the court shall by order direct the appraisers to set off to the claimant so much of the real property, including the residence, as will amount in value to the homestead exemption and the execution may be enforced against the remainder of the real property. [1891, ch. 67, § 9; R. C. 1895, § 3615.]

§ **5061. When sold.** If from the appraisers' report it appears to the court that the real property claimed as a homestead exceeds in value the amount of the homestead exemption and that it cannot be divided without material injury, he must make an order directing its sale under the execution; but

at such sale no bid must be received unless it exceeds the amount of the homestead exemption. [1891, ch. 67, § 10; R. C. 1895, § 3616.]

§ **5062. Proceeds of sale exempt. Disposition of.** If the sale is made the proceeds thereof to the amount of the homestead exemption must be paid to the claimant and the residue applied to the satisfaction of the execution; provided, that when the execution is against a husband, whose wife is living, the court may, in its discretion, direct the five thousand dollars to be deposited in court to be paid out only on the joint receipt of the husband and wife and it shall, whether paid directly to the claimant or to the husband and wife jointly, possess all the protection against legal process and voluntary disposition by the husband as did the original homestead premises. [1891, ch. 67, § 11; R. C. 1895, § 3617.]

§ **5063. Fees of appraisers.** The appraisers shall receive the same fees as jurors in civil cases in the district court, which with all other costs of these proceedings must be paid by the execution creditors in the first instance, but in the cases provided for in sections 5061 and 5062 the amount paid must be added as costs on execution and collected accordingly. [1891, ch. 67, § 12; R. C. 1899, § 3618.]

§ **5064. Proceeds of sale exempt.** If the homestead is conveyed as provided in section 5052 or sold for the satisfaction of any lien mentioned in section 5051, the price thereof or the proceeds of the sale beyond the amount necessary to satisfy such lien, and not exceeding in either case the amount of the homestead exemption, shall be entitled thereafter to the same protection against legal process as the law gives to the homestead. [1891, ch. 67, § 13; R. C. 1895, § 3619.]

§ **5065. Who may make declaration of homestead.** Any person who is the head of a family may make a declaration of homestead in the manner provided in the next two sections, but a failure to make such declaration shall not impair the homestead right. [R. C. 1895, § 3620.]

§ **5066. How executed and acknowledged.** In order to select a homestead the husband or other head of a family, or in case the husband has not made such selection, the wife must execute and acknowledge in the same manner as a grant of real property is acknowledged a declaration of homestead and file the same for record. [R. C. 1895, § 3621.]

§ **5067. Contents of.** The declaration of homestead must contain:

1. A statement showing that the person making it is the head of a family; or, when the declaration is made by the wife, showing that her husband has not made such declaration for their joint benefit.
2. A statement that the person making it is residing on the premises and claims them as a homestead.
3. A description of the premises.
4. An estimate of their cash value. [R. C. 1895, § 3622.]

§ **5068. Must be recorded.** The declaration must be recorded in the office of the register of deeds of the county in which the land is situated. [R. C. 1895, § 3623.]

§ **5069. Effect of sale of homestead.** The sale and disposition of one homestead shall not be held to prevent the selection or purchase of another as provided in this chapter. [1891, ch. 67, § 14; R. C. 1899, § 3624.]

§ **5070. "Head of family" defined.** The phrase "head of a family" as used in this chapter includes within its meaning:

1. The husband or wife when the claimant is a married person; but in no case are both husband and wife entitled each to a homestead under the provisions of this chapter.
2. Every person who has residing on the premises with him or her and under his or her care and maintenance, either:

(a) His or her child or the child of his or her deceased wife or husband, whether by birth or adoption.

(b) A minor brother or sister or the minor child of a deceased brother or sister.

(c) A father, mother, grandfather or grandmother.

(d) The father or mother, grandfather or grandmother of a deceased husband or wife.

(e) An unmarried sister or any other of the relatives mentioned in this section who have attained the age of majority and are unable to take care of or support themselves. [1891, ch. 67, § 15; R. C. 1899, § 3625.]

Widow without children is entitled to continue to occupy homestead for life and is not affected by second marriage. Fore v. Fore, 2 N. D. 260, 50 N. W. 712.

An unmarried man is head of family under certain conditions. Webster v. McGaurran, 8 N. D. 274.

Head of family, who is. Ness v. Jones, 10 N. D. 587, 88 N. W. 703.

§ 5071. **Descent and distribution of homestead estates.** Upon the death of a person in whom the title to real property constituting a homestead as defined in this chapter is vested a homestead estate in such real property shall survive, descend and be distributed to the persons and in the order following:

1. To the surviving husband or wife for life; or,
2. There being no surviving husband or wife, to the decedent's minor child or children until the youngest attains majority; or,
3. The surviving husband or wife dying before, then thereafter to the decedent's minor child or children until the youngest attains majority. [1891, ch. 67, § 16; R. C. 1895, § 3626.]

§ 5072. **"Homestead estate" and "youngest" defined.** The term "homestead estate" employed in this chapter shall be construed to mean the right to the possession, use, control, income and rents of the real property held or occupied by such decedent as a homestead at death; and the term "youngest" as employed in this chapter shall be construed to mean the decedent's child, whether by birth or adoption, last to attain majority. [R. C. 1895, § 3627.]

§ 5073. **Ascertaining and setting off homestead after death of owner.** If a homestead in such real property had been ascertained and set off to such decedent before death as provided in this chapter the homestead estate provided for in section 5071 shall be commensurate therewith and must not be again ascertained; but if such homestead had not been so ascertained and set off, the county court must ascertain in the manner provided in the probate code and set off and decree the homestead estate to the surviving husband or wife, or minor child or children, as the case may be; provided, however, that the real property which is subjected to the homestead estate by the county court and in which such estate is ascertained and set off by such court must not exceed in value or area the value or area prescribed in section 5049. [R. C. 1895, § 3628.]

§ 5074. **Decree of county court. Provisions of.** The county court shall ascertain and set forth in its decree setting off the homestead estate to the surviving husband or wife or minor child or children, whether ascertained by it or not, the name of and the dates at which the minor child, or each minor child, if more than one, will attain majority and direct in such decree that in case the surviving husband or wife dies before the last of such dates is reached, the minor child or children then surviving shall from the time of such death succeed to such homestead estate until the youngest attains majority. If a surviving minor child dies before a full satisfaction of the homestead estate such estate shall thereafter be proceeded with as though such child had never lived. [R. C. 1895, § 3629.]

§ 5075. **Estate descends exempt. Exception.** The real property subjected to such homestead estate shall, subject to the full satisfaction of such estate, descend exempt from decedent's debts except as provided in section 5051 and be distributed in the same manner as real property not subjected to a homestead estate, or as directed in the decedent's will; provided, that in no case

shall the real property constituting the homestead of a decedent, or any part thereof, descend or be distributed to any person other than the surviving husband or wife and decedent's heirs in the direct descending line as prescribed in chapter 43 until all the decedent's debts are fully paid. [R. C. 1895, § 3630.]

§ **5076. May be devised subject to homestead estate.** Subject to the homestead estate as defined by law and the payment of decedent's debts, the homestead may be devised to persons other than those mentioned in section 5075 like other real property of the testator. [1891, ch. 67, § 18; R. C. 1895, § 3631.]

§ **5077. Conveyance in case of insanity.** If either the husband or wife shall become insane, the county court of the county in which the homestead is situated may, upon application of the husband or wife not insane and upon due proof of such insanity, make an order permitting the husband or wife not insane to sell and convey or mortgage such homestead. [1891, ch. 67, § 19; R. C. 1895, § 3632.]

§ **5078. Requisites of petition.** Such application shall be made by a petition to the court subscribed and sworn to by the applicant, setting forth the name and age of the insane husband or wife; the number, age and sex of the children of such insane husband or wife; a description of the premises constituting the homestead; the value of the same; the county in which it is situated; and such facts in addition to that of the insanity of the husband or wife, relating to the circumstances or necessities of the applicant and his or her family, as he or she may rely upon in support of the petition. [R. C. 1895, § 3633.]

§ **5079. Notice, on whom and how served.** Notice of the application for such order shall be served upon such persons and in such manner as the court shall by order direct and in such order the court shall fix a time for the hearing of the application. [R. C. 1895, § 3634.]

§ **5080. Order of sale recorded.** A certified copy of the order granting permission to sell and convey or mortgage the homestead shall be filed for record and recorded in the office of the register of deeds of the county in which the homestead is situated. [R. C. 1895, § 3635.]

§ **5081. Court may direct disposition of funds.** On granting an order authorizing a sale of the homestead the court may direct that a part of the funds derived from such sale, not to exceed one-third thereof be set aside and may direct its investment for the use and benefit of the insane husband or wife. If such husband or wife dies while insane the sum so set aside reverts to the surviving husband or wife. If he or she is dead at the time the insane husband or wife dies, then such sum shall descend in accordance with the laws of succession as provided in this code. [1891, ch. 67, § 21; R. C. 1895, § 3636.]

§ **5082. Appeal.** On the hearing of such application any of the kindred of the insane person may appear and be heard in the premises, and may appeal from any order made on the subject to the district court for the county in which the land is situated in the manner provided for appeals in other cases. [1891, ch. 67, § 22; 1895, § 3637.]

§ **5083. Such conveyance valid.** A conveyance or mortgage of the homestead made pursuant to the last six sections shall be as valid and effectual as if the insane husband or wife had been sane and had joined in the execution and acknowledgment of such conveyance or mortgage. [R. C. 1895, § 3638.]

CHAPTER 42.

WILL.

Article 1.—Execution and Revocation of Will.

§ **5084. Who may make.** 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 43 of this code, being chargeable in both cases with the payment of all the decedent's debts as provided in the probate code. [Civ. C. 1877, § 683; R. C. 1895, § 3639.]

§ **5085. Married woman same right.** A married woman may dispose of all her separate estate by will without the consent of her husband and may alter or revoke in like manner as if she was single. Her will must be executed and proved in like manner as other wills. [Civ. C. 1877, § 684; R. C. 1899, § 3640.]

§ **5086. 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. [Civ. C. 1877, § 685; R. C. 1899, § 3641.]

§ **5087. What may be willed.** Every estate and interest in real or personal property to which heirs, husband, widow or next of kin might succeed may be disposed of by will. [Civ. C. 1877, § 686; R. C. 1899, § 3642.]

Rights of adopted child, established by order of court in proceedings to adopt such child, cannot be defeated by will of adopting parent. Quinn v. Quinn, 5 S. D. 328, 58 N. W. 808.

§ **5088. Made to any one capable of taking.** A testamentary disposition may be made to any person capable by law of taking the property so disposed of, except that no corporation can take under a will, unless expressly authorized by statute so to take. [Civ. C. 1877, § 687; R. C. 1895, § 3643.]

§ **5089. Nuncupative will. Requisites.** To make a nuncupative will valid and to entitle it to be admitted to probate the following requisites must be observed:

1. The estate bequeathed must not exceed in value the sum of one thousand dollars.
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 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 an injury received the same day. [Civ. C. 1877, § 688; R. C. 1899, § 3644.]

§ **5090. Mutual will.** A conjoint or mutual will is valid, but it may be revoked by any of the testators in like manner with any other will. [Civ. C. 1877, § 689; R. C. 1899, § 3645.]

§ **5091. Conditional will may be denied probate.** 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. [Civ. C. 1877, § 690; R. C. 1899, § 3646.]

§ **5092. Olographic will.** 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. [Civ. C. 1877, § 691; R. C. 1899, § 3647.]

§ **5093. How wills must be executed and attested.** Every will, other than a nuncupative will, must be in writing; and every will, other than an olographic will and a nuncupative will, must be executed and attested as follows:

1. It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto.

2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority.

3. The testator must at the time of subscribing or acknowledging 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 and in his presence. [Civ. C. 1877, § 691; R. C. 1899, § 3648.]

§ **5094. What unnecessary in nuncupative wills.** A nuncupative will is not required to be in writing, nor to be declared or attested with any formalities. [Civ. C. 1877, § 692; R. C. 1899, § 3649.]

§ **5095. How witnessed.** A witness to a written will must write with his name his place of residence; and a person who subscribes a 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. [Civ. C. 1877, § 693; R. C. 1899, § 3650.]

§ **5096. When codicil republishes will.** The execution of a codicil, referring to a previous will, has the effect to republish the will as modified by the codicil. [Civ. C. 1877, § 694; R. C. 1899, § 3651.]

§ **5097. Law of place governs.** 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 was made in this state and according to the provisions of this chapter. [Civ. C. 1877, § 695; R. C. 1899, § 3652.]

§ **5098. Validity of will depends on compliance with law.** No will or revocation is valid unless executed either according to the provisions of this chapter, or according to the law of the place in which it was made, or in which the testator was at the time domiciled. [Civ. C. 1877, § 696; R. C. 1899, § 3653.]

§ **5099. Law where made governs, though domicile subsequently changed.** Whenever a will or a revocation thereof is duly executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, the same is regulated as to the validity of its execution by the law of such place, notwithstanding that the testator subsequently changed his domicile to a place by the law of which such will would be void. [Civ. C. 1877, § 697; R. C. 1899, § 3654.]

§ **5100. Deposit with county judge. His duties.** Every county judge must deposit in his office any will delivered to him for that purpose and give a written receipt to the depositor; and must inclose such will in a sealed wrapper so that it cannot be read and indorse thereon the name of the testator, his residence and the date of the deposit; and such wrapper must not be opened until its delivery under the provisions of the next section. [Civ. C. 1877, § 698; R. C. 1899, § 3655.]

§ **5101. How disposed of.** A will deposited under the provisions of the last section must be delivered only:

1. To the testator in person.

2. Upon his written order duly proved by the oath of a subscribing witness.

3. After his death, to the person, if any, named in the indorsement on the wrapper of the will; or,

4. If there is no such indorsement and if the will was not deposited with the county judge having jurisdiction of its probate, then to the county judge who has jurisdiction. [Civ. C. 1877, § 699; R. C. 1899, § 3656.]

§ **5102. Opened after death by county judge.** The county judge with whom a will is deposited, or to whom it is delivered, must after the death of the testator publicly open and examine the will and file it in his office, there to remain until duly proved, or deliver it to the county judge having jurisdiction of its probate. [Civ. C. 1877, § 700; R. C. 1899, § 3657.]

§ **5103. Proof of lost will.** A lost or destroyed will of real or personal property, or both, may be established in the cases provided in the probate code or any act in force on that subject. [Civ. C. 1877, § 701; R. C. 1899, § 3658.]

§ **5104. Revocation of 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 and executed with the same formalities with which a will should be executed by such testator; or,

2. By being burnt, 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. [Civ. C. 1877, § 702; R. C. 1899, § 3659.]

§ **5105. How cancellation must be proved.** When a will is canceled or destroyed by any other person than the testator, the direction of the testator and the fact of such injury or destruction must be proved by two witnesses. [Civ. C. 1877, § 703; R. C. 1899, § 3660.]

§ **5106. Effect of partial erasure.** A revocation by obliteration on the face of the will may be partial or total, and is complete if the material part is so obliterated as to show an intention to revoke; but when, in order to effect a new disposition the testator attempts to revoke a provision of the will by altering or obliterating it on the face thereof, such revocation is not valid unless the new disposition is legally effected. [Civ. C. 1877, § 704; R. C. 1899, § 3661.]

§ **5107. Revocation of will in duplicate.** The revocation of a will, executed in duplicate, may be made by revoking one of the duplicates. [Civ. C. 1877, § 705; R. C. 1899, § 3662.]

§ **5108. When subsequent will revokes prior.** 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. [Civ. C. 1877, § 706; R. C. 1899, § 3663.]

§ **5109. Revocation does not revive former will without express words.** If, after making a will, the testator duly makes and executes a subsequent will, the destruction, canceling or revocation of the latter does not revive the former unless it appears by the terms of such revocation that it was his intention to revive the former will, or unless after such destruction, canceling or revocation he duly republishes the prior will. [Civ. C. 1877, § 707; R. C. 1895, § 3664.]

Presumption that one of two wills known to have been drawn was destroyed for the purpose of revocation overcome by direct uncontradicted testimony of person who drew both, that the one not found was the last. Starkweather v. Bell, 13 S. D. 475, 83 N. W. 566.

§ **5110. Will made before marriage revoked, if issue unprovided for.** If, after having made 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 revoked, unless provision has been made for such issue by some settlement, or unless such issue are provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation can be received. [Civ. C. 1877, § 707; R. C. 1899, § 3665.]

§ 5111. **Same, if wife unprovided for.** If after making a will the testator marries and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract 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 other evidence to rebut the presumption of revocation must be received. [Civ. C. 1877, § 708; R. C. 1899, § 3666.]

§ 5112. **Marriage of woman revokes.** A will executed by an unmarried woman is revoked by a subsequent marriage and is not revived by the death of her husband. [Civ. C. 1877, § 709; R. C. 1899, § 3667.]

§ 5113. **Effect of sale of devised property.** 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 a 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. [Civ. C. 1877, § 710; R. C. 1899, § 3668.]

§ 5114. **Incumbrance not a revocation.** A charge or incumbrance 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 devise and legacies therein contained must pass subject to such charge or incumbrance. [Civ. C. 1877, § 711; R. C. 1899, § 3669.]

§ 5115. **Partial disposal, not revocation.** 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. [Civ. C. 1877, § 712; R. C. 1899, § 3670.]

§ 5116. **When instrument expresses intent it is 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. [Civ. C. 1877, § 713; R. C. 1899, § 3671.]

§ 5117. **Revocation revokes codicils.** The revocation of a will revokes all its codicils. [Civ. C. 1877, § 714; R. C. 1899, § 3672.]

§ 5118. **Child unprovided for succeeds as in intestacy.** Whenever a testator has a child born after the making of his will, either in his lifetime or after his death 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. [Civ. C. 1877, § 715; R. C. 1899, § 3673.]

§ 5119. **Children omitted succeed as in intestacy.** When any testator omits to provide in his will for any of his children or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child must have the same share in the estate of the testator,

as if he had died intestate, and succeeds thereto as provided in the preceding section. [Civ. C. 1877, § 715; R. C. 1899, § 3674.]

§ 5120. **Rules governing assignments of shares in such cases.** 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 a 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. [Civ. C. 1877, § 715; R. C. 1899, § 3675.]

§ 5121. **Take nothing under three last sections, when.** 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 provisions of the three preceding sections. [Civ. C. 1877, § 715; R. C. 1899, § 3676.]

§ 5122. **What devise of land conveys.** 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. [Civ. C. 1877, § 715; R. C. 1899, § 3677.]

§ 5123. **Devisee's descendants take.** When any estate is devised to any child or other relation of the testator and the devisee dies before the testator leaving lineal descendants, such descendants take the estate so given by the will in the same manner as the devisee would have done had he survived the testator. [Civ. C. 1877, § 716; R. C. 1899, § 3678.]

§ 5124. **When gift to witness void.** All beneficial devises, legacies or 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 the will. [Civ. C. 1877, § 717; R. C. 1899, § 3679.]

§ 5125. **Witness takes if entitled to share in estate.** 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 of the other devisees or legatees named in the will in proportion to and out of the parts devised or bequeathed to them. [Civ. C. 1877, § 718; R. C. 1899, § 3680.]

§ 5126. **Subsequent incompetency of witness does not avoid will.** 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 allowance of the will, if it is otherwise satisfactorily proved. [Civ. C. 1877, § 718; R. C. 1899, § 3681.]

§ 5127. **Feloniously causing death of another, bar to taking under his will.** No person who has been 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 was dead. [R. C. 1895, § 3682.]

§ 5128. **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 like manner as if title thereto was 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. 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. [Civ. C. 1877, § 719; R. C. 1899, § 3683.]

ARTICLE 2.—INTERPRETATION OF WILLS AND EFFECT OF VARIOUS PROVISIONS.

§ 5129. **Intention of testator governs.** A will is to be construed according to the intention of the testator. When his intention cannot have effect to its full extent it must have effect as far as possible. [Civ. C. 1877, § 720; R. C. 1899, § 3684.]

§ 5130. **Will excludes oral declarations.** 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. [Civ. C. 1877, § 721; R. C. 1899, § 3685.]

§ 5131. **Rules of interpretation.** In interpreting a will, subject to the laws of this state the rules prescribed by the following sections of this chapter are to be observed, unless an intention to the contrary clearly appears. [Civ. C. 1877, § 722; R. C. 1899, § 3686.]

§ 5132. **Construed together, if several.** Several testamentary instruments executed by the same testator are to be taken and construed together as one instrument. [Civ. C. 1877, § 723; R. C. 1899, § 3687.]

§ 5133. **Parts construed together. If irreconcilable, latter prevails.** All parts of a will are to be construed in relation to each other, and so as if possible to form one consistent whole, but when several parts are absolutely irreconcilable the latter must prevail. [Civ. C. 1877, § 724; R. C. 1899, § 3688.]

§ 5134. **Distinct devise not affected by words less clear.** 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. [Civ. C. 1877, § 725; R. C. 1899, § 3689.]

§ 5135. **Ambiguities explained by reference to other parts.** When 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. [Civ. C. 1877, § 726; R. C. 1899, § 3690.]

§ 5136. **Words 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. [Civ. C. 1877, § 727; R. C. 1899, § 3691.]

§ 5137. **Give every expression effect.** The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render some of the expressions inoperative. [Civ. C. 1877, § 728; R. C. 1899, § 3692.]

§ 5138. **So as to prevent intestacy.** Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy. [Civ. C. 1877, § 729; R. C. 1899, § 3693.]

§ 5139. **Technical words.** Technical words in a will are to be taken in their technical sense unless the context clearly indicates a contrary intention. [Civ. C. 1877, § 730; R. C. 1899, § 3694.]

§ **5140. Same. Unnecessary.** Technical words are not necessary to give effect to any species of disposition by will. [Civ. C. 1877, § 731; R. C. 1899, § 3695.]

§ **5141. Term "heirs" not requisite to devise 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. [Civ. C. 1877, § 732; R. C. 1899, § 3696.]

§ **5142. Property embraced in power passes by will.** Real or personal property embraced in a power to devise passes by a will purporting to devise all the real or personal property of a testator. [Civ. C. 1877, § 733; R. C. 1899, § 3697.]

§ **5143. When all property passes.** 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. [Civ. C. 1877, § 734; R. C. 1899, § 3698.]

§ **5144. Devise of residue passes what.** 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. [Civ. C. 1877, § 735; R. C. 1899, § 3699.]

§ **5145. Bequest of residue passes what.** 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. [Civ. C. 1877, § 736; R. C. 1899, § 3700.]

§ **5146. When passes to those entitled to succeed.** A testamentary disposition to "heirs," "relations," "nearest relations," "representatives," "legal representative," or "personal representative," or "family," "issue," "descendants," "nearest," or "next of kin" of any person without other words of qualification and 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 code. [Civ. C. 1877, § 737; R. C. 1899, § 3701.]

§ **5147. When words of donation and not limitation.** The terms mentioned in the last section are used as words of donation and not 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. [Civ. C. 1877, § 738; R. C. 1899, § 3702.]

§ **5148. Postponed possession.** 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. [Civ. C. 1877, § 739; R. C. 1899, § 3703.]

§ **5149. Class includes all.** 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 future period it includes also all persons coming within the description before the time to which possession is postponed. [Civ. C. 1877, § 740; R. C. 1899, § 3704.]

§ **5150. 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. [Civ. C. 1877, § 741; R. C. 1899, § 3705.]

Governed by law of domicile of testator. Penfield v. Tower, 1 N. D. 216, 46 N. W. 413.

Real estate converted into money is governed by the law of the domicile of testator at the time of his death. Penfield v. Tower, 1 N. D. 216, 46 N. W. 413.

§ **5151. Unborn child included in 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. [Civ. C. 1877, § 742; R. C. 1899, § 3706.]

§ **5152. How imperfect description corrected.** 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 intention cannot be received. [Civ. C. 1877, § 743; R. C. 1899, § 3707.]

§ **5153. Testamentary dispositions vest at death.** Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death. [Civ. C. 1877, § 744; R. C. 1899, § 3708.]

§ **5154. Divested only by precise contingency.** A testamentary disposition when vested, cannot be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose. [Civ. C. 1877, § 745; R. C. 1899, § 3709.]

§ **5155. When disposition fails on death of devisee.** 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 5123. [Civ. C. 1877, § 746; R. C. 1899, § 3710.]

§ **5156. Interests in remainder unaffected.** The death of a devisee or legatee of a limited interest before the testator's death does not defeat the interests of persons in remainder who survive the testator. [Civ. C. 1877, § 747; R. C. 1899, § 3711.]

§ **5157. 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 be defeated. [Civ. C. 1877, § 748; R. C. 1899, § 3712.]

§ **5158. Condition precedent.** A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect. [Civ. C. 1877, § 749; R. C. 1899, § 3713.]

§ **5159. When disposition on condition vests.** When a testamentary disposition is made upon a condition precedent nothing vests until the condition is fulfilled, except when 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. [Civ. C. 1877, § 750; R. C. 1899, § 3714.]

§ **5160. When condition 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. [Civ. C. 1877, § 751; R. C. 1899, § 3715.]

§ **5161. Condition subsequent.** 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. [Civ. C. 1877, § 752; R. C. 1899, § 3716.]

§ **5162. Owners in common.** A devise or legacy given to more than one person vests in them as owners in common. [Civ. C. 1877, § 753; R. C. 1899, § 3717.]

§ **5163. Advancement not ademption of legacy.** Advancements or gifts are not to be taken as ademptions of general legacies, unless such intention is expressed by the testator in writing. [Civ. C. 1877, § 754; R. C. 1899, § 3718.]

ARTICLE 3.—GENERAL PROVISIONS.

§ **5164. Legacies classified.** 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 it is 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. [Civ. C. 1877, § 755; R. C. 1899, § 3719.]

§ **5165. Property chargeable with payment of debts.** 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 in this code and the probate code. [Civ. C. 1877, § 756; R. C. 1895, § 3720.]

§ **5166. Order of resort for payment of debts.** The property of a testator, except as otherwise specifically provided in this code and the probate code must be resorted to for the payment of debts in the following order:

1. The property which is expressly appropriated by the will for the payment of the debts.
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; and,
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. [Civ. C. 1877, § 757; R. C. 1895, § 3721.]

§ **5167. Same for payment of legacies.** The property of a testator, except as otherwise specifically provided in this code and the probate code, 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 specifically devised or bequeathed. [Civ. C. 1877, § 758; R. C. 1895, § 3722.]

§ **5168. Preferred legacies.** Legacies to husband, widow or kindred of any class are chargeable only after legacies to persons not related to the testator. [Civ. C. 1877, § 759; R. C. 1899, § 3723.]

§ **5169. Rules governing abatement.** Abatement takes place in any class only as between legacies of that class, unless a different intention is expressed in the will. [Civ. C. 1877, § 760; R. C. 1899, § 3724.]

§ **5170. Sale of property.** 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 county court to sell the property devised or bequeathed in the cases herein provided. [Civ. C. 1877, § 761; R. C. 1899, § 3725.]

§ **5171. When rights of purchaser not impaired by devise.** The rights of a purchaser or incumbrancer 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 the instrument containing such devise is duly proved as a will, and recorded in the office of the county court having jurisdiction thereof, or unless written notice of such devise is filed with the county judge of the county where the real property is situated within four years after the devisor's death. [Civ. C. 1877, § 762; R. C. 1899, § 3726.]

§ **5172. Duty of legatees for life.** When 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. [Civ. C. 1877, § 763; R. C. 1899, § 3727.]

§ **5173. Income after death.** In case of a bequest of the interest or income of a certain sum or fund the income accrues from the testator's death. [Civ. C. 1877, § 764; R. C. 1899, § 3728.]

§ **5174. Legacy in fear of death satisfied before death.** A legacy or a gift in contemplation, fear or peril of death may be satisfied before death. [Civ. C. 1877, § 765; R. C. 1899, § 3729.]

§ **5175. 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. [Civ. C. 1877, § 766; R. C. 1899, § 3730.]

§ **5176. Interest after due.** 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. [Civ. C. 1877, § 767; R. C. 1899, § 3731.]

§ **5177. Intention controls.** The four preceding sections are in all cases to be controlled by a testator's express intention. [Civ. C. 1877, § 768; R. C. 1899, § 3732.]

§ **5178. Who entitled to letters testamentary.** When 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 like manner as if he had been named executor. [Civ. C. 1877, § 769; R. C. 1899, § 3733.]

§ **5179. Authority to executor to appoint, void.** An authority to an executor to appoint an executor is void. [Civ. C. 1877, § 770; R. C. 1899, § 3734.]

§ **5180. Executor has no power before qualifying. Exception.** 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. [Civ. C. 1877, § 771; R. C. 1899, § 3735.]

§ **5181. Executor of executor.** No executor of an executor as such, has any power over the estate of the first testator. [Civ. C. 1877, § 772; R. C. 1899, § 3736.]

§ **5182. Will includes codicil.** The term "will" as used in this code includes all codicils as well as wills. [Civ. C. 1877, § 773; R. C. 1899, § 3737.]

§ **5183. What law governs.** Except as otherwise provided the validity and interpretation of wills is 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. [Civ. C. 1877, § 774; R. C. 1899, § 3738.]

Provisions of will relating to personal property situated in this state must be construed according to law of domicile of testator at time of his death. Crandall

v. Barker, 8 N. D. 264, 78 N. W. 347; Knox v. Barker, 8 N. D. 272, 78 N. W. 352; Penfield v. Tower, 1 N. D. 216, 46 N. W. 413.

§ 5184. Liability of devisees and legatees. Those to whom property is given by will are liable for the obligations of the testator in the cases and to the extent prescribed by the probate code. [Civ. C. 1877, § 775; R. C. 1895, § 3739.]

CHAPTER 43.

SUCCESSION.

§ 5185. Succession defined. Succession is the coming in of another to take the property of one who dies without disposing of it by will. [Civ. C. 1877, § 776; R. C. 1899, § 3740.]

§ 5186. Property passes to heirs. 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 county court and to the possession of any administrator appointed by that court for the purpose of administration. [Civ. C. 1877, § 777; R. C. 1899, § 3741.]

Administrator has power to reduce real estate to actual possession, but not required to do so. Statute permissive only. Territory v. Bramble, 2 Dak. 189, 3 N. W. 945.

Testamentary disposition of property can be made only by will. Moore Ex. v. Weston, 13 N. D. 574, 102 N. W. 163.

Husband and children become tenant in common of property of wife on her death, subject to temporary right of possession by administrator for sole purposes of administration. Johnson v. Brauch, 9 S. D. 116, 68 N. W. 173.

Title vests at once in heir subject to lien of administrator for purposes of administration. Elder v. Mining & Milling Co., 9 S. D. 636, 70 N. W. 1060.

§ 5187. Order of succession. 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 code, and 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 lawful 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 lawful 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 lawful 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 the descendants are in the same degree of kindred to the decedent, they share equally; otherwise, they take according to the right of representation. 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 lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the children living and the issue of the deceased child or children by right of representation.

2. If the decedent leaves no issue and the estate does not exceed in value the sum of five thousand dollars, all the estate goes to the surviving husband or wife, and all property in excess of five thousand dollars in value, one-half thereof goes to the surviving husband or wife and the other half goes to the decedent's father, and if he is dead, to the decedent's mother, and if both

father and mother are dead and the decedent leaves brothers or sisters or children of a deceased brother or sister, then in equal shares to the brothers and sisters of decedent and to the children of any deceased brother or sister by right of representation. If the decedent leaves no issue, nor husband, nor wife, the estate must go to the father, and if he is dead, to the mother. If the decedent leaves a surviving husband or wife and no issue and no father nor mother, nor brother, nor sister, nor children of a deceased brother or sister, then the whole estate goes to the surviving husband or wife.

3. If there is no issue, nor husband, nor wife, nor father, nor mother, then in equal shares to the brothers and sisters of the decedent and to the children of any deceased brother or sister by right of representation.

4. If the decedent leaves no issue, nor husband, nor wife, nor father and no brother or sister is living at the time of his death, the estate goes to his mother to the exclusion of the issue, if any, of deceased brothers or sisters.

5. If the decedent leaves no issue, nor husband, nor wife and no father, nor mother, nor brother, nor sister, the estate must go to the next of 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 ancestors must be preferred to those claiming through an ancestor more remote. However, 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 and not having 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 children of the same parent and to the issue of any such other children who are dead, by right of representation.

6. If at the death of such child, who dies under age, not having been married, all the other children of the 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 issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation.

7. If the decedent leaves no husband, wife or kindred, the estate escheats to the state for the support of the common schools. [Civ. C. 1877, § 778; 1893, ch. 50, § 1; R. C. 1899, § 3742; 1903, ch. 94.]

§ 5188. **Dower and courtesy abolished.** Dower and courtesy are abolished. [Civ. C. 1877, § 779; 1893, ch. 52, § 1; R. C. 1899, § 3743.]

§ 5189. **Inheritance by illegitimate child.** Every illegitimate child is an heir of the person who in writing signed in the presence of a competent witness 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; but he does not represent his father or mother by inheriting any part of the estate of his or her 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 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. [Civ. C. 1877, § 780; R. C. 1899, § 3744.]

If adopted under section 4118, is clothed with full rights of inheritance of legitimate child. Eddie v. Eddie, 8 N. D. 376, 79 N. W. 856.

§ **5190. Inheritance from illegitimate child.** 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. [Civ. C. 1877, § 781; R. C. 1899, § 3745.]

§ **5191. How degree of kindred established.** The degree of kindred is established by the number of generations and each generation is called a degree. [Civ. C. 1877, § 782; R. C. 1899, § 3746.]

§ **5192. Lineal and collateral.** The series of degrees form 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. [Civ. C. 1877, § 783; R. C. 1899, § 3747.]

§ **5193. 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. [Civ. C. 1877, § 784; R. C. 1899, § 3748.]

§ **5194. Degrees 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. [Civ. C. 1877, § 785; R. C. 1899, § 3749.]

§ **5195. Computation of degrees in collateral line.** In the collateral line the degrees are counted by generations from one of the relations up to the common ancestor and from the common ancestor to the other relations. 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 degree and so on. [Civ. C. 1877, § 786; R. C. 1899, § 3750.]

§ **5196. Kindred of half blood inherit.** 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 ancestors must be excluded from such inheritance. [Civ. C. 1877, § 787; R. C. 1899, § 3751.]

§ **5197. Advancements deducted from 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. [Civ. C. 1877, § 788; R. C. 1899, § 3752.]

In order to exclude heir amount of advancement must equal or exceed share to which heir would otherwise be entitled. Aspey v. Barry, 13 S. D. 220, 83 N. W. 91.

§ **5198. Excess not refunded.** 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. [Civ. C. 1877, § 789; R. C. 1899, § 3753.]

§ **5199. Advancements 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 as such by the child, or other successor or heir. [Civ. C. 1877, § 790; R. C. 1899, § 3754.]

§ 5200. **Expressed value governs.** 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. [Civ. C. 1877, § 791; R. C. 1899, § 3755.]

§ 5201. **Deducted from issue of person to whom made.** If any child or other lineal descendant receiving 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 like manner as if the advancement had been made directly to them. [Civ. C. 1877, § 792; R. C. 1899, § 3756.]

§ 5202. **Inheritance by representation.** 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. [Civ. C. 1877, § 793; R. C. 1899, § 3757.]

§ 5203. **Aliens may take.** Aliens may take in all cases by succession as well as citizens; and no person, capable of succeeding under the provisions of this chapter, is precluded from such succession by reason of the alienage of any relative. [Civ. C. 1877, § 794; R. C. 1899, § 3758.]

§ 5204. **If there are no heirs, escheats to the state.** If there is no one capable of succeeding under the preceding sections and the title fails from a defect of heirs the property of a decedent devolves and escheats to the state and an action for the recovery of such property and to reduce it into the possession of the state or for its sale and conveyance may be brought by the state's attorney in the district court of the county or judicial subdivision in which the property is situated. [Civ. C. 1877, § 795; R. C. 1899, § 3759.]

§ 5205. **Subject to charges and trusts.** Real property passing to the state under the preceding section, whether held by the state or its grantees, is subject to the same charges and trusts to which it would have been subject if it had passed by succession. [Civ. C. 1877, § 796; R. C. 1899, § 3760.]

§ 5206. **Liability of those who succeed.** Those who succeed to the property of a decedent are liable for his obligations in the cases and to the extent prescribed by the probate code. [Civ. C. 1877, § 797; R. C. 1899, § 3761.]

CHAPTER 44.

OBLIGATIONS.

Article 1.—Definition of Obligations.

§ 5207. **Obligation defined.** An obligation is a legal duty by which a person is bound to do or not to do a certain thing. [Civ. C. 1877, § 798; R. C. 1899, § 3762.]

§ 5208. **Origin and enforcement.** An obligation arises either from:

1. The contract of the parties; or,
2. The operation of law.

An obligation arising from operation of law may be enforced in the manner provided by law or by civil action or proceeding. [Civ. C. 1877, § 799; R. C. 1899, § 3763.]

ARTICLE 2.—INTERPRETATION OF OBLIGATIONS.

§ 5209. **Rules of interpretation.** The rules which govern the interpretation of contracts are prescribed by article 7 of chapter 45. Other obligations are interpreted by the same rules by which statutes of a similar nature are interpreted. [Civ. C. 1877, § 800; R. C. 1899, § 3764.]

§ 5210. **Obligations classified.** An obligation imposed upon several persons, or a right created in favor of several persons, may be:

1. Joint.
2. Several; or,
3. Joint and several. [Civ. C. 1877, § 801; R. C. 1899, § 3765.]

§ 5211. **When presumed joint.** An obligation imposed upon several persons or a right created in favor of several persons is presumed to be joint and not several, except in the special cases mentioned in the article on the interpretation of contracts. This presumption in the case of a right can be overcome only by express words to the contrary. [Civ. C. 1877, § 802; R. C. 1899, § 3766.]

Right of offset by surety. Clark v. Sullivan, 2 N. D. 103, 49 N. W. 416.
Payment by one joint debtor. Grovenor v. Signor, 10 N. D. 503, 88 N. W. 278.

§ 5212. **Contribution.** A party to a joint, or joint and several obligation who satisfies more than his share of the claim against all may require a proportionate contribution from all the parties joined with him. [Civ. C. 1877, § 803; R. C. 1899, § 3767.]

§ 5213. **Conditional defined.** An obligation is conditional when the rights or duties of any party thereto depend upon the occurrence of an uncertain event. [Civ. C. 1877, § 804; R. C. 1899, § 3768.]

§ 5214. **Conditions classified.** Conditions may be precedent, concurrent or subsequent. [Civ. C. 1877, § 805; R. C. 1899, § 3769.]

§ 5215. **Condition precedent.** A condition precedent is one which is to be performed before some right dependent thereon accrues or some act dependent thereon is performed. [Civ. C. 1877, § 806; R. C. 1899, § 3770.]

Conditions precedent must be performed, when. Johnson v. Schar, 9 S. D. 536, 70 N. W. 838.

§ 5216. **Concurrent.** Conditions concurrent are those which are mutually dependent and are to be performed at the same time. [Civ. C. 1877, § 807; R. C. 1899, § 3771.]

§ 5217. **Subsequent.** A condition subsequent is one referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the conditions. [Civ. C. 1877, § 808; R. C. 1899, § 3772.]

§ 5218. **Prerequisites to enforcement of obligation.** Before any party to an obligation can require another party to perform any act under it he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent, so imposed upon him, on the like fulfillment by the other party, except as provided by the next section. [Civ. C. 1877, § 809; R. C. 1899, § 3773.]

§ 5219. **Enforcement without performance, when performance waived.** If a party to an obligation gives notice to another before the latter is in default that he will not perform the same upon his part and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation, without previously performing or offering to perform any conditions upon his part in favor of the former party. [Civ. C. 1877, § 810; R. C. 1899, § 3774.]

Refusal to perform contract when performance required, effect of. Stanford v. McGill, 6 N. D. 536, 72 N. W. 938.
Refusal to perform relieves other party of offer to perform. Gleckler v. Slavens, 5 S. D. 364, 59 N. W. 323; McPherson v. Fargo, 10 S. D. 611, 74 N. W. 1057.

§ 5220. **Impossible or unlawful conditions are void.** A condition in a contract, the fulfillment of which is impossible or unlawful within the meaning of the article on the subject of contracts or which is repugnant to the nature of the interest created by the contract is void. [Civ. C. 1877, § 811; R. C. 1899, § 3775.]

§ 5221. **Forfeiture strictly interpreted against party benefited.** A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created. [Civ. C. 1877, § 812; R. C. 1899, § 3776.]

Forfeitures are not favored; must have substantial basis. Enos v. Insurance Co., 4 S. D. 639, 57 N. W. 919.

Waiver of contract of sale of land waiver of forfeiture, when. Pier v. Lee, 14 S. D. 600, 86 N. W. 642.

§ 5222. **Option to perform alternative obligations.** If an obligation requires the performance of one of two acts in the alternative the party required to perform has the right of selection, unless it is otherwise provided by the terms of the obligation. [Civ. C. 1877, § 813; R. C. 1899, § 3777.]

§ 5223. **Option passes when not exercised within time.** If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party. [Civ. C. 1877, § 814; R. C. 1899, § 3778.]

§ 5224. **Must select one in its entirety.** The party having the right of selection between alternative acts must select one of them in its entirety and cannot select part of one and part of another without the consent of the other party. [Civ. C. 1877, § 815; R. C. 1899, § 3779.]

§ 5225. **Valid one prevails.** If one of the alternative acts required by an obligation is such as the law will not enforce, or becomes unlawful or impossible of performance the obligation is to be interpreted as though the other stood alone. [Civ. C. 1877, § 816; R. C. 1899, § 3780.]

Article 3.—Transfer of Obligations.

§ 5226. **Burden transferred with beneficiary's consent.** The burden of an obligation may be transferred with the consent of the party entitled to its benefit, but not otherwise, except as provided by section 5235. [Civ. C. 1877, § 817; R. C. 1899, § 3781.]

§ 5227. **Right arising out of may be transferred.** A right arising out of an obligation is the property of the person to whom it is due and may be transferred as such. [Civ. C. 1877, § 818; R. C. 1899, § 3782.]

§ 5228. **Non-negotiable contract transferred by indorsement.** A non-negotiable written contract for the payment of money or personal property may be transferred by indorsement in like manner with negotiable instruments. Such indorsement shall transfer all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the indorsement. [Civ. C. 1877, § 819; R. C. 1899, § 3783.]

Contract transferred without indorsement, when. Kirby v. Jameson, 9 S. D. 8, 67 N. W. 854.

In right of action for breach of contract on non-negotiable note after transfer by indorsement constitutes no defense, when. State Bank v. Hayes, 16 S. D. 365, 92 N. W. 1068.

§ 5229. **Certain covenants run with land.** Certain covenants contained in grants of estates in real property are appurtenant to such estates and pass

with them so as to bind the assigns of the covenantor and to vest in the assigns of the covenantee in the same manner as if they had personally entered into them. Such covenants are said to run with the land. [Civ. C. 1877, § 819; R. C. 1899, § 3784.]

Covenants not running with land are of seizin of right to convey and against incumbrances. Gale v. Frazer, 4 Dak. 196, 30 N. W. 138.

Covenants of seizen do not run with land. Bowen v. Wolcott, 1 N. D. 497, 48 N. W. 426.

Covenants with land include implied as well as specific covenants. N. P. Ry. Co. v. McClure, 9 N. D. 73, 81 N. W. 52.

§ **5230. What so run.** The only covenants which run with the land are those specified in this article and those which are incidental thereto. [Civ. C. 1877, § 820; R. C. 1899, § 3785.]

§ **5231. Made for benefit of property, runs.** Every covenant contained in a grant of an estate in real property which is made for the direct benefit of the property or some part of it then in existence runs with the land. [Civ. C. 1877, § 821; R. C. 1899, § 3786.]

§ **5232. What last section includes.** The last section includes covenants of warranty, for quiet enjoyment or for further assurance on the part of a grantor and covenants for the payment of rent, or of taxes or assessments upon the land on the part of a grantee. [Civ. C. 1877, § 822; R. C. 1899, § 3787.]

§ **5233. Covenants limited to certain assigns.** A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property and made by the covenantor expressly for his assigns or to the assigns of the covenantee runs with the land so far only as the assigns thus mentioned are concerned. [Civ. C. 1877, § 823; R. C. 1899, § 3788.]

§ **5234. Binds only owner of whole estate.** A covenant running with the land binds those only who acquire the whole estate of the covenantor in some part of the property. [Civ. C. 1877, § 824; R. C. 1899, § 3789.]

§ **5235. Liable while holding only.** No one merely by reason of having acquired an estate subject to a covenant running with the land is liable for breach of the covenant before he acquired the estate, or after he has parted with it or ceased to enjoy its benefits. [Civ. C. 1877, § 825; R. C. 1899, § 3790.]

§ **5236. Burden of benefit apportioned.** When several persons, holding by several titles, are subject to the burden or entitled to the benefit of a covenant running with the land, it must be apportioned among them according to the value of the property subject to it held by them respectively, if such value can be ascertained and if not, then according to their respective interests in point of quantity. [Civ. C. 1877, § 826; R. C. 1899, § 3791.]

Article 4.—Extinction of Obligations.

§ **5237. Full performance extinguishes.** Full performance of an obligation by the party whose duty it is to perform it or by any other person on his behalf and with his assent, if accepted by the creditor, extinguishes it. [Civ. C. 1877, § 827; R. C. 1899, § 3792.]

§ **5238. Performance by one extinguishes liability of all.** Performance of an obligation by one of several persons who are jointly liable under it extinguishes the liability of all. [Civ. C. 1877, § 828; R. C. 1899, § 3793.]

§ **5239. Performance to one extinguishes. Exception.** An obligation in favor of several persons is extinguished by performance rendered to any of them, except in the case of a deposit made by owners in common or in joint

ownership which is regulated by the chapter on deposit. [Civ. C. 1877, § 829; R. C. 1899, § 3794.]

§ 5240. **Performance as directed extinguishes.** If a creditor or any one of two or more joint creditors at any time directs the debtor to perform his obligation in a particular manner, the obligation is extinguished by performance in that manner, even though the creditor does not receive the benefit of such performance. [Civ. C. 1877, § 830; R. C. 1899, § 3795.]

§ 5241. **When partial performance extinguishes pro tanto.** A partial performance of an indivisible obligation extinguishes a corresponding proportion thereof, if the benefit of such performance is voluntarily retained by the creditor, but not otherwise. If such partial performance is of such a nature that the creditor cannot avoid retaining it without injuring his own property, his retention thereof is not presumed to be voluntary. [Civ. C. 1877, § 831; R. C. 1899, 3796.]

§ 5242. **Payment defined.** Performance of an obligation for the delivery of money only is called payment. [Civ. C. 1877, § 832; R. C. 1899, § 3797.]

Protest can never make that involuntary which in its absence would be voluntary. Wessel v. Land Co., 3 N. D. 160, 54 N. W. 922.

What constitutes payment. Krump v. Bank, 8 N. D. 75, 76 N. W. 995; Lokken v. Miller, 9 N. D. 512, 84 N. W. 368; Green v. Hughitt Township, 5 S. D. 452, 59 N. W. 224; Star Wagon Co. v. Matthiessen, 3 Dak. 233, 14 N. W. 107.

§ 5243. **Performance, how applied when there are several obligations.** When a debtor under several obligations to another does an act by way of performance in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied as follows:

1. If at the time of the performance the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation is manifested to the creditor, it must be so applied.

2. If no such application is then made the creditor within a reasonable time after such performance may apply it toward the extinction of any obligation, performance of which was due to him from the debtor at the time of such performance; except that if similar obligations were due to him, both individually and as a trustee, he must unless otherwise directed by the debtor apply the performance to the extinction of all such obligations in equal proportion; and an application once made by the creditor cannot be rescinded without the consent of the debtor.

2. If neither party makes such application within the time prescribed herein the performance must be applied to the extinction of obligations in the following order and if there is more than one obligation of a particular class, to the extinction of all in that class ratably:

(a) Of interest due at the time of the performance.
(b) Of principal due at that time.
(c) Of the obligation earliest in date of maturity.
(d) Of an obligation not secured by a lien or collateral undertaking.
(e) Of an obligation secured by a lien or collateral undertaking. [Civ. C. 1877, § 833; R. C. 1899, § 3798.]

Direction as to application of payment and not thereafter changed is sufficient. Bank v. Roberts, 2 N. D. 195, 49 N. W. 722.

How payments are to be applied. Bank v. Roberts, 2 N. D. 195, 49 N. W. 722; Stebbins v. Lardner, 2 S. D. 127, 48 N. W. 847.

Creditor may apply on any debt, when. Fargo v. Jennings, 8 S. D. 99, 65 N. W. 433.

§ 5244. **Obligation extinguished by offer.** An obligation is extinguished by an offer of performance made in conformity to the rules herein prescribed and with intent to extinguish the obligation. [Civ. C. 1877, § 834; R. C. 1899, § 3799.]

Where the covenants of the contract are mutual and dependent, vendee can place vendor in default by an offer to perform; if no offer made vendee cannot rescind or recover payments made. Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037.

§ **5245. Not by offer of partial performance.** An offer of partial performance is of no effect. [Civ. C. 1877, § 835; R. C. 1899, § 3800.]

§ **5246. Must be made by or with assent of debtor.** An offer of performance must be made by the debtor or by some person on his behalf and with his assent. [Civ. C. 1877, § 836; R. C. 1899, § 3801.]

§ **5247. To creditor or one authorized by him.** An offer of performance must be made to the creditors, or to any one or two or more joint creditors or to a person authorized by one or more of them to receive or collect what is due under the obligation if such creditor or authorized person is present at the place where the offer may be made; and if not wherever the creditor may be found. [Civ. C. 1877, § 837; R. C. 1899, § 3802.]

§ **5248. Where may be made.** In the absence of an express provision to the contrary an offer of performance may be made at the option of the debtor:

1. At any place appointed by the creditor; or,
2. Wherever the person to whom the offer ought to be made can be found: or,
3. If such person cannot with reasonable diligence be found within this state and within a reasonable distance from his residence or place of business, or if he evades the debtor, then at his residence or place of business, if the same can with reasonable diligence be found within the state; or,
4. If this cannot be done, then at any place within this state. [Civ. C. 1877, § 838; R. C. 1899, § 3803.]

§ **5249. Must be made at the time fixed.** When an obligation fixes a time for its performance an offer of performance must be made at that time within reasonable hours and not before nor afterwards. [Civ. C. 1877, § 839; R. C. 1899, § 3804.]

§ **5250. When time not fixed.** When an obligation does not fix a time for its performance, an offer of performance may be made at any time before the debtor upon a reasonable demand has refused to perform. [Civ. C. 1877, § 840; R. C. 1899, § 3805.]

§ **5251. When may be made after due.** When delay in performance is capable of exact and entire compensation and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditor or by any other person in the meantime. [Civ. C. 1877, § 841; R. C. 1899, § 3806.]

Failure to perform in time bars defaulting person from rights under contract. Fargusson v. Talcott, 7 N. D. 183, (and note), 73 N. W. 207.

§ **5252. Must be in good faith.** An offer of performance must be made in good faith and in such manner as is most likely under the circumstances to benefit the creditor. [Civ. C. 1877, § 842; R. C. 1899, § 3807.]

§ **5253. Free from condition.** An offer of performance must be free from any conditions which the creditor is not bound on his part to perform. [Civ. C. 1877, § 843; R. C. 1899, § 3808.]

§ **5254. Must be able and willing.** An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer. [Civ. C. 1877, § 844; R. C. 1899, § 3809.]

§ **5255. Production unnecessary, if offer refused.** The thing to be delivered, if any, need not in any case be actually produced upon an offer of performance unless the offer is accepted. [Civ. C. 1877, § 845; R. C. 1899, § 3810.]

Tender not necessary after unqualified refusal to accept. McPherson v. Fargo, 10 S. D. 611, 74 N. W. 1057.

Person making tender must produce money. Stakke v. Chapman, 13 S. D. 269, 83 N. W. 261.

§ 5256. **Unmixed with other things.** A thing, when offered by way of performance, must not be mixed with other things from which it cannot be separated immediately and without difficulty. [Civ. C. 1877, § 846; R. C. 1899, § 3811.]

§ 5257. **Contingent offer.** When a debtor is entitled to the performance of a condition precedent to or concurrent with performance on his part, he may make his offer to depend upon the due performance of such condition. [Civ. C. 1877, § 847; R. C. 1899, § 3812.]

§ 5258. **Receipt obligatory.** A debtor has a right to require from his creditor a written receipt for any property delivered in performance of his obligation. [Civ. C. 1877, § 848; R. C. 1899, § 3813.]

§ 5259. **Obligation for payment extinguished by deposit.** An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor with some bank of deposit within this state of good repute and notice thereof is given to the creditor. [Civ. C. 1877, § 849; R. C. 1899, § 3814.]

Offer to pay taxes due stops interest. Dakota Loan & Trust Co. v. Codington Co., 9 S. D. 159, 68 N. W. 314.

Deposit in name of creditor necessary. Stakke v. Chapman, 13 S. D. 269, 83 N. W. 261.

Tender must be kept good as provided in statute. Brakhage v. Tracy, 13 S. D. 343, 83 N. W. 363.

§ 5260. **Objections waived.** All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer and which could be then obviated by him, are waived by the creditor, if not then stated. [Civ. C. 1877, § 850; R. C. 1899, § 3815.]

§ 5261. **When title to thing offered passes.** The title to a thing duly offered in performance of an obligation passes to the creditor if the debtor at the time signifies his intention to that effect. [Civ. C. 1877, § 851; R. C. 1899, § 3816.]

§ 5262. **Deposit of thing offered.** The person offering a thing, other than money, by way of performance must, if he means to treat it as belonging to the creditor, retain it as a depositary for hire until the creditor accepts it, or until he has given reasonable notice to the creditor that he will retain it no longer and if with reasonable diligence he can find a suitable depositary therefor, until he has deposited it with such person. [Civ. C. 1877, § 852; R. C. 1899, § 3817.]

§ 5263. **Obligation extinguished by offer and deposit.** An obligation for the delivery of money, property or a conveyance of property is not discharged by an offer of performance nor any of its incidents affected, unless the thing offered, if money, is deposited as provided in section 5259, or, if other than money, is deposited for the creditor with some depositary of good repute at the place of performance and notice of such deposit in either case given to the creditor. After such deposit and notice the thing deposited shall be at the risk and expense of the creditor. [Civ. C. 1877, § 853; R. C. 1895, § 3818.]

§ 5264. **Creditor gratuitous depositary.** If anything is given to a creditor by way of performance which he refuses to accept as such, he is not bound to return it without demand; but if he retains it he is a gratuitous depositary thereof. [Civ. C. 1877, § 854; R. C. 1899, § 3819.]

ARTICLE 5.—PERFORMANCE OF OBLIGATIONS OR OFFER.

§ 5265. When want of performance or offer excused. The want of performance of an obligation or of an offer of performance in whole or in part or any delay therein is excused by the following causes to the extent to which they operate:

1. When such performance or offer is prevented or delayed by the act of the creditor or by the operation of law, even though there may have been a stipulation that this shall not be an excuse.

2. When it is prevented or delayed by an irresistible superhuman cause or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary; or,

3. When the debtor is induced not to make it by any act of the creditor intended or naturally tending to have that effect done at or before the time at which such performance or offer may be made and not rescinded before that time. [Civ. C. 1877, § 855; R. C. 1899, § 3820.]

§ 5266. Debtor entitled to benefits. If the performance of an obligation is prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties. [Civ. C. 1877, § 856; R. C. 1899, § 3821.]

Party preventing performance barred from benefit from failure of other party to perform. Shelly v. Mikkelson, 5 N. D. 22, 63 N. W. 210.

§ 5267. Ratable proportion of consideration. If performance of an obligation is prevented by any cause excusing performance other than the act of the creditor, the debtor is entitled to a ratable proportion of the consideration to which he would have been entitled upon full performance according to the benefit which the creditor receives from the actual performance. [Civ. C. 1877, § 857; R. C. 1899, § 3822.]

§ 5268. What equivalent to offer and refusal. A refusal by a creditor to accept performance made before an offer thereof is equivalent to an offer and refusal, unless before performance is actually due he gives notice to the debtor of his willingness to accept it. [Civ. C. 1877, § 858; R. C. 1899, § 3823.]

ARTICLE 6.—ACCORD AND SATISFACTION OF OBLIGATIONS.

§ 5269. Accord defined. An accord is an agreement to accept in extinction of an obligation something different from or less than that to which the person agreeing to accept is entitled. [Civ. C. 1877, § 859; R. C. 1899, § 3824.]

Oral agreement to render satisfaction at a future time insufficient. Accord must be by delivery and reception of thing agreed to be accepted in satisfaction. Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037.

Not only an agreement to accept less but an actual acceptance required. Carpenter v. Railroad Co., 7 S. D. 584, 64 N. W. 1120.

Obligation not extinguished unless accord fully executed. Troy Mining Co. v. White, 10 S. D. 475, 74 N. W. 236.

Sufficient allegation that the accord agreement was executed by acceptance of the consideration. Troy Mining Co. v. Thomas, 15 S. D. 238, 88 N. W. 106.

§ 5270. Full execution only extinguishes. Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed. [Civ. C. 1877, § 860; R. C. 1899, § 3825.]

§ 5271. Acceptance is satisfaction. Acceptance by the creditor of the consideration of an accord extinguishes the obligation and is called satisfaction. [Civ. C. 1877, § 861; R. C. 1899, § 3826.]

§ 5272. Part performance accepted extinguishes. Part performance of an obligation either before or after a breach thereof, when expressly accepted

by the creditor in writing is satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation. [Civ. C. 1877, § 862; R. C. 1899, § 3827.]

Partial performance does not extinguish obligation unless accepted as such. Anderson v. Bank, 4 N. D. 182, 59 N. W. 1029.

Article 7.—Novation.

§ **5273. Defined.** Novation is the substitution of a new obligation for an existing one. [Civ. C. 1877, § 863; R. C. 1899, § 3828.]

§ **5274. How made.** Novation is made:

1. By the substitution of a new obligation between the same parties with intent to extinguish the old obligation.
2. By the substitution of a new debtor in the place of the old one with intent to release the latter; or,
3. By the substitution of a new creditor in place of the old one with intent to transfer the rights of the latter to the former. [Civ. C. 1877, § 864; R. C. 1899, § 3829.]

§ **5275. Made by contract.** Novation is made by contract and is subject to all the rules concerning contracts in general. [Civ. C. 1877, § 865; R. C. 1899, § 3830.]

§ **5276. Rescinding acceptance.** When the obligation of a third person or an order upon such person is accepted in satisfaction, the creditor may rescind such acceptance if the debtor prevents such person from complying with the order or from fufilling the obligation; or if at the time the obligation or order is received, such person is insolvent and this fact is unknown to the creditor; or if before the creditor can with reasonable diligence present the order to the person upon whom it is given, he becomes insolvent. [Civ. C. 1877, § 866; R. C. 1895, § 3831.]

Article 8.—Release.

§ **5277. Extinguishes obligation.** An obligation is extinguished by a release therefrom given to the debtor by the creditor upon a new consideration, or in writing, with or without new consideration. [Civ. C. 1877, § 867; R. C. 1899, § 3832.]

Where one gives new note for less than old note to be extinguished thereby, agreement for such extinguishment must be shown. Bank v. Guthrie, 11 S. D. 517, 78 N. W. 995.

§ **5278. Extends only to known claims.** A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which, if known by him, must have materially affected his settlement with the debtor. [Civ. C. 1877, § 868; R. C. 1899, § 3833.]

§ **5279. Releasing one does not release others.** A release of one of two or more joint debtors does not extinguish the obligations of any of the others unless they are mere guarantors; nor does it affect their right to contribution from him. [Civ. C. 1877, § 869; R. C. 1899, § 3834.]

CHAPTER 45.

CONTRACTS.

ARTICLE 1.—DEFINITION.

§ 5280. Defined. A contract is an agreement to do or not to do a certain thing. [Civ. C. 1877, § 870; R. C. 1899, § 3835.]

§ 5281. Requisites of. It is essential to the existence of a contract that there should be:

1. Parties capable of contracting.
2. Their consent.
3. A lawful object; and,
4. Sufficient cause or consideration. [Civ. C. 1877, § 871; R. C. 1899, § 3836.]

See Gaar, Scott & Co. v. Green, 6 N. D. 48, 58 N. W. 318.

Construction of written contract is for the court. Anderson v. Bank, 6 N. D. 497, 72 N. W. 916.

Consent essential to acceptance. Grissel v. Bank, 12 S. D. 93, 80 N. W. 161.

ARTICLE 2.—PARTIES.

§ 5282. Who may make. All persons are capable of contracting, except minors, persons of unsound mind and persons deprived of civil rights. [Civ. C. 1877, § 872; R. C. 1899, § 3837.]

§ 5283. Minors, etc. Minors and persons of unsound mind have only such capacity as is defined by chapter 2 of this code. [Civ. C. 1877, § 873; R. C. 1899, § 3838.]

§ 5284. Possible to identify parties. It is essential to the validity of the contract, not only that the parties should exist, but that it should be possible to identify them. [Civ. C. 1877, § 874; R. C. 1899, § 3839.]

§ 5285. Beneficiary may enforce. A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it. [Civ. C. 1877, § 875; R. C. 1899, § 3840.]

Stranger cannot enforce a contract though benefited. Parlin v. Hall, 2 N. D. 473, 52 N. W. 405.

One not a party to a contract cannot enforce the same though benefited. Parlin v. Hall, 2 N. D. 473, 52 N. W. 405.

Contract contemplates consideration passing between parties. McArthur v. Dryden, 6 N. D. 438, 71 N. W. 125.

Presupposes a valid contract. McArthur v. Dryden, 6 N. D. 438, 71 N. W. 125.

Stranger cannot intervene upon promise of vendor. Bray v. Booker, 6 N. D. 526, 72 N. W. 933.

ARTICLE 3.—CONSENT.

§ 5286. Requisites of consent. The consent of the parties to a contract must be:

1. Free.
2. Mutual; and,
3. Communicated by each to the other. [Civ. C. 1877, § 876; R. C. 1899, § 3841.]

§ 5287. Rescinded, if not free. A consent which is not free is, nevertheless, not absolutely void, but may be rescinded by the parties in the manner prescribed by the chapter on rescission. [Civ. C. 1877, § 877; R. C. 1899, § 3842.]

§ 5288. What renders apparent consent not free. An apparent consent is not real or free when obtained through:

1. Duress.
2. Menace.
3. Fraud.

4. Undue influence; or,
5. Mistake. [Civ. C. 1877, § 878; R. C. 1899, § 3843.]

§ 5289. When deemed not free. Consent is deemed to have been obtained through one of the causes mentioned in the last section only when it would not have been given had such cause not existed. [Civ. C. 1877, § 879; R. C. 1899, § 3844.]

§ 5290. Duress. Duress consists in:

1. Unlawful confinement of the person of the party or of the husband or wife of such party, or of an ancestor, descendant or adopted child of such party, husband or wife.
2. Unlawful detention of the property of any such person; or,
3. Confinement of such person, lawful in form, but fraudulently obtained or fraudulently made unjustly harassing or oppressive. [Civ. C. 1877, § 880; R. C. 1899, § 3845.]

Payment of illegal tax under protest may be recovered. Elevator Co. v. Bottineau County, 9 N. D. 346, 83 N. W. 212.

Payment of a judgment voluntarily made but under coercion or duress imposed by execution of legal process does not bar appeal. Signor v. Clark, 13 N. D. 35, 99 N. W. 68.

When defendant seeks to avoid liability on account of duress court should instruct jury what constitutes duress. McCormick v. Valsack, 4 S. D. 67, 55 N. W. 145.

Coercion sufficient to avoid a contract, what. McCormick v. Valsack, 4 S. D. 67, 55 N. W. 145.

§ 5291. Menace. Menace consists in a threat:

1. Of such duress as is specified in the first and third subdivisions of the last section.
2. Of unlawful and violent injury to the person or property of any such person as is specified in the last section; or,
3. Of injury to the character of any such person. [Civ. C. 1877, § 881; R. C. 1899, § 3846.]

§ 5292. Fraud classified. Fraud is either actual or constructive. [Civ. C. 1877, § 882; R. C. 1899, § 3847.]

§ 5293. Actual fraud. Actual fraud within the meaning of this chapter consists in any of the following acts committed by a party to the contract, or with his connivance, with intent to deceive another party thereto or to induce him to enter into the contract:

1. The suggestion as a fact of that which is not true by one who does not believe it to be true.
2. The positive assertion in a manner not warranted by the information of the person making it of that which is not true, though he believes it to be true.
3. The suppression of that which is true by one having knowledge or belief of the fact.
4. A promise made without any intention of performing it; or,
5. Any other act fitted to deceive. [Civ. C. 1877, § 883; R. C. 1899, § 3848.]

Secret reservation of a trust in property is against public policy, fraudulent in law and void as to attaching creditors. Newell v. Wagness, 1 N. D. 62, 44 N. W. 1014.

Secret trust in chattel mortgage defined. Bank v. Barnes, 8 N. D. 432, 79 N. W. 880.

"Acts fitted to deceive." "Connivance with intent to deceive or to induce another to enter into a contract" characterized as actual fraud. Whitbeck v. Sees, 10 S. D. 417, 73 N. W. 915.

Payments made prior to discovery of fraud do not estop plaintiff from rescinding after such discovery. Grewing v. Machine Co., 12 S. D. 127, 80 N. W. 176.

§ 5294. Constructive fraud. Constructive fraud consists:

1. In any breach of duty which without an actually fraudulent intent gains an advantage to the person in fault, or any one claiming under him,

by misleading another to his prejudice or to the prejudice of any one claiming under him; or,

2. In any such act or omissoin as the law specifically declares to be fraudulent without respect to actual fraud. [Civ. C. 1877, § 884; R. C. 1899, § 3849.]

§ 5295. **Actual, question of fact.** Actual fraud is always a question of fact. [Civ. C. 1877, § 885; R. C. 1899, § 3850.]

For the jury. Bank v. Graham, 16 S. D. 49, 91 N. W. 340.

§ 5296. **Undue influence.** Undue influence consists:

1. In the use, by one in whom a confidence is reposed by another or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him.

2. In taking an unfair advantage of another's weakness of mind; or,

3. In taking a grossly oppressive and unfair advantage of another's necessities or distress. [Civ. C. 1877, § 886; R. C. 1899, § 3851.]

Undue influence defined. Ingwaldson v. Skrivseth, 7 N. D. 388, 75 N. W. 772.

Consent essential to making a contract. Grissel v. Bank, 12 S. D. 93, 80 N. W. 161.

§ 5297. **Mistake classified.** Mistake may be either of fact or of law. [Civ. C. 1877, § 887; R. C. 1899, § 3852.]

§ 5298. **Fact.** Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake and consisting in:

1. An unconscious ignorance or forgetfulness of a fact past or present material to the contract; or,

2. Belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed. [Civ. C. 1877, § 888; R. C. 1899, § 3853.]

§ 5299. **Law.** Mistake of law constitutes a mistake within the meaning of this chapter only when it arises from:

1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,

2. A misapprehension of the law by one party of which the others are aware at the time of contracting, but which they do not rectify. [Civ. C. 1877, § 889; R. C. 1899, § 3854.]

Receipt for money paid by mistake of law does not operate as an estoppel. Gjerstadengen v. Hartzell, 9 N. D. 268, 83 N. W. 230.

§ 5300. **Of foreign laws, fact.** Mistake of foreign laws is a mistake of fact. [Civ. C. 1877, § 890; R. C. 1899, § 3855.]

§ 5301. **Mutual consent defined.** Consent is not mutual unless the parties all agree upon the same thing in the same sense. But in certain cases defined by the article on interpretation they are to be deemed so to agree without regard to the fact. [Civ. C. 1877, § 891; R. C. 1899, § 3856.]

§ 5302. **How communicated.** Consent can be communicated with effect only by some act or omission of the party contracting by which he intends to communicate it or which necessarily tends to such communication. [Civ. C. 1877, § 892; R. C. 1899, § 3857.]

§ 5303. **Acceptance must comply with conditions.** If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted. [Civ. C. 1877, § 893; R. C. 1899, § 3858.]

§ 5304. **When deemed fully communicated.** Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer in conformity to the last section. [Civ. C. 1877, § 894; R. C. 1899, § 3859.]

§ 5305. Acts which are an acceptance. Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal. [Civ. C. 1877, § 895; R. C. 1899, § 3860.]

§ 5306. Acceptance must be absolute. An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character, which the proposer can separate from the rest and which will include the person accepting. A qualified acceptance is a new proposal. [Civ. C. 1877, § 896; R. C. 1899, § 3861.]

§ 5307. When proposal revoked. A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards. [Civ. C. 1877, § 897; R. C. 1899, § 3862.]

§ 5308. How proposal revoked. A proposal is revoked:

1. By the communication of notice of revocation by the proposer to the other party in the manner prescribed by sections 5302 and 5304 before his acceptance has been communicated to the former.
2. By the lapse of the time prescribed in such proposal for its acceptance, or if no time is so prescribed the lapse of a reasonable time without communication of the acceptance.
3. By the failure of the acceptor to fulfill a condition precedent to acceptance; or,
4. By the death or insanity of the proposer. [Civ. C. 1877, § 898; R. C. 1899, § 3863.]

§ 5309. Subsequent consent. A contract which is voidable solely for want of due consent may be ratified by a subsequent consent. [Civ. C. 1877, § 899; R. C. 1899, § 3864.]

§ 5310. Acceptance of benefit a consent to obligation. A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known or ought to be known to the person accepting. [Civ. C. 1877, § 900; R. C. 1899, § 3865.]

Neither individuals or corporations accepting the benefits of a transaction can **repudiate it.** Morris v. Ewing, 8 N. D. 99, 76 N. W. 1047; Dedrick v. Land Co., 12 S. D. 59, 80 N. W. 153; Huron Prt. Co. v. Kittleson, 4 S. D. 520, 57 N. W. 233.

Mere fact of taking possession of building not of itself an acceptance of same **as having been** erected according to contract. Substantial performance, what is. **Anderson & Hu**nter v. Todd, 8 N. D. 158, 77 N. W. 599.

Article 4.—Object of a Contract.

§ 5311. Object of contract. The object of a contract is the thing which it is agreed on the part of the party receiving the consideration to do or not to do. [Civ. C. 1877, § 901; R. C. 1899, § 3866.]

§ 5312. Requisites of object. The object of a contract must be lawful when the contract is made and possible and ascertainable by the time the contract is to be performed. [Civ. C. 1877, § 902; R. C. 1899, § 3867.]

§ 5313. Possible defined. Everything is deemed possible except that which is impossible in the nature of things. [Civ. C. 1877, § 903; R. C. 1899, § 3868.]

§ 5314. Single unlawful object avoids contract. When a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void. [Civ. C. 1877, § 904; R. C. 1899, § 3869.]

§ 5315. Lawful object valid. When a contract has several distinct objects, of which one at least is lawful and one at least is unlawful in whole or in part, the contract is void as to the latter and valid as to the rest. [Civ. C. 1877, § 905; R. C. 1899, § 3870.]

ARTICLE 5.—CONSIDERATION.

§ 5316. Good consideration defined. Any benefit conferred or agreed to be conferred upon the promiser by any other person to which the promiser is not lawfully entitled or any prejudice suffered or agreed to be suffered by such person, other than such as he is at the time of consent lawfully bound to suffer as an inducement to the promiser, is a good consideration for a promise. [Civ. C. 1877, § 906; R. C. 1899, § 3871.]

Release of vendor from obligations of contract, a sufficient consideration to support the surrender. Kvello v. Taylor, 5 N. D. 76, 63 N. W. 889.

See Gaar, Scott & Co. v. Green, 6 N. D. 48, 58 N. W. 318.

Relinquishment of a timber culture entry a good consideration. Peoples v. Evens, 8 N. D. 121, 77 N. W. 93.

What constitutes consideration for a promise. Roberts v. First National Bank, 8 N. D. 474, 79 N. W. 993; McGlynn v. Scott, 4 N. D. 18, 58 N. W. 460

§ 5317. When legal or moral obligation good consideration. An existing legal obligation resting upon the promiser or a moral obligation originating in some benefit conferred upon the promiser, or prejudice suffered by the promisee is also a good consideration for a promise to an extent corresponding with the extent of the obligation, but no further or otherwise. [Civ. C. 1877, § 907; R. C. 1899, § 3872.]

Compromise of an honest controversy a good consideration. McGlynn v. Scott, 4 N. D. 460; Bank v. Lamont, 5 N. D. 393, 67 N. W. 145; Bank v. Barnes, 8 N. D. 432, 79 N. W. 880.

Extension of time of payment a sufficient consideration to support notes and mortgage. First National Bank of Hastings v. Lamont et al, 5 N. D. 393, 67 N. W. 145.

Moral obligation to pay sufficient consideration on express promise in writing. Rankin v. Matthiesen, 10 S. D. 628, 75 N. W. 196.

§ 5318. Consideration must be lawful. The consideration of a contract must be lawful within the meaning of section 5366. [Civ. C. 1877, § 908; R. C. 1899, § 3873.]

§ 5319. Contract void when consideration unlawful. If any part of a single consideration for one or more objects, or of several considerations for a single object is unlawful, the entire contract is void. [Civ. C. 1877, § 909; R. C. 1899, § 3874.]

Contract obtained for unlawful purposes cannot be avoided by maker on that account. Gage v. Fisher, 5 N. D. 297, 65 N. W. 809.

§ 5320. Consideration executed or executory. A consideration may be executed or executory in whole or in part. In so far as it is executory it is subject to the provisions of article 4 of this chapter. [Civ. C. 1877, § 910; R. C. 1899, § 3875.]

§ 5321. How executory consideration determined. When a consideration is executory it is not indispensable that the contract should specify its amount or the means of ascertaining it. It may be left to the decision of a third person or regulated by any specified standard. [Civ. C. 1877, § 911; R. C. 1895, § 3876.]

§ 5322. Consideration undetermined. Reasonable worth. When a contract does not determine the amount of the consideration, nor the method by which it is to be ascertained, or when it leaves the amount thereof to the discretion of an interested party the consideration must be so much money as the object of the contract is reasonably worth. [Civ. C. 1877, § 912; R. C. 1899, § 3877.]

Court has power to remit portion of verdict, when. Doyle v. Edwards, 15 S. D. 648, 91 N. W. 322.

§ 5323. Consideration not ascertainable. Contract void. When a contract provides an exclusive method by which its consideration is to be ascertained, which method is on its face impossible of execution, the entire contract is void. [Civ. C. 1877, § 913; R. C. 1899, § 3878.]

§ 5324. Exclusive method. Consideration not ascertainable. Provision void. When a contract provides an exclusive method by which its consideration is to be ascertained, which method appears possible on its face, but in fact is, or becomes impossible of execution, such provision only is void. [Civ. C. 1877, § 914; R. C. 1899, § 3879.]

§ 5325. Writing presumes consideration. A written instrument is presumptive evidence of a consideration. [Civ. C. 1877, § 914; R. C. 1899, § 3880.]

Consideration expressed in deed not conclusive. Fraley v. Bentley, 1 Dak 25, 46 N. W. 506.

Written instrument presumes consideration. First National Bank of Fargo v. Red River Valley National Bank, 9 N. D. 319, 83 N. W. 221; McGlynn v. Scott, 4 N. D. 18, 58 N. W. 460; Gira v. Harris, 14 S. D. 537, 86 N. W. 624; Corbett v. Clough, 8 S. D. 176, 65 N. W. 1074.

Sealed or unsealed instruments on a parity as to consideration. Heffleman v. Pennington County, 3 S. D. 162, 52 N. W. 851.

One signing a contract claiming to have signed as a witness only, the burden is on him to prove such fact. Hermiston v. Green, 11 S. D. 81, 75 N. W. 819.

A telegram containing a warranty of goods ordered by the addressee is a contract in writing and presumptive evidence of consideration. Twine Co. v. Wright, 11 S. D. 521, 78 N. W. 942.

Complaint should affirmatively show special facts constituting agreement. Smith v. Gale, 13 S. D. 162, 82 N. W. 385.

§ 5326. Burden of proving want of. The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it. [Civ. C. 1877, § 914; R. C. 1899, § 3881.]

Article 6.—Manner of Creating Contracts.

§ 5327. Contracts classified. A contract is either express or implied. [Civ. C. 1877, § 915; R. C. 1899, § 3882.]

§ 5328. Express. An express contract is one the terms of which are stated in words. [Civ. C. 1877, § 916; R. C. 1899, § 3883.]

Medical attendance to a person not a pauper while in pest house implies contract of patient to pay physician. Porter v. Ostland, 4 Dak. 98, 25 N. W. 731.

When a parol contract for real estate has been partly performed it may be enforced. Fideler v. Norton, 4 Dak. 258, 30 N. W. 128.

Oral contract ambiguous; intention of parties inferred from acts and surrounding circumstances. Blood v. Elevator Co., 1 S. D. 71, 45 N. W. 200.

§ 5329. Implied. An implied contract is one the existence and terms of which are manifested by conduct. [Civ. C. 1877, § 917; R. C. 1899, § 3884.]

§ 5330. What contracts may be oral. All contracts may be oral, except such as are specially required by statute to be in writing. [Civ. C. 1877, § 918; R. C. 1899, § 3885.]

§ 5331. When oral contract required to be in writing enforceable. When a contract, which is required by law to be in writing, is prevented from being put into writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing and acts upon such belief to his prejudice may enforce it against the fraudulent party. [Civ. C. 1877, § 919; R. C. 1899, § 3886.]

§ 5332. Contracts required to be in writing. The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent:

1. An agreement that by its terms is not to be performed within a year from the making thereof.
2. A special promise to answer for the debt, default or miscarriage of another, except in the cases provided for in section 6079.
3. An agreement made upon consideration of marriage, other than a mutual promise to marry.
4. An agreement for the sale of goods, chattels, or things in action at a price not less than fifty dollars, unless the buyer accepts or receives part of such goods and chattels or the evidences, or some of them, of such things

in action, or pays at the time some part of the purchase money; but when a sale is made by auction an entry by the auctioneer in his sale book at the time of the sale of the kind of property sold, the terms of sale, the price and the names of the purchaser and person on whose account the sale is made is a sufficient memorandum.

5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged. [Civ. C. 1877, § 920; R. C. 1899, § 3887.]

Oral agreement to be performed within a year valid though not entirely performed within the time. Sarles v. Sharlow, 5 Dak. 100, 37 N. W. 748.

Written contract not invalidated by prior parol contract. **Larison v. Wilbur, 1** N. D. 284, 47 N. W. 381.

Lease though void governs the rights and relations so far as executed. **Peoples** v. Evans, 8 N. D. 121, 77 N. W. 93.

Written authority required to bind principal for contract made by agent for sale of real estate. Ballou v. Bergvendsen, 9 N. D. 285, 83 N. W. **10.**

Where lease is void, that does not render it illegal if parties see fit to perform. If tenant goes into possession and occupies premises he is bound to pay rent. If either party refuse to perform cannot be forced to do so by equitable proceedings. Merchants State Bank v. Ruettell, 12 N. D. 519, 97 N. W. 853.

Employment of agent to find purchaser for real estate need not be in writing. McLaughlin v. Wheeler, 1 S. D. 497, 47 N. W. 816.

An unexecuted verbal agreement for the conveyance of land without more, is invalid and uninforceable. Cleveland v. Evans, 5 S. D. 53, 58 N. W. 8.

Letters and telegrams sufficient authority to authorize sale of real estate. Farrell v. Edwards, 8 S. D. 425, 66 N. W. 812; Townsend v. Kennedy, 6 S. D. 47, 60 N. W. 164.

Agreement in nature of special partnership to deal in particular pieces of real estate need not be in writing. Davenport v. Buchanan, 6 S. D. 376, 61 N. W. 47.

Agreement as to terms of the assignment of a sheriff's certificate of sale need not be in writing. Whiffen v. Hollister, 12 S. D. 68, 80 N. W. 156.

A suit for specific performance of a contract for sale of real estate cannot be maintained without evidence of written contract. Moody v. Howe, 17 S. D. 545.

§ 5333. Written contract supersedes oral negotiations. The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument. [Civ. C. 1877, § 921; R. C. 1899, § 3888.]

Ambiguities or uncertainties in writing may be explained. Kennedy v. Falde, 4 Dak. 319, 29 N. W. 667.

Non-acceptance of contract may be established by parol. Edwards Lumber Co. v. Baker, 2 N. D. 289, 50 N. W. 718; Lane v. O'Toole, 8 N. D. 210, 78 N. W. 77.

Parol evidence cannot contradict. Hutchinson v. Cleary, 3 N. D. 270, 55 N. W. 729.

Parol evidence not admissible to vary the terms of a written instrument. Hutchinson v. Cleary, 3 N. D. 270, 55 N. W. 729; Bank v. Lang, 2 N. D. 66, 49 N. W. 414; Lewis v. Railway Co., 5 S. D. 148, 58 N. W. 580; Fuel Co. v. Bruns, 1 N. D. 137, 45 N. W. 699; Schmitz v. Mining Co., 8 S. D. 544, 67 N. W. 618.

Parol evidence to vary terms of receipt may be introduced. Prairie School Township v. Haseleu, 3 N. D. 328, 55 N. W. 938.

A receipt embodying a contract may be explained by parol evidence. Prairie Township v. Haseleu, 3 N. D. 328, 55 N. W. 938; Register Co. v. Pfister, 5 S. D. 143, 58 N. W. 270; Osborne v. Stringham, 4 S. D. 593, 57 N. W. 776.

Independent parol agreement may be proved. Grand Forks Lumber Co. v. Tourtelot, 7 N. D. 587, 75 N. W. 901.

For exceptions, see Grand Forks Lumber & Coal Co. v. Tourtelot, 7 N. D. 587, 75 N. W. 901.

Parol to explain indorsement. Dickinson v. Burke, 8 N. D. 118, 77 N. W. 279.

An indorsee may prove by parol evidence an agreement relating to his indorsement in an action against his immediate indorser. Dickinson v. Burke, 8 N. D. 118, 77 N. W. 279.

Parol evidence not admissible to show that party acted as agent when contract on face shows it executed as principal. Bank v. Kellogg, 4 S. D. 312, 56 N. W. 1071; Dean v. Bank, 6 Dak. 222, 50 N. W. 831.

The rule that parol evidence is inadmissible to vary terms of written instrument **applies only to pa**rties to instrument or parties claiming under them. Jewett v. **Sundback, 5 S. D.** 111, 58 N. W. 20.

As between original parties parol evidence admissible to show true intent, **when language of** contract suggests doubt. Miller v. Way, 5 S. D. 468, 59 N. D. **467; Kennedy v. F**alde, 4 Dak. 319, 29 N. W. 667.

Parol evidence admissible to show intention of signer of a note who signs not **under signature of** maker but in place of attestation. Aultman & Co. v. Gunder**son, 6 S. D. 226, 60** N. W. 859.

Where contract is silent parol evidence inadmissible to show "time was of the essence." **Strunk** v. Smith, 8 S. D. 407, 66 N. W. 926.

Surety on note cannot show by parol that he signed in consideration of certain **agreements not ex**pressed in the written agreement. Anderson v. Matheny et al, **17 S. D. 225.**

§ **5334. Proving** written instruments. In proving any written instrument **or contract to which** there is a subscribing witness, or to which there are two **or more subscribing** witnesses, it shall not be necessary to call said witness **or any one of two** or more of said subscribing witnesses; but the instrument **or contract may be** proved, except for purposes of recording the same, by **the same evidence** by which an instrument or contract to which there is no **subscribing witness** may be proved; nor shall it be permissible to prove **such instrument or** contract in any case by proof of the handwriting of said **subscribing witness** or witnesses as the case may be, but in all cases such **instrument or contr**act must be proved in the same manner as one having **no subscribing witn**ess whatever. [1897, ch. 59; R. C. 1899, § 3888a.]

Not necessary to prove written contract by subscribing witnesses. McManus v. **Commow, 10 N. D.** 340, 87 N. W. 8.

Parol testimony admissible to show that order signed by members of board for **apparatus was con**ditional. Manufacturing Co. v. Kremer et al, 7 S. D. 463, 64 N. **W. 528; McCormic**k v. Faulkner, 7 S. D. 363, 64 N. W. 163.

§ **5335. Takes effect on delivery.** A contract in writing takes effect upon **its delivery to the** party in whose favor it is made or to his agent. [Civ. C. **1877, § 922**; R. C. 1899, § 3889.]

§ **5336. Chapter on transfers applies.** The provisions of the chapter on **transfers in general** concerning the delivery of grants, absolute and condi**tional, apply to all** written contracts. [Civ. C. 1877, § 923; R. C. 1899, § 3890.]

§ **5337. How seal affixed.** A corporate or official seal may be affixed to **an instrument by a** mere impression upon the paper or other material on **which such instrum**ent is written. [Civ. C. 1877, § 924; R. C. 1899, § 3891.]

§ **5338. Seals abolished.** All distinctions between sealed and unsealed **instruments are abo**lished. [Civ. C. 1877, § 925; R. C. 1899, § 3892.]

Distinction between instruments abolished. Pearson v. Post, 2 Dak. 220, 9 N. W. **684; Landauer v.** Sioux Falls Implement Co., 10 S. D. 205, 72 N. W. 467.

County warrant is a sealed instrument. Action may be brought within twenty **years. Heffleman** v. Pennington County, 3 S. D. 162, 52 N. W. 851.

Article 7.—Interpretation of Contracts.

§ **5339. Same rules for public and private.** All contracts, whether public **or private, are to** be interpreted by the same rules, except as otherwise **provided by this co**de. [Civ. C. 1877, § 926; R. C. 1899, § 3893.]

§ **5340. Must be interpreted to give effect to mutual intention.** A con**tract must be so** interpreted as to give effect to the mutual intention of **the parties as it e**xisted at the time of contracting so far as the same is **ascertainable and** lawful. [Civ. C. 1877, § 927; R. C. 1899, § 3894.]

Mutual intentions prevail if ascertainable. Frost v. Williams, 2 S. D. 457, 50 N. **W. 964; Fletcher** v. Arnett, 4 S. D. 615, 57 N. W. 915; Novotny v. Danforth, 9 S. D. **301, 68 N. W. 749.**

If language sufficient to express intention of parties it must be followed. **Washabaugh v. H**all, 4 S. D. 168, 56 N. W. 82; Strunk v. Smith, 8 S. D. 407, 66 **N. W. 926. Rober**ts v. Minn. Threshing Machine Co., 8 S. D. 579, 67 N. W. 607.

Satisfaction of the mind of a reasonable man sufficient. Richison v. Mead, 11 S. **D. 639, 80 N. W. 131.**

§ 5341. Rules in this article to be applied. For the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules given in this chapter are to be applied. [Civ. C. 1877, § 928; R. C. 1899, § 3895.]

§ 5342. Language governs if clear. The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity. [Civ. C. 1877, § 929; R. C. 1899, § 3896.]

§ 5343. Intention ascertained from writing alone, if possible. When a contract is reduced to writing the intention of the parties is to be ascertained from the writing alone if possible, subject, however, to the other provisions of this article. [Civ. C. 1877, § 930; R. C. 1899, § 3897.]

§ 5344. Real intention to govern in cases of fraud, etc. When through fraud, mistake or accident a written contract fails to express the real intention of the parties, such intention is to be regarded and the erroneous parts of the writing disregarded. [Civ. C. 1877, § 931; R. C. 1899, § 3898.]

§ 5345. Every part given effect. The whole of a contract is to be taken together so as to give effect to every part. if reasonably practicable, each clause helping to interpret the others. [Civ. C. 1877, § 932; R. C. 1899, § 3899.]

Meaning attached by parties to certain words used must prevail. Same meaning attaches to words used in different parts of contract. Ambiguous instruction. Estoppel. Anderson v. Bank, 4 N. D. 182, 59 N. W. 1029.

Intention of parties govern respective liabilities. Frost v. Williams, 2 S. D. 457, 50 N. W. 964.

§ 5346. Several contracts parts of one transaction taken together. Several contracts relating to the same matters between the same parties and made as parts of substantially one transaction are to be taken together. [Civ. C. 1877, § 933; R. C. 1899, § 3900.]

Contract and collateral contracts held as one. Bank v. Barnes, 8 N. D. 432, 79 N. W. 880.

Rule of interpretation prescribed. Does not unite several contracts into one. Bank v. Flath, 10 N. D. 281, 86 N. W. 867.

Contract should be construed most strongly against party who causes uncertainty to exist. Osborne v. Stringham, 4 S. D. 593, 57 N. W. 776.

§ 5347. So interpreted as to carry it into effect. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties. [Civ. C. 1877, § 934; R. C. 1899, § 3901.]

§ 5348. Words to be understood in ordinary sense. The words of a contract are to be understood in their ordinary and popular sense rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed. [Civ. C. 1877, § 935; R. C. 1899, § 3902.]

§ 5349. Technical words. Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense. [Civ. C. 1877, § 936; R. C. 1899, § 3903.]

§ 5350. What law governs. A contract is to be interpreted according to the law and usage of the place where it is to be performed, or if it does not indicate a place of performance, according to the law and usage of the place where it is made. [Civ. C. 1877, § 937; R. C. 1899, § 3904.]

Subject to the remedies of the forum in which suit is, including that of the statute of limitation. The Star Wagon Co. v. Matthieson, 3 Dak. 233, 14 N. W. 107.

Lex loci and lex fori presumed same unless contrary appears. Thomas v. Pendleton, 1 S. D. 150, 46 N. W. 180; Meuer v. C. M. & St. P. Ry., 5 S. D. 568, 59 N.

W. 945; Sandmeyer v. Insurance Co., 2 S. D. 346, 50 N. W. 353; Commercial Bank **v. Jackson, 9 S. D.** 605, 70 N. W. 846.

Contract for shipment of live stock governed by law of place where made. Meuer **v. Railway Co., 5 S.** D. 568, 59 N. W. 945.

Penal laws have no force beyond the boundaries of the state in which **they exist. Jones v. Trus**t Co., 7 S. D. 122, 63 **N.** W. 553.

§ **5351. Explained by reference to circumstances.** A contract may be **explained by referen**ce to the circumstances under which it was made and **the matter to which** it relates. [Civ. C. 1877, § 938; R. C. 1899, § 3905.]

Ambiguities may be explained by parol evidence. Hazelton Boiler Co. v. Fargo **Gas & Electric Co.,** 4 N. D. 365, 61 N. W. 151; Osborne Co. v. Stringham, 1 S. D. **406, 47 N. W. 408;** Osborne Co. v. Stringham, 4 S. D. 593, 57 N. W. 776; **Miller v. Way, 5 S. D. 468, 59** N. W. 467; Stokes v. Green, 10 S. D. 286, 73 N. W. 100; **Blood v. Fargo & S. Eleva**tor Co., 1 S. D. 71, 45 **N. W. 200.**

Circumstances under which contract was made to be taken into consideration in **construing it. Harr**is v. State, 9 S. D. 453, 69 N. W. 825; Pearson v. Post, 2 Dak. **220, 9 N. W. 684; K**ennedy v. Falde, 4 Dak. 319, 29 N. W. 667; Frost **v.** Williams, **2 S. D. 457, 50 N. W.** 964.

§ **5352. Extends no farther than parties intended to contract.** However **broad may be the** terms of a contract, it extends only to those things **concerning which it** appears that the parties intended to contract. [Civ. C. **1877, § 939; R. C. 18**99, § 3906.]

Sickness or death good cause for failure to fulfill contract for labor. McClellan **v. Harris, 7 S. D. 44**7, 64 N. W. 522.

§ **5353. As promis**er believed promisee understood it. If the terms of **a promise are in any** respect ambiguous or uncertain it must be interpreted **in the sense in which** the promiser believed at the time of making it that **the promisee understo**od it. [Civ. C. 1877, § 940; R. C. 1899, § 3907.]

§ **5354. Clauses subordinate to general intent.** Particular clauses of a **contract are subordin**ate to its general intent. [Civ. C. 1877, § 941; R. C. **1899, § 3908.]**

§ **5355. Written and original control printed and copied.** When a con**tract is partly writte**n and partly printed, or when part of it is written or **printed under the sp**ecial directions of the parties and with a special view **to their intention and** the remainder is copied from a form originally prepared **without special refer**ence to the particular parties and particular contract **in question, the writt**en parts control the printed parts and the parts which **are purely original** control those which are copied from a form and if **the two are absolut**ely repugnant the latter must be so far disregarded. **[Civ. C. 1877, § 942;** R. C. 1899, § 3909.]

§ **5356. Repugnan**cies reconciled. Repugnancy in a contract must be **reconciled, if possibl**e, by such an interpretation as will give some effect to **the repugnant claus**e subordinate to the general intent and purposes of **the whole contract.** [Civ. C. 1877, § 943; R. C. 1899, § 3910.]

Definite, unambiguous promise contained in a written obligation prevails though **apparently inconsis**tent with provisions of a prior agreement made by another **party to secure obl**igations resulting from first agreement. John A. Tollman Co. **v. Bowerman, 5 S.** D. 197, 58 N. W. 568.

§ **5357. Inconsisten**t words rejected. Words in a contract which are **wholly inconsistent w**ith its nature, or with the main intention of the parties **are to be rejected.** [Civ. C. 1877, § 944; R. C. 1899, § 3911.]

§ **5358. Uncertain**ty interpreted against party causing it. Presumption **as to cause.** In cases of uncertainty not removed by the preceding rules, **the language of a c**ontract should be interpreted most strongly against the **party who caused th**e uncertainty to exist. The promiser is presumed to **be such party, except** in a contract between a public officer or body, as such, **and a private party,** in which it is presumed that all uncertainty was caused **by the private party.** [Civ. C. 1877, § 945; R. C. 1899, § 3912.]

§ 5359. Reasonable stipulations implied. Stipulations which are necessary to make a contract reasonable or conformable to usage are implied in respect to matters concerning which the contract manifests no contrary intention. [Civ. C. 1877, § 946; R. C. 1899, § 3913.]

Reasonable time allowed when none specified. What is reasonable time question for jury. Acme Harvester Co. v. Axtell, 5 N. D. 315, 65 N. W. 680; Braithwaite v. Power, 1 N. D. 455, 48 N. W. 354.

§ 5360. Incidents, when and when not implied. All things that in law or usage are considered as incidental to a contract or as necessary to carry it into effect are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded. [Civ. C. 1877, § 947; R. C. 1899, § 3914.]

In absence of anything to contrary incidental stipulations necessary to make it reasonably conformable to usage, implied. Morrow v. Board of Education, 7 S. D. 553, 64 N. W. 1126; Stokes v. Green, 10 S. D. 286, 73 N. W. 100.

§ 5361. Rules governing time of performance when not specified. If no time is specified for the performance of an act required to be performed a reasonable time is allowed. If the act is in its nature capable of being done instantly as for example, if it consists in the payment of money only, it must be performed immediately upon the thing to be done being exactly ascertained. [Civ. C. 1877, § 948; R. C. 1899, § 3915.]

§ 5362. When time of the essence. Time is never considered as of the essence of a contract unless by its terms expressly so provided. [Civ. C. 1877, § 949; R. C. 1899, § 3916.]

Agreement that time shall be essence of contract need not be in any particular form. Cannot be presumed. See note to Fargusson v. Talcott, 7 N. D. 183, 73 N. W. 207; Strunk v. Smith, 8 S. D. 407, 66 N. W. 926; Washabaugh v. Hall, 4 S. D. 168, 56 N. W. 82.

§ 5363. When promise presumed joint and several. When all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several. [Civ. C. 1877, § 950; R. C. 1899, § 3917.]

§ 5364. Promise in singular by several presumed joint and several. A promise made in the singular number, but executed by several persons is presumed to be joint and several. [Civ. C. 1877, § 951; R. C. 1899, § 3918.]

§ 5365. Executed contract defined. An executed contract is one, the object of which is fully performed. All others are executory. [Civ. C. 1877, § 952; R. C. 1899, § 3919.]

Executed contract has qualities of chose in possession. Executory contract is chose in action. Mettel v. Gales, 12 S. D. 632, 82 N. W. 181.

Article 8.—Unlawful Contracts.

§ 5366. What is unlawful. That is not lawful which is:

1. Contrary to an express provision of law.
2. Contrary to the policy of express law, though not expressly prohibited; or,
3. Otherwise contrary to good morals. [Civ. C. 1877, § 953; R. C. 1899, § 3920.]

Contract based on appointment to office void as against public policy. Waldron v. Evans, 1 Dak. 11, 46 N. W. 607.

Void when contrary to express law. To the policy of express law though not expressly prohibited or contrary to good morals. Uhlig v. Garrison, 2 Dak. 71, 2 N. W. 253.

Under state of facts given, held invalid because was against public policy. Peck v. Levinger, 6 Dak. 54, 50 N. W. 481.

Agreement to compound felony void. School District v. Alderson, 6 Dak. 145, 41 N. W. 466.

Contract to teach with person not holding certificate is void. Hosmer v. Sheldon School District, 4 N. D. 197, 59 N. W. 1035; Goose River Bank v. Willow Lake School Township, 1 N. D. 26, 44 N. W. 1002; Hardy v. Purington, 6 S. D. 382, 61 N. W. 158.

Gambling in wheat—commissions and money as margins cannot be recovered back. **Dows & Co.** v. Glaspel, 4 N. D. 251, 60 N. W. 60.

Contract to control stock of another void. Gage v. Fisher, 5 N. D. 297, 65 N. W. 809.

Payment made for Sunday labor cannot be recovered back. Calkins v. Mining Co., 5 S. D. 299, 58 N. W. 797.

Assignment by public officer of salary or fees to become due for services to be performed void. Perkins v. Barns, 10 S. D. 306, 73 N. W. 80.

§ **5367. Certain contracts against the policy of the law.** All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law. [Civ. C. 1877, § 954; R. C. 1899, § 3921.]

Contracts reserving a secret trust are against public policy and void. Newell et al v. Wagness, 1 N. D. 62, 44 N. W. 1014.

Liability for loss may be limited by contract of shipper. Meuer v. C. M. & St. P. Ry., 5 S. D. 568, 59 N. W. 945.

§ **5368. Penalties and penal clauses void.** Penalties imposed by contract for any nonperformance thereof are void. But this section does not render void such bonds or obligations, penal in form, as have heretofore been commonly used; it merely rejects and avoids the penal clauses. [Civ. C. 1877, § 955; R. C. 1899, § 3922.]

Stipulation for attorney fees not penalty and may be enforced. Danforth v. Charles, 1 Dak. 285, 46 N. W. 576; Bank of Salem v. Rasmussen, 1 Dak. 60, 46 N. W. 574.

§ **5369. Fixing damages for breach void.** Every contract by which the amount of damages to be paid or other compensation to be made for a breach of an obligation is determined in anticipation thereof is to that extent void, except as expressly provided by the next section. [Civ. C. 1877, § 956; R. C. 1899, § 3923.]

A stipulation in contract that grantor of land may retain all payments in case of forfeiture held valid, if not in nature of forfeiture or penalty. Barnes v. Clement, 8 S. D. 421, 66 N. W. 810.

The above decision modified in, same title case, 12 S. D. 270, 81 N. W. 301.

A contract providing, in case of failure to complete building, that contractor shall be liable for penalty of specified sum per day held void. Measure of damages is reasonable rental. Seim v. Krause, 13 S. D. 530, 83 N. W. 583.

§ **5370. Exception to last section.** The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage. [Civ. C. 1877, § 957; R. C. 1899, § 3924.]

Parties to an agreement for the purchase of mining claims may agree to amount of damages. **Smith** v. Detroit Mining Co. et al, 17 S. D. 413.

§ **5371. Restricting enforcement of rights void.** Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights is void. [Civ. C. 1877, § 958; R. C. 1899, § 3925.]

Limitation of time to bring action in insurance policy void. Johnson v. D. F. & M. Ins. Co., 1 N. D. 167, 45 N. W. 799.

To what extent common carrier may limit liability. Kirby v. W. U. T. Co., 4 S. D. 105, 55 N. W. 759.

§ **5372. In restraint of business void.** Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by the next two sections is to that extent void. [Civ. C. 1877, § 959; R. C. 1899, § 3926.]

§ **5373. Good will excepted.** One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business

within a specified county, city or a part thereof, so long as the buyer or any person deriving title to the good will from him carries on a like business therein. [Civ. C. 1877, § 960; R. C. 1899, § 3927.]

An agreement to refrain from trade unaccompanied by sale of good will of business is void. Mapes v. Metcalf, 10 N. D. 601, 88 N. W. 713.

§ 5374. **Partners excepted.** Partners may upon or in anticipation of a dissolution of the partnership agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof. [Civ. C. 1877, § 961; R. C. 1899, § 3928.]

§ 5375. **In restraint of marriage void.** Every contract in restraint of the marriage of any person, other than a minor, is void. [Civ. C. 1877, § 962; R. C. 1899, § 3929.]

ARTICLE 9.—RESCISSION OF CONTRACTS.

§ 5376. **How extinguished.** A contract may be extinguished in like manner with any other obligation and also in the manner prescribed by this article. [Civ. C. 1877, § 963; R. C. 1899, § 3930.]

Written contract for sale and purchase of realty may be waived, annulled and extinguished by parol. Mohon v. Leech, 11 N. D. 181, 90 N. W. 807. Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856.

Cannot vary or contradict written contract by parol evidence of custom or usage. Deacon v. Mattison, 11 N. D. 190, 91 N. W. 35.

A written contract for sale of real estate may be annulled by parol or abandoned by the parties thereto. Haugan v. Skjervheim, 13 N. D. 616, 102 N. W. 311.

§ 5377. **Extinguished by rescission.** A contract is extinguished by its rescission. [Civ. C. 1877, § 964; R. C. 1899, § 3931.]

§ 5378. **When rescission permitted.** A party to a contract may rescind the same in the following cases only:

1. If the consent of the party rescinding, or of any party jointly contracting with him was given by mistake or obtained through duress, menace, fraud or undue influence exercised by or with the connivance of the party as to whom he rescinds or of any other party to the contract jointly interested with such party.
2. If through the fault of the party as to whom he rescinds the consideration for his obligation fails in whole or in part.
3. If such consideration becomes entirely void from any cause.
4. If such consideration before it is rendered to him fails in a material respect from any cause; or,
5. By consent of all of the other parties. [Civ. C. 1877, § 965; R. C. 1899, § 3932.]

Defendant refusing to perform contract before performance had been entered upon, plaintiff's remedy was for breach of contract. Davis & Rankin v. Bronson, 2 N. D. 300, 50 N. W. 836.

When sale is rescinded by vendee for breach of warranty, may sue for amount of negotiable note given for purchase price. Canham v. Plano Mfg. Co., 3 N. D. 229, 55 N. W. 583.

Surrender of land contract sufficient consideration, when. Kvello v. Taylor, 5 N. D. 76, 63 N. W. 889.

Vendee of personal property has a right to rescind sale for fraud. Hull v. Caldwell, 3 S. D. 451, 54 N. W. 100.

Failure to pay mortgage agreed to be paid good ground for rescission. Fletcher v. Arnett, 4 S. D. 615, 57 N. W. 915.

Fraud in procuring contract good ground for its recission. National Bank v. Taylor, 5 S. D. 99, 58 N. W. 297.

Fraudulent representation not made to plaintiff or relied upon by him not ground for rescission. Tootle v. Petrie, 8 S. D. 19, 65 N. W. 43.

Action to rescind may be brought by one offering to rescind as provided by statute who acts with reasonable promptness after discovery of cause for rescission. Hilton v. Advanvce Thresher Co., 8 S. D. 412, 66 N. W. 816.

One who takes a policy of hail insurance and retains the same and receives the **protection afforded** thereby cannot thereafter rescind on ground of fraud. North-**western Mutual v. Fleming, 12 S. D. 36, 80 N. W. 147.**

Contract for the sale of land may be rescinded for fraudulent representation of **owner's agent.** Rasmussen v. Reedy, 14 S. D. 15, 84 N. W. 205.

Purchaser is bound for contract price of goods delivered to him though contract **may have been rescinded** without cause. Dowagiac Mfg. Co. v. Higinbotham, 15 **S. D. 547, 91 N. W.** 330.

§ 5379. When permitted notwithstanding stipulation for compensation. A stipulation that errors of description shall not avoid a contract or shall **be the subject of** compensation, or both, does not take away the right of **rescission for fraud**, nor for mistake, when such mistake is in a matter **essential to the inducement** of the contract and is not capable of exact and **entire compensation**. [Civ. C. 1877, § 966; R. C. 1899, § 3933.]

§ 5380. Rules governing. Rescission when not affected by consent can be **accomplished only** by the use, on the part of the party rescinding, of reasonable **diligence to comply** with the following rules:

1. **He must rescind** promptly upon discovering the facts which entitle **him to rescind, if** he is free from duress, menace, undue influence or disa-**bility and is aware** of his right to rescind; and,

2. **He must restore** to the other party every thing of value which he has **received from him** under the contract; or must offer to restore the same upon **condition that such** party shall do likewise, unless the latter is unable or **positively refuses to** do so. [Civ. C. 1877, § 967; R. C. 1899, § 3934.]

Party obtaining property on contract must return property before can rescind. **McMahon v. Plummer, 6 Dak. 42, 50 N. W. 480; Johnson v. Burnside, 3 S. D. 230, 52 N. W. 1057; Lovell** v. McCaughey, 8 S. D. 471, 66 N. W. 1085.

Party has no right to complete contract after rescission and sue for contract price. **Davis & Rankin** v. Bronson, 2 N. D. 300, 50 N. W. 836.

After rescission recovery may be had if not transferred to innocent purchaser **before payment of** same. Fahey v. Esterley Machine Co., 3 N. D. 220, 55 N. W. 580.

Party seeking to rescind contract must restore to other party fruits of trans-**action, as condition** precedent. Anderson v. Bank, 4 N. D. 182, 59 N. W. 1029; N. **W. Mutual Hail Ins. Co. v. Fleming, 12 S. D. 36, 80 N. W. 147.**

False representations must not only have been believed but acted upon for action **resulting in damages.** Sioux Banking Co. v. Kendall, 6 S. D. 543, 62 N. W. 377.

Payments made prior to discovery of fraud do not estop rescission after such **discovery. Grewing** v. M. T. M. Co., 12 S. D. 127, 80 N. W. 176.

Fifteen months unreasonable time in option agreement where portion of land **was adjudged to** third person. Smith v. Detroit Mining Co., 17 S. D. 413.

Article 10.—Alteration and Cancellation of Contracts.

§ 5381. How oral contract altered. A contract not in writing may be **altered in any respect** by consent of the parties in writing without a new **consideration and** is extinguished thereby to the extent of the alteration. [Civ. C. 1877, § 968; R. C. 1899, § 3935.]

§ 5382. How written contract altered. A contract in writing may be **altered by a contract** in writing or by an executed oral agreement and not **otherwise.** [Civ. C. 1877, § 969; R. C. 1899, § 3936.]

The modification of a written contract by parol must be clear and satisfactory. **Buttz v. Colton, 6 Dak. 306, 43 N. W. 717.**

Written agreement may be abrogated by subsequent oral agreement fully executed. **Fletcher** Bros. v. Nelson, 6 N. D. 94, 69 N. W. 53.

Time of payment cannot be extended by oral agreement when based solely on **oral promise to pay** consideration therefor. Foster v. Furlong, 8 N. D. 282, 78 N. **W. 986.**

Bank will be bound by knowledge of its cashier of equitable defense to a note in **taking a renewal** thereof. Black Hills National Bank v. Kellogg, 4 S. D. 312, 56 **N. W. 1071.**

An unexecuted agreement to take a mortgage as security for the identical debt **on premises upon** which a claimant is entitled to a lien is not sufficient to defeat a **mechanic's lien.** Barnard & Leas Mfg. Co. v. Galloway, 5 S. D. 205, 58 N. W. 565.

Contract is executed when objects for which made are consummated. Mettel v. **Gales, 12 S. D. 632**, 82 N. W. 181.

§ 5383. **Destruction by consent extinguishes as to all consenting.** The destruction or cancellation of a written contract or of the signature of the parties liable thereon with intent to extinguish the obligation thereof, extinguishes it as to all of the parties consenting to the act. [Civ. C. 1877, § 970; R. C. 1899, § 3937.]

§ 5384. **Extinguished as to one and not all.** The intentional destruction, cancellation or material alteration of a written contract by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor against parties who do not consent to the act. [Civ. C. 1877, § 971; R. C. 1899, § 3938.]

Provisions for collection expenses destroys negotiability of note. Material alteration extinguishes debt. First National Bank v. Laughlin, 4 N. D. 391, 61 N. W. 473.

Where instrument converted into negotiable promissory note, note is void, even in the hands of a bona fide holder. Porter v. Hardy, 10 N. D. 551, 88 N. W. 458.

The alteration of a note from $1,000 to $1,060 is a material alteration. Wyckoff v. Johnson, 2 S. D. 91, 48 N. W. 837.

Burden is on defendant to show change in note was material and made subsequent to execution. Foley-Wadsworth Imp. Co. v. Soloman, 9 S. D. 511, 70 N. W. 639.

Fraudulent taking of note from holder of escrow. See Landauer v. Sioux Falls Imp. Co., 10 S. D. 205, 72 N. W. 467.

An unauthorized change of place of payment in note by clerk and subsequently erased will not defeat recovery. Acme Harvester Co. v. Butterfield, 12 S. D. 91, 80 N. W. 170.

Insertion of place of payment not of sufficient materiallity to avoid note. Port Huron Engine & Thresher Co. v. Sherman, 14 S. D. 461, 85 N. W. 1008.

§ 5385. **Destruction of one duplicate not within last section.** When a contract is executed in duplicate an alteration or destruction of one copy while the other exists is not within the provisions of the last section. [Civ. C. 1877, § 972; R. C. 1899, § 3939.]

Contracts for sale of land on crop payments, how canceled. Waiver of vendor's right to cancel, when. Timmins v. Russell, 13 N. D. 487, (and note), 99 N. W. 48; Fargusson v. Talcott, 7 N. D. 183, 73 N. W. 207; Boyum v. Johnson, 8 N. D. 306, 79 N. W. 149; Ross v. Page, 11 N. D. 458, 92 N. W. 822; Bucholz v. Leadbetter, 11 N. D. 473, 92 N. W. 830; Pier v. Lee, 14 S. D. 600, 86 N. W. 642.

CHAPTER 46.

OBLIGATIONS IMPOSED BY LAW.

§ 5386. **To abstain from injuring another's person or property.** Every person is bound without contract to abstain from injuring the person or property of another or infringing upon any of his rights. [Civ. C. 1877, § 973; R. C. 1899, § 3940.]

§ 5387. **Damages for deceit.** One who willfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damage which he thereby suffers. [Civ. C. 1877, § 974; R. C. 1899, § 3941.]

Rule of measure of damages in actions for deceit. Fargo Gas & Coke Co. v. Fargo Gas & Electric Co., 4 N. D. 219, 59 N. W. 1066.

Fraudulent indorsement of school warrant by school officer makes him personally liable. Whitbeck v. Sees, 10 S. D. 417, 73 N. W. 915.

Seller of fraudulent county warrant becomes personally liable. Parker v. Ausland, 13 S. D. 169, 82 N. W. 402.

§ 5388. **Deceit defined.** A deceit within the meaning of the last section is either:

1. The suggestion as a fact of that which is not true by one who does not believe it to be true.

2. The assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true.

3. The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,

4. A promise made without any intention of performing. [Civ. C. 1877, § 975; R. C. 1899, § 3942.]

It must appear that he not only believed representations to be true but that he acted thereon to his injury. First National Bank v. North, 2 S. D. 480, 51 N. W. 96; Sioux Banking Co. v. Kendal, 6 S. D. 543, 62 N. W. 377.

§ 5389. When intent to defraud every one misled presumed. One who practices a deceit with intent to defraud the public or a particular class of persons is deemed to have intended to defraud every individual in that class who is actually misled by the deceit. [Civ. C. 1877, § 976; R. C. 1899, § 3943.]

§ 5390. When thing obtained without consent must be restored. One who obtains a thing without consent of its owner or by a consent afterwards rescinded, or by an unlawful exaction which the owner could not at the time prudently refuse must restore it to the person from whom it was thus obtained, unless he has acquired a title thereto superior to that of such other person, or unless the transaction was corrupt and unlawful on both sides. [Civ. C. 1877, § 977; R. C. 1899, § 3944.]

§ 5391. Without demand. Exception. The restoration required by the last section must be made without demand; except when a thing is obtained by mutual mistake, in which case the party obtaining the thing is not bound to return it until he has notice of the mistake. [Civ. C. 1877, § 978; R. C. 1899, § 3945.]

§ 5392. Liability for willful act of negligence. Every one is responsible not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has willfully or by want of ordinary care, brought the injury upon himself. The extent of the liability in such cases is defined by articles 1 and 2 of chapter 97 on compensatory relief. [Civ. C. 1877, § 979; R. C. 1899, § 3946.]

Excavation near highway; injury to one trespassing. Sanders v. Reister, 1 Dak. 145, 46 N. W. 680.

Stock running at large in extra hazardous place, owner required to exercise extra care. Williams v. N. P., 3 Dak. 168, 14 N. W. 97.

Negligence of bank in collecting note. Plymouth Co. Bank v. Gilman, 6 Dak. 304, 50 N. W. 194; Plymouth Co. Bank v. Gilman, 3 S. D. 170, 52 N. W. 869.

Failure to employ an attorney and appear at a trial such inexcusable neglect as will prevent setting aside judgment. Minnehaha National Bank v. Hurley, 133 Dak. 18, 82 N. W. 87.

Want of title to right of way not ground of defense. Gam v. N. P. R. R. Co., 1 N. D. 252, 46 N. W. 972.

Damage by fire. Proximate cause. Gram v. N. P. Ry., 1 N. D. 252, 46 N. W. 972; Johnson v. N. P. Ry., 1 N. D. 354, 48 N. W. 227.

Negligence of fellow servant; who are. When negligence of servant is of employer. Ell v. N. P. R. R. Co., 1 N. D. 336, 48 N. W. 222.

Measure of damages. Negligence. Johnson v. N. P. R. R. Co., 1 N. D. 354, 48 N. W. 227; Ell v. N. P. R. R. Co., 1 N. D. 336, 48 N. W. 222.

Presumptions of negligence in setting fire. Johnson v. N. P. R. R. Co., 1 N. D. 354, 48 N. W. 227.

Question of plaintiff's negligence for jury. Boss v. N. P. Ry., 2 N. D. 128, 49 N. W. 655; Bennett v. N. P. Ry., 3 N. D. 91, 54 N. W. 314; Sprague v. Ry. Co., 6 Dak. 87, 50 N. W. 617; Williams v. Ry. Co., 3 Dak. 168, 14 N. W. 97; Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427; Sinkling v. Ry., 10 S. D. 560, 7 N. W. 1029.

Where one party has been negligent and the other party knowing it fails to use ordinary care to prevent an injury which the antecedent negligence renders possible, the negligence of the second party is the sole proximating cause of such injury. Bostwick v. Ry. Co., 2 N. D. 440, 51 N. W. 781; Bennett v. Ry. Co., 2 N. D. 112, 54 N. W. 314.

Care of railroad in approaching crossing must be commensurate with danger. Bishop v. Ry., 4 N. D. 536, 62 N. W. 605.

Liability of city for defective sidewalk. Chacey v. City of Fargo, 5 N. D. 173, 64 N. W. 932.

Negligence of stranger driving horse can not be imputed to plaintiff to defeat a recovery. Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676.

Burden of proving contributary negligence upon defendant. Ouverson v. City of Grafton, 5 N. D. 281, 65 N. W. 676; Gram v. N. P. Ry., 1 N. D. 252, 46 N. W. 972; Mares v. N. P. Ry., 3 Dak. 336, 21 N. W. 5; Sanders v. Reister, 1 Dak. 145, 46 N. W. 680; Bostwick v. M. & P. Ry., 2 N. D. 440, 51 N. W. 781; Smith v. C. M. & St. P. Ry., 4 S. D. 71, 55 N. W. 717; Bennett v. N. P. Ry., 3 N. D. 91, 54 N. W. 314; Songstad v. Ry., 5 Dak. 517, 41 N. W. 755; Elliott v. Ry., 5 Dak. 523, 41 N. W. 758; Sinkling v. Ry., 10 S. D. 560, 74 N. W. 1029.

Presumption of negligence is a rule of evidence and not affected by allegations of complaint. Mathews v. G. N. Ry., 7 N. D. 81, 72 N. W. 1085.

Duty of railroad company to keep look out at public crossings. Johnson v. Great Northern, 7 N. D. 284, 75 N. W. 250.

Negligence in use of private premises. Trespassing children. Negligence defined. Child responsible for its own torts. O'Leary v. Brooks Elevator Co., 7 N. D. 554, 75 N. W. 919.

Railway company liable for death of passenger carried by station, and put off in cold in intoxicated condition, when not allowed to remain in depot. Haug v. Ry., 8 N. D. 23, 77 N. W. 97.

Liability of city for failure to repair sidewalks. Coleman v. Fargo, 8 N. D. 69, 76 N. W. 1051.

Contributary negligence question for jury. Employer's liability for defective appliances. Cameron v. Great Northern, 8 N. D. 124, 77 N. W. 1016.

Master must furnish servant with reasonably safe and suitable machinery and appliances and a failure to do so makes master liable for injuries. Cameron v. G. N. Ry., 8 N. D. 124, 77 N. W. 1016; Olson v. Ry., 12 S. D. 326, 81 N. W. 634.

Question of contributory negligence considered and held properly submitted to jury. McTavish v. Ry., 8 N. D. 333, 79 N. W. 443.

Party assuming to act as collection agent is bound to give collections received preference over claim he may have on his own account against same debtor. Commercial Bank v. Red River National Bank, 8 N. D. 382, 79 N. W. 859.

Presentation of claims against city for injuries prerequisite to bringing suit. Trost v. Casselton, 8 N. D. 534, 79 N. W. 1071.

Conductor accepting train, knowing it to be in bad condition, guilty of contributory negligence. Cameron v. Ry., 8 N. D. 618, 80 N. W. 885.

Negligence of plaintiff in not seeking to recover money paid by mutual mistake until defendant has lost thereby valuable rights good defense. Fegan v. Ry., 9 N. D. 30, 81 N. W. 39.

Liability of landlord. Kneeland v. Beare, 11 N. D. 233, 92 N. W. 56.

Prima facie case of negligence under statute, how overcome. Hebron v. Ry. Co., 4 S. D. 538, 57 N. W. 494; Harrison v. Ry. Co., 6 S. D. 100, 60 N. W. 405; Lewis v. Ry. Co., 7 S. D. 183, 63 N. W. 781.

Question of negligence for jury. Alt v. N. W. Ry., 5 S. D. 20, 57 N. W. 1126.

Negligence of defendant gist of action. Saunders v. C. & N. W. Ry. Co., 6 S. D. 40; Harrison v. C. & N. W. Ry. Co., 6 S. D. 100.

Railroad has right to determine route passenger is to travel between points of beginning and termination. Church v. Ry. Co., 6 S. D. 235, 60 N. W. 854.

Setting fire on one's own premises, which spreads to that of another not presumptive of negligence. Mattoon v. Ry. Co., 6 S. D. 301, 60 N. W. 740.

Master not liable for injuries to servant when risk was apparent. Carlson v. Water Co., 8 S. D. 47, 65 N. W. 419.

Shipper riding in car with shipment contrary to contract guilty of contributory negligence. Heumphreus v. Ry. Co., 8 S. D. 103, 65 N. W. 466.

City liable for negligence in constructing sewers or drains. Dell Rapids Mer. Co. v. Dell Rapids, 11 S. D. 116, 75 N. W. 898.

Parent liable for negligent use of gun by son if parent knew of negligent and reckless manner son used gun furnished by parent. Johnson v. Glidden, 11 S. D. 236, 76 N. W. 933.

Statutory presumption of negligence of train men, when rebutted. Keilbach v. Ry. 11 S. D. 468, 78 N. W. 951.

Owner of building liable for damage resulting from unsafe condition. Patterson v. Schlitz Brewing Co., 16 S. D. 33, 91 N. W. 336; Waterhouse v. Schlitz Brewing Co., 12 S. D. 397, 81 N. W. 725.

§ 5393. Other obligations. Other obligations are prescribed by the first forty-three chapters of this code. [Civ. C. 1877, § 980; R. C. 1899, § 3947.]

CHAPTER 47.

SALE.

ARTICLE 1.—GENERAL PROVISIONS.

§ **5394. Sale defined.** Sale is a contract by which for a pecuniary consideration called a price one transfers to another an interest in property. [Civ. C. 1877, § 981; R. C. 1899, § 3948.]

Except for fraud party has no right to rescind executed sale. Hull v. Caldwell, 3 S. D. 451, 54 N. W. 100.

Where city purchases land for a pecuniary consideration, it takes absolute title although deed recites it is for city hall purposes only. City of Huron v. Wilcox, 17 S. D. 625.

§ **5395. Subject of sale.** The subject of sale must be property the title to which can be immediately transferred from the seller to the buyer. [Civ. C. 1877, § 982; R. C. 1899, § 3949.]

ARTICLE 2.—AGREEMENTS FOR SALE.

§ **5396. Classified.** An agreement for sale is either:

1. An agreement to sell.
2. An agreement to buy; or,
3. A mutual agreement to sell and buy. [Civ. C. 1877, § 983; R. C. 1899, § 3950.]

§ **5397. Agreement to sell defined.** An agreement to sell is a contract by which one engages for a price to transfer to another the title to a certain thing. [Civ. C. 1877, § 984; R. C. 1899, § 3951.]

§ **5398. Agreement to buy.** An agreement to buy is a contract by which one engages to accept from another and pay a price for the title to a certain thing. [Civ. C. 1877, § 985; R. C. 1899, § 3952.]

§ **5399. To sell and buy.** An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another who engages to accept the same from him and to pay a price therefor. [Civ. C. 1877, § 986; R. C. 1899, § 3953.]

§ **5400. What may be sold.** Any property which if in existence might be the subject of sale may be the subject of an agreement for a sale whether in existence or not. [Civ. C. 1877, § 987; R. C. 1899, § 3954.]

§ **5401. Duty of seller of realty.** An agreement to sell real property binds the seller to execute a conveyance in form sufficient to pass the title to the property. [Civ. C. 1877, § 988; R. C. 1899, § 3955.]

§ **5402. Duty on agreement to give usual covenants.** An agreement on the part of a seller of real property to give the usual covenants binds him to insert in the grant covenants of seizin, quiet enjoyment, further assurance, general warranty and against incumbrances. [Civ. C. 1877, § 989; R. C. 1899, § 3956.

§ **5403. Form of covenants.** The covenants mentioned in the last section must be in substance as follows:

The party of the first part covenants with the party of the second part that the former is now seized in fee simple of the property granted; that the latter shall enjoy the same without any lawful disturbance; that the same is free from all incumbrances; that the party of the first part and all persons acquiring any interest in the same through or for him will on demand execute and deliver to the party of the second part, at the expense of the latter, any further assurance of the same that may be reasonably required; and that the party of the first part will warrant to the party of the second part all

the said property against every person lawfully claiming the same. [Civ. C. 1877, § 990; R. C. 1899, § 3957.]

Assumption of mortgage by grantee is original undertaking and distinct from contract of purchase. Moore v. Booker, 4 N. D. 543, 62 N. W. 607.

§ 5404. **Warranty. Highways.** No covenants of warranty shall be considered as broken by the existence of a highway or railway upon the land conveyed, unless otherwise particularly specified in the deed. [1901, ch. 64.]

ARTICLE 3.—FORM OF THE CONTRACT.

§ 5405. **Statute of frauds. Personal property.** No sale of personal property or agreement to buy or sell it for a price of fifty dollars or more is valid unless:

1. The agreement or some note or memorandum thereof is in writing and subscribed by the party to be charged or by his agent; or,

2. The buyer accepts and receives part of the things sold or when it consists of a thing in action, part of the evidences thereof, or some of them; or,

3. The buyer at the time of the sale pays a part of the price. [Civ. C. 1877, § 991; R. C. 1899, § 3958.]

Oral agreement for the sale of property valued at $50 or over not valid until there has been voluntary receipt and acceptance of goods on part of buyer. Dinnie v. Johnson, 8 N. D. 153, 77 N. W. 612; Talbot v. Boyd, 11 N. D. 81, 88 N. W. 1026.

§ 5406. **Agreement to manufacture not within last section.** An agreement to manufacture a thing from materials furnished by the manufacturer or by another person is not within the provisions of the last section. [Civ. C. 1877, § 992; R. C. 1899, § 3959.]

§ 5407. **Agreement for sale of realty invalid unless in writing.** No agreement for the sale of real property, or of an interest therein, is valid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or his agent thereunto authorized in writing; but this does not abridge the power of any court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof. [Civ. C. 1877, § 993; R. C. 1899, § 3960.]

Agent cannot make contract for sale of land in absence of written authority. Ballou v. Bergvendsen, 9 N. D. 285, 83 N. W. 10.

Written authority to real estate brokers to sell real estate does not confer authority to sign contracts in owner's name. Brandrup v. Britten, 11 N. D. 376, 92 N. W. 453.

Employment of agent to find purchaser for real estate need not be in writing. McLaughlin v. Wheeler, 1 S. D. 497, 47 N. W. 816.

An unexecuted oral agreement for the sale of land cannot be enforced. Cleveland v. Evans, 5 S. D. 53, 58 N. W. 8.

Writing required may be subsequent to sale or purchase and contained in several writings and letters if authority can be understood from all when taken together. Townsend v. Kennedy, 6 S. D. 47, 60 N. W. 164.

An agreement ment in the nature of a special partnership for the purchase and disposition of a certain piece of property need not be in writing. Davenport v. Buchanan, 6 S. D. 376, 61 N. W. 47.

Letter or telegram sufficient authority for agent to bind principal in sale of land. Farrell v. Edwards, 8 S. D. 425, 66 N. W. 812.

Agreement to sell sheriff's certificate of purchase need not be in writing. Whiffen v. Hollister, 12 S. D. 68, 80 N. W. 156.

§ 5408. **Form of transfer.** The form of a transfer of real property is described by the chapter on such transfers. [Civ. C. 1877, § 994; R. C. 1899, § 3961.]

ARTICLE 4.—RIGHTS AND OBLIGATIONS OF THE SELLER. RIGHTS AND DUTIES BEFORE DELIVERING.

§ 5409. **Seller acts as depositary.** After personal property has been sold, and until the delivery is completed the seller has the rights and obligations

of a depositary for hire, except that he must keep the property without charge until the buyer has had a reasonable opportunity to remove it. [Civ. C. 1877, § 995; R. C. 1899, § 3962.]

§ 5410. Seller may rescind. If a buyer of personal property does not pay for it according to contract and it remains in the possession of the seller after payment is due, the seller may rescind the sale, or may enforce his lien for the price in the manner prescribed by chapter 87 on liens. [Civ. C. 1877, § 996; R. C. 1899, § 3963.]

ARTICLE 5.—DELIVERY OF PERSONAL PROPERTY.

§ 5411. Delivered reasonable time after demand. One who sells personal property, whether it was in his possession at the time of sale or not, must put it into a condition fit for delivery and deliver it to the buyer within a reasonable time after demand unless he has a lien thereon. [Civ. C. 1877, § 997; R. C. 1899, § 3964.]

§ 5412. Where deliverable. Personal property sold is deliverable at the place where it is at the time of the sale or agreement to sell or if it is not then in existence, it is deliverable at the place where it is produced. [Civ. C. 1877, § 998; R. C. 1899, § 3965.]

§ 5413. Where brought for acceptance. Risk of transportation. One who sells personal property must bring it to his own door or other convenient place for its acceptance by the buyer, but further transportation is at the risk and expense of the buyer. [Civ. C. 1877, § 999; R. C. 1899, § 3966.]

§ 5414. Notice of option. When either party to a contract of sale has an option as to the time, place or manner of delivery, he must give the other party reasonable notice of his choice; and if he does not give such notice within a reasonable time his right of option is waived. [Civ. C. 1877, § 1000; R. C. 1899, § 3967.]

§ 5415. Buyer's directions govern sending. If a seller agrees to send the thing sold to the buyer he must follow the directions of the latter as to the manner of sending, or it will be at his own risk during its transportation. If he follows such directions or if in the absence of special directions he uses ordinary care in forwarding the thing it is at the risk of the buyer. [Civ. C. 1877, § 1001; R. C. 1899, § 3968.]

§ 5416. Delivery within reasonable hours. The delivery of a thing sold can be offered or demanded only within reasonable hours of the day. [Civ. C. 1877, § 1002; R. C. 1899, § 3969.]

ARTICLE 6.—WARRANTY OF PERSONAL PROPERTY.

§ 5417. Defined. A warranty is an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction, whether past, present or future. [Civ. C. 1877, § 1003; R. C. 1899, § 3970.]

§ 5418. Not implied from mere sale. Except as prescribed by this article a mere contract of sale or agreement to sell does not imply a warranty. [Civ. C. 1877, § 1004; R. C. 1899, § 3971.]

Sale implies warranty, when. Waiver question for jury. Northwestern Cordage Co. v. Rice, 5 N. D. 432, 67 N. W. 298.

Sale does not imply warranty of thing sold. McCormick Harvester Machine Co. v. Watson, 5 S. D. 9, 57 N. W. 945.

In sale of horse what constitutes warranty. Davis v. Iverson, 5 S. D. 295, 58 N. W. 796.

§ 5419. Sale of personalty warrants title. One who sells or agrees to sell personal property as his own thereby warrants that he has a good and unincumbered title thereto. [Civ. C. 1877, § 1005; R. C. 1899, § 3972.]

§ 5420. Bulk equal to sample. One who sells or agrees to sell goods by sample thereby warrants the bulk to be equal to the sample. [Civ. C. 1877, § 1006; R. C. 1899, § 3973.]

Sale by sample. Breach of warranty. Damages. James v. Bekkedahl, 10 N. D. 120, 86 N. W. 226.

§ 5421. Knows nothing to destroy inducement to buy. One who sells or agrees to sell personal property, knowing that the buyer relies upon his advice or judgment, thereby warrants to the buyer that neither the seller, nor any agent employed by him in the transaction, knows the existence of any fact concerning the thing sold which would to his knowledge destroy the buyer's inducement to buy. [Civ. C. 1877, § 1007; R. C. 1899, § 3974.]

§ 5422. Not in existence, sound and merchantable. One who agrees to sell merchandise not then in existence thereby warrants that it shall be sound and merchantable at the place of production contemplated by the parties and as nearly so at the place of delivery as can be secured by reasonable care. [Civ. C. 1877, § 1008; R. C. 1899, § 3975.]

§ 5423. Free from latent defects. One who sells or agrees to sell an article of his own manufacture thereby warrants it to be free from any latent defect not disclosed to the buyer, arising from the process of manufacture and also that neither he nor his agent in such manufacture has knowingly used improper materials therein. [Civ. C. 1877, § 1009; R. C. 1899, § 3976.]

§ 5424. Fit for purpose. One who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose. [Civ. C. 1877, § 1010; R. C. 1899, § 3977.]

§ 5425. Inaccessible, warranted sound and merchantable. One who sells or agrees to sell merchandise inaccessible to the examination of the buyer thereby warrants that it is sound and merchantable. [Civ. C. 1877, § 1011; R. C. 1899, § 3978.]

§ 5426. Trade-mark genuine. One who sells or agrees to sell any article to which there is affixed or attached a trade-mark thereby warrants that mark to be genuine and lawfully used. [Civ. C. 1877, § 1012; R. C. 1899, § 3979.]

§ 5427. Truth of marks of quantity or quality. One who sells or agrees to sell any article to which there is affixed or attached a statement or mark to express the quantity or quality thereof or the place where it was in whole or in part produced, manufactured or prepared, thereby warrants the truth thereof. [Civ. C. 1877, § 1013; R. C. 1899, § 3980.]

Seller by sample guarantees quality of property sold shall be equal to sample. Standard Rope & Twine Co. v. Olmen, 13 S. D. 296, 83 N. W. 271.

§ 5428. Validity of instrument. One who sells or agrees to sell an instrument purporting to bind any one to the performance of an act thereby warrants the instrument to be what it purports to be and to be binding according to its purport upon all parties thereto; and also warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, when that is material, the extinction of its obligations, or its invalidity for any cause. [Civ. C. 1877, § 1014; R. C. 1899, § 3981.]

§ 5429. Provisions sound and wholesome. One who makes a business of selling provisions for domestic use warrants by a sale thereof to one who buys for actual consumption, and not for the purpose of sale, that they are sound and wholesome. [Civ. C. 1877, § 1015; R. C. 1899, § 3982.]

§ 5430. Good will. One who sells the good will of a business thereby warrants that he will not endeavor to draw off any of the customers. [Civ. C. 1877, § 1016; R. C. 1899, § 3983.]

Sale of business implies sale of good will when party agrees to refrain from trade. Mapes v. Metcalf, 10 N. D. 601, 88 N. W. 713.

§ 5431. Judicial sale. Upon a judicial sale the only warranty implied is that the seller does not know that the sale will not pass a good title to the property. [Civ. C. 1877, § 1017; R. C. 1899, § 3984.]

§ 5432. **Scope of general warranty.** A general warranty does not extend to defects inconsistent therewith of which the buyer was then aware or which were then easily discernible by him without the exercise of peculiar skill, but it extends to all other defects. [Civ. C. 1877, § 1018; R. C. 1899, § 3985.]

ARTICLE 7.—RIGHTS AND OBLIGATIONS OF THE BUYER.

§ 5433. **To pay and remove in reasonable time.** A buyer must pay the price of the thing sold on its delivery and must take it away within a reasonable time after the seller offers to deliver it. [Civ. C. 1877, § 1019; R. C. 1899, § 3986.]

§ 5434. **Right to inspect.** On an agreement for sale with warranty the buyer has a right to inspect the thing sold at a reasonable time before accepting it and may rescind the contract if the seller refuses to permit him to do so. [Civ. C. 1877, § 1020; R. C. 1899, § 3987.]

§ 5435. **Rescission for breach of warranty.** The breach of a warranty entitles the buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended by the parties to operate as a condition. [Civ. C. 1877, § 1021; R. C. 1899, § 3988.]

Waiver of claim for breach of warranty. The Minneapolis Thresher Co. v. Lincoln Manufacturing Co., 4 N. D. 410, 61 N. W. 145.

A vendee to whom personal property has been transferred on executed sale can not recover on implied warranty in absence of fraud. Hull v. Caldwell, 3 S. D. 451, 54 N. W. 100.

ARTICLE 8.—SALE BY AUCTION.

§ 5436. **Defined.** A sale by auction is a sale by public outcry to the highest bidder on the spot. [Civ. C. 1877, § 1022; R. C. 1899, § 3989.]

§ 5437. **When complete.** A sale by auction is complete when the auctioneer publicly announces by the fall of his hammer or in any other customary manner that the thing is sold. [Civ. C. 1877, § 1023; R. C. 1899, § 3990.]

§ 5438. **Withdrawal of bid.** Until the announcement mentioned in the last section has been made any bidder may withdraw his bid, if he does so in a manner reasonably sufficient to bring it to the notice of the auctioneer. [Civ. C. 1877, § 1024; R. C. 1899, § 3991.]

§ 5439. **Printed conditions govern.** When a sale by auction is made upon written or printed conditions, such conditions cannot be modified by any oral declaration of the auctioneer, except so far as they are for his own benefit. [Civ. C. 1877, § 1025; R. C. 1899, § 3992.]

§ 5440. **Sale without reserve. Rights of bidder.** If at a sale by auction, the auctioneer having authority to do so, publicly announces that the sale will be without reserve or makes any announcement equivalent thereto the highest bidder in good faith has an absolute right to the completion of the sale to him and upon such a sale bids by the seller or any agents for him are void. [Civ. C. 1877, § 1026; R. C. 1899, § 3993.]

§ 5441. **Employment of bidder in a fraud.** The employment by a seller at a sale at auction without the knowledge of the buyer of any person to bid at the sale, without an intention on the part of the bidder to buy and on the part of the seller to enforce his bid, is a fraud upon the buyer which entitles him to rescind his purchase. [Civ. C. 1877, § 1027; R. C. 1899, § 3994.]

§ 5442. **Auctioneer's entry binding.** When property is sold by auction an entry made by the auctioneer in his sale book at the time of the sale specifying the name of the person for whom he sells, the thing sold, the price, the terms of sale and the name of the buyer binds both parties in the same manner as if made by themselves. [Civ. C. 1877, § 1028; R. C. 1899, § 3995.]

CHAPTER 48.

EXCHANGE.

§ **5443. Defined.** Exchange is a contract by which the parties mutually give or agree to give one thing for another, neither thing or both things being money only. [Civ. C. 1877, § 1029; R. C. 1899, § 3996.]

§ **5444. Governed by section 5405.** The provisions of section 5405 apply to all exchanges in which the value of the thing to be given by either party is fifty dollars or more. [Civ. C. 1877, § 1030; R. C. 1899, § 3997.]

§ **5445. Governed by chapter on sale.** The provisions of the chapter on sale apply to exchanges. Each party has the rights and obligations of a seller as to the thing which he gives and of a buyer as to that which he takes. [Civ. C. 1877, § 1031; R. C. 1899, § 3998.]

§ **5446. Money warranted genuine.** On an exchange of money each party thereby warrants the genuineness of the money given by him. [Civ. C. 1877, § 1032; R. C. 1899, § 3999.]

CHAPTER 49.

DEPOSIT.

Article 1.—Deposit in General.

§ **5447. Deposit classified.** A deposit may be voluntary or involuntary; and for safe-keeping or for exchange. [Civ. C. 1877, § 1033; R. C. 1899, § 4000.]

§ **5448. Voluntary.** A voluntary deposit is made by one giving to another with his consent the possession of personal property to keep for the benefit of the former or of a third party. The person giving is called the depositor and the person receiving the depositary. [Civ. C. 1877, § 1034; R. C. 1899, § 4001.]

This section is general and covers all kinds of deposits. Hawkins v. Hubbard, 2 S. D. 631, 51 N. W. 774.

A general deposit of county funds by county treasurer is not a loan. Allibone v. Ames, 9 S. D. 74, 68 N. W. 165.

§ **5449. Involuntary.** An involuntary deposit is made:

1. By the accidental leaving or placing of personal property in the possession of any person without negligence on the part of its owner; or,

2. In cases of fire, shipwreck, inundation, insurrection, riot or like extraordinary emergencies by the owner of personal property committing it out of necessity to the care of any person. [Civ. C. 1877, § 1035; R. C. 1899, § 4002.]

§ **5450. Duty of depositary under last section.** The person with whom a thing is deposited in the manner described in the last section is bound to take charge of it if able to do so. [Civ. C. 1877, § 1036; R. C. 1899, § 4003.]

§ **5451. For keeping.** A deposit for keeping is one in which the depositary is bound to return the identical things deposited. [Civ. C. 1877, § 1037; R. C. 1899, § 4004.]

§ 5452. **For exchange.** A deposit for exchange is one in which the depositary is only bound to return a thing corresponding in kind to that which is deposited. [Civ. C. 1877, § 1038; R. C. 1899, § 4005.]

ARTICLE 2.—OBLIGATIONS OF THE DEPOSITARY.

§ 5453. **Delivery on demand. Exceptions.** A depositary must deliver the thing to the person for whose benefit it was deposited on demand, whether the deposit was made for a specified time or not, unless he has a lien upon the thing deposited, or has been forbidden or prevented from doing so by the real owner thereof, or by the act of the law and has given the notice required by section 5456. [Civ. C. 1877, § 1039; R. C. 1899, § 4006.]

When replevin will not lie against depositary. What constitutes an escrow. Nichols & Shepard Co. v. Bank, 6 N. D. 404, 71 N. W. 135.

§ 5454. **Demand prerequisite to delivery.** A depositary is not bound to deliver a thing deposited without demand even when the deposit is made for a specified time. [Civ. C. 1877, § 1040; R. C. 1899, § 4007.]

§ 5455. **Place of delivery.** A depositary must deliver the thing deposited at his residence or place of business as may be most convenient for him. [Civ. C. 1877, § 1041; R. C. 1899, § 4008.]

§ 5456. **Prompt notice of adverse claim.** A depositary must give prompt notice to the person for whose benefit the deposit was made of any proceedings taken adversely to his interest in the thing deposited, which may tend to excuse the depositary from delivering the same to him. [Civ. C. 1877, § 1042; R. C. 1899, § 4009.]

§ 5457. **Notice of wrongful detention.** A depositary who believes that a thing deposited with him is wrongfully detained from its true owner may give him notice of the deposit; and if within a reasonable time afterwards he does not claim it and sufficiently establish his right thereto and indemnify the depositary against the claim of the depositor, the depositary is exonerated from liability to the person to whom he gave the notice upon returning the thing to the depositor, or assuming in good faith a new obligation changing his position in respect to the thing to his prejudice. [Civ. C. 1877, § 1043; R. C 1899, § 4010.]

§ 5458. **Delivery to disagreeing owners.** If a thing deposited is owned jointly or in common by persons who cannot agree upon the manner of its delivery, the depositary may deliver to each his proper share thereof, if it can be done without injury to the thing. [Civ. C. 1877, § 1044; R. C. 1899, § 4011.]

ARTICLE 3.—DEPOSIT FOR KEEPING.

§ 5459. **Indemnity to depositary for damages.** A depositor must indemnify the depositary:

1. For all damage caused to him by the defects or vices of the thing deposited; and,

2. For all expenses necessarily incurred by him about the thing other than such as are involved in the nature of the undertaking. [Civ. C. 1877, § 1045; R. C. 1899, § 4012.]

§ 5460. **Care of animals.** A depositary of living animals must provide them with suitable food and shelter and treat them kindly. [Civ. C. 1877, § 1046; R. C. 1899, § 4013.]

§ 5461. **May not use deposit.** A depositary may not use the thing deposited or permit it to be used for any purpose without the consent of the depositor. He may not, if it is purposely fastened by the depositor, open it without the consent of the latter except in case of necessity. [Civ. C. 1877, § 1047; R. C. 1899, § 4014.]

Can only be used with pledgor's consent. Hawkins v. Hubbard, 2 S. D. 631, 51 N. W. 774.

§ 5462. Damages for wrongful use. A depositary is liable for any damage happening to the thing deposited during his wrongful use thereof, unless such damage must inevitably have happened though the property had not been thus used. [Civ. C. 1877, § 1048; R. C. 1899, § 4015.]

§ 5463. Sale if perishing. If a thing deposited is in actual danger of perishing before instructions can be obtained from the depositor, the depositary may sell it for the best price obtainable and retain the proceeds as a deposit, giving immediate notice of his proceedings to the depositor. [Civ. C. 1877, § 1049; R. C. 1899, § 4016.]

§ 5464. When willfulness or gross negligence presumed. If a thing is lost or injured during its deposit and the depositary refuses to inform the depositor of the circumstances under which the loss or injury occurred so far as he has information concerning them, or willfully misrepresents the circumstances to him, the depositary is presumed to have willfully or by gross negligence permitted the loss or injury to occur. [Civ. C. 1877, § 1050; R. C. 1899, § 4017.]

§ 5465. Rules governing services by depositary. So far as any service is rendered by a depositary or required from him his duties and liabilities are prescribed by chapters 52, 53 and 54. [Civ. C. 1877, § 1051; R. C. 1899, § 4018.]

§ 5466. Measure of liability. The liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor or has reason to suppose the thing deposited to be worth. [Civ. C. 1877, § 1052; R. C. 1899, § 4019.]

Article 4.—Gratuitous Deposit.

§ 5467. Defined. Gratuitous deposit is a deposit for which the depositary receives no consideration beyond the mere possession of the thing deposited. [Civ. C. 1877, § 1053; R. C. 1899, § 4020.]

§ 5468. Involuntary, gratuitous. An involuntary deposit is gratuitous, the depositary being entitled to no reward. [Civ. C. 1877, § 1054; R. C. 1899, § 4021.]

§ 5469. Use slight care. A gratuitous depositary must use at least slight care for the preservation of the thing deposited. [Civ. C. 1877, § 1055; R. C. 1899, § 4022.]

§ 5470. When duties cease. The duties of a gratuitous depositary cease:

1. Upon his restoring the thing deposited to its owner; or,
2. Upon his giving reasonable notice to the owner to remove it, the owner failing to do so within a reasonable time. But an involuntary depositary under subdivision 2 of section 5449 cannot give such notice until the emergency that gave rise to the deposit is passed. [Civ. C. 1877, § 1056; R. C. 1899, § 4023.]

Article 5.—Storage.

§ 5471. Defined. A deposit not gratuitous is called storage. The depositary in such case is called a depositary for hire. [Civ. C. 1877, § 1057; R. C. 1899, § 4024.]

§ 5472. Must use ordinary care. A depositary for hire must use at least ordinary care for the preservation of the thing deposited. [Civ. C. 1877, § 1058; R. C. 1899, § 4025.]

§ 5473. Right to compensation. In the absence of a different agreement or usage a depositary for hire is entitled to one week's hire for the sustenance and shelter of living animals during any fraction of a week and to half a month's hire for the storage of any other property during any fraction of a half month. [Civ. C. 1877, § 1059; R. C. 1899, § 4026.]

§ 5474. Termination of deposit. In the absence of an agreement as to the length of time during which a deposit is to continue it may be terminated by the depositor at any time and by the depositary upon reasonable notice. [Civ. C. 1877, § 1060; R. C. 1899, § 4027.]

§ 5475. **Same. Payment for full time.** Notwithstanding an agreement respecting the length of time during which a deposit is to continue, it may be terminated by the depositor on paying all that would become due to the depositary in case of the deposit so continuing. [Civ. C. 1877, § 1061; R. C. 1899, § 4028.]

Article 6.—Innkeeper.

§ 5476. **Innkeeper's liability.** An innkeeper or keeper of a boarding house is liable for all losses of or injuries to personal property placed by his guests or boarders under his care, unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner or by the act of some one whom he brought into the inn or boarding house. [Civ. C. 1877, § 1062; R. C. 1895, § 4029.]

Liable for injury to goods for want of ordinary care. Scheffer v. Corson, 5 S. D. 233, 58 N. W. 555.

An innkeeper has no lien on property leased of third person and brought to and left at hotel by guest. McClain v. Williams, 11 S. D. 227, 76 N. W. 930.

§ 5477. **How exempted from liability.** If an innkeeper or boarding house keeper keeps a fire proof safe and gives notice to a guest or boarder, either personally or by putting up a printed notice in a prominent place in the room occupied by the guests or boarders that he keeps such a safe and will not be liable for money, jewelry, documents or other articles of unusual value and small compass unless placed therein, he is not liable, except so far as his own acts contribute thereto for any loss of or injury to such article, if not deposited with him and not required by the guest or boarder for present use. [Civ. C. 1877, § 1063; R. C. 1899, § 4030.]

Article 7.—Finding.

§ 5478. **Finder, depositary for hire.** One who finds a thing lost is not bound to take charge of it; but if he does so, he is thenceforward a depositary for the owner with the rights and obligations of a depositary for hire. [Civ. C. 1877, § 1064; R. C. 1899, § 4031.]

§ 5479. **Must notify owner.** If the finder of a thing knows or suspects who is the owner, he must with reasonable diligence give him notice of the finding; and if he fails to do so, he is liable in damages to the owner and has no claim to any reward offered by him for the recovery of the thing or to any compensation for his trouble or expenses. [Civ. C. 1877, § 1065; R. C. 1899, § 4032.]

§ 5480. **May require proof of ownership.** The finder of a thing may in good faith before giving it up require reasonable proof of ownership from any person claiming it. [Civ. C. 1877, § 1066; R. C. 1899, § 4033.]

§ 5481. **Compensation and reward.** The finder of a thing is entitled to compensation for all expenses necessarily incurred by him in its preservation and for any other services necessarily performed by him about it and to a reasonable reward for keeping it. [Civ. C. 1877, § 1067; R. C. 1899, § 4034.]

§ 5482. **Storing releases from liability.** The finder of a thing may exonerate himself from liability at any time by placing it on storage with any responsible person of good character at a reasonable expense. [Civ. C. 1877, § 1068; R. C. 1899, § 4035.]

§ 5483. **When finder may sell.** The finder of a thing may sell it, if it is a thing which is commonly the subject of sale, when the owner cannot with reasonable diligence be found; or, being found, refuses upon demand to pay the lawful charges of the finder in the following cases:

1. When the thing is in danger of perishing or of losing the greater part of its value; or,
2. When the lawful charges of the finder amount to two-thirds of its value.

[Civ. C. 1877, § 1069; R. C. 1899, § 4036.]

§ **5484. Manner of sale.** A sale under the provisions of the last section must be made in the same manner as the sale of a thing pledged. [Civ. C. 1877, § 1070; R. C. 1899, § 4037.]

§ **5485. Claim exonerated by surrender.** The owner of a thing found may exonerate himself from the claims of the finder by surrendering it to him in satisfaction thereof. [Civ. C. 1877, § 1071; R. C. 1899, § 4038.]

§ **5486. No application to things abandoned.** The provisions of this article have no application to things which have been intentionally abandoned by their owners. [Civ. C. 1877, § 1072; R. C. 1899, § 4039.]

Article 8.—Deposit for Exchange.

§ **5487. Title transferred by.** A deposit for exchange transfers to the depositary the title to the thing deposited and creates between him and the depositor the relation of debtor and creditor merely. [Civ. C. 1877, § 1073; R. C. 1899, § 4040.]

See section 5448; also annotation to section 5448.

CHAPTER 50.

LOAN.

Article 1.—Loan for Use.

§ **5488. Defined.** A loan for use is a contract by which one gives to another the temporary possession and use of personal property and the latter agrees to return the same thing to him at a future time without reward for its use. [Civ. C. 1877, § 1074; R. C. 1899, § 4041.]

§ **5489. Title and increase belong to lender.** A loan for use does not transfer the title to the thing; and all its increase during the period of the loan belongs to the lender. [Civ. C. 1877, § 1075; R. C. 1899, § 4042.]

§ **5490. Must use great care.** A borrower for use must use great care for the preservation in safety and in good condition of the thing lent. [Civ. C. 1877, § 1076; R. C. 1895, § 4043.]

§ **5491. Treat animal with great kindness.** One who borrows a living animal for use must treat it with great kindness and provide everything necessary and suitable for it. [Civ. C. 1877, § 1077; R. C. 1899, § 4044.]

§ **5492. Degree of skill.** A borrower for use is bound to have and to exercise such skill in the care of the thing lent as he causes the lender to believe him to possess. [Civ. C. 1877, § 1078; R. C. 1899, § 4045.]

§ **5493. Repair injuries.** A borrower for use must repair all deteriorations or injuries to the thing lent which are occasioned by his negligence however slight. [Civ. C. 1877, § 1079; § R. C. 1899, § 4046.]

§ **5494. Use only for anticipated purposes.** The borrower of a thing for use may use it for such purposes only as the lender might reasonably anticipate at the time of lending. [R. C. 1877, § 1080; R. C. 1899, § 4047.]

§ **5495. Must not lend without consent.** The borrower of a thing for use must not part with it to a third person without the consent of the lender. [Civ. C. 1877, § 1081; R. C. 1899, § 4048.]

§ **5496. Expenses during loan.** The borrower of a thing for use must bear all its expenses during the loan, except such as are necessarily incurred by him to preserve it from unexpected and unusual injury. For such expense he is entitled to compensation from the lender who may, however, exonerate himself by surrendering the thing to the borrower. [Civ. C. 1877, § 1082; R. C. 1899, § 4049.]

§ **5497. Indemnity to borrower for defects.** The lender of a thing for use must indemnify the borrower for damages caused by defects or vices

in it which he knew at the time of lending and concealed from the borrower. [Civ. C. 1877, § 1083; R. C. 1899, § 4050.]

§ **5498. Return may be required at any time.** The lender of a thing for use may at any time require its return, even though he lent it for a specified time or purpose. But if on the faith of such an agreement the borrower has made such arrangements that a return of the thing before the period agreed upon would cause him loss, exceeding the benefit derived by him from the loan, the lender must indemnify him for such loss, if he compels such return, the borrower not having in any manner violated his duty. [Civ. C. 1877, § 1084; R. C. 1899, § 4051.]

§ **5499. When to be returned.** If a thing is lent for use for a specified time or purpose, it must be returned to the lender without demand as soon as the time has expired or the purpose has been accomplished. In other cases it need not be returned until demanded. The borrower of a thing for use must return it to the lender at the place contemplated by the parties at the time of the lending; or if no particular place was so contemplated by them, then at the place where it was at that time. [Civ. C. 1877, §§ 1085, 1086; R. C. 1899, § 4052.]

Article 2.—Loan for Exchange.

§ **5500. Defined.** A loan for exchange is a contract by which one delivers personal property to another and the latter agrees to return to the lender a similar thing at a future time without reward for its use. [Civ. C. 1877, § 1087; R. C. 1899, § 4053.]

§ **5501. Same.** A loan which the borrower is allowed by the lender to treat as a loan for use or for exchange at his option is subject to all the provisions of this article. [Civ. C. 1877, § 1088; R. C. 1899, § 4054.]

§ **5502. Transfers title.** By a loan for exchange the title to the thing lent is transferred to the borrower and he must bear all its expenses and is entitled to all its increase. [Civ. C. 1877, § 1089; R. C. 1899, § 4055.]

§ **5503. Cannot require different performance.** A lender for exchange cannot require the borrower to fulfill his obligations at a time or in a manner different from that which was originally agreed upon. [Civ. C. 1877, § 1090; R. C. 1899, § 4056.]

§ **5504. Sections applicable.** Sections 5496 and 5498 apply to a loan for exchange. [Civ. C. 1877, § 1091; R. C. 1899, § 4057.]

Article 3.—Loan of Money.

§ **5505. Defined.** A loan of money is a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrowed. A loan for mere use is governed by the article on loan for use. [Civ. C. 1877, § 1092; R. C. 1899, § 4058.]

§ **5506. Repayment in current funds.** A borrower of money must pay the amount due in such money as is current at the time when the loan becomes due, whether such money is worth more or less than the actual money lent. [Civ. C. 1877, § 1093; R. C. 1899, § 4059.]

§ **5507. Loan presumes interest.** Whenever a loan of money is made it is presumed to be made upon interest, unless it is otherwise expressly stipulated at the time in writing. [Civ. C. 1877, § 1094; R. C. 1899, § 4060.]

§ **5508. Interest defined.** Interest is the compensation allowed for the use, or forbearance, or detention of money, or its equivalent. [Civ. C. 1877, § 1095; R. C. 1899, § 4061.]

§ **5509. Rate deemed annual.** When a rate of interest is prescribed by law or contract without specifying the period of time by which such rate is to be calculated it is to be deemed an annual rate. [Civ. C. 1877, § 1096; R. C. 1899, § 4062.]

§ 5510. Legal rate seven per cent. Interest for any legal indebtedness shall be at the rate of seven per cent per annum, unless a different rate is contracted for in writing and all contracts shall bear the same rate of interest after they become due as before, unless it clearly appears therefrom that such was not the intention of the parties. [1890, ch. 184, § 1; 1893, ch. 131, § 1; R. C. 1899, § 4063.]

§ 5511. Usury defined. No person, firm, company or corporation shall directly or indirectly take, or receive, or agree to take or recive in money, goods or things in action or in any other way any greater sum or any greater value for the loan or forbearance of money, goods or things in action than twelve per cent per annum; and in the computation of interest the same shall not be compounded. Any violation of this section shall be deemed usury; provided, that any contract to pay interest not usurious on interest overdue shall not be deemed usury. [1890, ch. 184, § 2; 1893, ch. 131, § 2; R. C. 1899, § 4064.]

Usurious contract: interest can not be recovered. Illegal interest paid, when a counter claim. Wood v. Cuthbertson, 3 Dak. 328, 21 N. W. 3.

The taking of a note for a greater amount than actually paid on loan is usury. Building and loan association exempt. Vermont Loan & Trust Co. v. Whithed, 2 N. D. 82, 49 N. W. 318.

Usury what constituted under law 1890. Folsom v. Kilbourne, 5 N. D. 402, 67 N. W. 291; Bank v. Lemke, 3 N. D. 154, 54 N. W. 919.

Action to recover. Hanson v. Bank, 6 N. D. 212, 69 N. W. 202.

City warrants draw interest after presentation and refusal of payment. Freeman v. Huron, 10 S. D. 368, 73 N. W. 260.

Seven per cent rate of interest unless contract to pay more is in writing duly signed. Tucker v. Randall, 10 S. D. 581, 74 N. W. 1036.

Interest may be charged on accounts stated monthly and agreed to. McCuish v. Smail, 13 S. D. 397, 83 N. W. 426.

§ 5512. Interest taken in advance. The interest which would become due at the end of the term for which a loan is made, not exceeding ninety days' interest in all, may be deducted from the loan in advance if the parties thus agree. [Civ. C. 1877, § 1099; R. C. 1895, § 4065.]

§ 5513. Penalty for usury. The taking, receiving, reserving or charging a rate of interest greater than is allowed by section 5510, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action for that purpose twice the amount of interest thus paid from the person taking or receiving the same; provided, that such action is commenced within two years from the time the usurious transaction occurred. [Civ. C. 1877, § 1100; 1887, ch. 207, § 1; 1893, ch. 131, § 3; R. C. 1895, § 4066.]

One seeking relief against usurious contract is confined to statutory remedy. Robinson v. McKinney, 4 Dak. 290, 29 N. W. 658.

Where mortgage is given to include one then existing and which bore lower rate of interest contract held not usurious. Hodgson v. Davis, 6 Dak. 21, 50 N. W. 478.

Contract construed and declared usurious. Wood v. Cuthberston, 6 Dak. 328, 21 N. W. 3.

Repeal of usury laws does not affect transactions had before repeal. Bank v. Lemke, 3 N. D. 154, 54 N. W. 919.

Right to recover usury paid is personal to the borrower. One of two joint makers cannot recover. Executrix can not recover usury not paid by decedent. Lealos v. Bank, 9 N. D. 60, 81 N. W. 56; Cahn v. Bank, 1 S. D. 237, 46 N. W. 185.

Recover double amount of all interest paid and not merely the excess over lawful rate. Waldner v. Bowden State Bank, 13 N. D. 604, 102 N. W. 169.

Plea of usury can not be interposed against mortgage by one who merely buys equity of redemption. Hill v. Alliance Building Co., 6 S. D. 160, 60 N. W. 752.

Usurious interest paid more than three years before commencement of action cannot be recovered. Wilson v. Selbie, 7 S. D. 494, 64 N. W. 537.

Usury must have been actually paid before suit for recovery can be instituted. Davey v. Bank, 8 S. D. 214, 66 N. W. 122.

Usury cannot be set up as defense in foreclosure proceedings by advertisement **after sale. N. W. M.** & T. Co. v. Bradley, 9 S. D. 495, 70 N. W. 648.
Usury must be pleaded specially to be of avail. Yankton Building & Loan Ass'n. **v. Dowling, 10 S. D.** 540, 74 N. W. 436.
See annotation to section 5511.

§ 5514. Judgments bear seven per cent. Interest is payable on judgments **recovered in the cour**ts of this state at the rate of seven per cent per annum, **and no greater rate**, but such interest must not be compounded in any manner or form. [Civ. C. 1877, § 1101; R. C. 1899, § 4067.]

§ 5515. Same rate before and after breach. Any legal rate of interest **stipulated by a contr**act remains chargeable after a breach thereof, as before, **until the contract is** superseded by a verdict or other new obligation. [Civ. **C. 1877, § 1102; R. C.** 1899, § 4068.]

CHAPTER 51.

HIRING.

Article 1.—Hiring in General.

§ 5516. Defined. Hiring is a contract by which one gives to another the **temporary possession** and use of property, other than money, for reward and **the latter agrees to** return the same to the former at a future time. [Civ. **C. 1877, § 1103; R.** C. 1899, § 4069.]

Contract to work farm on shares not one of hire but in nature of adventure. On **breach measure of** damage is value of share of crop. Bowers v. Graves & Vinton **Co., 8 S. D. 385, 66** N. W. 931.

§ 5517. Products belong to hirer. The products of a thing hired during **the hiring belong to** the hirer. [Civ. C. 1877, § 1104; R. C. 1899, § 4070.]

§ 5518. Quiet possession. An agreement to let upon hire binds the letter **to secure to the hirer** the quiet possession of the thing hired during the term **of the hiring against** all persons lawfully claiming the same. [Civ. C. 1877, **§ 1105; R. C. 1899, §** 4071.]

§ 5519. Ordinary care. The hirer of a thing must use ordinary care for **its preservation in sa**fety and in good condition. [Civ. C. 1877, § 1106; R. C. **1899, § 4072.]**

§ 5520. Repair injuries. The hirer of a thing must repair all deteriora**tions or injuries the**reto occasioned by his ordinary negligence. [Civ. C. **1877, § 1107: R. C. 1**899, § 4073.]

§ 5521. Use only for purpose let. When a thing is let for a particular **purpose the hirer mu**st not use it for any other purpose; and if he does the **letter may hold him** responsible for its safety during such use in all events **or may treat the con**tract as thereby rescinded. [Civ. C. 1877, § 1108; R. C. **1899, § 4074.]**

§ 5522. When letter may terminate hiring. The letter of a thing may **terminate the hiring** and reclaim the thing before the end of the term agreed **upon:**

1. When the hirer uses or permits a use of the thing hired in a manner **contrary to the agree**ment of the parties; or,

2. When the hirer does not within a reasonable time after request make **such repairs as he is** bound to make. [Civ. C. 1877, § 1109; R. C. 1899, **§ 4075.]**

§ 5523. When hirer may terminate. The hirer of a thing may terminate **the hiring before the** end of the term agreed upon:

1. When the letter does not within a reasonable time after request fulfill **his obligations, if any**, as to placing and securing the hirer in the quiet pos**session of the thing h**ired, or putting it into a good condition, or repairing; or,

2. When the greater part of the thing hired or that part, which was and which the letter had at the time of the hiring reason to believe was the material inducement to the hirer to enter into the contract, perishes from any other cause than the ordinary negligence of the hirer. [Civ. C. 1877, § 1110; R. C. 1899, § 4076.]

§ 5524. When hiring terminated. The hiring of a thing terminates:

1. At the end of the term agreed upon.
2. By the mutual consent of the parties.
3. By the hirer acquiring a title to the thing hired superior to that of the letter; or,
4. By the destruction of the thing hired. [Civ. C. 1877, § 1111; R. C. 1899, § 4077.]

§ 5525. When terminated by death. If the hiring of a thing is terminable at the pleasure of one of the parties it is terminated by notice to the other of his death or incapacity to contract. In other cases it is not terminated thereby. [Civ. C. 1877, § 1112; R. C. 1899, § 4078.]

§ 5526. Proportionate hire paid, when. When the hiring of a thing is terminated before the time originally agreed upon the hirer must pay the due proportion of the hire for such use as he has actually made of the thing, unless such use is merely nominal and of no benefit to him. [Civ. C. 1877, § 1113; R. C. 1899, § 4079.]

Article 2.—Hiring of Real Property.

§ 5527. Obligations of lessor of dwelling. The lessor of a building intended for the occupation of human beings must in the absence of an agreement to the contrary put it into condition fit for such occupation and repair all subsequent dilapidations thereof, except that the lessee must repair all deteriorations or injuries thereto occasioned by his ordinary negligence. [Civ. C. 1877, § 1114; R. C. 1899, § 4080.]

Cellar and first story of building in store block not embraced in section. Edmison v. Asleson, 4 Dak. 145, 27 N. W. 82.

§ 5528. When lessee may repair or vacate. If within a reasonable time after notice to the lessor of dilapidations which he ought to repair he neglects to do so the lessee may repair the same himself and deduct the expense of such repairs from the rent, or otherwise recover it from the lessor; or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent or performance of other conditions. [Civ. C. 1877, § 1115; R. C. 1899, § 4081.]

Sewer connection not included in "repairs," "dilapidation" or "deterioration" on original improvement. Torrson v. Walla, 11 N. D. 481, 92 N. W. 834.

Parol proof of notice of condition of building sufficient. Prior v. Sanborn Co., 12 S. D. 86, 80 N. W. 169.

§ 5529. Hiring of realty presumed for one year. A hiring of real property, other than lodgings, in places where there is no usage on the subject is presumed to be for one year from its commencement, unless otherwise expressed in the hiring. [Civ. C. 1877, § 1116; R. C. 1899, § 4082.]

§ 5530. Of lodgings for rent term. A hiring of lodgings for an unspecified term is presumed to have been made for such length of time as the parties adopt for the estimation of the rent. Thus a hiring at a weekly rate of rent is presumed to be for one week. In the absence of any agreement respecting the length of time of the rent the hiring is presumed to be monthly. [Civ. C. 1877, § 1117; R. C. 1899, § 4083.]

§ 5531. When hiring presumed renewed. If a lessee of real property remains in possession thereof after the expiration of the hiring and the lessor accepts rent from him the parties are presumed to have renewed the

hiring on the same terms and for the same time, not exceeding one year. [Civ. C. 1877, § 1118; R. C. 1899, § 4084.]

Acceptance of rent after term expires renews lease. Field v. Mott, 9 N. D. 621, 84 N. W. 555.

Demand for payment of past due rent after demand for possession does not renew lease. Banbury v. Sherin, 4 S. D. 88, 55 N. W. 723.

One holding over after termination of lease liable for rent; the words "guess he would have to give up the house," not sufficient notice. Hunter v. Karcher, 8 S. D. 554, 67 N. W. 621.

§ 5532. **Same when no** term originally specified. A hiring of real property for a term not specified by the parties is deemed to be renewed as stated in the last section at the end of the term implied by law, unless one of the parties gives notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding one month. [Civ. C. 1877, § 1119; R. C. 1899, § 4085.]

§ 5533. **Rents, when payable.** When there is no contract or usage to the contrary the rent of agricultural and wild lands is payable yearly at the end of each year. Rents of lodgings are payable monthly at the end of each month. Other rents are payable quarterly at the end of each quarter from the time the hiring takes effect. The rent for a hiring shorter than the periods herein specified is payable at the termination of the hiring. [Civ. C. 1877, § 1120; R. C. 1899, § 4086.]

§ 5534. **Notice of adverse proceedings.** Every tenant who receives notice of any proceeding to recover the real property occupied by him, or the possession thereof, must immediately inform his landlord of the same and also deliver to the landlord the notice, if in writing, and is responsible to the landlord for all damages which he may sustain by reason of any omission to inform him of the notice or to deliver it to him if in writing. The attornment of a tenant to a stranger is void, unless it is made with the consent of the landlord or in consequence of a judgment of a court of competent jurisdiction. [Civ. C. 1877, § 1121; R. C. 1899, § 4087.]

§ 5535. **Double letting** of room prohibited. One who hires part of a room for a dwelling is entitled to the whole of the room, notwithstanding any agreement to the contrary; and if a landlord lets a room as a dwelling for more than one family, the person to whom he first lets any part of it is entitled to the possession of the whole room for the term agreed upon and every tenant in the building under the same landlord is relieved from all obligation to pay rent to him while such double letting of any room continues. [Civ. C. 1877, § 1122; R. C. 1899, § 4088.]

§ 5536. **Written notice** before removal of property. Any person, firm, association or corporation occupying premises under a written lease, who fraudulently and clandestinely removes his or their goods, chattels or personal property from any leased or demised premises without first giving due notice to the landlord, his agent, or duly authorized attorney, shall be deemed guilty of a misdemeanor. Any person, firm, association or corporation found guilty of a misdemeanor as provided in this section shall be punishable by a fine of not less than twenty dollars nor more than two hundred dollars, or by imprisonment in the county jail not less than ten days nor more than ninety days, or by both such fine and imprisonment. [1903, ch. 118.]

Article 3.—Hiring of Personal Property.

§ 5537. **Obligations of** letter of personalty. One who lets personal property must deliver it to the hirer, secure his quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he lets it and repair all deteriorations thereof not occasioned by the fault of the hirer and not the natural result of its use. [Civ. C. 1877, § 1123; R. C. 1899, § 4089.]

§ 5538. **Hirer bears ordinary expenses.** A hirer of personal property must bear all such expenses concerning it as might naturally be foreseen to attend it during its use by him. All other expenses must be borne by the letter. [Civ. C. 1877, § 1124; R. C. 1899, § 4090.]

§ 5539. **Rights when section 5536 not complied with.** If a letter fails to fulfill his obligations as prescribed by section 5536, the hirer after giving him notice to do so, if such notice can conveniently be given, may expend any reasonable amount necessary to make good the letter's default and may recover such amount from him. [Civ. C. 1877, § 1125; R. C. 1899, § 4091.]

§ 5540. **Return of thing hired.** At the expiration of the term for which personal property is hired the hirer must return it to the letter at the place contemplated by the parties at the time of hiring, or if no particular place was so contemplated by them, at the place at which it was at that time. [Civ. C. 1877, § 1126; R. C. 1899, § 4092.]

§ 5541. **Charter party.** The contract by which a ship is let is termed a charter party. By it the owner may either let the capacity or burden of the ship, continuing the employment of the owner's master, crew and equipments, or may surrender the entire ship to the charterer, who then provides them himself. The master or part owner may be a charterer. [Civ. C. 1877, § 1127; R. C. 1899, § 4093.]

CHAPTER 52.

SERVICE.

Article 1.—Definition of Employment.

§ 5542. **Employment defined.** The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employe, to do something for the benefit of the employer or a third person. [Civ. C. 1877, § 1128; R. C. 1899, § 4094.]

Injunction restraining fulfillment of contract excuses contractor. **Burkhardt v.** School Township, 9 S. D. 315, 69 N. W. 16.

Article 2.—Obligations of the Employer.

§ 5543. **Indemnity to employe.** An employer must indemnify his employe except as prescribed in the next section for all that he necessarily expends or loses in direct consequence of the discharge of his duties as such or of his obedience to the directions of the employer, even though unlawful, unless the employe at the time of obeying such directions believed them to be unlawful. [Civ. C. 1877, § 1129; R. C. 1899, § 4095.]

§ 5544. **Ordinary risks. Co-employes.** An employer is not bound to indemnify his employe for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employe. [Civ. C. 1877, § 1130; R. C. 1899, § 4096.]

Servant risks ordinary dangers of employment. Herbert v. N. **P. Ry., 3 Dak. 38,** 13 N. W. 349.

Who fellow servants depends upon character of work of employers. **Ell v. N. P.** Ry., 1 N. D. 336, 48 N. W. 222.

Master must not only furnish safe and proper machinery, but must also place same under control of competent servants. Gates v. C. M. & St. P. Ry., 2 S. D. 422, 50 N. W. 907: Gates v. C. M. & St. P. Ry., 4 S. D. 433; N. P. Ry. v. Herbert, 116 U. S. 642, 57 N. W. 200.

If employer has knowledge of some latent hazard which employe does not know he is bound to notify servant thereof. Carlson v. Water Co., 8 S. D. 47, 65 N. W. 419.

Ordinary risks, McKeever v. Homestake Mining Co., 10 S. D. 599, 74 N. W. 1053.

Conductor and brakeman are fellow servants. N. P. Ry. v. Hogan, 63 Fed. 102.

Note:—The annotations under this section relating to railroad employes should have been under section 4400.

§ 5545. Employer's negligence. An employer must in all cases indemnify his employe for losses caused by the former's want of ordinary care. [Civ. C. 1877, § 1131; R. C. 1899, § 4097.]

ARTICLE 3.—OBLIGATIONS OF THE EMPLOYE.

§ 5546. Obligations of gratuitous employe. One who without consideration undertakes to do a service for another is not bound to perform the same but if he actually enters upon its performance he must use at least slight care and diligence therein. [Civ. C. 1877, § 1132; R. C. 1899, § 4098.]

One performing services for state where no provision has been made for payment can not maintain action against state. Harris v. State, 9 S. D. 453, 69 N. W. 825.

§ 5547. Same. One who by his own special request induces another to intrust him with the performance of a service must perform the same fully. In other cases one who undertakes a gratuitous service may relinquish it at any time. [Civ. C. 1877, § 1133; R. C. 1899, § 4099.]

§ 5548. Same. Power of attorney. A gratuitous employe who accepts a written power of attorney must act under it so long as it remains in force, or until he gives notice to his employer that he will not do so. [Civ. C. 1877, § 1134; R. C. 1899, § 4100.]

§ 5549. Duties of employe for reward. One who for a good consideration agrees to serve another must perform the service and must use ordinary care and diligence therein so long as he is thus employed. [Civ. C. 1877, § 1135; R. C. 1899, § 4101.]

Morris v. Union National Bank, 13 S. D. 329, 83 N. W. 252.
Bank bound to exercise reasonable degree of skill only in making collections. Morris v. Union National Bank, 13 S. D. 329, 83 N. W. 252.

§ 5550. Employe for his own benefit. One who is employed at his own request to do that which is more for his own advantage than for that of his employer must use great care and diligence therein to protect the interests of the latter. [Civ. C. 1877, § 1136; R. C. 1899, § 4102.]

§ 5551. Contract for personal services. Two years. A contract to render personal service, other than a contract of apprenticeship, as provided in the chapter on master and servant, cannot be enforced against the employe beyond the term of two years from the commencement of service under it, but if the employe voluntarily continues his services under it beyond that time the contract may be referred to as affording a presumptive measure of the compensation. [Civ. C. 1877, § 1137; R. C. 1899, § 4103.]

§ 5552. Must obey employer. An employe must substantially comply with all the directions of his employer concerning the service on which he is engaged, even though contrary to the provisions of this and the two succeeding chapters, except when such obedience is impossible or unlawful, or would impose new and unreasonable burdens upon the employe, or in case of an emergency, which, according to the best information which the employe can with reasonable diligence obtain the employer did not contemplate, in which he cannot with reasonable diligence be consulted and in which noncompliance is judged by the employe in good faith and in the exercise of reasonable discretion to be absolutely necessary for the protection of the employer's interest. In all such cases the employe must conform as nearly to the directions of his employer as may be reasonably practicable, and most for the interest of the latter. [Civ. C. 1877, § 1138; R. C. 1899, § 4104.]

§ 5553. Conform to usage. An employe must perform his service in conformity to the usage of the place of performance, unless otherwise directed by his employer, or unless it is impracticable, or manifestly injurious to his employer to do so. [Civ. C. 1877, § 1139; R. C. 1899, § 4105.]

§ 5554. Reasonable skill. An employe is bound to exercise a reasonable degree of skill, unless his employer has notice before employing him of his want of skill. [Civ. C. 1877, § 1140; R. C. 1899, § 4106.]

§ 5555. Use all skill possessed. An employe is bound to use such skill as he possesses so far as the same is required for the service specified. [Civ. C. 1877, § 1141; R. C. 1899, § 4107.]

§ 5556. What belongs to employer. Everything which an employe acquires by virtue of his employment, except the compensation, if any, which is due to him from his employer, belongs to the latter, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment. [Civ. C. 1877, § 1142; R. C. 1899, § 4108.]

§ 5557. Account to employer. An employe must on demand render to his employer just accounts of all his transactions in the course of his services as often as may be reasonable and must without demand give prompt notice to his employer of everything which he receives for his account. [Civ. C. 1877, § 1143; R. C. 1899, § 4109.]

§ 5558. Not to deliver without demand. An employe, who receives anything on account of his employer in any capacity other than that of a mere servant, is not bound to deliver it to him until demanded, and is not at liberty to send it to him from a distance without demand in any mode involving greater risk than its retention by the employe himself. [Civ. C. 1877, § 1144; R. C. 1899, § 4110.]

§ 5559. Employer's business to receive preference. An employe who has any business to transact on his own account similar to that intrusted to him by his employer must always give the latter the preference. If entrusted with similar affairs by different employers, he must give them preference according to their relative urgency, or, other things being equal, according to the order in which they were committed to him. [Civ. C. 1877, § 1145; R. C. 1899, § 4111.]

Preference must be given to accounts accepted for collection over claims owned by agent against same party. Bank v. Red River Bank, 8 N. D. 382, 79 N. W. 859.

§ 5560. Ordinary care in selecting substitute. An employe who is expressly authorized to employ a substitute is liable to his principal only for want of ordinary care in his selection. The substitute is directly responsible to the principal. [Civ. C. 1877, § 1146; R. C. 1899, § 4112.]

§ 5561. Liability for culpable negligence. An employe who is guilty of a culpable degree of negligence is liable to his employer for the damage thereby caused to the latter; and the employer is liable to him if the service is not gratuitous for the value of such services only as are properly rendered. [Civ. C. 1877, § 1147; R. C. 1899, § 4113.]

§ 5562. When surviving employe to act. When service is to be rendered by two or more persons jointly and one of them dies, the survivor must act alone if the service to be rendered is such as he can rightly perform without the aid of the deceased person, but not otherwise. [Civ. C. 1877, § 1148; R. C. 1899, § 4114.]

§ 5563. Confidential employments. The obligations peculiar to confidential employments are defined in chapters 60 and 61. [Civ. C. 1877, § 1149; R. C. 1899, § 4115.]

Article 4.—Termination of Employment.

§ 5564. What terminates employment. Every employment in which the power of the employe is not coupled with an interest in its subject is terminated by notice to him of:

1. The death of the employer; or,
2. His legal incapacity to contract.

Every employment is terminated:

1. By the expiration of its appointed term.

2. **By the extinction** of its subject.
3. **By the death** of the employe; or,
4. **By his legal** incapacity to act as such. [Civ. C. 1877, § 1150; R. C. 1899, § 4116.]

§ **5565. Continuance in certain cases.** An employe, unless the term of his service has expired or unless he has a right to discontinue it at any time without notice, must continue his service after notice of the death or incapacity of his employer, so far as is necessary to protect from serious injury the interests of the employer's successor in interest, until a reasonable time after notice of the facts has been communicated to such successor. The successor must compensate the employe for such service according to the terms of the contract of employment. [Civ. C. 1877, § 1151; R. C. 1899, § 4117.]

§ **5566. At will on notice.** An employment, having no specified term, may be terminated at the will of either party on notice to the other, except when otherwise provided by this chapter. [Civ. C. 1877, § 1152; R. C. 1899, § 4118.]

§ **5567. For willful breach of duty or incapacity.** An employment, even for a specified term, may be terminated at any time by the employer in case of any willful breach of duty by the employe in the course of his employment or in case of his habitual neglect of his duty or continued incapacity to perform it. [Civ. C. 1877, § 1153; R. C. 1899, § 4119.]

§ **5568. For breach of employer's obligations.** Any employment, even for a specified term, may be terminated by the employe at any time in case of any willful or permanent breach of the obligations of his employer to him as an employe. [Civ. C. 1877, § 1154; R. C. 1899, § 4120.]

§ **5569. Compensation when dismissed for cause.** An employe dismissed by his employer for good cause is not entitled to any compensation for services rendered since the last day upon which a payment became due to him under the contract. [Civ. C. 1877, § 1155; R. C. 1899, § 4121.]

§ **5570. Compensation when employe quits for cause.** An employe who quits the service of his employer for good cause is entitled to such proportion of the compensation which would become due in case of full performance, as the services which he has already rendered bear to the services which he was to render as full performance. [Civ. C. 1877, § 1156; R. C. 1899, § 4122.]

Employer terminating special contract is liable for work done and material furnished. **Caldwell** v. Myers, 2 S. D. 506, 51 N. W. 210.

Servant quitting for cause may recover on quantum meruit. Bedow v. Tonkin, 5 S. D. 432, 59 N. W. 222; McClellan v. Harris, 7 S. D. 447, 64 N. W. 522.

Injunction restraining work excuses contractor. Burkhardt v. School Township, 9 S. D. 315, 69 N. W. 16.

CHAPTER 53.

PARTICULAR EMPLOYMENTS.

Article 1.—Master and Servant.

§ **5571. Servant defined.** A servant is one who is employed to render personal service to his employer, otherwise than in pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master. [Civ. C. 1877, § 1157; R. C. 1899, § 4123.]

Liability for servant's torts; who are servants. Curtis v. Dinneen, 4 Dak. 245, 30 N. W. 148.

Part performance of contract for affreightment will entitle carrier to full pay unless voluntarily accepted. Braithwaite v. Power, 1 N. D. 455, 48 N. W. 354.

Allegations of complaint not denied by answer of amount agreed to be paid, is admitted. **Calkins** v. Mining Co., 5 S. D. 299, 58 N. W. 797.

§ 5572. **Hiring presumed to be for wage-term.** A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate, for one day; a hiring by piece work, for no specified term. [Civ. C. 1877, § 1158; R. C. 1899, § 4124.]

§ 5573. **Month presumed.** In the absence of any agreement or custom as to the rate or value of wages the term of service or the time of payment, a servant is presumed to be hired by the month at a monthly rate of reasonable wages, to be paid when the service is performed. [Civ. C. 1877, § 1159; R. C. 1899, § 4125.]

§ 5574. **Renewal for same term and wages presumed.** When after the expiration of an agreement respecting the wages and the term of service the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service. [Civ. C. 1877, § 1160; R. C. 1899, § 4126.]

§ 5575. **Time belongs to whom.** The entire time of a domestic servant belongs to the master and the time of other servants, to such extent as is usual in the business in which they serve, not exceeding in any case ten hours in a day. [Civ. C. 1877, § 1161; R. C. 1899, § 4127.]

§ 5576. **Must account to master.** A servant must deliver to his master, as soon as with reasonable diligence he can find him, everything that he receives for his account without demand; but he is not bound without orders from his master to send anything to him through another person. [Civ. C. 1877, § 1162; R. C. 1899, § 4128.]

§ 5577. **Causes for discharge.** A master may discharge any servant, other than an apprentice, whether engaged for a fixed term or not:

1. If he is guilty of misconduct in the course of his service or of gross immorality, though unconnected with the same; or,
2. If, being employed about the person of the master or in a confidential position, the master discovers that he has been guilty of misconduct before or after the commencement of his service of such a nature that if the master had known or contemplated it, he would not have so employed him. [Civ. C. 1877, § 1163; R. C. 1899, § 4129.]

Article 2.—Agents.

§ 5578. **Must not exceed authority.** An agent must not exceed the limits of his actual authority as defined by the chapters on agency. [Civ. C. 1877, § 1164; R. C. 1899, § 4130.]

§ 5579. **Keep principal informed.** An agent must use ordinary diligence to keep his principal informed of his acts in the course of the agency. [Civ. C. 1877, § 1165; R. C. 1899, § 4131.]

§ 5580. **Duty as collector of negotiable instrument.** An agent employed to collect a negotiable instrument must collect it promptly and take all measures necessary to charge the parties thereto in case of its dishonor, and, if it is a bill of exchange, must present it for acceptance with reasonable diligence. [Civ. C. 1877, § 1166; R. C. 1899, § 4132.]

§ 5581. **Responsibility of subagent.** A mere agent of an agent is not responsible as such to the principal of the latter. [Civ. C. 1877, § 1167; R. C. 1899, § 4133.]

Article 3.—Factors.

§ 5582. **Defined.** A factor is an agent who in the pursuit of an independent calling is employed by another to sell property for him and is vested by the latter with the possession or control of the property or authorized to receive payment therefor from the purchaser. [Civ. C. 1877, § 1168; R. C. 1899, § 4134.]

§ 5583. Must obey instructions. Exception. A factor must obey the instructions of his principal to the same extent as any other employe, notwithstanding any advances he may have made to his principal upon the property consigned to him except that, if the principal forbids him to sell at the market price, he may nevertheless sell for his reimbursement after giving to his principal reasonable notice of his intention to do so and of the time and place of sale and proceeding in all respects as a pledgee. [Civ. C. 1877, § 1169; R. C. 1899, § 4135.]

§ 5584. Give usual credit. A factor may sell property consigned to him on such credit as is usual, but, having once agreed with the purchaser upon the terms of credit, may not extend it. [Civ. C. 1877, § 1170; R. C. 1899, § 4136.]

§ 5585. Liability under guarantee commission. A factor who charges his principal with a guarantee commission upon a sale thereby assumes absolutely to pay the price when it falls due as if it was a debt of his own and not as a mere guarantor for the purchaser; but he does not thereby assume any additional responsibility for the safety of his remittance of the proceeds. [Civ. C. 1877, § 1171; R. C. 1899, § 4137.]

§ 5586. How agreement to guarantee released. A factor who receives property for sale under a general agreement or usage to guarantee the sale or the remittance of the proceeds cannot relieve himself from responsibility therefor without the consent of his principal. [Civ. C. 1877, § 1172; R. C. 1899, § 4138.]

Article 4.—Shipmasters.

§ 5587. Appointed by owner. The master of a ship is appointed by the owner and holds during his pleasure. The word "ship" as used in this code shall be construed to mean any boat, vessel or structure fitted for navigation. [Civ. C. 1877, § 1173; R. C. 1899, § 4139.]

§ 5588. When master to be on board. The master of a ship is bound to be always on board when entering or leaving port. The word "port" as used in this code shall be construed to mean any place on a navigable river or lake where a vessel lands to receive or put off freight or passengers or for any other purpose and when a vessel has made a landing it is said to be in port. [Civ. C. 1877, § 1174; R. C. 1899, § 4140.]

§ 5589. Taking pilot. Before leaving a port the master of a ship must take a pilot on board and the navigation of the vessel devolves on him. [Civ. C. 1877, § 1175; R. C. 1899, § 4141.]

§ 5590. Power over seamen. The master of a ship may enforce the obedience of the mate and crew to his lawful commands by confinement and other reasonable corporal punishment not prohibited by law, being responsible for the abuse of his power. [Civ. C. 1877, § 1176; R. C. 1899, § 4142.]

§ 5591. Power over passengers. The master of a ship may confine any person on board during a voyage for willful disobedience to his lawful command. [Civ. C. 1877, § 1177; R. C. 1899, § 4143.]

§ 5592. May take private supplies. If during a voyage the ship's supplies fail the master with the advice of the officers may compel persons who have private supplies on board to surrender them for the common want on payment of their value or giving security therefor. [Civ. C. 1877, § 1178; R. C. 1899, § 4144.]

§ 5593. When may abandon ship. The master of a ship must not abandon it during the voyage without the advice of the other officers. [Civ. C. 1877, § 1179; R. C. 1899, § 4145.]

§ 5594. On abandonment must take away valuables. The master of a ship upon abandoning it must carry with him so far as it is in his power the money and the most valuable of the goods on board under penalty of

being personally responsible. If the articles thus taken are lost from causes beyond his control he is exonerated from liability. [Civ. C. 1877, § 1180; R. C. 1899, § 4146.]

§ **5595. Cannot trade on his own account.** The master of a ship who engages for a common profit on the cargo must not trade on his own account and if he does he must account to his employer for all profits thus made by him. [Civ. C. 1877, § 1181; R. C. 1899, § 4147.]

§ **5596. Great care and diligence.** The master of a ship must use great care and diligence in the performance of his duties and is responsible for all damage occasioned by his negligence, however slight. [Civ. C. 1877, § 1182; R. C. 1899, § 4148.]

§ **5597. Chapter 63 applies.** The authority and liability of the master of a ship as an agent for the owners of the ship and cargo are regulated by chapter 63. [Civ. C. 1877, § 1183; R. C. 1899, § 4149.]

Article 5.—Mates and Seamen.

§ **5598. Mate defined.** The mate of a ship is the officer next in command to the master. [Civ. C. 1877, § 1184; R. C. 1899, § 4150.]

§ **5599. Seamen defined.** All persons employed in the navigation of a ship or upon a voyage, other than the master and mate, are to be deemed seamen within the provisions of this code. [Civ. C. 1877, § 1185; R. C. 1899, § 4151.]

§ **5600. Engaged by master. Cause for discharge.** The mate and seamen of a ship are engaged by the master and may be discharged by him at any period of the voyage for willful and persistent disobedience or gross disqualification, but cannot otherwise be discharged before the termination of the voyage. [Civ. C. 1877, § 1186; R. C. 1899, § 4152.]

§ **5601. Unseaworthy vessel.** A mate or seamen is not bound to go on a voyage in a ship that is not seaworthy; and if there is reasonable doubt of its seaworthiness he may refuse to proceed until a proper survey has been had. [Civ. C. 1877, § 1187; R. C. 1899, § 4153.]

§ **5602. Agreement to abandon wages or lien void.** A seaman cannot by reason of any agreement be deprived of his lien upon the ship or of any remedy for the recovery of his wages to which he would otherwise have been entitled. Any stipulation by which he consents to abandon his right to wages in case of the loss of a ship or to abandon any right he may have or obtain in the nature of salvage is void. [Civ. C. 1877, § 1188; R. C. 1899, § 4154.]

§ **5603. When special agreement of seamen is binding.** No special agreement entered into by a seaman can impair any of his rights or add to any of his obligations as defined by law, unless he fully understands the effect of the agreement and receives a fair compensation therefor. [Civ. C. 1877, § 1189; R. C. 1899, § 4155.]

§ **5604. When wages due.** Except as hereinafter provided the wages of seamen are due when and so far only as freightage is earned, unless the loss of freightage is owing to the fault of the owner or master. [Civ. C. 1877, § 1190; R. C. 1899, § 4156.]

§ **5605. When wages begin.** The right of a mate or seaman to wages and provisions begins either from the time he begins work, or from the time specified in the agreement for his beginning work, or from his presence on board, whichever first happens. [Civ. C. 1877, § 1191; R. C. 1899, § 4157.]

§ **5606. Wages when voyage broken up.** When a voyage is broken up before departure of the ship, the seaman must be paid for the time they have served and may retain for their indemnity such advances as they have received. [Civ. C. 1877, § 1192; R. C. 1899, § 4158.]

§ **5607. Full wages when wrongfully discharged.** When a mate or seaman is wrongfully discharged or is driven to leave the ship by the cruelty

of the master on the voyage, it is then ended with respect to him and he may thereupon recover his full wages. [Civ. C. 1877, § 1193; R. C. 1899, § 4159.]

§ 5608. **Wages after loss or wreck.** In case of loss or wreck of the ship a seaman is entitled to his wages up to the time of the loss or wreck, whether freightage has been earned or not, if he exerts himself to the utmost to save the ship, cargo and stores. [Civ. C. 1877, § 1194; 1899, § 4160.]

§ 5609. **Certificate of master, evidence.** A certificate from the master or chief surviving officer of a ship to the effect that a seaman exerted himself to the utmost to save the ship, cargo and stores is presumptive evidence of the fact. [Civ. C. 1877, § 1195; R. C. 1899, § 4161.]

§ 5610. **Wages when disabled without fault.** When a mate or seaman is prevented from rendering service by illness or injury, incurred without his fault, in the discharge of his duty on the voyage or by being wrongfully discharged, or by a capture of the ship he is entitled to wages notwithstanding. [Civ. C. 1877, § 1196; R. C. 1899, § 4162.]

§ 5611. **Expenses of sickness borne by ship.** If a mate or seaman becomes sick or disabled during the voyage without his fault, the expenses of furnishing him with suitable medical advice, medicine, attendance and other provisions for his wants must be borne by the ship until the close of the voyage. [Civ. C. 1877, § 1197; R. C. 1899, § 4163.]

§ 5612. **Wages to time of death.** If a mate or seaman dies during the voyage, his personal representatives are entitled to his wages to the time of his death, if he would have been entitled to them had he lived to the end of the voyage. [Civ. C. 1877, § 1198; R. C. 1899, § 4164.]

§ 5613. **Desertion, etc., forfeits wages.** Desertion of the ship without cause, or a justifiable discharge by the master during the voyage for misconduct, or a theft of any part of the cargo or appurtenances of the ship, or a willful injury thereto or to the ship forfeits all wages due for the voyage to a mate or seaman thus in fault. [Civ. C. 1877, § 1199; R. C. 1899, § 4165.]

§ 5614. **Cannot ship goods.** A mate or seaman may not under any pretext ship goods on his own account without permission from the master. [Civ. C. 1877, § 1200; R. C. 1899, § 4166.]

§ 5615. **Embezzlement or injury made good.** If any part of the cargo or appurtenances of a ship is embezzled or injured by the mate or a seaman, the offender, or if it is not known which is the offender, all those of whom negligence or fault may be presumed must make good the loss. [Civ. C. 1877, § 1201; R. C. 1899, § 4167.]

§ 5616. **Further regulations.** The shipment of officers and seamen and their rights and duties are further regulated by law. [Civ. C. 1877, § 1202; R. C. 1899, § 4168.]

Article 6.—Ship's Managers.

§ 5617. **Defined.** The general agent for the owners in respect to the care of a ship and freight is called the manager; if he is a part owner he is also called the managing owner. [Civ. C. 1877, § 1203; R. C. 1899, § 4169.]

§ 5618. **Duties of.** Unless otherwise directed, it is the duty of the manager of a ship to provide for the complete seaworthiness of the ship; to take care of it in port; to see that it is provided with necessary papers, with a proper master, mate and crew and supplies of provisions and stores. [Civ. C. 1877, § 1204; R. C. 1899, § 4170.]

§ 5619. **Managing owner.** A managing owner is presumed to have no right to compensation for his own services. [Civ. C. 1877, § 1205; R. C. 1899, § 4171.]

CHAPTER 54.

SERVICE WITHOUT EMPLOYMENT.

§ **5620. No compensation. Expenses allowed.** One who officiously and without consent of the real or apparent owner of a thing takes it into his possession for the purpose of rendering a service about it must complete such service and use ordinary care, diligence and reasonable skill about the same. He is not entitled to any compensation for his service or expenses, except that he may deduct actual and necessary expenses incurred by him about such service from any profits which his service has caused the thing to acquire for its owner and must account to the owner for the residue. [Civ. C. 1877, § 1206; R. C. 1899, § 4172.]

§ **5621. Salvage.** Any person other than the master, mate or seaman thereof who rescues a ship, her appurtenances or cargo from danger is entitled to a reasonable compensation therefor, to be paid out of the property saved. He has lien for such claim which is regulated by chapters 74 and 87. [Civ. C. 1877, § 1207; R. C. 1899, § 4173.]

CHAPTER 55.

CARRIAGE IN GENERAL.

§ **5622. Contract for defined.** The contract of carriage is a contract for the conveyance of property, persons or messages from one place to another. [Civ. C. 1877, § 1208; R. C. 1899, § 4174.]

§ **5623. Classified.** Carriage is either:

1. Inland; or,
2. Marine. [Civ. C. 1877, § 1209; R. C. 1899, § 4175.]

§ **5624. Classes defined.** Carriers upon the ocean, upon arms of the sea, upon the great lakes or such other navigable waters or rivers as are within the admiralty jurisdiction of the United States are marine carriers. All others are inland carriers. [Civ. C. 1877, § 1210; R. C. 1899, § 4176.]

§ **5625. Carriers by sea.** Rights and duties peculiar to carriers by sea are defined by acts of congress. [Civ. C. 1877, § 1211; R. C. 1899, § 4177.]

§ **5626. Carriers without reward.** Carriers without reward are subject to the same rules as employes without reward, except so far as is otherwise provided by the following chapters on carriage. [Civ. C. 1877, § 1212; R. C. 1899, § 4178.]

§ **5627. Same. Must complete carriage.** A carrier without reward, who has begun to perform his undertaking, must complete it in like manner as if he had received a reward, unless he restores the person or thing carried to as favorable a position as before he commenced the carriage. [Civ. C. 1877, § 1213; R. C. 1899, § 4179.]

CHAPTER 56.

CARRIAGE OF PERSONS.

ARTICLE 1.—GRATUITOUS CARRIAGE OF PERSONS.

§ 5628. Must use ordinary care. A carrier of persons without reward must use ordinary care and diligence for their safe carriage. [Civ. C. 1877, § 1214; R. C. 1899, § 4180.]

ARTICLE 2.—CARRIAGE FOR REWARD.

§ 5629. Utmost care and diligence. A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose and must exercise to that end a reasonable degree of skill. [Civ. C. 1877, § 1215; R. C. 1899, § 4181.]

§ 5630. Must use safe vehicles. A carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care. [Civ. C. 1877, § 1216; R. C. 1899, § 4182.]

§ 5631. Must not overload. A carrier of persons for reward must not overcrowd or overload his vehicles. [Civ. C. 1877, § 1217; R. C. 1899, § 4183.]

§ 5632. Treatment of passengers. A carrier of persons for reward must give to passengers all such accommodations as are usual and are reasonable, must treat them with civility and give them a reasonable degree of attention. [Civ. C. 1877, § 1218; R. C. 1899, § 4184.]

§ 5633. Must travel at reasonable speed. A carrier of persons for reward must travel at a reasonable rate of speed and without any unreasonable delay or deviation from his proper route. [Civ. C. 1877, § 1219; R. C. 1899, § 4185.]

CHAPTER 57.

CARRIAGE OF PROPERTY.

ARTICLE 1.—GENERAL DEFINITIONS.

§ 5634. Freight, freightage, consignor and consignee defined. Property carried is called freight; the reward, if any, to be paid for its carriage is called freightage; the person who delivers the freight to the carrier is called the consignor and the person to whom it is to be delivered is called the consignee. [Civ. C. 1877, § 1220; R. C. 1899, § 4186.]

ARTICLE 2.—OBLIGATIONS OF THE CARRIER.

§ 5635. Ordinary care for reward; without reward slight. A carrier of property for reward must use at least ordinary care and diligence in the performance of all his duties. A carrier without reward must use at least slight care and diligence. [Civ. C. 1877, § 1221; R. C. 1899, § 4187.]

§ 5636. Must comply with directions. A carrier must comply with the directions of the consignor or consignee to the same extent that an employe is bound to comply with those of his employer. [Civ. C. 1877, § 1222; R. C. 1899, § 4188.]

§ 5637. Conflicting directions. When the directions of a consignor and consignee are conflicting the carrier must comply with those of the consignor in respect to all matters except the delivery of the freight, as to which he

must comply with the directions of the consignee, unless the consignor has specially forbidden the carrier to receive orders from the consignee inconsistent with his own. [Civ. C. 1877, § 1223; R. C. 1899, § 4189.]

§ 5638. **Storage by marine carrier. Deviation.** A marine carrier must not stow freight upon deck during the voyage, except when it is usual to do so, nor make any improper deviation from or delay in the voyage, nor do any other unnecessary act which would avoid an insurance in the usual form upon the freight. [Civ. C. 1877, § 1224; R. C. 1899, § 4190.]

§ 5639. **Manner of delivery.** A carrier of property must deliver it to the consignee at the place to which it is addressed in the manner usual at that place. [Civ. C. 1877, § 1225; R. C. 1899, § 4191.]

§ 5640. **Place of delivery, when no usage.** If there is no usage to the contrary at the place of delivery freight must be delivered as follows:

1. If carried upon a railway owned and managed by the carrier it may be delivered at the station nearest the place to which it is addressed.
2. If carried by sea from a foreign country it may be delivered at the wharf where the ship moors within a reasonable distance from the place of address; or if there is no wharf, on board a lighter alongside the ship; or,
3. In other cases it must be delivered to the consignee or his agent personally, if either can with reasonable diligence be found. [Civ. C. 1877, § 1226; R. C. 1899, § 4192.]

§ 5641. **Notice to consignee. When carrier becomes warehouseman.** If for any reason a carrier does not deliver freight to the consignee or his agent personally, he must give notice to the consignee of its arrival and keep the same in safety upon his responsibility as a warehouseman until the consignee has had a reasonable time to remove it. If the place of residence or business of the consignee is unknown to the carrier, he may give the notice by letter dropped in the nearest post office. [Civ. C. 1877, § 1227; R. C. 1899, § 4193.]

§ 5642. **Liability terminated.** If a consignee does not accept and remove freight within a reasonable time after the carrier has fulfilled his obligation to deliver or duly offered to fulfill the same, the carrier may exonerate himself from further liability by placing the freight in a suitable warehouse on storage on account of the consignee and giving notice thereof to him. [Civ. C. 1877, § 1228; R. C. 1899, § 4194.]

§ 5643. **When unclaimed property may be sold.** Whenever any trunk, carpetbag, valise, bundle, package or article of property transported or coming into the possession of any railroad, or express company or any other common carrier in the course of his or its business as common carrier shall remain unclaimed and the legal charges thereon unpaid during the space of six months after its arrival at the point to which it shall have been directed and the owner or person to whom the same is consigned cannot be found upon diligent inquiry or, being found and notified of the arrival of such article, shall refuse or neglect to receive the same and pay the legal charges thereon for the space of three months, it shall be lawful for such common carrier to sell such article at public auction after giving the owner or consignee fifteen day's notice of the time and place of sale through the post office and by advertising in a newspaper published in the county where such sale is made and out of the proceeds of such sale to pay all legal charges on such article and the amount over, if any, shall be paid to the owner or consignee upon demand. [1879, ch. 51, § 1; R. C. 1899, § 4195.]

§ 5644. **When perishable property may be sold.** Perishable property which has been transported to its destination and the owner or consignee notified of its arrival, or being notified, refuses or neglects to receive the same and pay the legal charges thereon, or if upon diligent inquiry the consignee cannot be found, such carrier may in the exercise of a reasonable discretion sell the same at public or private sale without advertising and the proceeds

after deducting the freight and charges and expenses of sale shall be paid to the owner or consignee upon demand. [1879, ch. 51, § 2; R. C. 1899, § 4196.]

§ **5645. Applies to hotel keepers.** The provisions of the last two sections shall apply to hotel keepers and warehousemen. [1879, ch. 51, § 3; R. C. 1899, § 4197.]

Article 3.—Bill of Lading.

§ **5646. Defined.** A bill of lading is an instrument in writing signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place. [Civ. C. 1877, § 1229; R. C. 1899, § 4198.]

§ **5647. Negotiable.** All the title to the freight which the first holder of a bill of lading had when he received it passes to every subsequent indorsee thereof in good faith and for value in the ordinary course of business with like effect and in like manner as in the case of a bill of exchange. [Civ. C. 1877, § 1230; R. C. 1899, § 4199.]

Possession of an unindorsed bill of lading by a stranger raises no presumption that stranger is agent of consignor. Stewart v. Gregory et al, 9 N. D. 618, 84 N. W. 553.

§ **5648. When delivery transfers.** When a bill of lading is made to bearer or in equivalent terms, a simple transfer thereof by delivery conveys the same title as an indorsement. [Civ. C. 1877, § 1231; R. C. 1899, § 4200.]

§ **5649. Obligations of carrier not altered.** A bill of lading does not alter the rights or obligations of the carrier as defined in this chapter unless it is plainly inconsistent therewith. [Civ. C. 1877, § 1232; R. C. 1899, § 4201.]

§ **5650. Carrier must give sets of bills, on demand.** A carrier must subscribe and deliver to the consignor on demand any reasonable number of bills of lading of the same tenor, expressing truly the original contract for carriage; and if he refuses to do so the consignor may take the freight from him and recover from him besides all damages thereby occasioned. [Civ. C. 1877, § 1233; R. C. 1899, § 4202.]

§ **5651. Carrier exonerated by delivering freight to holder.** A carrier is exonerated from liability for freight by delivery thereof in good faith to any holder of a bill of lading therefor, properly indorsed, or made in favor of the bearer. [Civ. C. 1877, § 1234; R. C. 1899, § 4203.]

§ **5652. When surrender required.** When a carrier has given a bill of lading or other instrument substantially equivalent thereto, he may require its surrender or a reasonable indemnity against claims thereon before delivering the freight. [Civ. C. 1877, § 1235; R. C. 1899, § 4204.]

Article 4.—Freightage.

§ **5653. In advance. Exception.** A carrier may require his freightage to be paid upon his receiving the freight; but if he does not demand it then he cannot until he is ready to deliver the freight to the consignee. [Civ. C. 1877, § 1236; R. C. 1899, § 4205.]

§ **5654. Consignor liable for freightage. Exception.** The consignor of freight is presumed to be liable for the freightage, but if the contract between him and the carrier provides that the consignee shall pay it and the carrier allows the consignee to take the freight he cannot afterwards recover the freightage from the consignor. [Civ. C. 1877, § 1237; R. C. 1899, § 4206.]

§ **5655. When consignee liable.** The consignee of freight is liable for the freightage if he accepts the freight with notice of the intention of the consignor that he should pay it. [Civ. C. 1877, § 1238; R. C. 1899, § 4207.]

§ **5656. No freightage on increase.** No freightage can be charged upon the natural increase of freight. [Civ. C. 1877, § 1239; R. C. 1899, § 4208.]

§ **5657. Apportioned. Payment accordingly.** If freightage is apportioned by a bill of lading or other contract made between a consignor and carrier the carrier is entitled to payment according to the apportionment for so much as he delivers. [Civ. C. 1877, § 1240; R. C. 1899, § 4209.]

§ **5658. Part accepted. Freightage apportioned.** If a part of the freight is accepted by a consignee without a specific objection that the rest is not delivered, the freightage must be apportioned and paid as to that part, though not apportioned in the original contract. [Civ. C. 1877, § 1241; R. C. 1899, § 4210.]

§ **5659. According to distance. At place short of destination. Qualification.** If a consignee voluntarily receives freight at a place short of the one appointed for delivery the carrier is entitled to a just proportion of the freightage according to distance. If the carrier, being ready and willing, offers to complete the transit he is entitled to the full freightage. If he does not thus offer completion and the consignee receives the freight only from necessity, the carrier is not entitled to any freightage. [Civ. C. 1877, § 1242; R. C. 1899, § 4211.]

§ **5660. No extra freightage for carrying further.** If freight is carried further or more expeditiously than was agreed upon by the parties, the carrier is not entitled to additional compensation and cannot refuse to deliver it on the denmand of the consignee at the place and time of its arrival. [Civ. C. 1877, § 1243; R. C. 1899, § 4212.]

§ **5661. Lien for freightage.** A carrier has a lien for freightage which is regulated by chapters 74, 86 and 87 of this code. [Civ. C. 1877, § 1244; R. C. 1899, § 4213.]

Article 5.—General Average.

§ **5662. Jettison and general average.** A carrier by water may, when in case of extreme peril it is necessary for the safety of the ship or cargo, throw overboard or otherwise sacrifice any or all of the cargo or appurtenances of the ship. Throwing property overboard for such purpose is called jettison and the loss incurred thereby is called a general average loss. [Civ. C. 1877, § 1245; R. C. 1899, § 4214.]

§ **5663. Jettison begins with most bulky freight.** A jettison must begin with the most bulky and least valuable articles so far as possible. [Civ. C. 1877, § 1246; R. C. 1899, § 4215.]

§ **5664. Jettison ordered only by master. Exception.** A jettison can be made only by authority of the master of a ship, except in case of his disability or of an overruling necessity, when it may be made by any other person. [Civ. C. 1877, § 1247; R. C. 1899, § 4216.]

§ **5665. How loss by jettison apportioned.** The loss incurred by a jettison when lawfully made, must be borne by all that part of the ship, appurtenances, freightage and cargo for the benefit of which the sacrifice is made as well as by the owner of the thing sacrificed. [Civ. C. 1877, § 1248; R. C. 1899, § 4217.]

§ **5666. Loss by jettison. Adjustment.** The proportions in which a general average loss is to be borne must be ascertained by an adjustment in which the owner of each separate interest is to be charged with such proportion of the value of the thing lost as the value of his part of the property affected bears to the value of the whole. But an adjustment made at the end of a voyage, if valid there, is valid everywhere. [Civ. C. 1877, § 1249; R. C. 1899, § 4218.]

§ **5667. Values of ship, etc., how estimated.** In estimating values for the purpose of a general average the ship and appurtenances must be valued as at the end of the voyage, the freightage at one-half the amount due on delivery and the cargo as at the time and place of its discharge; adding in each case

the amount made good by contribution. [Civ. C. 1877, § 1250; R. C. 1899, § 4219.]

§ **5668. When deck stowage entitled to contribution.** The owner of things stowed on deck in case of their jettison is entitled to the benefit of a general average contribution only in case it is usual to stow such things on deck upon such a voyage. [Civ. C. 1877, § 1251; R. C. 1899, § 4220.]

§ **5669. These rules applicable to every sacrifice.** The rules herein stated concerning jettison are equally applicable to every other voluntary sacrifice of property on a ship or expense necessarily incurred for the preservation of the ship and cargo from extraordinary perils. [Civ. C. 1877, § 1252; R. C. 1899, § 4221.]

CHAPTER 58.

CARRIAGE OF MESSAGES.

§ **5670. Delivery.** A carrier of messages for reward must deliver them at the place to which they are addressed or to the persons for whom they are intended. [Civ. C. 1877, § 1253; R. C. 1899, § 4222.]

§ **5671. Great care. By telegraph, utmost diligence.** A carrier of messages for reward must use great care and diligence in the transmission and delivery of messages. A carrier by telegraph must use the utmost diligence therein. [Civ. C. 1877, § 1254; R. C. 1899, § 4223.]

CHAPTER 59.

COMMON CARRIERS.

ARTICLE 1.—COMMON CARRIERS IN GENERAL.

§ **5672. Defined.** Every one who offers to the public to carry persons, property or messages is a common carrier of whatever he thus offers to carry. [Civ. C. 1877, § 1255; R. C. 1899, § 4224.]

Telegraph company common carrier. Kirby v. Western Union, 4 S. D. 105, 55 N. W. 759; 7 S. D. 623, 65 N. W. 37.

Who are. Meuer v. C., M. & St. P. Ry., 5 S. D. 568, 59 N. W. 945.

§ **5673. Must accept and carry.** A common carrier must, if able to do so, accept and carry whatever is offered to him at a reasonable time and place of a kind that he undertakes or is accustomed to carry. [Civ. C. 1877, § 1256; R. C. 1899, § 4225.]

§ **5674. Preference to United States and state.** A common carrier must always give a preference in time and may give a preference in price to the United States and to this state. [Civ. C. 1877, § 1258; R. C. 1899, § 4226.]

§ **5675. Must start when and where.** A common carrier must start at such time and place as he announces to the public unless detained by accident or the elements or in order to connect with carriers on other lines of travel. [Civ. C. 1877, § 1259; R. C. 1899, § 4227.]

§ **5676. Compensation. Payment refused.** A common carrier is entitled to a reasonable compensation and no more which he may require to be paid in advance. If payment thereof is refused he may refuse to carry. [Civ. C. 1877, § 1260; R. C. 1899, § 4228.]

May demand payment in advance. See cases cited under section 5672.

§ **5677. Obligations limited only by contract.** The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract. [Civ. C. 1877, § 1261; R. C. 1899, § 4229.]

§ **5678. Exoneration by agreement limited.** A common carrier cannot be exonerated by any agreement made in anticipation thereof from liability for the gross negligence, fraud or willful wrong of himself or his servants. [Civ. C. 1877, § 1262; R. C. 1899, § 4230.]

Bill of lading not special contract unless signed by consignor or consignee. Hartwell v. N. P. Ry. Co., 5 Dak. 463, 41 N. W. 732.

May limit liability by contract. See cases cited in section 5672.

§ **5679. Carrier's right to modify obligations restricted.** A passenger, consignor or consignee by accepting a ticket, bill of lading or written contract for carriage with a knowledge of its terms assents to the rate of hire, the time, place and manner of delivery therein stated. But his assent to any other modification of the carrier's rights or obligations, contained in such instrument can only be manifested by his signature to the same. [Civ. C. 1877, § 1263; R. C. 1899, § 4231.]

Article 2.—Common Carriers of Persons.

§ **5680. Carriage of luggage.** A common carrier of persons, unless his vehicle is fitted for the reception of passengers exclusively, must receive and carry a reasonable amount of luggage for each passenger without any charge except for an excess of weight over one hundred pounds to a passenger. [Civ. C. 1877, § 1264; R. C. 1899, § 4232.]

§ **5681. Luggage.** Luggage may consist of any articles intended for the use of a passenger while traveling or for his personal equipment. Bicycles are hereby declared to be, and are deemed luggage for the purposes of this article, and shall be transported as luggage for passengers by railroad corporations, and subject to the same liabilities as other luggage; and no passenger shall be required to crate, cover or otherwise protect any such bicycle; provided, however, that a railroad corporation shall not be required to transport under the provisions of this article more than one bicycle for a single person. [1897, ch. 117; R. C. 1899, § 4233.]

§ **5682. Liability for luggage.** The liability of a carrier for luggage received by him with a passenger is the same as that of a common carrier of property. [Civ. C. 1877, § 1266; R. C. 1899, § 4234.]

§ **5683. When luggage delivered. When at passenger's risk.** A common carrier must deliver every passenger's luggage whether within the prescribed weight or not, immediately upon the arrival of the passenger at his destination; and, unless the vehicle would be overcrowded or overloaded thereby, must carry it on the same vehicle by which he carries the passenger to whom it belongs; except that when luggage is transported by rail it must be checked and carried in a regular baggage car; and whenever passengers neglect or refuse to have their luggage so checked and transported it is carried at their risk. [Civ. C. 1877, § 1267; R. C. 1899, § 4235.]

Railroad bound to take all persons who apply for passage and their baggage. Waldron v. C. & N. W. Ry., 1 Dak. 336, 46 N. W. 456.

§ **5684. Must provide vehicles.** A common carrier of persons must provide a sufficient number of vehicles to accommodate all the passengers who can be reasonably expected to require carriage at any one time. [Civ. C. 1877, § 1268; R. C. 1899, § 4236.]

§ **5685. Must provide seats.** A common carrier of persons must provide every passenger with a seat. He must not overload his vehicle by receiving and carrying more passengers than its rated capacity allows. [Civ. C. 1877, § 1269; R. C. 1899, § 4237.]

§ **5686. May make rules.** A common carrier of persons may make rules for the conduct of his business and may require passengers to conform to them if they are lawful, public, uniform in their application and reasonable. [Civ. C. 1877, § 1270; 1899, § 4238.]

§ **5687. When fare demandable.** A common carrier may demand the fare of passengers either at starting or at any subsequent time. [Civ. C. 1877, § 1271; R. C. 1899, § 4239.]

§ **5688. Ejection of passengers, how and where.** A passenger who refuses to pay his fare or to conform to any lawful regulation of the carrier may be ejected from the vehicle by the carrier. But this must be done with as little violence as possible and at any usual stopping place or near some dwelling house. After having ejected the passenger a carrier has no right to require the payment of any part of his fare. [Civ. C. 1877, §§ 1272, 1273; R. C. 1899, § 4240.]

Passenger upon a simple contract to carry from one point to another should go by most direct route. Church v. C. M. & St. P. Ry., 6 S. D. 235, 60 N. W. 854.

§ **5689. Lien on luggage.** A common carrier has a lien upon the luggage of a passenger for the payment of such fare as he is entitled to from him. This lien is regulated by the chapters on liens. [Civ. C. 1877, § 1274; R. C. 1899, § 4241.]

Article 3.—Common Carriers of Property.

§ **5690. Inland carrier's liability. Exception.** Unless the consignor accompanies the freight and retains exclusive control thereof, an inland common carrier of property is liable from the time that he accepts until he relieves himself from liability pursuant to sections 5638 to 5641, for the loss or injury thereof from any cause whatever, except;

1. An inherent defect, vice or weakness or a spontaneous action of the property itself.
2. The act of a public enemy of the United States or of this state.
3. The act of the law; or
4. Any irresistible superhuman cause. [Civ. C. 1877, § 1275; 1897, ch. 118; R. C. 1899, § 4242.]

Company not liable for goods left in warehouse after arrival at destination by agreement with baggageman unknown to agent. Mulligan v. N. P. Ry., 4 Dak. 315, 29 N. W. 659.

Limitation of liability by special contract. Hartwell v. N. P., 5 Dak. 463, 41 N. W. 732.

Shipment of cattle to T, care of P, order of S & C, and delivered to P without order of S & C, makes carrier liable for value of cattle. Stone v. C. M. & St. P. Ry., 8 S. D. 1, 65 N. W. 29.

§ **5691. Foregoing exceptions limited.** A common carrier is liable even in the cases excepted by the last section, if his ordinary negligence exposes the property to the cause of the loss. [Civ. C. 1877, § 1276; R. C. 1899, § 4243.]

§ **5692. When liable for delay.** A common carrier is liable for delay only when it is caused by his want of ordinary care and diligence. [Civ. C. 1877, § 1277; R. C. 1899, § 4244.]

§ **5693. Marine carrier's liability.** A marine carrier is liable in like manner as an inland carrier, except for loss or injury caused by the perils of the sea or fire. The liability of a common carrier by sea is further regulated by acts of congress. [Civ. C. 1877, §§ 1278, 1279; R. C. 1899, § 4245.]

§ **5694. Perils of sea defined.** Perils of the sea are from:

1. Storms and waves.
2. Rocks, shoals and rapids.
3. Other obstacles though of human origin.
4. Changes of climate.
5. The confinement necessary at sea.
6. Animals peculiar to the sea; and,
7. All other dangers peculiar to the sea. [Civ. C. 1877, § 1280; R. C. 1899, § 4246.]

§ **5695. Valuables. Liability limited. Exceptions.** A common carrier of gold. silver, platina or precious stones or of imitations thereof in a manufactured or unmanufactured state, of timepieces of any description, of negotiable paper or other valuable writings, of pictures, glass or chinaware, is not liable for more than fifty dollars upon the loss or injury of any one package of such articles, unless he has notice upon his receipt thereof by mark upon the package or otherwise of the nature of the freight. [Civ. C. 1877, § 1281; R. C. 1899, § 4247.]

§ **5696. Exonerated by delivery to communicating carrier.** If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier, carrying to the place of address, or connected with those who thus carry and his liability ceases upon making such delivery. [Civ. C. 1877, § 1282; R. C. 1899, § 4248.]

Station agent as such can not contract for carrying freight beyond his line. Company may however authorize him to do so. Page v. C., St. P., M. & O. Ry., 7 S. D. 297, 64 N. W. 137; Sutton v. C. & N. W. Ry., 14 S. D. 111, 84 N. W. 396; Coats v. C., M. & St. P. Ry., 8 S D. 173, 65 N. W. 1067.

§ **5697. How first carrier exonerated when freight lost.** If freight, addressed to a place beyond the usual route of the common carrier who first received it, is lost or injured, he must, within a reasonable time after demand, give satisfactory proof to the consignor that the loss or injury did not occur while it was in his charge, or he will be himself liable therefor. [Civ. C. 1877, § 1283; R. C. 1899, § 4249.]

§ **5698. Services other than carriage and delivery.** In respect to any service rendered by a common carrier about freight, other than its carriage and delivery, his rights and obligations are defined by the chapters on deposit and service. [Civ. C. 1877, § 1284; R. C. 1899, § 4250.]

Article 4.—Common Carriers of Messages.

§ **5699. Order of transmission of telegraph messages.** A carrier of messages by telegraph must, if it is practicable, transmit every such message immediately upon its receipt. But if this is not practicable, and several messages accumulate upon his hands, he must transmit them in the following order:

1. Messages from public agents of the United States, or of this state, on public business.
2. Messages intended in good faith for immediate publication in newspapers, and not for any secret use.
3. Messages giving information relating to the sickness or death of any person.
4. Other messages, in the order in which they were received. [Civ. C. 1877, § 1285; R. C. 1899, § 4251.]

§ **5700. Messages other than telegraph.** A common carrier of messages, otherwise than by telegraph, must transmit messages in the order in which he received them, except messages from agents of the United States or of this state on public business to which he must always give priority. But he may fix upon certain times for the simultaneous transmission of messages previously received. [Civ. C. 1877, § 1286; R. C. 1899, § 4252.]

§ **5701. Damages for postponing messages.** Every person whose message is refused or postponed, contrary to the provisions of this chapter, is entitled to recover from the carrier his actual damages, and fifty dollars in addition thereto. [Civ. C. 1877, § 1287; R C. 1899, § 4253.]

See decisions cited in annotation section 5672.

CHAPTER 60.

TRUSTS IN GENERAL.

ARTICLE 1.—NATURE AND CREATION OF A TRUST.

§ 5702. **Classified.** A trust is either:

1. Voluntary; or,
2. Involuntary. [Civ. C. 1877, § 1288; R. C. 1899, § 4254.]

Agent taking title in fraud of principal creates constructive trust. Fideler v. Norton, 4 Dak. 258, 30 N. W. 128.

§ 5703. **Voluntary.** A voluntary trust is an obligation arising out of personal confidence reposed in, and voluntarily accepted by one for the benefit of another. [Civ. C. 1877, § 1289; R. C. 1899, § 4255.]

§ 5704. **Involuntary.** An involuntary trust is one which is created by operation of law. [Civ. C. 1877, § 1290; R. C. 1899, § 4256.]

§ 5705. **Trustor, trustee, beneficiary, defined.** The person whose confidence creates a trust is called the trustor; the person in whom the confidence is reposed is called the trustee; and the person for whose benefit the trust is created is called the beneficiary. [Civ. C. 1877, § 1291; R. C. 1899, § 4257.]

§ 5706. **Constructive trust.** Every one who voluntarily assumes a relation of personal confidence with another, is deemed a trustee within the meaning of this chapter, not only as to the person who reposes such confidence, but as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence, or over whose affairs he by such confiedence, obtains any control. [Civ. C. 1877, § 1292; R. C. 1899, § 4258.]

Bank receiving deposits trustee of express trust. McLaughlin v. Bank, 6 Dak. 406, 43 N. W. 715.

Partners are trustees for each other. State v. Reddick, 2 S. D. 124, 48 N. W. 846.

For trust funds in hands of insolvent bank see Kimmel v. Dickson, 5 S. D. 221, 69 N. W. 49; Bank v. Johnson, 6 N. D. 180, 86 N. W. 21; Plano Mfg. Co. v. Auld, 14 S. D. 512, 86 N. W. 21.

Property taken in the name of one person for the benefit of another, one who purchased of him with knowledge of his trust relations becomes himself trustee. Luscombe v. Griggsby, 11 S. D. 408, 78 N. W. 357.

Loan and collection agents must act with the highest good faith toward principal. Bush v. Froelich, 14 S. D. 62, 84 N. W. 230.

§ 5707. **For what purpose created.** A trust may be created for any purpose for which a contract may lawfully be made, except as otherwise prescribed by the chapters on uses and trusts and on transfers. [Civ. C. 1877, 1293; R. C. 1899, § 4259.]

§ 5708. **How created as to trustor and beneficiary.** Subject to the provisions of section 4821 a voluntary trust is created as to the trustor and beneficiary by any words or acts of the trustor, indicating with reasonable certainty:

1. An intention on the part of the trustor to create a trust; and,
2. The subject, purpose and beneficiary of the trust. [Civ. C. 1877, § 1294; R. C. 1899, § 4260.]

Involuntary trustee of real estate, liability of. Prondzinski v. Garbutt, 10 N. D. 300, 86 N. W. 969; Prondzinski v. Garbutt, 8 N. D. 191, 77 N. W. 1012; Jasper v. Hazen, 1 N. D. 75, 44 N. W. 1018.

Trust arises in favor of beneficiary in any assets obtained by fraud. Bank v. Kimball Milling Co., 1 S. D. 388, 47 N. W. 402; Sussenbach v. Bank, 5 Dak. 477, 41 N. W. 662; Jasper v. Hazen, 1 N. D. 75, 44 N. W. 1018; Plaintiff's Remedy, 1 N. D. 75.

Involuntary trustee, who are. Van Dyke v. Griggsby, 11 S. D. 30, 75 N. W. 274; Luscombe v. Griggsby, 11 S. D. 408, 78 N. W. 357.

Statute contemplates active trusts only, passive prohibited. Does not qualify other sections cited. Murphey v. Cook, 11 S. D. 47, 75 N. W. 387.

§ 5709. **How as to trustee.** Subject to the provisions of section 4821, a voluntary trust is created as to the trustee by any words or acts of his, indicating with reasonable certainty:

1. His acceptance of the trust or his acknowledgment, made upon sufficient consideration, of its existence; and,
2. The subject, purpose and beneficiary of the trust. [Civ. C. 1877, § 1295; R. C. 1899, § 4261.]

§ 5710. **Trustee by wrongful detention.** One who wrongfully detains a thing is an involuntary trustee thereof for the benefit of the owner. [Civ. C. 1877, 1296; R. C. 1899, § 4262.]

§ 5711. **Trustee by fraud, etc.** One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust or other wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it. [Civ. C. 1877, § 1297; R. C. 1899, § 4263.]

Article 2.—Obligations of Trustees.

§ 5712. **Highest good faith to beneficiary.** In all matters connected with his trust a trustee is bound to act in the highest good faith toward his beneficiary and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat or adverse pressure of any kind. [Civ. C. 1877, § 1298; R. C. 1899, § 4264.]

§ 5713. **Use of property for trustee's profit prohibited.** A trustee may not use or deal with the trust property for his own profit or for any other purpose unconnected with the trust in any manner. [Civ. C. 1877, § 1299; R. C. 1899, § 4265.]

Good faith between partners; partners trustees for each other; each accountable for use of property for individual gain. Lay v. Emery, 8 N. D. 515, 79 N. W. 1053.

§ 5714. **Transactions when trustee's interest adverse to beneficiary prohibited. Exceptions.** Neither a trustee, nor any of his agents, may take part in any transaction concerning the trust in which he or any one for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except as follows:

1. When the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee and of all other facts concerning the transaction which might affect his own decision and without the use of any influence on the part of the trustee, permits him to do so.
2. When the beneficiary not having power to contract, the district court upon the like information of the facts, grants the like permission; or,
3. When some of the beneficiaries having capacity to contract and some not having it, the former grant permission for themselves and the district court for the latter in the manner above prescribed. [Civ. C. 1877, § 1300; R. C. 1899, § 4266.]

§ 5715. **Use of influence for advantage prohibited.** A trustee may not use the influence which his position gives to obtain any advantage from his beneficiary. [Civ. C. 1877, § 1301; R. C. 1899, § 4267.]

§ 5716. **Undertaking adverse trust prohibited.** No trustee so long as he remains in the trust may undertake another trust adverse in its nature to the interest of his beneficiary in the subject of the trust without the consent of the latter. [Civ. C. 1877, § 1302; R. C. 1899, § 4268.]

§ 5717. **Adverse interest acquired.** If a trustee acquires any interest or becomes charged with any duty adverse to the interest of his beneficiary in the subject of the trust, he must immediately inform the latter thereof and may be at once removed. [Civ. C. 1877, § 1303; R. C. 1899, § 4269.]

§ 5718. **Violation of preceding sections a fraud.** Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of the trust. [Civ. C. 1877, § 1304; R. C. 1899, § 4270.]

§ 5719. **Presumption against trustee.** All transactions between a trustee and his beneficiary during the existence of the trust or while the influence acquired by the trustee remains by which he obtains any advantage from his beneficiary are presumed to be entered into by the latter without sufficient consideration and under undue influence. [Civ. C. 1877, § 1305; R. C. 1899, § 4271.]

§ 5720. **Liability for mingling property.** A trustee who willfully and unnecessarily mingles the trust property with his own so as to constitute himself in appearance its absolute owner is liable for its safety in all events. [Civ. C. 1877, § 1306; R. C. 1899, § 4272.]

§ 5721. **Liability for unlawful use.** A trustee who uses or disposes of the trust property contrary to section 5713 may, at the option of the beneficiary, be required to account for all profits so made or to pay the value of its use and, if he has disposed therof, to replace it with its fruits or to account for its proceeds with interest. [Civ. C. 1877, § 1307; R. C. 1899, § 4273.]

§ 5722. **Liability for unauthorized use.** A trustee who uses or disposes of the trust property in any manner not authorized by the trust, but in good faith and with intent to serve the interest of the beneficiary, is liable only to make good whatever is lost to the beneficiary by his error. [Civ. C. 1877, § 1308; R. C. 1899, § 4274.]

§ 5723. **Liability for co-trustees consenting.** A trustee is responsible for the wrongful acts of a co-trustee to which he consented or which by his negligence he enabled the latter to commit but for no others. [Civ. C. 1877, 1309; R. C. 1899, § 4275.]

Article 3.—Obligations of Third Persons.

§ 5724. **When transferee involuntary trustee.** Every one to whom property is transferred in violation of a trust holds the same as an involuntary trustee under such trust, unless he purchased it in good faith and for a valuable consideration. [Civ. C. 1877, § 1310; R. C. 1899, § 4276.]

Purchaser from trustee with knowledge holds in trust for rightful owner Luscombe v. Grigsby, 11 S. D. 408, 78 N. W. 357.

Addition of word "trustee" to name of grantee does not create trust. Rua v. Watson, 13 S. D. 453, 83 N. W. 572.

§ 5725. **Trustee's misapplication no prejudice to good faith.** One who actually and in good faith transfers any money or other property to a trustee as such is not bound to see to the application thereof; and his rights can in no way be prejudiced by a misapplication thereof by the trustee. Other persons must at their peril see to the proper application of money or other property paid or delivered by them. [Civ. C. 1877, § 1311; R. C. 1899, § 4277.]

CHAPTER 61.

TRUSTS FOR THE BENEFIT OF THIRD PERSONS.

ARTICLE 1.—NATURE AND CREATION OF THE TRUST.

§ **5726. Scope of chapter.** The provisions of this chapter apply only to express trusts, created for the benefit of another than the trustor, and in which the title to the trust property is vested in the trustee; not including, however, those of executors, administrators and guardians as such. [Civ. C. 1877, § 1312; R. C. 1899, § 4278.]

§ **5727. By mutual consent, enforceable before rescission.** The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission. [Civ. C. 1877, § 1313; R. C. 1899, § 4279.]

§ **5728. When court trustor.** When a trustee is appointed by a court or public officer as such, such court or officer is the trustor within the meaning of the last section. [Civ. C. 1877, § 1314; R. C. 1899, § 4280.]

§ **5729. Where object, etc., expressed.** The nature, extent and object of a trust are expressed in the declaration of trust. [Civ. C. 1877, § 1315; R. C. 1899, § 4281.]

§ **5730. What deemed part of declaration of trust.** All declarations of a trustor to his trustees in relation to the trust before its acceptance by the trustees, or any of them, are to be deemed part of the declaration of the trust, except that when a declaration of trust is made in writing all previous declarations by the same trustor are merged therein. [Civ. C. 1877, § 1316; R. C. 1899, § 4282.]

ARTICLE 2.—OBLIGATIONS OF TRUSTEES.

§ **5731. Must follow directions. Exception.** A trustee must fulfill the purpose of the trust as declared at its creation and must follow all the directions of the trustor given at that time, except as modified by the consent of all parties interested in the same manner and to the same extent as an employe. [Civ. C. 1877, § 1317; R. C. 1899, § 4283.]

§ **5732. Ordinary care and diligence required.** A trustee, whether he receives any compensation or not, must use at least ordinary care and diligence in the execution of his trust. [Civ. C. 1877, § 1318; R. C. 1899, § 4284.]

§ **5733. Duty as to appointment of successor.** If a trustee procures or assents to his discharge from his office before his trust is fully executed, he must use at least ordinary care, and diligence to secure the appointment of a trustworthy successor before accepting his own final discharge. [Civ. C. 1877, § 1319; R. C. 1899, § 4285.]

§ **5734. Investment of trust money.** A trustee must invest money received by him under the trust as fast as he collects a sufficient amount, in such manner as to afford reasonable security and interest for the same. [Civ. C. 1877, § 1320; R. C. 1899, § 4286.]

§ **5735. Liability for failure.** If the trustee omits to invest the trust moneys according to the last section, he must pay simple interest thereon, if such omission is negligent merely and compound interest if it is willful. [Civ. C. 1877, § 1321; R. C. 1899, § 4287.]

§ **5736. Cannot enforce claims purchased in contemplation of appointment.** A trustee cannot enforce any claim against the trust property which he purchases after or in contemplation of his appointment as trustee; but he may be allowed by any competent court to charge to the trust property

what he has in good faith paid for the claim upon discharging the same. [Civ. C. 1877, § 1322; R. C. 1899, § 4288.]

ARTICLE 3.—POWERS OF TRUSTEES.

§ 5737. **Authority of trustee.** A trustee is a general agent for the trust property. His authority is such as is conferred upon him by the declaration of trust and by this chapter and none other. His acts, within the scope of his authority, bind the trust property to the same extent as the acts of a general agent bind his principal. [Civ. C. 1877, § 1323; R. C. 1899, § 4289.]

Ordinarily trustee personally liable on all contracts made by him as trustee. May charge liability upon trust fund. Creditor may follow trust property. Authority of trustee. Mercantile Co. v. Grover, 7 N. D. 460, 75 N. W. 914.

§ 5738. **All co-trustees must act.** When there are several co-trustees all must unite in any act to bind the trust property, unless the declaration of trust otherwise provides. [Civ. C. 1877, § 1324; R. C. 1899, § 4290.]

§ 5739. **Discretionary power controlled by court.** A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but may be controlled by the district court if not reasonably exercised, unless an absolute discretion is clearly conferred by the declaration of trust. [Civ. C. 1877, § 1325; R. C. 1899, § 4291.]

ARTICLE 4.—RIGHTS OF TRUSTEES.

§ 5740. **Payment of expenses incurred.** A trustee is entitled to the payment out of the trust property of all expenses actually and properly incurred by him in the performance of his trust. He is entitled to the repayment of even unlawful expenditures if they were productive of actual benefit to the estate. [Civ. C. 1877, § 1326; R. C. 1899, § 4292.]

§ 5741. **Compensation.** When a declaration of trust is silent upon the subject of compensation, the trustee is entitled to the same compensation as an executor. If it specifies the amount of his compensation, he is entitled to the amount thus specified and no more. If it directs that he shall be allowed a compensation, but does not specify the rate or amount, he is entitled to such compensation as may be reasonable under the circumstances. [Civ. C. 1877, § 1327; R. C. 1899, § 4293.]

§ 5742. **Involuntary trustee excluded.** An involuntary trustee, who becomes such through his own fault, has none of the rights mentioned in this article. [Civ. C. 1877, § 1328; R. C. 1899, § 4294.]

ARTICLE 5.—TERMINATION OF THE TRUST.

§ 5743. **How trust extinguished.** A trust is extinguished by the entire fulfillment of its object or by such object becoming impossible or unlawful. [Civ. C. 1877, § 1329; R. C. 1899, § 4295.]

§ 5744. **Trust not revocable. Exception.** A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor and in that case the power must be strictly pursued. [Civ. C. 1877, § 1330; R. C. 1899, § 4296.]

§ 5745. **How office vacated.** The office of a trustee is vacated:

1. By his death; or,
2. By his discharge. [Civ. C. 1877, § 1331; R. C. 1899, § 4297.]

§ 5746. **Discharge of trustee.** A trustee can be discharged from his trust only as follows:

1. By the extinction of the trust.
2. By the completion of his duties under the trust.
3. By such means as may be prescribed by the declaration of trust.
4. By the consent of the beneficiary if he has capacity to contract.

5. By the judgment of a competent tribunal in a direct proceeding for that purpose that he is of unsound mind; or,

6. By the district court. [Civ. C. 1877, § 1332; R. C. 1899, § 4298.]

§ **5747. Removal by court.** The district court may remove any trustee who has violated or is unfit to execute the trust. [Civ. C. 1877, § 1333; R. C. 1899, § 4299.]

ARTICLE 6.—SUCCESSION OR APPOINTMENT OF NEW TRUSTEES.

§ **5748. Court may fill vacancies.** The district court may appoint a trustee whenever there is a vacancy and the declaration of trust does not provide a practicable method of appointment. [Civ. C. 1877, § 1334; R. C. 1899, § 4300.]

§ **5749. Trust survives to co-trustees.** On the death, renunciation or discharge of one of several co-trustees the trust survives to the others. [Civ. C. 1877, § 1335; R. C. 1899, § 4301.]

§ **5750. When court may appoint trustee.** When a trust exists without any appointed trustee, or when all the trustees renounce, die or are discharged the district court of the county or judicial subdivision where the trust property, or some portion thereof, is situated, must appoint another trustee and direct the execution of the trust. The court may in its discretion appoint the original number or any less number of trustees. [Civ. C. 1877, § 1336; R. C. 1899, § 4302.]

CHAPTER 62.

AGENCY.

ARTICLE 1.—DEFINITION OF AGENCY.

§ **5751. Defined.** An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency. [Civ. C. 1877, § 1337; R. C. 1899, § 4303.]

Agency cannot be proved by acts or declarations of alleged agent unless same is brought to knowledge of principal and not repudiated. Loverin-Browne Co. v. Bank, 7 N. D. 569, 75 N. W. 923.

One acting as local agent of a corporation is presumed to be authorized to contract for rent of quarters used. Grigsby v. W. U. Tel. Co., 5 S. D. 561, 59 N. W. 734.

§ **5752. Who may appoint and who be agent.** Any person having capacity to contract may appoint an agent and any person may be an agent. [Civ. C. 1877, § 1338; R. C. 1899, § 4304.]

§ **5753. Special and general agent defined.** An agent for a particular act or transaction is called a special agent. All others are general agents. [Civ. C. 1877, § 1339; R. C. 1899, § 4305.]

§ **5754. Agency classified.** An agency is either actual or ostensible. [Civ. C. 1877, § 1340; R. C. 1899, § 4306.]

§ **5755. Actual.** An agency is actual when the agent is really employed by the principal. [Civ. C. 1877, § 1341; R. C. 1899, § 4307.]

§ **5756. Ostensible.** An agency is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent, who is not really employed by him. [Civ. C. 1877, § 1342; R. C. 1899, § 4308.]

Agency cannot be established by statements or acts of pretended agent. Gordon v. Vermont Loan & T. Co., 6 N. D. 454, 71 N. W. 556; Bank v. Elevator Co., 11 N. D. 280, 91 N. W. 436.

Insurance agent not agent for insured without notice that he acts as such. S. B. T. Mfg. Co. v. D. F. & M. I. Co., 2 S. D. 17, 48 N. W. 310; on rehearing, Id. 3 S. D. 205, 48 N. W. 310; Fromherz v. Yankton F. Co., 7 S. D. 187, 63 N. W. 784.

Authority is such as principal causes third party to believe exists. Reid v. Kellogg, 8 S. D. 596, 67 N. W. 687.

General agent of insurance company may without knowledge of principal employ soliciting agent whose waiver of condition in the policy against incumbrances will bind company. Harding v. Norwich Fire Ins. Society, 10 S. D. 64, 71 N. W. 755; Enos v. St. P. F. & M. Co., 4 S. D. 639, 57 N. W. 919.

ARTICLE 2.—AUTHORITY OF AGENTS.

§ 5757. **Extent of authority.** An agent may be authorized to do any acts which his principal might do, except those to which the latter is bound to give his personal attention. [Civ. C. 1877, § 1343; R. C. 1899, § 4309.]

§ 5758. **Acts done by or to agent.** Every act which according to this code may be done by or to any person may be done by or to the agent of such person for that purpose, unless a contrary intention clearly appears. [Civ. C. 1877, § 1344; R. C. 1899, § 4310.]

§ 5759. **Agent's authority limited.** An agent can never have authority, either actual or ostensible, to do an act which is and is known or suspected by the person with whom he deals to be a fraud upon the principal. [Civ. C. 1877, § 1345; R. C. 1899, § 4311.]

§ 5760. **How agency created.** An agency may be created and an authority may be conferred by a precedent authorization or a subsequent ratification. [Civ. C. 1877, § 1346; R. C. 1899, § 4312.]

§ 5761. **No consideration necessary.** A consideration is not necessary to make an authority, whether precedent or subsequent, binding upon the principal. [Civ. C. 1877, § 1347; R. C. 1899, § 4313.]

§ 5762. **Form of authorization.** An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing. [Civ. C. 1877, § 1348; R. C. 1899, § 4314.]

Employment of an agent to find a purchaser for real estate need not be in writing. McLaughlin v. Wheeler, 1 S. D. 497, 47 N. W. 816.

§ 5763. **How ratification made.** A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified or, when an oral authorization would suffice by accepting or retaining the benefit of the act with notice thereof. [Civ. C. 1877, § 1349; R. C. 1899, § 4315.]

When principal not bound for fraudulent representations of agent after acceptance of benefits. Nichols v. Burns, 5 Dak. 28, 37 N. W. 752.

Ratification of mortgage executed by unauthorized agent must be in writing. Morris v. Ewing, 8 N. D. 99, 76 N. W. 1047.

Acts of unauthorized agent not ratified do not bind principal. Clendening v. Hawk, 8 N. D. 419, 79 N. W. 878; Larpenteur v. Williams, 1 S. D. 373, 81 N. W. 625.

Principal bound for the authority third party is justified in believing agent had from acts of principal. Aldrich v. Wilmarth, 3 S. D. 523, 54 N. W. 811.

Principal cannot repudiate acts of agent where he has knowingly received benefits. Jewell Nursery Co. v. State, 5 S. D. 623, 59 N. W. 1025; Union Trust Co. v. Phillips, 7 S. D. 225, 63 N. W. 903; Townsend v. Kennedy, 6 S. D. 47, 60 N. W. 164; Anderson v. Bank, 4 N. D. 182, 59 N W. 1029; Wyckoff v. Johnson, 2 S. D. 91, 48 N. W. 837.

Acceptance of benefits retained unknowingly not ratification. Fargo v. Cravens, 9 S. D. 646, 70 N. W. 1053.

Corporation is liable for contracts, benefits of which it accepts. Kaeppler v. Redfield Creamery Co., 12 S. D. 483, 81 N. W. 907; Chase v. Redfield Creamery Co., 12 S. D. 529, 81 N. W. 951.

A vendor ratifies unauthorized sale by suing for value of property. Plano Mfg. Co. v. Millage, 14 S. D. 331, 85 N. W. 594.

§ 5764. **Part ratified, all ratified.** Ratification of part of an indivisible transaction is a ratification of the whole. [Civ. C. 1877, § 1350; R. C. 1899, § 4316.]

§ 5765. **Ratification, when valid.** A ratification is not valid, unless at the time of ratifying the act done the principal has power to confer authority for such an act. [Civ. C. 1877, § 1351; R. C. 1899, § 4317.]

§ 5766. **Retroactive ratification limited.** No unauthorized act can be made valid retroactively to the prejudice of third persons without their consent. [Civ. C. 1877, § 1352; R. C. 1899, § 4318.]

Cannot affect third parties acting without notice. Clendening v. Hawk, 10 N. D. 90, 86 N. W. 114.

§ 5767. **Rescission of ratification.** A ratification may be rescinded when made without such consent as is required in a contract or with an imperfect knowledge of the material facts of the transaction ratified, but not otherwise. [Civ. C. 1877, § 1353; R. C. 1899, § 4319.]

§ 5768. **Authority.** An agent has such authority as the principal actually or ostensibly confers upon him. [Civ. C. 1877, § 1354; R. C. 1899, § 4320.]

Under power to sell real estate agent has no authority to cancel contract of sale. Authority to contract confers no authority to cancel or surrender. Luke v. Griggs, 4 Dak. 287, 30 N. W. 170.

Fact of agency and extent of agent's power cannot be proved by the agent's declarations. Scope of agent's authority cannot be proven by parol, when. Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924.

Agent not representing principal when principal is present and acts for himself. Hutchinson v. Cleary, 3 N. D. 270, 55 N. W. 729.

Agent authorized to sell property of his principal cannot sell to himself. Anderson v. Bank, 5 N. D. 80, 64 N. W. 114.

See Corey v. Hunter, 10 N. D. 5, 84 N. W. 570; Aldrich v. Wilmarth, 3 S. D. 523, 54 N. W. 811; Shull v. New Birdsall Co., 15 S. D. 8, 86 N. W. 654.

Ostensible authority question of fact. Corey v. Hunter, 10 N. D. 5, 84 N. W. 570; Reid v. Kellogg, 8 S. D. 596, 67 N. W. 687.

§ 5769. **Actual authority.** Actual authority is such as a principal intentionally confers upon the agent or intentionally or by want of ordinary care allows the agent to believe himself to possess. [Civ. C. 1877, § 1355; R. C. 1899, § 4321.]

§ 5770. **Ostensible authority.** Ostensible authority is such as the principal intentionally or by want of ordinary care causes or allows a third person to believe the agent to possess. [Civ. C. 1877, § 1356; R. C. 1899, § 4322.]

§ 5771. **Has authority defined by law. Exception.** Every agent has actually such authority as is defined by this and the succeeding chapter, unless specially deprived thereof by his principal, and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restriction upon his authority. [Civ. C. 1877, § 1357; R. C. 1899, § 4323.]

Use of the word "trustee" is not notice of any kind. Rua v. Watson, 13 S. D. 453, 83 N. W. 572.

§ 5772. **Authority to do necessary acts; make representations.** An agent has authority:

1. To do everything necessary or proper and useful in the ordinary course of business for effecting the purpose of his agency; and,

2. To make a representation respecting any matter of fact, not including the terms of his authority, but upon which his right to use his authority depends and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is made. [Civ. C. 1877, § 1358; R. C. 1899, § 4324.]

Principal is bound only by acts or admissions of agent strictly within the scope of his authority. Bank v. North, 6 Dak. 136, 41 N. W. 736; Bank v. Gillman, 3 S. D. 170, 52 N. W. 869; Roberts v. M. T. M. Co., 8 S. D. 579, 67 N. W. 607; LaRue v. St. H. & D. E. Co., 3 S. D. 637, 54 N. W. 806; Short v. N. P. E. Co., 1 N. D. 159, 45 N. W. 706; Estey v. Birnbaum, 9 S. D. 174, 68 N. W. 290; Wendt v. C., St. P. & M. Ry., 4 S. D. 476, 57 N. W. 226; Parliman v. Young, 2 Dak. 175, 4 N. W. 711.

Agent not allowed to make oral agreement changing terms of written contract. Reeves v. Corrigan, 3 N. D. 415, 57 N. W. 80.

Cashier of a bank has no authority to rediscount paper except on express authority from directors. Bank not liable for loan so made on forged paper. Bank v. Michigan City Bank, 8 N. D. 608, 80 N. W. 766.

A general agent having charge of a bank's collections has authority to compromise or settle claims for a sum less than due by virtue of such general agency to collect a loan. Bank v. Prior, 10 N. D. 146, 86 N. W. 362.

Bank cashier cannot contract beyond the scope of duties as such. North Star Boot & Shoe Co. v. Stebbins, 2 S. D. 74, 48 N. W. 833.

An agent to make collections is not authorized to accept in payment of his principal's claim an account against himself. Union School Furniture Co. v. Mason, 3 S. D. 147, 52 N. W. 671.

Special agent may not appoint sub-agent. Fargo v. Craven, 9 S. D. 646, 70 N. W. 1053.

Attorney may bind client for expenses in taking appeal. Pilcher v. Trust Co., 12 S. D. 52, 80 N. W. 151.

§ 5773. **When agent may disobey instructions.** An agent has power to disobey instructions in dealing with the subject of the agency in cases when it is clearly for the interest of his principal that he should do so and there is not time to communicate with the principal. [Civ. C. 1877, § 1359; R. C. 1899, § 4325.]

§ 5774. **Authority limited to specific terms.** When an authority is given partly in general and partly in specific terms, the general authority gives no higher powers than those specifically mentioned. [Civ. C. 1877, § 1360; R. C. 1899, § 4326.]

§ 5775. **General authority limited.** An authority expressed in general terms, however broad, does not authorize an agent:

1. To act in his own name unless it is the usual course of business to do so.
2. To define the scope of his agency; or,
3. To do any act which a trustee is forbidden to do by article 2 of chapter 60 of this code. [Civ. C. 1877, § 1361; R. C. 1899, § 4327.]

Agent not authorized to withhold contract of principal with third person on account of personal interest. Holt v. Colton, 4 Dak. 67, 22 N. W. 495.

If agent contract in his own name he alone is bound. Bank v. Lang, 2 N. D. 66, 49 N. W. 414.

§ 5776. **May warrant title to personalty.** An authority to sell personal property includes authority to warrant the title of the principal and the quality and quantity of the property. [Civ. C. 1877, § 1362; R. C. 1899, § 4328.]

§ 5777. **Give usual covenants of warranty.** An authority to sell and convey real property includes authority to give the usual covenants of warranty. [Civ. C. 1877, § 1363; R. C. 1899, § 4329.]

§ 5778. **Receive price.** A general agent to sell, who is intrusted by the principal with the possession of the thing sold, has authority to receive the price. [Civ. C. 1877, § 1364; R. C. 1899, § 4330.]

§ 5779. **Special agent may on delivery.** A special agent to sell has authority to receive the price on delivery of the thing sold, but not afterwards. [Civ. C. 1877, § 1365; R. C. 1899, § 4331.]

Agent for designated counties and business has no authority to employ attorney for general legal business for principal. Kirby v. Scraper Co., 9 S. D. 623, 70 N. W. 1052.

Agent for sale of machinery cannot bind principal for value of second hand machinery delivered in contemplation of value of new. Shull v. New Birdsall Co., 15 S. D. 8, 86 N. W. 654.

ARTICLE 3.—MUTUAL OBLIGATIONS OF PRINCIPALS AND THIRD PERSONS.

§ 5780. **Rights and liabilities of agent accrue to principal.** An agent represents his principal for all purposes within the scope of his actual or ostensible authority and all the rights and liabilities which would accrue to the agent from the transactions within such limit, if they had been entered

into on his own account, accrue to the principal. [Civ. C. 1877, § 1366; R. C. 1899, § 4332.]

§ 5781. **When incomplete execution binding.** A principal is bound by an incomplete execution of an authority when it is consistent with the whole purpose and scope thereof, but not otherwise. [Civ. C. 1877, § 1367; R. C. 1899, § 4333.]

§ 5782. **When notice to one notice to both.** As against a principal both principal and agent are deemed to have notice of whatever either has notice of and ought in good faith and the exercise of ordinary care and diligence to communicate to the other. [Civ. C. 1877, § 1368; R. C. 1899, § 4334.]

Knowledge acquired by agent before he became such to bind principal must have been present in the mind of agent at time he acted to bind principal. Gregg v. Baldwin, 9 N. D. 515, 84 N. W. 373.

Knowledge of agent not imparted to principal when agent is nominal, merely. Indemnity Co. v. Schroeder, 12 N. D. 110, 95 N. W. 436.

Knowledge of bank cashier of equities against note made to him individually and by him indorsed to bank is knowledge of bank. Black Hills Bank v. Kellogg, 4 S. D. 312, 56 N. W. 1071.

§ 5783. **Authorized acts bind when authority exceeded.** When an agent exceeds his authority his principal is bound by his authorized acts so far only as they can be plainly separated from those which are unauthorized. [Civ. C. 1877, § 1369; R. C. 1899, § 4335.]

§ 5784. **When ostensible authority binding.** A principal is bound by acts of his agent under a merely ostensible authority to those persons only, who have in good faith and without ordinary negligence incurred a liability or parted with value upon the faith thereof. [Civ. C. 1877, § 1370; R. C. 1899, § 4336.]

§ 5785. **When exclusive credit to agent binds principal.** If exclusive credit is given to an agent by the person dealing with him, his principal is exonerated by payment or other satisfaction made by him to his agent in good faith before receiving notice of the creditor's election to hold him responsible. [Civ. C. 1877, § 1371; R. C. 1899, § 4337.]

§ 5786. **Set-off against agent.** One who deals with an agent without knowing or having reason to believe that the agent acts as such in the transaction may set-off against any claim of the principal arising out of the same all claims which he might have set-off against the agent before notice of the agency. [Civ. C. 1877, § 1372; R. C. 1899, § 4338.]

§ 5787. **Instrument within scope of authority binding.** Any instrument within the scope of his authority by which an agent intends to bind his principal does bind him, if such intent is plainly inferable from the instrument itself. [Civ. C. 1877, § 1373; R. C. 1899, § 4339.]

A partner may bind firm by written contract, when. Pearson v. Post, 2 Dak. 220, 9 N. W. 684. Affirmed in 108 U. S. 418.

Deed made by person holding power of attorney, though informal, binds principal if true intent can be gathered therefrom. Donovan v. Welch, 11 N. D. 113, 90 N. W. 262.

§ 5788. **Principal responsible for agent's negligence.** Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business; and for his willful omission to fulfill the obligations of the principal. [Civ. C. 1877, § 1374; R. C. 1899, § 4340.]

Wife not responsible for husband's torts not committed in performance of duty while acting as her servant. Curtis v. Dinneen, 4 Dak. 245, 30 N. W. 148.

One cannot be held for fraudulent representations of unauthorized agent by accepting benefits without knowledge of such representations. Nichols v. Bruns, 5 Dak. 28, 37 N. W. 752.

Every partner is liable for fraudulent representations of every other partner made in the sale of partnership property as a means of effecting sale. Brundage v. Mellon, 5 N. D. 72, 63 N. W. 209.

§ 5789. **Principal's responsibility limited.** A principal is responsible for no other wrongs committed by his agent than those mentioned in the last section, unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service. [Civ. C. 1877, § 1375; R. C. 1899, § 4341.]

ARTICLE 4.—OBLIGATIONS OF AGENTS TO THIRD PERSONS.

§ 5790. **Agent warrants authority.** One who assumes to act as an agent thereby warrants to all who deal with him in that capacity that he has the authority which he assumes. [Civ. C. 1877, § 1376; R. C. 1899, § 4342.]

§ 5791. **When agent liable as principal.** One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency in any of the following cases and in no others:

1. When with his consent credit is given to him personally in a transaction.
2. When he enters into a written contract in the name of his principal without believing in good faith that he has authority to do so; or,
3. When his acts are wrongful in their nature. [Civ. C. 1877, § 1377; R. C. 1899, § 4343.]

Agent personally bound by agreement, when. Moore v. Booker, 4 N. D. 543, 62 N. W. 607.

Unauthorized agent liable as principal for breach of contract. Kennedy v. Stovehouse, 13 N. D. 232, 100 N. W. 258.

School directors signing contract as individuals for school supplies whose acts are not thereafter ratified by board of directors become personally liable. Western Publishing House v. Murdick, 4 S. D. 207, 56 N. W. 120; Western Publishing House v. Bachman, 2 S. D. 512, 51 N. W. 214.

One taking money agreeing to procure insurance on property and making no effort to do so becomes liable in case of loss for amount insurance money received would have secured. Lindsay v. Pettigrew, 5 S. D. 500, 59 N. W. 726.

Where parties unite in voluntary unincorporated association and for convenience contract under an association name, it not being a legally responsible body, its acts are the acts of its members who instigate and sanction the same. Winona Lumber Co. v. Church, 6 S. D. 498, 62 N. W. 107.

§ 5792. **Surrender of property adversely claimed.** If an agent receives anything for the benefit of his principal, to the possession of which another person is entitled, he must on demand surrender it to such person, or so much of it as he has under his control at the time of demand, on being indemnified for any advance which he has made to his principal in good faith on account of the same; and is responsible therefor if after notice from the owner, he delivers it to his principal. [Civ. C. 1877, § 1378; R. C. 1899, § 4344.]

§ 5793. **This article subject to chapter 2.** The provisions of this article are subject to the provisions of chapter 2 of this code. [Civ. C. 1877, § 1379; R. C. 1899, § 4345.]

ARTICLE 5.—DELEGATION OF AGENCY.

§ 5794. **When agent cannot delegate powers.** An agent unless specially forbidden by his principal to do so can delegate his powers to another person in any of the following cases, and in no others:

1. When the act to be done is purely mechanical.
2. When it is such as the agent cannot himself and the subagent can lawfully perform.
3. When it is the usage of the place to delegate such powers; or,

4. When such delegation is specially authorized by the principal. [Civ. C. 1877, § 1380; R. C. 1899, § 4346.]

See Pickert v. Rugg, 1 N. D. 230, 46 N. W. 446.

If agent has authority to employ attorney he may delegate that authority. Davis v. Matthews, 8 S. D. 300, 66 N. W. 456; Kirby v. Scraper Co., 9 S. D. 623, 70 N. W. 1052.

Bank at which note is payable and to which sent for collection cannot employ bank in any other city as its sub-agent to collect so as to make payment to it payment to owner of note. Sherman v. Port Huron E. & T. Co., 8 S. D. 343, 66 N. W. 1077; Sherman v. Port Huron E. & T. Co., 13 S. D. 95, 82 N. W. 413. (Authorities in conflict on this subject.)

Under certain conditions attorney may bind client for costs of appeal. Pilcher v. Trust Co., 12 S. D. 52, 80 N. W. 151.

§ 5795. **Wrongful delegation makes agent principal.** If an agent employs a subagent without authority, the former is a principal and the latter his agent and the principal of the former has no connection with the latter. [Civ. C. 1877, § 1381; R. C. 1899, § 4347.]

§ 5796. **Rightful subagent principal's agent.** A subagent lawfully appointed represents the principal in like manner with the original agent; and the original agent is not responsible to third persons for the acts of the subagent. [Civ. C. 1877, § 1382; R. C. 1899, § 4348.]

Applied in Kuhnert v. Angell, 10 N. D. 59, 84 N. W. 579.

Article 6.—Termination of Agency.

§ 5797. **How terminated.** An agency is terminated as to every person having notice thereof by:

1. The expiration of its term.
2. The extinction of its subject.
3. The death of the agent.
4. His renunciation of the agency; or,
5. The incapacity of the agent to act as such. [Civ. C. 1877, § 1383; R. C. 1899, § 4349.]

§ 5798. **Not coupled with interest, how terminated.** Unless the power of an agent is coupled with an interest in the subject of the agency it is terminated as to every person having notice thereof by:

1. Its revocation by the principal.
2. His death; or,
3. His incapacity to contract. [Civ. C. 1877, § 1384; R. C. 1899, § 4350.]

Power of sale in real estate mortgage is power coupled with interest and death of mortgagor does not revoke. Grandin v. Emmons, 10 N. D. 223, 86 N. W. 723; Reilly v. Phillips, 4 S. D. 604, 57 N. W. 780.

One acting as agent for loan company and acting for borrowers under power of attorney, has no interest in land mortgaged. Power of attorney though irrevocable becomes extinct by death of person giving it. Brown v. Skotland, 12 N. D. 445, 97 N. W. 543.

CHAPTER 63.

PARTICULAR AGENCIES.

Article 1.—Auctioneers.

§ 5799. **Authority from seller.** An auctioneer in the absence of special authorization or usage to the contrary has authority from the seller only as follows:

1. To sell by public auction to the highest bidder.

2. To sell for cash only, except such articles as are usually sold on credit at auction.
3. To warrant in like manner with other agents to sell according to section 5776.
4. To prescribe reasonable rules and terms of sale.
5. To deliver the thing sold upon payment of the price.
6. To collect the price; and,
7. To do whatever else is necessary or proper and usual in the ordinary course of business for effecting these purposes. [Civ. C. 1877, § 1385; R. C. 1899, § 4351.]

§ **5800. Authority from bidder.** An auctioneer has authority from a bidder at the auction as well as from the seller to bind both by a memorandum of the contract as prescribed in the chapter on sale. [Civ. C. 1877, § 1386; R. C. 1899, § 4352.]

Article 2.—Factors.

§ **5801. Defined.** A factor is an agent who is employed to buy or sell property in his own name and who is intrusted by his principal with the possession thereof as defined in section 5582. [Civ. C. 1877, § 1387; R. C. 1899, § 4353.]

§ **5802. Authority.** In addition to the authority of agents in general a factor has actual authority from his principal, unless specially restricted:
1. To insure property consigned to him uninsured.
2. To sell on credit anything intrusted to him for sale except such things as it is contrary to usage to sell on credit; but not to pledge, mortgage or barter the same; and,
3. To delegate his authority to his partner or servant, but not to any person in an independent employment. [Civ. C. 1877, § 1388; R. C. 1899, § 4354.]

§ **5803. Ostensible authority.** A factor has ostensible authority to deal with the property of his principal as his own in transactions with persons not having notice of the actual ownership. [Civ. C. 1877, § 1389; R. C. 1899, § 4355.]

Article 3.—Shipmasters and Pilots.

§ **5804. General agent of owner.** The master of a ship is a general agent for its owner in all matters concerning the same. [Civ. C. 1877, § 1390; R. C. 1899, § 4356.]

§ **5805. Has authority to borrow.** The master of a ship has authority to borrow money on the credit of its owner, if it is necessary to enable him to complete the voyage, and if neither the owner nor his proper agent for such matters can be consulted without injurious delay. [Civ. C. 1877, § 1391; R. C. 1899, § 4357.]

§ **5806. Agent for owner of cargo.** The master of a ship during a voyage is a general agent for each of the owners of the cargo and has authority to do whatever they might do for the preservation of their respective interests, except to sell or hypothecate the same. [Civ. C. 1877, § 1392; R. C. 1899, § 4358.]

§ **5807. Authority to make contracts binding owner.** The master of a ship may procure all its necessary repairs and supplies, may engage cargo and passengers for carriage and in a foreign port may enter into a charter party; and his contracts for these purposes bind the owner to the full amount of the value of the ship and freightage. [Civ. C. 1877, § 1393; R. C. 1899, § 4359.]

§ **5808. Authority to hypothecate.** The master of a ship may hypothecate the ship, freightage and cargo in the cases prescribed by the chapters on

bottomry and respondentia and in no others. [Civ. C. 1877, § 1394; R. C. 1899, § 4360.]

§ **5809. Authority to sell ship.** When a ship, whether foreign or domestic, is seriously injured or the voyage is otherwise broken up beyond the possibility of pursuing it, the master in case of necessity may sell the ship without instructions from the owners, unless by the earliest use of ordinary means of communication he can inform the owners and await their instructions. [Civ. C. 1877, § 1395; R. C. 1899, § 4361.]

§ **5810. Authority to sell cargo.** The master of a ship may sell the cargo, if the voyage is broken up beyond the possibility of pursuing it, and no other ship can be obtained to carry it to its destination and the sale is otherwise absolutely necessary. [Civ. C. 1877, § 1396; R. C. 1899, § 4362.]

§ **5811. Authority to pay ransom.** The master of a ship in case of its capture may engage to pay a ransom for it in money or in part of the cargo and his engagement will bind the ship, freightage and cargo. [Civ. C. 1877, § 1397; R. C. 1899, § 4363.]

§ **5812. Authority ceases on abandonment to insurers.** The power of the master of a ship to bind its owner or the owners of the cargo ceases upon the abandonment of the ship and freightage to insurers. [Civ. C. 1877, § 1398; R. C. 1899, § 4364.]

§ **5813. Master's personal liability.** Unless otherwise expressly agreed, or unless the contracting parties give exclusive credit to the owner, the master of a ship is personally liable upon his contracts relative thereto, even when the owner is also liable. [Civ. C. 1877, § 1399; R. C. 1899, § 4365.]

§ **5814. Liable for negligence of crew.** The master of a ship is liable to third persons for the acts or negligence of persons employed in its navigation, whether appointed by him or not, to the same extent as the owner of the ship. [Civ. C. 1877, § 1400; R. C. 1899, § 4366.]

§ **5815. When for negligence of pilot.** The owner or master of a ship is not responsible for the negligence of a pilot whom he is bound by law to employ; but if he is allowed an option between pilots, some of whom are competent, or is required only to pay compensation to a pilot whether he employs him or not, he is responsible to third persons. [Civ. C. 1877, § 1401; R. C. 1899, § 4367.]

Article 4.—Ship's Managers.

§ **5816. Authority to contract and settle.** A ship's manager has power to make contracts requisite for the performance of his duties as such; to enter into charter parties or make contracts for carriage and to settle for freightage and to adjust averages. [Civ. C. 1877, § 1402; R. C. 1899, § 4368.]

§ **5817. Authority limited.** Without special authority a ship's manager cannot borrow money or give up the lien for freightage or purchase a cargo or bind the owners of the ship to an insurance. [Civ. C. 1877, § 1403; R. C. 1899, § 4369.]

CHAPTER 64.

PARTNERSHIP IN GENERAL.

Article 1.—What Constitutes a Partnership.

§ **5818. Partnership defined.** Partnership is the association of two or more persons for the purpose of carrying on business together and dividing its profits between them. [Civ. C. 1877, § 1404; R. C. 1899, § 4370.]

An agreement between residents of different states to divide the profits of loans made by agent for principal do not make them partners. Grigsby v. Day, 9 S. D. 585, 70 N. W. 881.

§ **5819. Ship owners not partners.** Part owners of a ship do not by simply using it in joint enterprise become partners as to the ship. [Civ. C. 1877, § 1405; R. C. 1899, § 4371.]

§ **5820. Formed only by consent.** A partnership can be formed only by the consent of all the parties thereto and therefore no new partner can be admitted into a partnership without the consent of every existing member thereof. [Civ. C. 1877, § 1406; R. C. 1899, § 4372.]

Article 2.—Partnership Property.

§ **5821. Defined.** The property of a partnership consists of all that is contributed to the common stock at the formation of the partnership and all that is subsequently acquired thereby. [Civ. C. 1877, § 1407; R. C. 1899, § 4373.]

§ **5822. Extent of member's interest.** The interest of each member of a partnership extends to every portion of its property. [Civ. C. 1877, § 1408; R. C. 1899, § 4374.]

§ **5823. Shares in profit or loss presumed equal.** In the absence of an agreement on the subject the shares of partners in the profits or loss of the business are equal, and the share of each in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss. [Civ. C. 1877, § 1409; R. C. 1899, § 4375.]

§ **5824. Loss divided same as profits.** An agreement to divide the profits of a business implies an agreement for a corresponding division of its losses, unless it is otherwise expressly stipulated. [Civ. C. 1877, § 1410; R. C. 1899, § 4376.]

§ **5825. Lien on property for payment of debts.** Each member of a partnership may require its property to be applied to the discharge of its debts and has a lien upon the shares of the other partners for this purpose and for the payment of the general balance, if any, due to him. [Civ. C. 1877, § 1411; R. C. 1899, § 4377.]

A judgment not made a lien on assets of partner in suit for dissolution cannot be enforced as such. Wishek v. Hammond, 10 N. D. 72, 84 N. W. 587.

Partner has lien on firm assets for balance due him on accounting after payment of firm debts. Betts v. Letcher, 1 S. D. 182, 46 N. W. 193.

Partner cannot acquire homestead rights in partnership property against a copartner. Brady v. Kreuger, 8 S. D. 464, 66 N. W. 1083.

§ **5826. What presumed partnership property.** Property, whether real or personal, acquired with partnership funds is presumed to be partnership property. [Civ. C. 1877, § 1412; R. C. 1899, § 4378.]

An action at law will not lie by one partner against a copartner where no settlement of the partnership accounts has been had. Devore v. Woodruff, 1 N. D. 143, 45 N. W. 701.

Article 3.—Mutual Obligations of Partners.

§ **5827. Partners trustees.** The relations of partners are confidential. They are trustees for each other within the meaning of chapter 60 of this code. Their obligations as such trustees are defined by that chapter. [Civ. C. 1877, § 1413; R. C. 1899, § 4379.]

Partnership relations require the highest good faith. Lay v. Emery, 8 N. D. 515, 79 N. W. 1053; Betts v. Letcher, 1 S. D. 182, 46 N. W. 193.

Missappropriation of partnership funds by one of partners does not constitute embezzlement. State v. Reddick, 2 S. D. 124, 48 N. W. 846.

Deceit makes partner personally liable for amount so procured from partnership fund. Davenport v. Buchanan, 6 S. D. 376, 61 N. W. 47.

§ **5828. Highest good faith required.** In all proceedings connected with the formation, conduct, dissolution and liquidation of the partneship every partner is bound to act in the highest good faith toward his copartners. He may not obtain any advantage over them in the partnership affairs by

the slightest misrepresentation, concealment, threat or adverse pressure of any kind. [Civ. C. 1877, § 1414; R. C. 1899, § 4380.]

§ **5829. Each member must account to partnership.** Each member of a partnership must account to it for every thing that he receives on account thereof and is entitled to reimbursement therefrom for everything that he properly expends for the benefit thereof and to be indemnified thereby for all losses and risks which he necessarily incurs on its behalf. [Civ. C. 1877, § 1415; R. C. 1899, § 4381.]

§ **5830. No compensation.** A partner is not entitled to any compensation for services rendered by him to the partnership. [Civ. C. 1877, § 1416; R. C. 1899, § 4382.]

Compensation. See Wisner v. Field, 11 N. D. 257, 91 N. W. 67.

Article 4.—Renunciation of Partnership.

§ **5831. Renunciation with notice exonerates.** A partner may exonerate himself from all future liability to a third person on account of the partnership by renouncing in good faith all participation in its future profits and giving notice to such third person and to his own copartners that he has made such renunciation and that, so far as may be in his power, he dissolves the partnership and does not intend to be liable on account thereof for the future. [Civ. C. 1877, § 1417; R. C. 1899, § 4383.]

§ **5832. Cannot claim profits thereafter.** After a partner has given notice of his renunciation of the partnership he cannot claim any of its subsequent profits and his copartners may proceed to dissolve the partnership. [Civ. C. 1877, § 1418; R. C. 1899, § 4384.]

CHAPTER 65.

GENERAL PARTNERSHIP.

Article 1.—What is a General Partnership.

§ **5833. Defined.** Every partnership that is not formed in accordance with the law concerning special partnership and every special partnership, so far only as the general partners are concerned, is a general partnership. [Civ. C. 1877, § 1419; R. C. 1899, § 4385.]

Article 2.—Powers and Authority of Partners.

§ **5834. Majority governs.** Unless otherwise expressly stipulated, the decision of the majority of the members of a general partnership binds it in the conduct of its business. [Civ. C. 1877, § 1420; R. C. 1899, § 4386.]

§ **5835. Each partner general agent.** Every general partner is agent for the partnership in the transaction of its business and has authority to do whatever is necessary to carry on such business in the ordinary manner and for this purpose may bind his copartners by an agreement in writing. [Civ. C. 1877, § 1421; R. C. 1899, § 4387.]

Fraudulent representation of one partner binds the others. Brundage v. Mellon, 5 N. D. 72, 63 N. W. 209.

Authority conferred upon a partnership may be exercised by either member of the firm. McLaughlin v. Wheeler, 1 S. D. 497, 47 N. W. 816; Pearson v. Post, 2 Dak. 220, 9 N. W. 684.

§ **5836. Authority limited.** A partner as such has not authority to do any of the following acts, unless his copartners have wholly abandoned the business to him or are incapable of acting:

1. To make an assignment of the partnership property, or any portion thereof, to a creditor or to a third person in trust for the benefit of a creditor or of all creditors.

2. To dispose of the good will of the business.
3. To dispose of the whole of the partnership property at once, unless it consists entirely of merchandise.
4. To do any act which would make it impossible to carry on the ordinary business of the partnership.
5. To confess a judgment.
6. To submit a partnership claim to arbitration; or,
7. To do any act not within the scope of the preceding section. [Civ. C. 1877, § 1422; R. C. 1899, § 4388.]

One partner has no authority to bind firm by a guaranty of commercial paper of a third party. Clarke v. Wallace et al, 1 N. D. 404, 48 N. W. 339.

Purchase of boots and shoes in name of bank by cashier for benefit of third person, not ratified by bank does not bind bank. N. S. B. & S. Co. v. Stebbins, 2 S. D. 74, 48 N. W. 833.

As to certain acts of bank cashier being void see Noyes v. Crandall, 6 S. D. 460, 61 N. W. 806.

§ **5837. Effect of bad faith.** A partner is not bound by any act of a copartner in bad faith toward him, though within the scope of a partner's powers, except in favor of persons who have in good faith parted with value in reliance upon such act. [Civ. C. 1877, § 1423; R. C. 1899, § 4389.]

Article 3.—Mutual Obligations of Partners.

§ **5838. Profits belong to firm.** All profits made by a general partner in the course of any business usually carried on by the partnership belong to the firm. [Civ. C. 1877, § 1424; R. C. 1899, § 4390.]

§ **5839. Partner cannot have adverse interest.** A general partner, who agrees to give his personal attention to the business of the partnership, may not engage in any business which gives him an interest adverse to that of the partnership or which prevents him from giving to such business all the attention which would be advantageous to it. [Civ. C. 1877, § 1425; R. C. 1899, § 4391.]

§ **5840. May engage in separate business.** A partner may engage in any separate business, except as otherwise provided by the last two sections. [Civ. C. 1877, § 1426; R. C. 1899, § 4392.]

§ **5841. When must account for profits.** A general partner, transacting business contrary to the provisions of this article, may be required by any copartner to account to the partnership for the profits of such business. [Civ. C. 1877, § 1427; R. C. 1899, § 4393.]

Article 4.—Liability of Partners.

§ **5842. Liable to third persons.** Every general partner is liable to third persons for all the obligations of the partnership jointly with his copartners. [Civ. C. 1877, § 1428; R. C. 1899, § 4394.]

§ **5843. Liability defined by chapter 62.** The liability of general partners for each other's acts is defined by chapter 62 of this code. [Civ. C. 1877, § 1429; R. C. 1899, § 4395.]

Each liable for fraudulent representation of other in sale of property. Brundage v. Mellon, 5 N. D. 72, 63 N. W. 209.

§ **5844. Ostensible partner.** Any one permitting himself to be represented as a partner, general or special is liable as such to third persons to whom such representation is communicated, who on the faith thereof give credit to the partnership. [Civ. C. 1877, § 1430; R. C. 1899, § 4396.]

§ **5845. Otherwise only partner in fact liable.** No one is liable as a partner who is not such in fact, except as provided by the last section. [Civ. C. 1877, § 1431; R. C. 1899, § 4397.]

ARTICLE 5.—TERMINATION OF PARTNERSHIP.

§ **5846. Duration of partnership.** If no term is prescribed by agreement for its duration, a general partnership continues until dissolved by a partner or by operation of law. [Civ. C. 1877, § 1432; R. C. 1899, § 4398.]

§ **5847. Causes dissolving.** A general partnership is dissolved as to all the partners:

1. By lapse of the time prescribed by agreement for its duration.
2. By the express will of any partner if there is no such agreement.
3. By the death of a partner.
4. By the transfer to a person not a partner of the interest of any partner in the partnership property.
5. By war or by the prohibition of commercial intercourse between the country in which one partner resides and that in which another resides; or
6. By a judgment of dissolution. [Civ. C. 1877, § 1433; R. C. 1899, § 4399.]

Partnership is dissolved eo instante when partners form a corporation. Hennessy v. Griggs et al, 1 N. D. 52, 44 N. W. 1010.

§ **5848. Partial dissolution.** A general partnership may be dissolved as to himself only by the expressed will of any partner, notwithstanding his agreement for its continuance, subject, however, to liability to his copartners for any damage caused to them thereby, unless the circumstances are such as to entitle him to a judgment of dissolution. [Civ. C. 1877, § 1434; R. C. 1899, § 4400.]

§ **5849. Judgment of dissolution.** A general partner is entitled to a judgment of dissolution:

1. When he or another partner becomes legally incapable of contracting.
2. When another partner fails to perform his duties under the agreement of partnership or is guilty of serious misconduct; or,
3. When the business of the partnership can be carried on only at a permanent loss. [Civ. C. 1877, § 1435; R. C. 1899, § 4401.]

§ **5850. Liability until notice given.** The liability of a general partner for the acts of his copartners continues, even after a dissolution of the partnership, in favor of persons who have had dealings with and given credit to the partnership during its existence, until they have had personal notice of the dissolution; and in favor of other persons, until such dissolution has been advertised in a newspaper published in every county where the partnership at the time of its dissolution had a place of business; to the extent in either case to which such persons part with value in good faith and in the belief that such partner is still a member of the firm. [Civ. C. 1877, § 1436; R. C. 1899, § 4402.]

Dissolution of partnership. Effect of settlement. Setting aside contracts. See Little v. Little, 2 N. D. 175, 49 N. W. 736.

Failure to give notice of dissolution to parties doing business with firm continues liability of partners. Cornwall v. McKinney, 12 S. D. 118, 80 N. W. 171.

Making two deposits in one year, held "dealings with" a banking firm and giving credit thereto. Tobin v. McKinney, 14 S. D. 52, 84 N. W. 228.

§ **5851. When change of name sufficient notice.** A change of the partnership name, which plainly indicates the withdrawal of a partner is a sufficient notice of the fact of such withdrawal to all persons to whom it is communicated. But a change in the name which does not contain such an indication is not notice of the withdrawal of any partner. [Civ. C. 1877, § 1437; R. C. 1899, § 4403.]

ARTICLE 6.—LIQUIDATION.

§ **5852. Authority after dissolution.** After the dissolution of a partnership the powers and authority of the partners are such only as are prescribed by this article. [Civ. C. 1877, § 1438; R. C. 1899, § 4404.]

§ 5853. **Who may act in liquidation.** Any member of a general partnership may act in liquidation of its affairs, except as provided by the next section. [Civ. C. 1877, § 1439; R. C. 1899, § 4405.]

§ 5854. **Who may not act.** If the liquidation of a partnership is committed by consent of all the partners to one or more of them, the others have no right to act therein; but their acts are valid in favor of persons parting with value in good faith upon the credit thereof. [Civ. C. 1877, § 1440; R. C. 1899, § 4406.]

§ 5855. **Authority of partner liquidating.** A partner authorized to act in liquidation may collect, compromise or release any debts due to the partnership, pay or compromise any claims against it, and dispose of the partnership property. [Civ. C. 1877, § 1441; R. C. 1899, § 4407.]

§ 5856. **Same.** A partner authorized to act in liquidation may indorse in the name of the firm promissory notes or other obligations held by the partnership for the purpose of collecting the same, but he cannot create any new obligation in its name, or revive a debt against the firm by an acknowledgment, when an action thereon is barred under the provisions of the code of civil procedure. [Civ. C. 1877, § 1442; R. C. 1899, § 4408.]

§ 5857. **Surviving partner's authority.** On the death of a partner the surviving partners succeed to all the partnership property, whether real or personal, in trust for the purposes of liquidation, even though the deceased was appointed by agreement sole liquidator; and the interest of the deceased in the ultimate distribution of the partnership assets passes to those who succeed to his other personal property. [Civ. C. 1877, § 1442; R. C. 1899, § 4409.]

Article 7.—Of the Use of Fictitous Names.

§ 5858. **Fictitious names. Service. Publication.** Except as otherwise provided in the next section, every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the district court of the county or subdivision in which its principal place of business is situated a certificate, stating the names in full of all the members of such partnership and their places of residence, and publish the same once a week for four sucessive weeks in a newspaper published in the county, if there is one, and if there is none in such county, then in a newspaper published in an adjoining county. [Civ. C. 1877, § 1443; R. C. 1899, § 4410.]

Objection that certificate has not been filed must be taken by answer, otherwise it is waived. Heegaard v. Trust Co., 3 S. D. 569, 54 N. W. 656.

§ 5859. **Foreign partnership.** A commercial or banking partnership, established and transacting business in a place without the United States, may without filing the certificate or making the publication prescribed in the last section use in this state the partnership name used by it there, although it is fictitions or does not show the names of the persons interested as partners in such business. [Civ. C. 1877, § 1444; R. C. 1899, § 4411.]

§ 5860. **How certificates executed.** The certificate filed with the clerk of the district court, provided in section 5858, must be signed by the partners and acknowledged before some officer authorized to take acknowledgments of conveyances of real property. [Civ. C. 1877, § 1445; 1881, ch. 30, § 1; R. C. 1899, § 4412.]

§ 5861. **Penalty.** Persons doing business as partners, contrary to the provisions of this article shall not maintain any action on or on account of any contracts made or transactions had in their partnership name in any court of this state, until they have first filed the certificate and made the publication herein required; provided, however, that if such partners shall at any time comply with the provisions of this article, then such partnership shall have the right to maintain an action in all such partnership contracts and trans-

actions entered into prior as well as after such compliance with this article and the disability heretofore imposed on partnerships by said article for a failure to comply therewith are hereby removed and made to conform to this section. [Civ. C. 1877, § 1445; 1881, ch. 30, § 1; R. C. 1899, § 4412.]

§ **5862. New certificate when members changed.** On every change in the members of a partnership transacting business in this state under a fictitious name or designation which does not show the names of the persons interested as partners in the business except in the cases mentioned in section 5859, a new certificate must be filed with the clerk of the district court and a new publication made as required by this article on the formation of such partnership. [Civ. C. 1877, § 1446; R. C. 1899, § 4413.]

§ **5863. Duty of clerk.** Every clerk of the district court must keep a register of the names of firms and persons mentioned in the certificates filed with him pursuant to this article, entering in alphabetical order the name of every such partnership and of each partner therein. [Civ. C. 1877, § 1447; R. C. 1899, § 4414.]

§ **5864. Certified copies evidence.** Copies of the entries of the clerk of the district court, as herein directed, when certified by him and affidavits of publication made as prescribed in section 7294 of the code of civil procedure are presumptive evidence of the facts therein stated. [Civ. C. 1877, § 1448; R. C. 1895, § 4415.]

CHAPTER 66.

SPECIAL PARTNERSHIP.

Article 1.—Formation of the Partnership.

§ **5865. Special partnership authorized.** A special or limited partnership may be formed by any two or more persons in the manner and with the effect prescribed in this chapter for the transaction of any business except banking or insurance. [Civ. C. 1877, § 1449; R. C. 1899, § 4416.]

§ **5866. How constituted.** A special partnership may consist of one or more persons called general partners and one or more persons called special partners. [Civ. C. 1877, § 1450; R. C. 1899, § 4417.]

§ **5867. How formed.** Persons desirous of forming a special partnership must severally sign a certificate, stating:

1. The name under which such partnership is to be conducted.
2. The general nature of the business intended to be transacted.
3. The names of all the partners and their residences, specifying which are general and which are special partners.
4. The amount of capital which each special partner has contributed to the common stock; and,
5. The periods at which such partnership will begin and end. [Civ. C. 1877, § 1451; R. C. 1899, § 4418.]

§ **5868. Certificate, how executed and filed.** Certificates under the last section must be acknowledged by all the partners before some officer authorized to take acknowledgment of deeds, one to be filed in the office of the clerk of the district court of the county or subdivision and the other recorded in the office of the register of deeds of the county in which the principal place of business of the partnership is situated in a book to be kept for that purpose open to public inspection; and if the partnership has places of business situated in different counties, a copy of the certificate, certified by the register of deeds in whose office it is recorded, must be filed in the clerk's office as aforesaid and recorded in like manner in the office of the register of deeds in every such county. If any false statement is made in any such certificate

all the persons interested in the partnership are liable as general partners for all the engagements thereof. [Civ. C. 1877, § 1452; R. C. 1899, § 4419.]

§ **5869. Affidavits required of partners.** An affidavit of each of the partners stating that the sums specified in the certificate of the partnership as having been contributed by each of the special partners has been actually and in good faith paid in the lawful money of the United States, must be filed in the same office with the original certificate. [Civ. C. 1877, § 1453; R. C. 1899, § 4420.]

§ **5870. Compliance necessary to formation.** No special partnership is formed until the provisions of the last five sections are complied with. [Civ. C. 1877, § 1454; R. C. 1899, § 4421.]

§ **5871. Publication required.** The certificate mentioned in this article or a statement of its substance must be published in a newspaper printed in the county where the original certificate is filed and if no newspaper is there printed then in a newspaper in the state nearest thereto. Such publication must be made once a week for four successive weeks, beginning within one week from the time of filing of such certificate. In case the publication is not so made the partnership must be deemed general. [Civ. C. 1877, § 1455; R. C. 1899, § 4422.]

§ **5872. Affidavit of publication filed.** An affidavit of publication pursuant to the preceding section made by the printer, publisher or chief clerk of a newspaper, may be filed with the register of deeds with whom the original certificate was filed and is presumptive evidence of the facts therein stated. [Civ. C. 1877, § 1456; R. C. 1899, § 4425.]

Article 2.—Powers, Rights and Duties of the Partners.

§ **5873. How renewed or continued.** Every renewal or continuance of a special partnership must be certified, recorded, verified and published in the same manner as upon its original formation. [Civ. C. 1877, § 1457; R. C. 1899, § 4424.]

§ **5874. Style of special partnership. Sign.** The business of a special partnership must be conducted under a name consisting of the names or surnames of one or more of the general partners only with or without the addition of the words "and company" or "& Co." Such partnership shall put in some conspicuous place on the outside and in front of the building in which it has its chief place of business some sign on which shall be painted in legible English characters all the names of all the members of such partnership, designating the special partners. [Civ. C. 1877, § 1458; R. C. 1899, § 4425.]

§ **5875. Only general partners have authority.** The general partners only have authority to transact the business of a special partnership. [Civ. C. 1877, § 1459; R. C. 1899, § 4426.]

§ **5876. Rights of special partner.** A special partner may at all times investigate the partnership affairs and advise his partners or their agents as to their management. [Civ. C. 1877, § 1460; R. C. 1899, § 4427.]

§ **5877. May deal with firm.** A special partner may lend money to the partnership or advance money for it and take from it security therefor and as to such loans or advances has the same right as any other creditor; but in case of the insolvency of the partnership, all other claims which he may have against it must be postponed until all other creditors are satisfied. [Civ. C. 1877, § 1461; R. C. 1899, § 4428.]

§ **5878. Who joined in actions.** In all matters relating to a special partnership its general partners may sue and be sued alone in the same manner as if there were no special partners. [Civ. C. 1877, § 1462; R. C. 1899, § 4429.]

§ **5879. Withdrawal of capital.** No special partner under any pretense may withdraw any part of the capital invested by him in the partnership during its continuance. [Civ. C. 1877, § 1463; R. C. 1899, § 4430.]

§ **5880. May receive interest and profits.** A special partner may receive such lawful interest and such proportion of profits as may be agreed upon,

if not paid out of the capital invested in the partnership by him, or by some other special partner, and is not bound to refund the same to meet subsequent losses. [Civ. C. 1877, § 1464; R. C. 1899, § 4431.]

§ 5881. When special becomes general partner. If a special partner withdraws capital from the firm contrary to the provisions of this article he thereby becomes a general partner. [Civ. C. 1877, § 1465; R. C. 1899, § 4432.]

§ 5882. When preference void. Every transfer of the property of a special partnership or of a partner therein, made after or in contemplation of the insolvency of such partnership or partner with intent to give a preference to any creditor of such partnership, or partner over any creditor of such partnership, is void against the creditors thereof; and every judgment confessed, lien created or security given in like manner and with like intent is in like manner void. [Civ. C. 1877, § 1466; R. C. 1899, § 4436.]

Article 3.—Liability of Partners.

§ 5883. Of general partner. The general partners in a special partnership are liable to the same extent as partners in a general partnership. [Civ. C. 1877, § 1467; R. C. 1899, § 4434.]

§ 5884. Special partners, liability limited. Exceptions. The contribution of a special partner to the capital of the firm and the increase thereof is liable for its debts, but he is not otherwise liable therefor except as follows:

1. If he has willfully made or permitted a false or materially defective statement in the certificate of the partnership, the affidavit filed therewith or the published announcement thereof, he is liable as a general partner to all the creditors of the firm.
2. If he has willfully interfered with the business of the firm, except as permitted in article 2 of this chapter, he is liable in like manner; or,
3. If he has willfully joined in or assented to an act contrary to any of the provisions of article 2 of this chapter he is liable in a like manner. [Civ. C. 1877, § 1468; R. C. 1899, § 4435.]

§ 5885. When special liable as general partner. When a special partner has unintentionally done any of the acts mentioned in the last section he is liable as a general partner to any creditor of the firm who has been actually misled thereby to his prejudice. [Civ. C. 1877, § 1469; R. C. 1899, § 4436.]

§ 5886. Estoppel, when contracting with as such. One who upon making a contract with a partnership accepts from or gives to it a written memorandum of the contract, stating that the partnership is special and giving the names of the special partners, cannot afterwards charge the persons thus named as general partners upon that contract by reason of any error or defect in the proceedings for the creation of the special partnership prior to the acceptance of the memorandum, if an effort has been made by the partners in good faith to form a special partnership in the manner provided by law. [Civ. C. 1877, § 1470; R. C. 1899, § 4437.]

Article 4.—Alteration and Dissolution.

§ 5887. When special becomes general partnership. A special partnership becomes general, if within ten days after any partner withdraws from it, or any new partner is received into it, or a change is made in the nature of its business, or in its name, a certificate of such fact, duly verified and signed by one or more af the partners, is not filed with the clerk of the district court and the register of deeds with whom the original certificate of the partnership was filed and notice thereof published as is provided in article 1 of this chapter for the publication of this certificate. [Civ. C. 1877, § 1471; R. C. 1899, § 4438.]

§ 5888. How new special partners admitted. New special partners may be admitted into a special partnership upon a certificate, stating the names, residences and contributions to the common stock of each of such partners,

signed by each of them and by the general partners, verified, acknowledged or proved and filed with the clerk and recorded in the register's office in which the original certificate was filed according to the provisions of article 1 of this chapter. [Civ. C. 1877, § 1472; R. C. 1899, § 4439.]

§ 5889. **Dissolution. Notice filed and published.** A special partnership is subject to dissolution in the same manner as a general partnership, except that no dissolution by the act of the partners is complete until a notice thereof has been filed and recorded in the office of the register of deeds with whom the original certificate was recorded and filed in the office of the clerk of the district court and published once in each week for four successive weeks in a newspaper printed in each county where the partnership has a place of business. [Civ. C. 1877, § 1473; R. C. 1899, § 4440.]

CHAPTER 67.

INSURANCE IN GENERAL.

ARTICLE 1.—DEFINITION OF INSURANCE.

§ 5890. **Defined.** Insurance is a contract whereby one undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event. [Civ. C. 1877, § 1474; R. C. 1899, § 4441.]

A corporation which undertakes to guarantee fixed revenue per acre from farm land is an insurance company. State v. Hogan, 8 N. D. 301, 78 N. W. 1051.

ARTICLE 2.—WHAT MAY BE INSURED.

§ 5891. **Insurable interest.** Any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest or create a liability against him may be insured against, subject to the provisions of this chapter, with the exception of an insurance for or against the drawing of any lottery or for or against any chance or ticket in a lottery drawing a prize. [Civ. C. 1877, § 1475; R. C. 1899, § 4442.]

§ 5892. **Insurance classified.** The most usual kinds of insurance are:

1. Marine insurance.
2. Fire insurance.
3. Life insurance.
4. Health insurance; and
5. Accident insurance. [Civ. C. 1877, § 1476; R. C. 1899, § 4443.]

§ 5893. **All kinds subject to chapter.** All kinds of insurance are subject to the provisions of this chapter. [Civ. C. 1877, § 1477; R. C. 1899, § 4444.]

ARTICLE 3.—PARTIES TO THE CONTRACT.

§ 5894. **Insurer and insured defined.** The person who undertakes to indemnify another by a contract of insurance is called the insurer and the person indemnified is called the insured. [Civ. C. 1877, § 1478; R. C. 1899, § 4445.]

§ 5895. **Who may insure.** Any one who is capable of making a contract may be an insurer, subject to the restrictions imposed by special statutes upon foreign corporations, nonresidents and others. [Civ. C. 1877, § 1479; R. C. 1899, § 4446.]

§ 5896. **Who may be insured.** Any one except a public enemy may be insured. [Civ. C. 1877, § 1480; R. C. 1899, § 4447.]

§ 5897. **Insurance of mortgaged property.** When a mortgagor of property effects insurance in his own name, providing that the loss shall be payable to the mortgagee, or assigns a policy of insurance to the mortgagee, the insurance is deemed to be upon the interest of the mortgagor, who does

not cease to be a party to the original contract and any act of his which would otherwise avoid the insurance will have the same effect, although the property is in the hands of the mortgagee. [Civ. C. 1877, § 1481; R. C. 1895, § 4448.]

Mortgagee to whom policy to mortgagor is made payable may sue alone where his claim exceeds the amount of the insurance. Travelers v. California Co., 1 N. D. 151, 45 N. W. 703.

Mortgagee liable for premium when mortgage so provides. St. P. F. & M. Co. v. Upton, 2 N. D. 229, 50 N. W. 702.

Failure on part of mortgagee to comply with the stipulations in the policy will operate to forfeit policy. Ormsby v. Phenix Ins. Co., 5 S. D. 72, 58 N. W. 301.

§ 5898. Same. New contract. If an insurer assents to the transfer of an insurance from a mortgagor to a mortgagee and at the time of his assent imposes further obligations on the assignee, making a new contract with him, the acts of the mortgagor cannot affect his right. [Civ. C. 1877, § 1482; R. C. 1899, § 4449.]

Article 4.—Insurable Interest.

§ 5899. Defined. Every interest in the property, or any relation thereto, or liability in respect thereof of such a nature that a contemplated peril might directly damnify the insured is an insurable interest. [Civ. C. 1877, § 1483; R. C. 1899, § 4450.]

§ 5900. Classified. An insurable interest in property may consist in:

1. An existing interest.
2. An inchoate interest founded on an existing interest; or,
3. An expectancy coupled with an existing interest in that out of which the expectancy arises. [Civ. C. 1877, § 1484; R. C. 1899, § 4451.]

§ 5901. Carrier or depositary has. A carrier or depositary of any kind has an insurable interest in a thing held by him as such to the extent of its value. [Civ. C. 1877, § 1485; R. C. 1899, § 4452.]

§ 5902. Contingent or expectant interest not. A mere contingent or expectant interest in anything, not founded on an actual right to the thing, nor upon valid contract for it, is not insurable. [Civ. C. 1877, § 1486; R. C. 1899, § 4453.]

§ 5903. Measure of. The measure of an insurable interest in property is the extent to which the insured might be damnified by loss or injury thereof. [Civ. C. 1877, § 1487; R. C. 1899, § 4454.]

§ 5904. Insurance without interest void. The sole object of insurance is the indemnity of the insured and if he has no insurable interest the contract is void. [Civ. C. 1877, § 1488; R. C. 1899, § 4455.]

§ 5905. When interest must exist. An interest insured must exist when the insurance takes effect and when the loss occurs, but need not exist in the meantime. [Civ. C. 1877, § 1489; R. C. 1899, § 4456.]

Insurers not liable if at time of loss insured has no interest in insured property. Tierney v. Phenix Ins. Co., 4 N. D. 565, 62 N. W. 642; Ormsby v. Phenix Ins. Co., 5 S. D. 72, 58 N. W. 301.

Immaterial variance in incumbrance upon value or size of property in no way detrimental will not vitiate insurance. McNamara v. D. F. & M. Co., 1 S. D. 342, 47 N. W. 288.

§ 5906. When change of interest suspends insurance. Except in the cases specified in the next five sections and in the cases of life, accident and health insurance, a change of interest in any part of a thing insured, unaccompanied by a corresponding change of interest in the insurance, suspends the insurance to an equivalent extent, until the interest in the thing and the interest in the insurance are vested in the same person. [Civ. C. 1877, § 1490; R. C. 1899, § 4457.]

§ 5907. Change after loss does not affect. A change of interest in a thing insured after the occurrence of an injury which results in a loss does not

affect the right of the insured to indemnity for the loss. [Civ. C. 1877, § 1491; R. C. 1899, § 4458.]

§ **5908. Change** in one of several things. A change of interest in one or more of several distinct things insured by one policy does not avoid the insurance as to the others. [Civ. C. 1877, § 1492; R. C. 1895, § 4459.]

§ **5909. Incumbrance** or reinsurance of one of several things. The procurement of any other contract of insurance upon or the incumbrance of one or more of the several distinct things insured by one policy does not render void any insurance upon the things not covered by such other contract of insurance or incumbrance; but in case of loss or damage such an amount shall be deducted from the insurance as the value of the property so incumbered or doubly insured bears to the value of all the property covered by the policy. Any agreement made to waive the provisions of this or the preceding section is void. [R. C. 1895, § 4460.]

§ **5910. Change** of interest by death. A change of interest by will or succession on the death of the insured does not avoid an insurance; and his interest in the insurance passes to the person taking his interest in the thing insured. [Civ. C. 1877, § 1493; R. C. 1899, § 4461.]

§ **5911. Change** among joint owners. A transfer of interest by one of several partners, joint owner or owners in common who are jointly insured to the others does not avoid an insurance, even though it has been agreed that the insurance shall cease upon an alienation of the thing insured. [Civ. C. 1877, § 1494; R. C. 1899, § 4462.]

§ **5912. Stipulation** of interest void. Every stipulation in a policy of insurance for the payment of loss whether the person insured has or has not any interest in the property insured or that the policy shall be received as proof of such interest and every policy executed by way of gaming or wagering is void. [Civ. C. 1877, § 1494; R. C. 1899, § 4463.]

Article 5.—Concealment and Representation.

§ **5913. Concealment** defined. A neglect to communicate that which a party knows and ought to communicate is called a concealment. [Civ. C. 1877, § 1495; R. C. 1899, § 4464.]

§ **5914. Rescission** on account of. A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance. [Civ. C. 1877, § 1496; R. C. 1899, § 4465.]

§ **5915. Mutual** disclosures. Each party to a contract of insurance must communicate to the other in good faith all facts within his knowledge which are or which he believes to be material to the contract and which the other has not the means of ascertaining and as to which he makes no warranty. [Civ. C. 1877, § 1497; R. C. 1899; § 4466.]

§ **5916. What** not bound to disclose. Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other:

1. Those which the other knows.
2. Those which in the exercise of ordinary care the other ought to know and of which the former has no reason to suppose him ignorant.
3. Those of which the other waives communication.
4. Those which prove or tend to prove the existence of a risk excluded by a warranty and which are not otherwise material; and,
5. Those which relate to a risk excepted from the policy and which are not otherwise material. [Civ. C. 1877, § 1498; R. C. 1899, § 4467.]

§ **5917. How materiality** determined. Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due in forming his estimate

of the disadvantages of the proposed contract or in making his inquiries. [Civ. C. 1877, § 1499; R. C. 1899, § 4468.]

Questions of materiality of statements of insured in application reviewed. Waterbury v. D. F. & M. Co., 6 Dak. 468, 43 N. W. 697.

§ 5918. **Presumption of knowledge.** Each party to a contract of insurance is bound to know all the general causes which are open to his inquiry, equally with that of the other and which may affect either the political or material perils contemplated and all general usages of trade. [Civ C. 1877, § 1500; R. C. 1899, § 4469.]

§ 5919. **Right to information waived.** The right to information of material facts may be waived, either by the terms of insurance, or by neglect to make inquiries as to such facts, when they are distinctly implied in other facts of which information is communicated. [Civ. C. 1877, § 1501; R. C. 1899, § 4470.]

§ 5920. **Information as to interest.** Information of the nature or amount of the interest of one insured need not be communicated unless in answer to inquiry, except as prescribed by section 5937. [Civ. C. 1877, § 1502; R. C. 1899, § 4471.]

Failure of insured to inform insurer property is incumbered by chattel mortgage voids policy. Harding v. Norwich Co., 10 S. D. 64, 71 N. W. 755.

§ 5921. **Rescission for fraudulent concealment.** An intentional and fraudulent omission on the part of one insured to communicate information of matters proving or tending to prove the falsity of a warranty entitles the insurer to rescind. [Civ. C. 1877, § 1503; R. C. 1899, § 4472.]

§ 5922. **Matters of opinion.** Neither party to a contract of insurance is bound to communicate even upon inquiry information of his own judgment upon the matters in question. [Civ. C. 1877, § 1504; R. C. 1899, § 4473.]

§ 5923. **Form of representation.** A representation may be oral or written. [Civ. C. 1877, § 1505; R. C. 1899, § 4474.]

§ 5924. **When may be made.** A representation may be made at the same time with issuing the policy or before it. [Civ. C. 1877, § 1506; R. C. 1899, § 4475.]

§ 5925. **Rules of interpretation.** The language of a representation is to be interpreted by the same rules as the language of contracts in general. [Civ. C. 1877, § 1507; R. C. 1899, § 4476.]

§ 5926. **What deemed promise.** A representation as to the future is to be deemed a promise, unless it appears that it was merely a statement of belief or expectation.. [Civ. C. 1877, § 1508; R. C. 1899, § 4477.]

§ 5927. **Cannot qualify contract; may, implied warranty.** A representation cannot be allowed to qualify an express provision in a contract of insurance; but it may qualify an implied warranty. [Civ. C. 1877, § 1509; R. C. 1899, § 4478.]

§ 5928. **When may be withdrawn.** A representation may be altered or withdrawn before the insurance is effected, but not afterwards. [Civ. C. 1877, § 1510; R. C. 1899, § 4479.]

§ 5929. **Time to which refers.** The completion of the contract of insurance is the time to which a representation must be presumed to refer. [Civ. C. 1877, § 1511; R. C. 1899, § 4480.]

§ 5930. **On information and belief.** When a person insured has no personal knowledge of a fact, he may, nevertheless repeat information which he has upon the subject and which he believes to be true with the explanation that he does so on the information of others, or he may submit the information in its whole extent to the insurer; and in neither case is he responsible for its truth, unless it proceeds from an agent of the insured whose duty it is to give the intelligence. [Civ. C. 1877, § 1512; R. C. 1899, § 4481.]

§ 5931. **When deemed false.** A representation is to be deemed false when the facts fail to correspond with its assertions or stipulations. [Civ. C. 1877, § 1513; R. C. 1899, § 4482.]

§ **5932. Effect of falsity.** If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false. [Civ. C. 1877, § 1514; R. C. 1899, § 4483.]

§ **5933. How materiality determined.** The materiality of a representation is determined by the same rule as the materiality of a concealment. [Civ. C. 1877, § 1515; R. C. 1899, § 4484.]

§ **5934. When not material.** No oral or written misrepresentation made in the negotiation of a contract or policy of insurance by the insured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss. [R. C. 1895, § 4485.]

§ **5935. Modification. Rescission.** The provisions of this article apply as well to a modification of a contract of insurance as to its original formation. Whenever a right to rescind a contract of insurance is given to the insured by any provision of this chapter such right may be exercised at any time previous to the commencement of an action on the contract. [Civ. C. 1877, § 1516; R. C. 1899, § 4486.]

Article 6.—The Policy.

§ **5936. Defined.** The written instrument in which a contract of insurance is set forth is called a policy of insurance. [Civ. C. 1877, § 1517; R. C. 1899, § 4487.]

§ **5937. What must specify.** A policy of insurance must specify:

1. The parties between whom the contract is made.
2. The rate of premium.
3. The property or life insured.
4. The interest of the insured in property insured, if he is not the absolute owner thereof.
5. The risks insured against; and,
6. The period during which the insurance is to continue. [Civ. C. 1877, § 1518; R. C. 1899, § 4488.]

§ **5938. Applied only to interest.** When the name of the person intended to be insured is specified in a policy, it can be applied only to his own proper interest. [Civ. C. 1877, § 1519; R. C. 1899, § 4489.]

§ **5939. Insurance by trustee or agent.** When an insurance is made by an agent or trustee, the fact that his principal or beneficiary is the person really insured may be indicated by describing him as an agent or trustee or by other general words in the policy. [Civ. C. 1877, § 1520; R. C. 1899, § 4490.]

§ **5940. Terms govern joint or common interest.** To render an insurance effected by one partner or part owner, applicable to the interest of his copartners or of other part owners, it is necessary that the terms of the policy should be such as are applicable to the joint or common interest. [Civ. C. 1877, § 1521; R. C. 1899, § 4491.]

§ **5941. Only person intended may claim benefit.** When the description of the insured in a policy is so general that it may comprehend any person or any class of persons, he only can claim the benefit of the policy who can show that it was intended to include him. [Civ. C. 1877, § 1522; R. C. 1899, § 4492.]

Provision that policy becomes void on assured mortgaging property without **consent of company** indorsed on policy cannot be waived by a mere soliciting **agent. Smith v. Insurance** Co., 6 Dak. 433, 43 N. W. 810.

Divestiture of title before loss by foreclosure having been established, judgment **annulling foreclosure** inadmissable. Tierney v. Phoenix Co., 4 N. D. 565, 62 N. W. 642.

Insuring under assumed name. See Pollard v. F. F. Co., 1 S. D. 570, 47 N. W. 1060.

Insured not bound by representation made by agent to company. S. B. T. Mfg. Co. v. D. F. & M. Co., 2 S. D. 17, 48 N. W. 310.

Untrue answers made to medical examiner to questions propounded constitute breach of warranty and avoid contract. Knudson v. Legion of Honor, 7 S. D. 214, 63 N. W. 911.

§ **5942. Benefit of any owner.** A policy may be so framed that it will inure to the benefit of whomsoever during the continuance of the risk may become the owner of the interest insured. [Civ. C. 1877, § 1523; R. C. 1899, § 4493.]

§ **5943. Transfer suspends.** The mere transfer of a thing insured does not transfer the policy, but suspends it until the same person becomes owner of both the policy and the thing insured. [Civ. C. 1877, § 1524; R. C. 1899, § 4494.]

§ **5944. Classified.** A policy is either open or valued. [Civ. C. 1877, § 1525; R. C. 1899, § 4495.]

§ **5945. Open.** An open policy is one in which the value of the thing insured is not agreed upon, but is left to be ascertained in case of loss. [Civ. C 1877, § 1526; R. C. 1899, § 4496.]

§ **5946. Valued.** A valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum. [Civ. C. 1877, § 1527; R. C. 1899, § 4497.]

§ **5947. Running.** A running policy is one which contemplates successive insurances and which provides that the object of the policy may be from time to time defined, especially as to the subjects of insurance, by additional statements or indorsements. [Civ. C. 1877, § 1528; R. C. 1899, § 4498.]

§ **5948. Receipt for premium. Effect of.** An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid. [Civ. C. 1877, § 1529; R. C. 1899, § 4499.]

§ **5949. Agreement not to transfer void.** An agreement made before a loss not to transfer the claim of a person insured against the insurer after the loss has happened is void. [Civ. C. 1877, § 1530; R. C. 1899, § 4500.]

§ **5950. Holder may surrender for cancellation.** The holder of any policy of insurance against loss or damage to property by fire or other casualty hereafter issued by any insurance company doing business in this state may, notwithstanding any provision thereof or contract to the contrary, at any time surrender the same for cancellation; and upon such surrender the company issuing such policy shall retain or receive such proportion and not more of the premium paid or agreed to be paid as corresponds with the usual short rates upon term policies as adopted and maintained by the Minnesota and Dakota fire underwriters' union of St. Paul, Minnesota, for the time the policy remained in force. [1887, ch. 69, § 1; R. C. 1899, § 4501.]

§ **5951. Notice necessary to forfeit.** No such policy of insurance shall by virtue of any condition or provision thereof be forfeited, suspended or impaired for nonpayment of any note or obligation taken for the premium, or any part thereof, unless the insurer shall, not less than thirty days prior to the maturity of such premium, note or obligation, mail, postage prepaid, to the assured at his usual post office a notice, stating:

1. The date when such note or obligation will become due.
2. The amount of principal and interest that will then be due.
3. The effect upon the policy of nonpayment.
4. Such notice shall further inform the assured of his right at his own election either to pay in full and keep the policy in full force, or to terminate the insurance by surrendering the policy and paying such part of the whole premium as it shall have earned and must further state the amount which

the assured is lawfully required to pay, or which on account of previous payment may be due him in case of his election to terminate the insurance on the day of the maturity of the premium, note or obligation. [1887, ch. 69, § 2; R. C. 1899, § 4502.]

ARTICLE 7.—WARRANTIES.

§ **5952. Classified.** A warranty is either express or implied. [Civ. C. 1877, § 1531; R. C. 1899, § 4503.]

§ **5953. No form necessary.** No particular form of words is necessary to create a warranty. [Civ. C. 1877, § 1532; R. C. 1899, § 4504.]

§ **5954. Express, must be written.** Every express warranty made at or before the execution of a policy must be contained in the policy itself, or in another instrument signed by the insured and referred to in the policy as making a part of it. [Civ. C. 1877, § 1533; R. C. 1899, § 4505.]

§ **5955. To what time may relate.** A warranty may relate to the past, the present, the future or to any or all of these. [Civ. C. 1877, § 1534; R. C. 1899, § 4506.]

§ **5956. What statement of fact is express warranty.** A statement in a policy of a matter relating to the person or thing insured or to the risk as a fact is an express warranty thereof. [Civ. C. 1877, § 1535; R. C. 1899, § 4507.]

§ **5957. Statement of intention a warranty.** A statement in a policy, which imports that it is intended to do or not to do a thing which materially affects the risk, is a warranty that such act or omission shall take place. [Civ. C. 1877, § 1536; R. C. 1899, § 4508.]

§ **5958. As to future, when need not be fulfilled.** When before the time arrives for the performance of a warranty relating to the future a loss insured against happens or performance becomes unlawful at the place of the contract or impossible, the omission to fulfill the warranty does not avoid the policy. [Civ. C. 1877, § 1537; R. C. 1899, § 4509.]

§ **5959. Rescission for violation of material.** The violation of a material warranty or other material provision of a policy on the part of either party thereto entitles the other to rescind. [Civ. C. 1877, § 1538; R. C. 1899, § 4510.]

§ **5960. What avoids policy.** A policy may declare that a violation of specified provisions thereof shall avoid it; otherwise the breach of an immaterial provision does not avoid the policy. [Civ. C. 1877, § 1539; R. C. 1899, § 4511.]

Forfeiture waived by demanding judgment for premium note. Johnson v. D. F. & M. Co., 1 N. D. 167, 45 N. W. 799.

Policy containing provision of avoidance in case property insured is incumbered without notice, held valid. Peet v. D. F. & M. Co., 7 S. D. 410, 64 N. W. 206.

§ **5961. Breach without fraud.** A breach of warranty without fraud merely exonerates an insurer from the time that it occurs, or when it is broken in its inception, prevents the policy from attaching to the risk. [Civ. C. 1877, § 1540; R. C. 1899, § 4512.]

ARTICLE 8.—PREMIUM.

§ **5962. When premium payable.** An insurer is entitled to the payment of the premium as soon as the thing insured is exposed to the peril insured against. [Civ. C. 1877, § 1541; R. C. 1899, § 4513.]

§ **5963. When insured entitled to return.** A person insured is entitled to a return of premium as follows:

1. To the whole of the premium if no part of his interest in the thing insured is exposed to any of the perils insured against.

2. When the insurance is made for a definite period of time and the insured surrenders his policy, to such proportion of the premium as corresponds with the unexpired time after deducting from the whole premium

any claim for loss or damage under the policy which has previously accrued. [Civ. C. 1877, § 1542; R. C. 1899, § 4514.]

Insurance company may recover on past due note. Assured not entitled to deduction for unearned premium maturing after policy becomes void for non-payment. St. P. F. & M. v. Coleman, 6 Dak. 458, 43 N. W. 693.

§ 5964. **Premium defined.** The term premium within the meaning of sections 5950, 5951 and 5963 includes policy fees in excess of two dollars on any one policy and all other sums of money paid or agreed to be paid in consideration of the policy of insurance. [1887, ch. 69, § 3; R. C. 1899, § 4515.]

§ 5965. **Return when insurance voidable.** A person insured is entitled to a return of the premium when the contract is voidable on account of the fraud or misrepresentation of the insurer or on account of facts of the existence of which the insured was ignorant without his fault; or when by any default of the insured other than actual fraud, the insurer never incurred any liability under the policy. [Civ. C. 1877, § 1543; R. C. 1899, § 4516.]

§ 5966. **Not entitled to return.** If a peril insured against has existed and the insurer has been liable for any period, however short, the insured is not entitled to a return of premium so far as that particular risk is concerned, unless the insurance was for a definite period of time, in which case he is entitled to a proportionate return under sections 5950 and 5963. [Civ. C. 1877, § 1544; R. C. 1895, § 4517.]

§ 5967. **Return in over insurance by several.** In case of an over insurance by several insurers the insured is entitled to a ratable return of the premium, proportioned to the amount by which the aggregate sum insured in all the policies exceeds the insurable value of the thing at risk. [Civ. C. 1877, § 1545; R. C. 1899, § 4518.]

§ 5968. **Contribution to return.** When an over insurance is effected by simultaneous policies the iusurers contribute to the premium to be returned in proportion to the amount insured by their respective policies. [Civ. C. 1877, § 1546; R. C. 1899, § 4519.]

§ 5969. **Same.** When an over insurance is effected by successive policies, those only contribute to a return of the premium who are exonerated by prior insurances from the liability assumed by them and in proportion as the sum for which the premium was paid exceeds the amount for which on account of prior insurance they could be made liable. [Civ. C. 1877, § 1547; R. C. 1899, § 4520.]

Article 9.—Loss.

§ 5970. **When insurer liable.** An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause. [Civ. C. 1877, § 1548; R. C. 1899, § 4521.]

§ 5971. **Liable for loss in rescuing.** An insurer is liable when the thing insured is rescued from a peril insured against that would otherwise have caused a loss, if in the course of such rescue the thing is exposed to peril, not insured against, which permanently deprives the insured of its possession in whole or in part; or when a loss is caused by efforts to rescue the thing insured from a peril insured against. [Civ. C. 1877, § 1549; R. C. 1899, § 4522.]

§ 5972. **Not liable for a peril excepted.** When a peril is specially excepted in a contract of insurance, a loss which would not have occurred but for such peril is thereby excepted, although the immediate cause of the loss

was a peril which was not excepted. [Civ. C. 1877, § 1550; R. C. 1899, § 4523.]

§ **5973. Willful act exonerates; negligence not.** An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured or of his agents or others. [Civ. C. 1877, § 1551; R. C. 1899, § 4524.]

Hunting out of season with loaded gun held not to be voluntary exposure to unnecessary danger. Cornwell v. Accident Association, 6 N. D. 201, 69 N. W. 191.

Use of kerosene to kindle fire on one occasion did not void policy. Angier v. W. Assurance Co., 10 S. D. 82, 71 N. W. 761.

ARTICLE 10.—NOTICE OF LOSS.

§ **5974. Without unnecessary delay.** In case of loss upon an insurance against fire an insurer is exonerated, if notice thereof is not given to him by some person insured, or entitled to the benefit of the insurance without unnecessary delay. [Civ. C. 1877, § 1552; R. C. 1899, § 4525.]

§ **5975. Only best proof in power required.** When preliminary proof of loss is required by a policy the insured is not bound to give such proof as would be necessary in a court of justice; but it is sufficient for him to give the best evidence which he has in his power at the time. [Civ. C. 1877, § 1553; R. C. 1899, § 4526.]

§ **5976. Defects in, how waived.** All defects in a notice of loss or in preliminary proof thereof which the insured might remedy and which the insurer omits to specify to him without unnecessary delay as grounds of objection are waived. [Civ. C. 1877, § 1554; R. C. 1899, § 4527.]

§ **5977. Delay in, how waived.** Delay in the presentation to an insurer of notice or proof of loss is waived, if caused by any act of his, or if he omits to make objections promptly and specifically upon that ground. [Civ. C. 1877, § 1555; R. C. 1899, § 4528.]

Evidence examined and held waiver. Johnson v. D. F. & M. Co., 1 N. D. 167, 45 N. W. 799; Purcell v. St. P. F. & M. Co., 5 N. D. 100, 64 N. W. 943; Peet v. D. F. & M. Co., 1 S. D. 462, 47 N. W. 532.

An objection to the sufficiency of proof of loss on a specific ground is a waiver of all others. Enos v. St. P. F. & M. Co., 4 S. D. 639, 57 N. W. 919.

Failure to make objection to proof until after expiration of time prescribed for making, held waiver of time. Angier v. W. Assurance Co., 10 S. D. 82, 71 N. W. 761.

Making proof of loss may be waived by company's adjuster. Hitchcock v. Insurance Co., 10 S. D. 271, 72 N. W. 898.

§ **5978. Time in which to make. Blanks to be furnished.** Upon notice of loss being given to the insurer on behalf of the insured or of a beneficiary under a policy of life insurance the insured shall within twenty days after receipt of such notice furnish to the insured or beneficiary, as the case may be, a blank form of proof of loss and the insured shall have sixty days after such blank form is furnished in which to make such proof of loss; in case of life insurance the beneficiary shall have ninety days after receipt of such blank form in which to make such proof of loss. If the insurer shall fail to furnish such blank form of proof of loss within the time aforesaid he shall be deemed to have waived such proof and any agreement made to waive the provisions of this section is void. [R. C. 1895, § 4529.]

§ **5979. Failure to furnish certificate of another.** If a policy requires by way of preliminary proof of loss the certificate or testimony of another person than the insured, it is sufficient for the insured to use reasonable diligence to procure it and in case of the refusal of such person to give it, then to furnish reasonable evidence to the insurer that such refusal was not induced by any just grounds of disbelief in the facts necessary to be certified. [Civ. C. 1877, § 1556; R. C. 1899, § 4530.]

ARTICLE 11.—DOUBLE INSURANCE.

§ 5980. **Defined.** A double insurance exists when the same person is insured by several insurers separately in respect to the same subject and interest. [Civ. C. 1877, § 1557; R. C. 1899, § 4531.]

§ 5981. **Contribution of insurers.** In case of double insurance the several insurers are liable to pay losses thereon as follows:

1. In fire insurance each insurer must contribute ratably towards the loss without regard to the dates of the several policies.

2. In marine insurance the liability of the several insurers for a total loss, whether actual or constructive, when the policies are not simultaneous is in the order of the dates of the several policies, no liability attaching to a second or other subsequent policy, except as to the excess of the loss over the amount of all previous policies on the same interest. If two or more policies bear date upon the same day they are deemed to be simultaneous and the liability of insurers on simultaneous policies is to contribute ratably with each other. The insolvency of any of the insurers does not affect the proportionate liability of the other insurers. The liability of all insurers on the same marine interest for a partial or average loss is to contribute ratably. [Civ. C. 1877, § 1558; R. C. 1899, § 4532.]

ARTICLE 12.—REINSURANCE.

§ 5982. **Defined.** A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance. [Civ. C. 1877, § 1559; R. C. 1899, § 4533.]

§ 5983. **Disclosures required.** When an insurer obtains reinsurance he must communicate all the representations of the original insurer and also all the knowledge and information he possesses, whether previously or subsequently acquired, which is material to the risk. [Civ. C. 1877, § 1560; R. C. 1899, § 4534.]

§ 5984. **Contract of indemnity.** A reinsurance is presumed to be a contract of indemnity against liability and not merely against damage. [Civ. C. 1877, § 1561; R. C. 1899, § 4535.]

§ 5985. **Original insured no interest.** The original insured has no interest in a contract of reinsurance. [Civ. C. 1877, § 1562; R. C. 1899, § 4536.]

CHAPTER 68.

MARINE INSURANCE.

ARTICLE 1.—DEFINITION OF MARINE INSURANCE.

§ 5986. **Definition.** Marine insurance is an insurance against risks connected with navigation to which a ship, cargo, freightage, profits or other insurable interest in movable property may be exposed during a certain voyage or a fixed period of time. [Civ. C. 1877, § 1563; R. C. 1899, § 4537.]

ARTICLE 2.—INSURABLE INTEREST.

§ 5987. **Owner always has.** The owner of a ship has in all cases an insurable interest in it, even when it has been chartered by one who covenants to pay him its value in case of loss. [Civ. C. 1877, § 1564; R. C. 1899, § 4538.]

§ 5988. **Hypothecation reduces interest.** The insurable interest of the owner of a ship hypothecated by bottomry is only the excess of its value over the amount secured by bottomry. [Civ. C. 1877, § 1565; R. C. 1899, § 4539.]

§ **5989. Freightage defined as to insurance.** Freightage in the sense of a policy of marine insurance signifies all the benefit derived by the owner, either from the chartering of the ship or its employment for the carriage of his own goods or those of others. [Civ. C. 1877, § 1566; R. C. 1899, § 4540.]

§ **5990. Expected freightage.** The owner of a ship has an insurable interest in expected freightage which he would have certainly earned but for the intervention of a peril insured against. [Civ. C. 1877, § 1567; R. C. 1899, § 4541.]

§ **5991. Same.** The interest mentioned in the last section exists, in the case of a charter party, when the ship has broken ground on the chartered voyage; and if the price is to be paid for the carriage of goods, when they are actually on board or there is some contract for putting them on board and both ship and goods are ready for the specified voyage. [Civ. C. 1877, § 1568; R. C. 1899, § 4542.]

§ **5992. When profits insurable interest.** One who has an interest in the thing from which profits are expected to proceed has an insurable interest in the profits. [Civ. C. 1877, § 1569; R. C. 1899, § 4543.]

§ **5993. Charterer has.** The charterer of a ship has an insurable interest in it to the extent that he is liable to be damnified by its loss. [Civ. C. 1877, § 1570; R. C. 1899, § 4544.]

Article 3.—Concealment.

§ **5994. Disclosures more extensive.** In marine insurance each party is bound to communicate in addition to what is required by section 5915 all the information which he possesses material to the risk, except such as is mentioned in section 5916 and to state the exact and whole truth in relation to all matters that he represents or upon inquiry assumes to disclose. [Civ. C. 1877, § 1571; R. C. 1899, § 4545.]

§ **5995. Belief of another material.** In marine insurance information of the belief or expectation of a third person in reference to a material fact is material. [Civ. C. 1877, § 1572; R. C. 1899, § 4546.]

§ **5996. When knowledge of loss presumed.** A person insured by a contract of marine insurance is presumed to have had knowledge at the time of insuring of a prior loss, if the information might possibly have reached him in the usual mode of transmission and at the usual rate of communication. [Civ. C. 1877, § 1573; R. C. 1899, § 4547.]

§ **5997. What does not vitiate entire contract.** A concealment in marine insurance in respect to any of the following matters does not vitiate the entire contract, but merely exonerates the insurer from a loss resulting from the risk concealed:

1. The national character of the insured.
2. The liability of the thing insured to capture and detention.
3. The liability to seizure from breach of foreign laws of trade.
4. The want of necessary documents; and,
5. The use of false and simulated papers. [Civ. C. 1877, § 1574; R. C. 1899, § 4548.]

Article 4.—Representations.

§ **5998. Rescission for false.** If a representation by a person insured by contract of marine insurance is intentionally false in any respect, whether material or immaterial, the insurer may rescind the entire contract. [Civ. C. 1877, § 1575; R. C. 1899, § 4549.]

§ **5999. Without fraud does not avoid.** The eventual falsity of a representation as to expectation does not in the absence of fraud avoid a contract of insurance. [Civ. C. 1877, § 1576; R. C. 1899, § 4550.]

Article 5.—Implied Warranties.

§ 6000. **Seaworthiness.** In every marine insurance upon a ship or freight, or freightage, or upon anything which is the subject of marine insurance a warranty is implied that the ship is seaworthy. [Civ. C. 1877, § 1577; R. C. 1899, § 4551.]

§ 6001. **Seaworthy defined.** A ship is seaworthy when reasonably fit to perform the services and to encounter the ordinary perils of the voyage contemplated by the parties to the policy. [Civ. C. 1877, § 1578; R. C. 1899, § 4552.]

§ 6002. **When foregoing warranty complied with.** An implied warranty of seaworthiness is complied with if the ship is seaworthy at the time of the commencement of the risk, except in the following cases:

1. When the insurance is made for a specified length of time, the implied warranty is not complied with, unless the ship is seaworthy at the commencement of every voyage she may undertake during that time; and,

2. When the insurance is upon the cargo, which by the terms of the policy, or the description of the voyage or the established custom of the trade is to be transhipped at an intermediate port, the implied warranty is not complied with, unless each vessel upon which the cargo is shipped or transhipped is seaworthy at the commencement of its particular voyage. [Civ. C. 1877, § 1579; R. C. 1899, § 4553.]

§ 6003. **What seaworthiness includes.** A warranty of seaworthiness extends not only to the structure of the ship itself, but requires that it be properly laden and provided with a competent master, a sufficient number of competent officers and seamen and the requisite appurtenances and equipments such as cables and anchors, food, fuel and lights and other necessary or proper stores and implements for the voyage. [Civ. C. 1877, § 1580; R. C. 1899, § 4554.]

§ 6004. **As to each part of voyage.** When different portions of the voyage contemplated by a policy differ in respect to the things requisite to make the ship seaworthy therefor, a warranty of seaworthiness is complied with, if at the commencement of each portion the ship is seaworthy with reference to that portion. [Civ. C. 1877, § 1581; R. C. 1899, § 4555.]

§ 6005. **Delay in repairing exonerates.** When a ship becomes unseaworthy during the voyage to which an insurance relates, an unreasonable delay in repairing the defect exonerates the insurer from liability from any loss arising therefrom. [Civ. C. 1877, § 1582; R. C. 1899, § 4556.]

§ 6006. **Seaworthy as to cargo.** A ship which is seaworthy for the purpose of an insurance upon the ship may, nevertheless, by reason of being unfitted to receive the cargo be unseaworthy for the purpose of insurance upon the cargo. [Civ. C. 1877, § 1583; R. C. 1899, § 4557.]

§ 6007. **Neutral papers.** When the nationality or neutrality of a ship or cargo is expressly warranted it is implied that the ship will carry the requisite documents to show such nationality or neutrality and that it will not carry any documents which cast reasonable suspicion thereon. [Civ. C. 1877, § 1584; R. C. 1899, § 4558.]

Article 6.—The Voyage and Deviation.

§ 6008. **Voyage fixed by mercantile usage.** When the voyage contemplated by a policy is described by the places of beginning and ending, the voyage insured is one which conforms to the course from point to point fixed by mercantile usage between those places. [Civ. C. 1877, § 1585; R. C. 1899, § 4559.]

§ 6009. **When not so fixed.** If the course of sailing is not fixed by mercantile usage, the voyage insured by a policy is the way between the places specified, which to a master of ordinary skill and discretion would

seem the most natural, direct and advantageous. [Civ. C. 1877, § 1586; R. C. 1899, § 4560.]

§ 6010. Deviation defined. Deviation is a departure from the course of the voyage insured mentioned in the last two sections, or an unreasonable delay in pursuing the voyage; or the commencement of an entirely different voyage. [Civ. C. 1877, § 1587; R. C. 1899, § 4561.]

§ 6011. When proper. A deviation is proper:

1. When caused by circumstances over which neither the master nor the owner of the ship has any control.
2. When necessary to comply with a warranty or to avoid a peril, whether insured against or not.
3. When made in good faith and upon reasonable grounds of belief in its necessity to avoid a peril; or,
4. When made in good faith for the purpose of saving human life or relieving another vessel in distress. [Civ. C. 1877, § 1588; R. C. 1899, § 4562.]

§ 6012. Improper. Every deviation not specified in the last section is improper. [Civ. C. 1877, § 1589; R. C. 1899, § 4563.]

§ 6013. Insurer not liable after. An insurer is not liable for any loss happening to a thing insured subsequently to an improper deviation. [Civ. C. 1877, § 1590; R. C. 1899, § 4564.]

Article 7.—Loss.

§ 6014. Classified. A loss may be either total or partial. [Civ. C. 1877, § 1591; R. C. 1899, § 4565.]

§ 6015. Partial. Every loss which is not total is partial. [Civ. C. 1877, § 1592; R. C. 1899, § 4566.]

§ 6016. Total loss classified. A total loss may be either actual or constructive. [Civ. C. 1877, § 1593; R. C. 1899, § 4567.]

§ 6017. Actual total. An actual total loss is caused by:

1. A total destruction of the thing insured.
2. The loss of the thing by sinking or by being broken up.
3. Any damage to the thing which renders it valueless to the owner for the purposes for which he held it; or,
4. Any other event which entirely deprives the owner of the possession at the port of destination of the thing insured. [Civ. C. 1877, § 1594; R. C. 1899, § 4568.]

§ 6018. Constructive total. A constructive total loss is one which gives to a person insured a right to abandon under section 6026. [Civ. C. 1877, § 1595; R. C. 1895, § 4569.]

§ 6019. When actual loss presumed. An actual loss may be presumed from the continued absence of a ship without being heard of; and the length of time which is sufficient to raise this presumption depends on the circumstances of the case. [Civ. C. 1877, § 1596; R. C. 1899, § 4570.]

§ 6020. Duty to procure another ship for cargo. When a ship is prevented at an intermediate port from completing the voyage by the perils insured against, the master must make every exertion to procure in the same or a contiguous port another ship for the purpose of conveying the cargo to its destination and the liability of a marine insurer thereon continues after they are thus reshipped. [Civ. C. 1877, § 1597; R. C. 1899, § 4571.]

§ 6021. Liable for cost of reshipment. In addition to the liability mentioned in the last section a marine insurer is bound for damages, expenses of discharging, storage, reshipment, extra freightage and all other expenses incurred in saving the cargo reshipped pursuant to the last section up to the amount insured. [Civ. C. 1877, § 1598; R. C. 1899, § 4572.]

§ 6022. **Payment without notice.** Upon an actual **total loss a person** insured is entitled to payment without notice of abandonment. [Civ. C. 1877, § 1599; R. C. 1899, § 4573.]

§ 6023. **General average loss.** When it has been agreed **that an insurance** upon a particular thing or class of things shall be free from **particular average** a marine insurer is not liable for any particular average **loss not depriving** the insured of the possession at the port of destination **of the whole of such** thing or class of things, even though it becomes entirely **worthless; but he** is liable for his proportion of all general average loss **assessed upon the** thing insured. [Civ. C. 1877, § 1600; R. C. 1899, § 4574.]

§ 6024. **What against actual total loss covers.** An **insurance confined in** terms to an actual total loss does not cover a constructive **total loss, but** covers any loss which necessarily results in depriving **the insured of the** possession at the port of destination of the entire thing **insured.** [Civ. C. 1877, § 1601; R. C. 1899, § 4575.]

ARTICLE 8.—ABANDONMENT.

§ 6025. **Defined.** Abandonment is the act by which **after a constructive** total loss a person insured by a contract of marine **insurance declares to** the insurer that he relinquishes to him his interest **in the thing insured.** [Civ. C. 1877, § 1602; R. C. 1899, § 4576.]

§ 6026. **When authorized.** A person insured by **a contract of marine** insurance may abandon the thing insured, or any particular **portion thereof,** separately valued by the policy, or otherwise separately **insured and recover** for a total loss thereof when the cause of the loss is a **peril insured against:**

1. If more than half thereof in value is actually **lost or would have to** be expended to recover it from the peril.

2. If it is injured to such an extent as to reduce **its value more than** one-half.

3. If the thing insured, being a ship, the contemplated **voyage cannot** be lawfully performed without incurring an expense to **the insured of more** than half the value of the thing abandoned, or without **incurring a risk** which a prudent man would not take under the circumstances; **or,**

4. If, the thing insured being cargo and freightage, **the voyage cannot** be performed nor another ship procured by the master **within a reasonable** time and with reasonable diligence to forward the cargo **without incurring** the like expenses or risk. But freightage cannot in any **case be abandoned** unless the ship is also abandoned. [Civ. C. 1877, § 1603; **R. C. 1899, § 4577.]**

§ 6027. **Must be absolute.** An abandonment must **be neither partial** nor conditional. [Civ. C. 1877, § 1604; R. C. 1899, § 4578.]

§ 6028. **When made.** An abandonment must be made **within a reason-**able time after information of the loss and after the **commencement of the** voyage and before the party abandoning has information **of its completion.** [Civ. C. 1877, § 1605; R. C. 1899, § 4579.]

§ 6029. **When becomes ineffectual.** When the information **upon which** an abandonment has been made proves incorrect or the **thing insured was** so far restored when the abandonment was made that **there was then in** fact no total loss, the abandonment becomes ineffectual. **[Civ. C. 1877,** § 1606; R. C. 1899, § 4580.]

§ 6030. **Made by written notice.** Abandonment is made **by giving notice** thereof to the insurer which may be done orally or **in writing.** [Civ. C. 1877, § 1607; R. C. 1899, § 4581.]

§ 6031. **Requisites of notice.** A notice of abandonment **must be explicit** and must specify the particular cause of the abandonment; **but need state** only enough to show that there is probable cause **therefor and need not be** accompanied with proof of interest or of loss. [Civ. C. **1877, § 1608; R. C.** 1899, § 4582.]

§ 6032. Sustained only on cause specified. An abandonment can be sustained only upon the cause specified in the notice thereof. [Civ. C. 1877, § 1609; R. C. 1899, § 4583.]

§ 6033. Equivalent to transfer. An abandonment is equivalent to a transfer by the insured of his interest to the insurer with all the chances of recovery and indemnity. [Civ. C. 1877, § 1610; R. C. 1899, § 4584.]

§ 6034. Payment entitles insurer to salvage. If a marine insurer pays for a loss as if it was an actual total loss, he is entitled to whatever may remain of the thing insured or its proceeds or salvage as if there had been a formal abandonment. [Civ. C. 1877, § 1611; R. C. 1899, § 4585.]

§ 6035. Insured's agents become insurer's on abandonment. Upon an abandonment acts done in good faith by those who were agents of the insured in respect to the thing insured subsequent to the loss are at the risk of the insurer and for his benefit. [Civ. C. 1877, § 1612; R. C. 1899, § 4586.]

§ 6036. Acceptance of unnecessary. An acceptance of an abandonment is not necessary to the rights of the insured and is not to be presumed from the mere silence of the insurer upon his receiving notice of abandonment. [Civ. C. 1877, § 1613; R. C. 1899, § 4587.]

§ 6037. Acceptance conclusive. The acceptance of an abandonment, whether express or implied, is conclusive upon the parties and admits the loss and sufficiency of the abandonment. [Civ. C. 1877, § 1614; R. C. 1899, § 4588.]

§ 6038. Accepted is irrevocable. An abandonment once made and accepted is irrevocable, unless the ground upon which it was made proves to be unfounded. [Civ. C. 1877, § 1615; R. C. 1899, § 4589.]

§ 6039. To whom freightage belongs after. On an accepted abandonment of a ship freightage earned previous to the loss belongs to the insurer thereof; but freightage subsequently earned belongs to the insurer of the ship [Civ. C. 1877, § 1616; R. C. 1899, § 4590.]

§ 6040. Refusal to accept. If an insurer refuses to accept a valid abandonment, he is liable as upon an actual total loss, deducting from the amount any proceeds of the thing insured which may have come to the hands of the insured. [Civ. C. 1877, § 1617; R. C. 1899, § 4591.]

§ 6041. Rights, if abandonment omitted. If a person insured omits to abandon he may, nevertheless, recover his actual loss. [Civ. C. 1877, § 1618; R. C. 1899, § 4592.]

Article 9.—Measure of Indemnity.

§ 6042. Valuation conclusive between parties. A valuation in a policy of marine insurance is conclusive between the parties thereto in the adjustment of either a partial or total loss, if the insured has some interest at risk and there is no fraud on his part; except that when a thing has been hypothecated by bottomry or respondentia before its insurance and without the knowledge of the person actually procuring the insurance, he may show the real value. But a valuation fraudulent in fact entitles the insurer to rescind the contract. [Civ. C. 1877, § 1619; R. C. 1899, § 4593.]

§ 6043. Partial loss. Liability. A marine insurer is liable upon a partial loss only for such proportion of the amount insured by him as the loss bears to the value of the whole interest of the insured in the property insured. [Civ. C. 1877, § 1620; R. C. 1899, § 4594.]

§ 6044. Recovery of profits, how estimated. When profits are separately insured in a contract of marine insurance, the insured is entitled to recover in case of loss a proportion of such profits equivalent to the proportion which the value of the property lost bears to the value of the whole. [Civ. C. 1877, § 1621; R. C. 1899, § 4595.]

§ 6045. How loss determined on valued policy. In case of a valued policy of marine insurance on freightage or cargo, if a part only of the subject is

exposed to risk the valuation applies only in proportion to such part. [Civ. C. 1877, § 1622; R. C. 1899, § 4596.]

§ 6046. When loss of profits presumed. When profits are valued and insured by a contract of marine insurance, a loss of them is conclusively presumed from a loss of the property out of which they were expected to arise and the valuation fixes their amount. [Civ. C. 1877, § 1623; R. C. 1899, § 4597.]

§ 6047. How loss on open policy estimated. In estimating a loss under an open policy of marine insurance the following rules are to be observed:

1. The value of a ship is its value at the beginning of the risk including all articles or charges which add to its permanent value or which are necessary to prepare it for the voyage insured.

2. The value of the cargo is its actual cost to the insured, when laden on board or when that cost cannot be ascertained, its market value at the time and place of lading, adding the charges incurred in purchasing and placing it on board, but without reference to any losses incurred in raising money for its purchase, or to any drawback on its exportation, or to the fluctuations of the market at the port of destination, or to expenses incurred on the way or on arrival.

3. The value of freightage is the gross freightage, exclusive of primage, without reference to the cost of earning it; and,

4. The cost of insurance is in each case to be added to the value thus estimated. [Civ. C. 1877, § 1624; R. C. 1899, § 4598.]

§ 6048. How partial loss of cargo estimated. If a cargo insured against partial loss arrives at the port of destination in a damaged condition, the loss of the insured is deemed to be the same proportion of the value, which the market price at that port of the thing so damaged bears to the market price it would have brought if sound. [Civ. C. 1877, § 1625; R. C. 1899, § 4599.]

§ 6049. Liability for repairs and labor to recover. A marine insurer is liable for all the expenses attendant upon a loss which forces a ship into port to be repaired; and when it is agreed that the insured may labor for the recovery of the property the insurer is liable for the expense incurred thereby; such expense in either case being in addition to the total loss, if that afterward occurs. [Civ. C. 1877, § 1626; R. C. 1899, § 4600.]

§ 6050. Liability for insured's contribution to general average. A marine insurer is liable for a loss falling upon the insured through a contribution in respect to the thing insured, required to be made by him towards a general average loss called for by a peril insured against. [Civ. C. 1877, § 1627; R. C. 1899, § 4601.]

§ 6051. Subrogation of right to contribution. When a person insured by a contract of marine insurance has a demand against others for contribution he may claim the whole loss from the insurer, subrogating him to his own right to contribution. But no such claim can be made upon the insurer after the separation of the interests liable to contribution, nor when the insured, having the right and opportunity to enforce contribution from others, has neglected or waived the exercise of that right. [Civ. C. 1877, § 1628; R. C. 1899, § 4602.]

§ 6052. Liability for partial loss of ship. In the case of a partial loss of a ship or its equipment the old materials are to be applied toward payment for the new and whether the ship is new or old a marine insurer is liable for only two-thirds of the remaining cost of the repairs, except that he must pay for anchors and cannon in full and for sheathing metal at a depreciation of only two and one-half per cent for each month that it has been fastened to the ship. [Civ. C. 1877, § 1629; R. C. 1899, § 4603.]

CHAPTER 69.

FIRE INSURANCE.

§ 6053. Rescission for alteration in use increasing risk. An alteration in the use or condition of a thing insured from that to which it is limited by the policy, made without the consent of the insurer, by means within the control of the insured and increasing the risk entitles an insurer to rescind a contract of fire insurance. [Civ. C. 1877, § 1630; R. C. 1899, § 4604.]

A policy limiting the use of building insured to certain purposes is void if building is used without knowledge of insured for purposes increasing hazard. School District v. Insurance Co., 7 S. D. 458, 64 N. W. 527.

§ 6054. Not if risk not increased. An alteration in the use or condition of a thing insured from that to which it is limited by the policy, which does not increase the risk, does not affect a contract of fire insurance. [Civ. C. 1877, § 1631; R. C. 1899, § 4605.]

§ 6055. When contract unaffected, though risk increased. A contract of fire insurance is not affected by any act of the insured subsequent to the execution of the policy, which does not violate its provisions, even though it increases the risk and is the cause of a loss. [Civ. C. 1877, § 1632; R. C. 1899, § 4606.]

§ 6056. Measure of indemnity. If there is no valuation in the policy, the measure of indemnity in an insurance against fire is the full amount stated in the policy; but the effect of a valuation in a policy of fire insurance is the same as in a policy of marine insurance. [Civ. C. 1877, § 1633; R. C. 1899, § 4607.]

§ 6057. Standard policy. No fire insurance company, corporation or association, their officers or agents, shall make, issue, use or deliver for use any fire insurance policy or renewal of any fire policy on property in this state other than such as shall conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions with the printed form of contract or policy heretofore filed in the office of the commissioner of insurance as a standard policy for this state and no other or different provisions, agreement, condition or clause shall in any manner be made a part of such contract or policy or be indorsed thereon or delivered therewith, except as follows, to wit:

1. The name of the company, its location and place of business, the date of its incorporation or organization, and the state or county under which the same is organized, the amount of paid up capital stock, whether it is a stock or mutual company, the names of its officers, the number and date of the policy; and if it is issued through a manager or agent of the company, the words, "this policy shall not be valid until countersigned by the duly authorized manager or agent of the company, at ....." may be printed on policies issued on property in this state.

2. Printed or written forms of description and specifications or schedules of the property covered by any particular policy and any other matter necessary to express clearly all the facts and conditions of insurance on any particular risk, which facts or conditions shall in no case be inconsistent with or a waiver of any of the provisions or conditions of the standard policy herein provided for may be written upon or attached or appended to any policy issued on property in this state.

3. A company, corporation or association organized or incorporated under and in pursuance of the laws of this state or elsewhere, if entitled to do business in this state, may with the approval of the commissioner of insurance, if the same is not already included in the standard form as filed in the office

of the commissioner of insurance, print on its policies any provision which it is required by law to insert therein, if such provision is not in conflict with the laws of this state or the United States, or of the provisions of the standard form provided for herein, but said provision shall be printed apart from the other provisions, agreements or conditions of the policy and in type not smaller than the body of the policy and under a separate title, as follows: "Provisions required by law to be stated in this policy" and be a part of said policy.

4. There may be indorsed on the outside of any policy herein provided for the name, with the word "agent or agents" and place of business, of any insurance agent or agents, either by writing, printing, stamping or otherwise.

5. When two or more companies, each having previously complied with the laws of this state, unite to issue a joint policy, there may be expressed in the heading of such policy the fact of the severalty of the contract; also the proportion of premiums to be paid to each company and the proportion of liability which each company agrees to assume. And in the printed conditions of such policy the necessary change may be made from the singular to the plural number, when reference is had to the companies issuing such policies. [1890, ch. 74, § 4; R. C. 1895, § 4608.]

§ 6058. Construction of standard policy. Policies of insurance in the form prescribed by the last section shall be in all respects subject to the same rules of construction as to their effect or the waiver of any of their provisions as if the form thereof had not been prescribed. [R. C. 1895, § 4609.]

CHAPTER 70.

LIFE AND HEALTH INSURANCE.

§ 6059. When payable. An insurance upon life may be made payable on the death of the person or on his surviving a specified period, or periodically so long as he shall live, or otherwise contingently on the continuance or termination of life. [Civ. C. 1877, § 1634; R. C. 1899, § 4610.]

§ 6060. In whom person has insurable interest. Every person has an insurable interest in the life and health:

1. Of himself.

2. Of any person on whom he depends wholly or in part for education or support.

3. Of any person under a legal obligation to him for the payment of money, or respecting property or services, of which death or illness might delay or prevent the performance; and,

4. Of any person upon whose life any estate or interest vested in him depends. [Civ. C. 1877, § 1635; R. C. 1899, § 4611.]

§ 6061. Policy transferable. A policy of insurance upon life or health may pass by transfer, will or succession to any person, whether he has an insurable interest or not, and such person may recover upon it whatever the insured might have recovered. [Civ. C. 1877, § 1636; R. C. 1899, § 4612.]

§ 6062. When notice of transfer unnecessary. Notice to an insurer of a transfer or bequest therefor is not necessary to preserve the validity of a policy of insurance upon life or health, unless thereby expressly required. [Civ. C. 1877, § 1637; R. C. 1899, § 4613.]

§ 6063. Measure of indemnity. Unless the interest of a person insured is susceptible of exact pecuniary measurement, the measure of indemnity under a policy of insurance upon life or health is the sum fixed in the policy. [Civ. C. 1877, § 1638; R. C. 1899, § 4614.]

§ **6064. Suicide no defense after one year.** In all suits upon policies of insurance on life hereafter issued by any regular or assessment insurance company, doing business in this state, it shall be no defense after the policy has been in force one year, that the insured committed suicide, and any stipulation in the policy to the contrary shall be void. [1903, ch. 111.]

CHAPTER 71.

INDEMNITY.

§ **6065. Defined.** Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties or of some other person. [Civ. C. 1877, § 1639; R. C. 1899, § 4615.]

§ **6066. Against unlawful act void.** An agreement to indemnify a person against an act thereafter to be done is void, if the act is known by such person at the time of doing it to be unlawful. [Civ. C. 1877, § 1640; R. C. 1899, § 4616.]

§ **6067. Against act done valid, unless felony.** An agreement to indemnify a person against an act already done is valid, even though the act was known to be wrongful, unless it was a felony. [Civ. C. 1877, § 1641; R. C. 1899, § 4617.]

§ **6068. Against act of person includes agents.** An agreement to indemnify against the acts of a certain person, applies not only to his acts and their consequences, but also to those of his agents. [Civ. C. 1877, § 1642; R. C. 1899, § 4618.]

§ **6069. Several includes each.** An agreement to indemnify several persons applies to each unless a contrary intention appears. [Civ. C. 1877, § 1643; R. C. 1899, § 4619.]

§ **6070. When liable jointly with person indemnified.** One who indemnifies another person against an act to be done by the latter, is liable jointly with the person indemnified and separately to every person injured by such act. [Civ. C. 1877, § 1644; R. C. 1899, § 4620.]

§ **6071. Rules to be applied in interpretation.** In the interpretation of a contract of indemnity the following rules are to be applied, unless a contrary intention appears:

1. Upon an indemnity against liability, expressly or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable.
2. Upon an indemnity against claims or demands, or damages or costs, expressly or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof.
3. An indemnity against claims or demands, or liability, expressly or in other equivalent terms, embraces the costs of defense against such claims, demands or liability incurred in good faith and in the exercise of reasonable discretion.
4. The person indemnifying is bound on request of the person indemnified to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity; but the person indemnified has the right to conduct such defense, if he chooses to do so.
5. If after request the person indemnifying neglects to defend the person indemnified, a recovery against the latter suffered by him in good faith is conclusive in his favor against the former.
6. If the person indemnifying, whether he is a principal or a surety in the agreement, has not reasonable notice of the action or proceedings against the person indemnified, or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former.

7. A stipulation, that a judgment against the person indemnified shall be conclusive upon the person indemnifying, is inapplicable if he had a good defense upon the merits which by want of ordinary care he failed to establish in the action. [Civ. C. 1877, § 1645; R. C. 1895, § 4621.]

One suing on contract of indemnity must show he was injured or became liable to another for damages growing out of the transaction indemnified against. Cranmer v. Building & Loan Ass'n., 6 S. D. 341, 61 N. W. 35.

§ 6072. Engagement to answer for violation of duty. Reimbursement. When one at the request of another engages to answer in damages, whether liquidated or unliquidated, for any violation of duty on the part of the latter, he is entitled to be reimbursed in the same manner as a surety for whatever he may pay. [Civ. C. 1877, § 1646; R. C. 1899, § 4622.]

§ 6073. When sureties called bail. Upon those contracts of indemnity which are taken in legal proceedings as security for the performance of an obligation imposed or declared by the tribunals and known as undertakings or recognizances, the sureties are called bail. [Civ. C. 1877, § 1647; R. C. 1899, § 4623.]

§ 6074. Obligations of bail, how governed. The obligations of bail are governed by the statutes specially applicable thereto. [Civ. C. 1877, § 1648; R. C. 1895, § 4624.]

CHAPTER 72.

GUARANTY

Article 1.—Definition of Guaranty.

§ 6075. Defined. A guaranty is a promise to answer for the debt, default or miscarriage of another person. [Civ. C. 1877, § 1649; R. C. 1899, § 4625.]

§ 6076. Knowledge of principal unnecessary. A person may become guarantor even without the knowledge or consent of the principal. [Civ. C. 1877, § 1650; R. C. 1899, § 4626.]

Article 2.—Creation of Guaranty.

§ 6077. Consideration for. When a guaranty is entered into at the same time with the original obligation or with the acceptance of the latter by the guarantee and forms with that obligation a part of the consideration to him, no other consideration need exist. In all other cases there must be a consideration distinct from that of the original obligation. [Civ. C. 1877, § 1651; R. C. 1899, § 4627.]

One agreeing to collect money due him and payor of note and pay payee, on obligation of payor, is liable as guarantor if he collects money. Rankin v. Matthiesen, 10 S. D. 628, 75 N. W 196.

§ 6078. When must be in writing. Except as prescribed by the next section a guaranty must be in writing and signed by the guarantor; but the writing need not express a consideration. [Civ. C. 1877, § 1652; R. C. 1899, § 4628.]

§ 6079. When need not be in writing. A promise to answer for the obligation of another in any of the following cases is deemed an original obligation of the promiser and need not be in writing:

1. When the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise; or by one who has received a discharge from an obligation in whole or in part in consideration of such promise.

2. When the creditor parts with value or enters into an obligation in consideration of the obligation in respect to which the promise is made, in

terms or under circumstances such as to render the party making the promise the principal debtor and the person in whose behalf it is made his surety.

3. When the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor; or upon the consideration that the party receiving it releases the property of another from a levy or his person from imprisonment under an execution on a judgment obtained upon the antecedent obligation; or upon a consideration beneficial to the promiser, whether moving from either party to the antecedent obligation or from another person.

4. When a factor undertakes for a commission to sell merchandise and guarantee the sale.

5. When the holder of an instrument for the payment of money upon which a third person is or may become liable to him, transfers it in payment of a precedent debt of his, or for a new consideration, and in connection with such transfer enters into a promise respecting such instrument. [Civ. C. 1877, § 1653; R. C. 1899, § 4629.]

Instructions construed. McArthur v. Doyden, 6 N. D. 438, 71 N. W. 125.

Defendant said "I will see that you get your money," held an original undertaking and binding. Meldrum, v. Kenefick, 15 S. D. 370, 89 N. W. 863.

§ 6080. Acceptance necessary. A mere offer to guaranty is not binding until notice of its acceptance is communicated by the guarantee to the guarantor; but an absolute guaranty is binding upon the guarantor without notice of acceptance. [Civ. C. 1877, § 1654; R. C. 1899, § 4630.]

Test is whether there has been a mental assent—necessary to existence of contract. **Sewing** Machine Co. v. Church, 11 N. D. 420, 92 N. W. 805.

Article 3.—Interpretation of Guaranty.

§ 6081. Of contract, what implied. In a guaranty of a contract the terms of which are not then settled, it is implied that its terms shall be such as will not expose the guarantor to greater risks than he would incur under those terms which are most common in similar contracts at the place where the principal contract is to be performed. [Civ. C. 1877, § 1655; R. C. 1899, § 4631.]

§ 6082. Of obligations, what implied. A guaranty to the effect that an obligation is good or is collectible imports that the debtor is solvent and that the demand is collectible by the usual legal proceedings, if taken with reasonable diligence. [Civ. C. 1877, § 1656; R. C. 1899, § 4632.]

§ 6083. When not discharged by omission. A guaranty such as is mentioned in the last section is not discharged by an omission to take proceedings upon the principal debt or upon any collateral security for its payment, if no part of the debt could have been collected thereby. [Civ. C. 1877, § 1657; R. C. 1899, § 4633.]

§ 6084. When insolvency presumed from removal. In the cases mentioned in section 6082 the removal of the principal from the state leaving no property therein from which the obligation might be satisfied is equivalent to the insolvency of the principal in its effect upon the rights and obligations of the guarantor. [Civ. C. 1877, § 1658; R. C. 1899, § 4634.]

Article 4.—Liability of Guarantors.

§ 6085. When guaranty deemed unconditional. A guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor. [Civ. C. 1877, § 1659; R. C. 1899, § 4635.]

§ 6086. When guarantor of payment liable. A guarantor of payment or performance is liable to the guarantee immediately upon the default of

the principal and without demand or notice. [Civ. C. 1877, § 1660; R. C. 1899, § 4636.]

Guaranty examined and held absolute. Fisk v. Stone, 6 Dak. 35, 50 N. W. 125.

Where "A" releases securities at the verbal request of "B" on promise to pay, held good. Dodge v. Furber, 6 Dak. 217, 50 N. W. 831.

"Guaranty of collection" construed. Laches releases guarantor, insolvency of guarantor will not excuse laches. Thorp v. Laughlin, 4 N. D. 167, 59 N. W. 967.

Payee transferring note by indorsement guarantees payment and purchaser is protected as innocent purchaser for value if indorsed before maturity. Dunham v. Peterson, 5 N. D. 414, 67 N. W. 293.

"I hereby guarantee their collection and payment within five years" held a guaranty of both collection and payment. Greely v. McCoy, 3 S. D. 218, 52 N. W. 1050.

Purchaser of mortgaged property in absence of contract to pay, not liable for mortgage debt. Granger v. Roll, 6 S. D. 611, 62 N. W. 970.

§ 6087. **Liability on conditional obligation.** When one guarantees a conditional obligation, his liability is commensurate with that of his principal and he is not entitled to notice of the default of the principal, unless he is unable by the exercise of reasonable diligence to acquire information of such default and the creditor has actual notice thereof. [Civ. C. 1877, § 1661; R. C. 1899, § 4637.]

§ 6088. **Limit of obligation.** The obligation of a guarantor must be neither larger in amount, nor in other respects more burdensome, than that of the principal; and if in its terms it exceeds it, it is reducible in proportion to the principal obligation. [Civ. C. 1877, § 1662; R. C. 1899, § 4638.]

§ 6089. **Not liable on principal's unlawful contract.** A guarantor is not liable if the contract of the principal is unlawful, but he is liable, notwithstanding any mere personal disability of the principal though the disability is such as to make the contract void against the principal. [Civ. C. 1877, § 1663; R. C. 1899, § 4639.]

Article 5.—Continuing Guaranty.

§ 6090. **Defined.** A guaranty relating to a future liability of the principal under successive transactions, which either continue his liability or from time to time renew it after it has been satisfied is called a continuing guaranty [Civ. C. 1877, § 1664; R. C. 1899, § 4640.]

§ 6091. **When may be revoked.** A continuing guaranty may be revoked at any time by the guarantor in respect to future transactions, unless there is a continuing consideration as to such transactions which he does not renounce. [Civ. C. 1877, § 1665; R. C. 1899, § 4641.]

What exonerates. Alteration. Moline Plow Co. v. Gilbert, 3 Dak. 239, 15 N. W. 1; Foley-Wadsworth Imp. Co. v. Solomon, 9 S. D. 511, 70 N. W. 639.

Article 6.—Exoneration of Guarantors.

§ 6092. **When exonerated.** A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor without the consent of the guarantor the original obligation of the principal is altered in any respect, or the remedies or rights of the creditors against the principal in respect thereto is in any way impaired or suspended. [Civ. C. 1877, § 1666; R. C. 1899, § 4642.]

The laches of plaintiff in pursuing legal remedies against debtor exonerates guarantor. Thorp v. Laughlin, 4 N. D. 167, 59 N. W. 967; Stackpole v. D. L. & T. Co., 10 S. D. 389, 73 N. W. 258.

Distinction between guarantor and surety. Bailey Loan Co. v. Seward, 9 S. D. 326, 69 N. W. 58.

Extension of time for payment of note for a consideration discharges surety. Niblack v. Champeny, 10 S. D. 165, 72 N. W. 402.

§ 6093. **Preceding section limited.** A promise by a creditor, which for any cause is void, or voidable by him at his option, does not alter the obligation or suspend or impair the remedy within the meaning of the last section. [Civ. C. 1877, § 1667; R. C. 1899, § 4643.]

§ **6094. Guarantor once exonerated not liable.** The rescission of an agreement altering the original obligation of a debtor or impairing the remedy of a creditor, does not restore the liability of a guarantor who has been exonerated by such agreement. [Civ. C. 1877, § 1668; R. C. 1899, § 4644.]

§ **6095. Part performance, proportional exoneration.** The acceptance by a creditor of anything in partial satisfaction of an obligation reduces the obligation of a guarantor thereof in the same measure as that of the principal, but does not otherwise affect it. [Civ. C. 1877, § 1669; R. C. 1899, § 4645.]

§ **6096. Mere delay** no exoneration. Mere delay on the part of a creditor to proceed against the principal or to enforce any other remedy does not exonerate a guarantor. [Civ. C. 1877, § 1670; R. C. 1899, § 4646.]

Mere delay will not exonerate a guarantor. Porter v. Andews, 10 N. D. 558, 88 N. W. 567.

§ **6097. Liability of guarantor indemnified.** A guarantor, who has been indemnified by the principal, is liable to the creditor to the extent of the indemnity, notwithstanding that the creditor without the assent of the guarantor may have modified the contract or released the principal. [Civ. C. 1877, § 1671; R. C. 1899, § 4647.]

§ **6098. Principal discharged by law no exoneration.** A guarantor is not exonerated by the discharge of his principal by operation of law without the intervention or omission of the creditor. [Civ. C. 1877, § 1672; R. C. 1899, § 4648.]

CHAPTER 73.

SURETYSHIP.

Article 1.—Who are Sureties.

§ **6099. Defined.** A surety is one who at the request of another and for the purpose of securing to him a benefit becomes responsible for the performance by the latter of some act in favor of a third person or hypothecates property as security therefor. [Civ. C. 1877, § 1673; R. C. 1899, § 4649.]

Wife assumes no personal liability by signing mortgage. Bank v. Francis, 8 N. D. 369, 79 N. W. 853.

Surety contracts for benefit of debtor. Guarantor contracts for benefit of creditor. **Bailey Loan** Co. v. Seward, 9 S. D. 326, 69 N. W. 58.

§ **6100. Surety appearing as principal.** One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is in fact a surety except as against persons who have acted on the faith of his apparent character of principal. [Civ. C. 1877, § 1674; R. C. 1899, § 4650.]

Article 2.—Liability of Sureties.

§ **6101. Express terms govern.** A surety cannot be held beyond the express terms of his contract and if such contract prescribes a penalty for its breach, he cannot in any case be liable for more than the penalty. [Civ. C. 1877, § 1675; R. C. 1899, § 4651.]

Not necessary to exhaust collaterals before proceeding against guarantors. **Deering v. Russell, 5** N. D. 319, 65 N. W. 691; Bingham v. Mears, 4 N. D. 437, 61 N. W. 808.

Sureties signing fidelity bond not liable, when. Standard Oil Co. v. Arnestad, 6 N. D. 255, 69 N. W. 197.

Liability of surety; alterations discharge sureties; when sureties not released. N. L. Lodge No. 1 v. Kennedy, 7 N. D. 146, 73 N. W. 524.

Liability of surety limited to amount for which he signs. Custer County v. Albien, 7 S. D. 482, 64 N. W. 533.

Surety must give notice to collect collateral before failure to do so releases surety. Bailey Loan Co. v. Seward, 9 S. D. 326, 69 N. W. 58.

Contract of suretyship on behalf of partnership continues no longer than partnership. Insurance Co. v. Holt, 10 S. D. 171, 72 N. W. 403.

§ **6102. How terms of contract interpreted.** In interpreting the terms of a contract of suretyship the same rules are to be observed as in the case of other contracts. [Civ. C. 1877, § 1676; R. C. 1899, § 4652.]

§ **6103. Is surety after judgment.** Notwithstanding the recovery of judgment by a creditor against a surety, the latter still occupies the relation of surety. [Civ. C. 1877, § 1677; R. C. 1899, § 4653.]

§ **6104. Exonerated by performance or offer.** Performance of the principal obligation or an offer of such performance duly made as provided in this code exonerates a surety. [Civ. C. 1877, § 1678; R. C. 1899, § 4654.]

§ **6105. How exonerated.** A surety is exonerated:

1. In like manner with a guarantor.
2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights or which lessens his security; or,
3. To the extent to which he is prejudiced by an omission of the creditor to do anything when required by the surety which it is his duty to do. [Civ. C. 1877, § 1679; R. C. 1899, § 4655.]

Extension of time to debtor for sufficient consideration and to definite time without surety's consent exonerates surety. Machine Co. v. William Rae, 9 N. D. 482, 84 N. W. 346.

Extension of time discharges surety, when. Niblack v. Champeny, 10 S. D. 165, 72 N. W. 402.

Article 3.—Rights of Sureties.

§ **6106. Same as guarantor.** A surety has all the rights of a guarantor whether he becomes personally responsible or not. [Civ. C. 1877, § 1680; R. C. 1899, § 4656.]

§ **6107. May require proceedings against principal.** A surety may require his creditors to proceed against the principal or to pursue any other remedy in his power, which the surety cannot himself pursue and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced. [Civ. C. 1877, § 1681; R. C. 1899, § 4657.]

Notice to creditor by surety to proceed against principal must be specific before surety is relieved. Kennedy v. Falde, 4 Dak. 319, 29 N. W. 667; Bailey Loan Co. v. Seward, 9 S. D. 326, 69 N. W. 58.

§ **6108. May compel principal to perform.** A surety may compel his principal to perform the obligation when due. [Civ. C. 1877, § 1682; R. C. 1899, § 4658.]

§ **6109. Principal bound to reimburse surety.** If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses; but the surety has no claim for reimbursement against other persons, though they may have been benefited by his act except as prescribed by the next section. [Civ. C. 1877, § 1683; R. C. 1899, § 4659.]

§ **6110. Entitled to same remedies as creditor. Contribution.** A surety upon satisfying the obligations of the principal is entitled to enforce every remedy, which the creditor then has against the principal to the extent of reimbursing what he has expended; and also to require all his cosureties to contribute thereto without regard to the order of time in which they became such. [Civ. C. 1877, § 1684; R. C. 1899, § 4660.]

§ **6111. Subrogated to rights of creditors.** A surety is entitled to the benefit of every security for the performance of the principal obligation

held by the creditor or by a cosurety at the time of entering into the contract of suretyship or acquired by him afterwards, whether the surety was aware of the security or not. [Civ. C. 1877, § 1685; R. C. 1899, § 4661.]

Surety may offset his individual claim against creditor where both creditor and principal are insolvent. Clark v. Sullivan, 2 N. D. 103, 49 N. W. 416.

Where surety pays note secured by chattel mortgage he becomes vested with title of note and mortgage and can sue in conversion. Thurston v. Osborne-McMillan Co., 13 N. D. 508, 101 N. W. 892.

A surety, having paid the debt of his principal is entitled to the collaterals deposited as security for the debt paid. Lien v. Bank, 12 S. D. 317, 81 N. W. 628; Bank v. Lien, 14 S. D. 410, 85 N. W. 924; Park v. Robinson, 15 S. D. 551, 91 N. W. 344.

§ 6112. **Hypothecated property of principal first applied.** Whenever property of a surety is hypothecated with the property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation. [Civ. C. 1877, § 1686; R. C. 1899, § 4662.]

It is not a defense on an appeal undertaking that plaintiff holds collateral he refuses to proceed against there being no proof that surety was prejudiced thereby. Bingham v. Mears, 4 N. D. 437, 61 N. W. 808.

Article 4.—Rights of Creditors.

§ 6113. **Entitled to surety's securities.** A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation and may upon the maturity of the obligation compel the application of such security to its satisfaction. [Civ. C. 1877, § 1687; R. C. 1899, § 4663.]

Article 5.—Letter of Credit.

§ 6114. **Defined.** A letter of credit is a written instrument addressed by one person to another, requesting the latter to give credit to the person in whose favor it is drawn. [Civ. C. 1877, § 1688; R. C. 1899, § 4664.]

Action on when lies. Party to contract. Letter of credit. Parlin v. Hall et al, 2 N. D. 473, 52 N. W. 405.

§ 6115. **May be several.** A letter of credit may be addressed to several persons in succession. [Civ. C. 1877, § 1689; R. C. 1899, § 4665.]

§ 6116. **To whom writer liable.** The writer of a letter of credit is upon the default of the debtor liable to those who gave credit in compliance with its terms. [Civ. C. 1877, § 1690; R. C. 1899, § 4666.]

§ 6117. **Classified and classes defined.** A letter of credit is either general or special. When the request for credit in a letter is addressed to specified persons by name or description the letter is special. All other letters of credit are general. [Civ. C. 1877, § 1691; R. C. 1899, § 4667.]

§ 6118. **Authority conferred by general.** A general letter of credit gives any person to whom it may be shown authority to comply with its requests and by his so doing it becomes as to him of the same effect as if addressed to him by name. [Civ. C. 1877, § 1692; R. C. 1899, § 4668.]

§ 6119. **Successive credits.** Several persons may successively give credit upon a general letter. [Civ. C. 1877, § 1693; R. C. 1899, § 4669.]

§ 6120. **When continuing guaranty.** If the parties to a letter of credit appear by its terms to contemplate a course of future dealing between the parties, it is not exhausted by giving a credit even to the amount limited by the letter, which is subsequently reduced or satisfied by payments made by the debtor, but is to be deemed a continuing guaranty. [Civ. C. 1877, § 1694; R. C. 1899, § 4670.]

§ 6121. **Notice unnecessary unless provided.** The writer of a letter of credit is liable for credit given upon it without notice to him, unless its terms express or imply the necessity of giving notice. [Civ. C. 1877, § 1695; R. C. 1899, § 4671.]

§ **6122. Credit given must agree with letter.** If a letter of credit prescribes the persons by whom or the mode in which the credit is to be given, or the term of credit, or limits the amount thereof, the writer is not bound except for transactions which in these respects conform strictly to the terms of the letter. [Civ. C. 1877, § 1696; R. C. 1899, § 4672.]

CHAPTER 74.

LIENS IN GENERAL.

Article 1.—Definition of Liens.

§ **6123. Defined.** A lien is a charge imposed upon specific property by which it is made security for the performance of an act. [Civ. C. 1877, § 1697; R. C. 1899, § 4673.]

§ **6124. Classified.** Liens are either general or special. [Civ. C. 1877, § 1698; R. C. 1899, § 4674.]

§ **6125. General.** A general lien is one which the holder thereof is entitled to enforce as a security for the performance of all the obligations, or all of a particular class of obligations, which exist in his favor against the owner of the property. [Civ. C. 1877, § 1699; R. C. 1899, § 4675.]

§ **6126. Special.** A special lien is one which the holder thereof can enforce only as a security for the performance of a particular act or obligation and of such obligations as may be incidental thereto. When the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount so paid by him as a part of the claim for which his own lien exists. [Civ. C. 1877, § 1700; R. C. 1899, § 4676.]

Junior lien holder may after default in prior lien buy prior lien and add amount paid to his lien. Foster v. Furlong, 8 N. D. 282, 78 N. W. 986.

§ **6127. Certain liens subject to this chapter.** Contracts of mortgage, pledge, bottomry or respondentia are subject to all the provisions of this chapter. [Civ. C. 1877, § 1701; R. C. 1899, § 4677.]

Chattel mortgages included. Everett v. Buchanan, 2 Dak. 249, 6 N. W. 439.

Article 2.—Creation of Liens.

§ **6128. How created.** A lien is created:

1. By contract of the parties; or,
2. By operation of law. [Civ. C. 1877, § 1702; R. C. 1899, § 4678.]

§ **6129. By operation of law.** No lien arises by mere operation of law until the time at which the act to be secured thereby ought to be performed. [Civ. C. 1877, § 1703; R. C. 1899, § 4679.]

§ **6130. Liens on future interest.** An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquired an interest in the thing to the extent of such interest; provided, however, that in case of a contract or agreement for a lien upon the future earnings of man, animal or machinery, personal notice thereof in writing shall be served upon the party for whom such services are performed before the payment of such services, which said notice may be served and returned in the same manner as a summons in a civil action; provided further, that in case of such agreement in regard to the earnings of machinery which is operated with man and animal, such lien shall not attach to more than fifty per cent of the gross earnings of such machinery, man and animal; and provided further, that the payment hereinbefore referred to shall not be construed so as to include claims or debts

held by the person for whom such services are so performed against a person owning or operating said machinery. [Civ. C. 1877, § 1704; R. C. 1899, § 4680; 1901, ch. 118.]

Owner of threshing rig may mortgage future earnings. Sykes v. Hannawalt, 5 N. D. 335, 65 N. W. 682; Reynolds v. Strong, 10 N. D. 81, 85 N. W. 987.

Chattel mortgage on unplanted crop for year given valid. Schwienber v. Elevator Co., 9 N. D. 113, 81 N. W. 35; Donovan v. Elevator Co., 7 N. D. 513, 75 N. W. 809; Hostetter v. Elevator Co., 4 N. D. 357, 61 N. W. 49; Bank v. Mann & Co., 2 N. D. 456, 51 N. W. 946; Bank v. Hanson, 3 N. D. 465, 57 N. W. 345; Brewing Co. v. Elevator Co., 5 Dak. 62, 37 N. W. 763; Bank v. Elevator Co., 6 Dak. 357, 43 N. W. 806.

Mortgage of tenant attaches on division of grain. Bidgood v. Elevator Co., 9 N. D. 627, 84 N. W. 561. See note for who may maintain trover.

Crop contract having provided title shall remain in landlord until division of crop, tenant's mortgage passes no title until division. Bank v. Canfield, 12 S. D. 330, 81 N. W. 630.

§ 6131. **Upon crops, limited. Exception.** A lien by contract upon crops shall attach only to the crop next maturing after the delivery of such contract, except in the case of liens by contract to secure the purchase price, or rental, of the land upon which such crops are to be grown. [1897, ch. 55; R. C. 1899, § 4681.]

Contract title to crop, made how. Angell v. Egger, 6 N. D. 391, 71 N. W. 547. See note 9 N. D. 630.

§ 6132. **Obligations not in existence.** A lien may be created by contract to take immediate effect as security for the performance of obligations not then in existence. [Civ. C. 1877, § 1705; R. C. 1899, § 4682.]

Article 3.—Effect of Liens.

§ 6133. **Transfer no title.** Nothwithstanding an agreement to the contrary, a lien or a contract for a lien transfers no title to the property subject to the lien. [Civ. C. 1877, § 1706; R. C. 1899, § 4683.]

Title to mortgaged property remains in mortgagor. Sanford v. Elevator Co., 2 N. D. 6, 48 N. W. 434; Harding v. Insurance Society, 10 S. D. 64, 71 N. W. 755; Roberts v. Parker, 14 S. D. 323, 85 N. W. 591; Bank v. Elevator Co., 6 Dak. 357, 43 N. W. 806; Everett v. Buchanan, 2 Dak. 249, 6 N. W. 439.

Claim and delivery. Action by chattel mortgagee. Defenses. James v. Willson, 8 N. D. 186, 77 N. W. 603.

Chattel mortgage not witnessed good between parties. Machine Co. v. Lee, 4 S. D. 495, 57 N. W. 258.

A mortgagee does not assign mortgage by executing deed as he has no title. Loan Association v. Dowling, 10 S. D. 540, 74 N. W. 438.

§ 6134. **Contracts for forfeiting property subject to void.** All contracts for the forfeiture of property subject to a lien in satisfaction of the obligation secured thereby and all contracts in restraint of the right of redemption from a lien are void. [Civ. C. 1877, § 1707; R. C. 1895, § 4684.]

§ 6135. **Does not imply obligation to perform.** The creation of a lien does not of itself imply that any person is bound to perform the act for which the lien is a security. [Civ. C. 1877, § 1708; R. C. 1899, § 4685.]

§ 6136. **Not security for other than original obligations.** The existence of a lien upon property does not of itself entitle the person in whose favor it exists to a lien upon the same property, for the performance of any other obligation than that which the lien originally secured. [Civ. C. 1877, § 1709; R. C. 1899, § 4686.]

Payment of debt extinguishes lien to extent of payment; cannot be held for other debt. Locke v. Hubbard, 9 S. D. 364, 69 N. W. 588.

§ 6137. **Extent of compensation to holder.** One who holds property by virtue of a lien thereon is not entitled to compensation from the owner thereof for any trouble or expense which he incurs respecting it, except to the same extent as a borrower under sections 5495 and 5496. [Civ. C. 1877, § 1710; R. C. 1899, § 4687.]

ARTICLE 4.—PRIORITY OF LIENS.

§ **6138. Priority according to date.** Other things being equal, different liens upon the same property have priority according to the time of their creation except in cases of bottomry and respondentia. [Civ. C. 1877, § 1711; R. C. 1899, § 4688.]

Senior mortgagee is estopped from asserting priority over a junior mortgage acquired on his representations that junior mortgage was a first lien. Morris v. Beecher et al, 1 N. D. 130, 45 N. W. 696.

Agister lien. Priority. Bank v. Scott, 7 N. D. 312, 75 N. W. 254; Wright v. Sherman, 3 S. D. 290, 52 N. W. 1093.

Mortgage lien superior to lien for subsequent personal property tax. Miller v. Anderson, 1 S. D. 539, 47 N. W. 957.

A lien of a carrier for transportation charges with notice is inferior to a mortgage. Owen v. B. C. R. & N. Ry. Co., 11 S. D. 153, 76 N. W. 302.

§ **6139. Mortgage for price prior to all.** A mortgage given for the price of real property at the time of its conveyance has priority over all other liens created against the purchaser, subject to the operation of the recording laws. [Civ. C. 1877, § 1712; R. C. 1899, § 4689.]

Lien for purchase money superior, when. Kalscheuer v. Upton, 6 Dak. 449, 43 N. W. 816.

Mortgage of real estate may be complete without power of sale Grant County v. Mortgage Co., 3 S. D. 390, 53 N. W. 746.

§ **6140. Order of resort for payment.** When one has a lien upon several things and other persons have subordinate liens upon, or interests in some but not all of the same things, the person having the prior lien, if he can do so without risk of loss to himself or of injustice to other persons, must resort to the property in the following order, on the demand of any party interested:

1. To the things upon which he has an exclusive lien.
2. To the things which are subject to the fewest subordinate liens.
3. In like manner inversely to the number of subordinate liens upon the same thing; and,
4. When several things are within one of the foregoing classes, and subject to the same number of liens, resort must be had:

(a) To things which have not been transferred since the prior lien was created.

(b) To the things which have been so transferred without a valuable consideration; and,

(c) To the things which have been so transferred for a valuable consideration in the inverse order of the transfers. [Civ. C. 1877, § 1713; R. C. 1895, § 4690.]

Mortgagee with knowledge of subsequent liens must first exhaust property on which he holds exclusive lien before resorting to sale of property covered by subsequent lien. Union Bank v. M. M. & Stoddard Co., 7 N. D. 201, 73 N. W. 527.

ARTICLE 5.—REDEMPTION OF LIENS.

§ **6141. Redemption, by whom and when made.** Every person having an interest in property, subject to a lien, has a right to redeem it from the lien, at any time after the claim is due and before his right of redemption is foreclosed. [Civ. C. 1877, § 1714; R. C. 1899, § 4691.]

Mortgagor can not consent to sale of property by superior mortgagee so as to defeat junior mortgage. Everitt v. Buchanan, 2 Dak. 249, 6 N. W. 439.

None but lienholder can object to payment of lien before due by subsequent lienholder. Kalscheuer v. Upton, 6 Dak. 449, 43 N. W. 816.

Unrecorded assignment of mortgage void as to subsequent mortgages or encumbrances in good faith for value first recorded. Merrill v. Luce, 6 S. D. 354, 61 N. W. 43.

Lienholder not made party to mechanics lien foreclosure, not barred from right of redemption. Trust Co. v. Lynch, 10 S. D. 410, 73 N. W. 908.

Junior mortgagee may redeem from prior mortgage at any time before sale. DeLuce v. Root, 12 S. D. 141, 80 N. W. 181; Boot & Shoe Co. v. Anderson, 9 S. D. 560, 70 N. W. 877; MacGregor v. Pierce, 17 S. D. 51.

§ 6142. **Inferior lien holder may redeem. Subrogation.** One who has a lien inferior to another upon the same property has a right:

1. To redeem the property in the same manner as its owner might from the superior lien; and,

2. To be subrogated to all the benefits of the superior lien when necessary for the protection of his interests, upon satisfying the claim secured thereby. [Civ. C. 1877, § 1715; R. C. 1899, § 4692.]

§ 6143. **How made.** Redemption from a lien is made by performing the act for the performance of which it is a security, and paying the damages if any, to which the holder of the lien is entitled for delay, or by offering to perform such act and pay such damages; provided, that if the act requires the delivery of money, property or a conveyance of property the same shall be deposited and notice thereof given as provided in section 5263. [Civ. C. 1877, § 1716; R. C. 1895, § 4693.]

Article 6.—Extinction of Liens.

§ 6144. **Deemed accessory to act secured.** A lien is to be deemed accessory to the act for the performance of which it is a security, whether any person is bound for such performance or not, and is extinguishable in like manner with any other accessory obligation. [Civ. C. 1877, § 1717; R. C. 1899, § 4694.]

Payment of sum named in note is act to be performed. Bennett v. Ellis, 13 S. D. 401, 83 N. W. 429.

§ 6145. **Extinguished by sale of property. What defendant may show in conversion.** The sale of any property on which there is a lien in satisfaction of the claim secured thereby, or, in case of personal property its wrongful conversion by the person holding the lien extinguishes the lien thereon; provided, however, that in an action for the conversion of personal property the defendant may show in mitigation of damages the amount due on any lien to which the plaintiff's rights were subject, and which was held or paid by the defendant or any person under whom he claims. [Civ. C. 1877, § 1718; R. C. 1895, § 4695.]

Purchaser of mortgaged property liable for conversion. Nichols, Shepard & Co. v. Burnes, 3 Dak. 148, 14 N. W. 110.

Private sale by mortgagee on first mortgage conversion as to second mortgage and first mortgage is extinguished. Lovejoy v. Bank, 5 N. D. 623, 67 N. W. 956.

Use of mortgaged property by mortgagee with consent of mortgagor not conversion. Van Dusen & Co. v. Arnold, 5 S. D. 588, 59 N. W. 961.

§ 6146. **Not extinguished by mere lapse of time.** A lien is not extinguished by the mere lapse of the time within which under the provisions of the code of civil procedure an action can be brought upon the principal obligation. Civ. C. 1877, § 1719; R. C. 1899, § 4696.]

§ 6147. **Not extinguished by partial performance.** The partial performance of an act secured by a lien does not extinguish the lien upon any part of the property subject thereto, even if it is divisible. [Civ. C. 1877, § 1720; R. C. 1899, § 4697.]

Until debt fully paid mortgage lien continues. Subject to statutory provisions. Bank v. Elevator Co., 4 S. D. 409, 57 N. W. 77.

§ 6148. **By restoration of property if lien dependent on possession.** The voluntary restoration of property to its owner by the holder of a lien thereon, dependent upon possession, extinguishes the lien as to such property, unless otherwise agreed by the parties and extinguishes it, notwithstanding any such agreement, as to creditors of the owner and persons subsequently

acquiring title to the property, or a lien thereon, in good faith and for a good consideration. [Civ. C. 1877, § 1721; R. C. 1899, § 4698.]

Lien for repairs lost by voluntary surrender of thing repaired to owner. Burdick v. Marshall, 8 S. D. 308, 66 N. W. 462.

CHAPTER 75.

MORTGAGE.

ARTICLE 1.—MORTGAGE IN GENERAL.

§ 6149. Defined. Formalities necessary. Mortgage is a contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession. A mortgage of real property can be created, renewed or extended only by writing, executed with the formalities required in the case of a grant of real property. [Civ. C. 1877, § 1722; R. C. 1899, § 4699.]

Mortgage is "extended" when made to stand as security for some debt not originally included therein. Bank v. Francis, 8 N. D. 369, 79 N. W. 853.

Chattel mortgage conveys no title; is only security for debt. Sandmeyer v. Insurance Co., 2 S. D. 346, 50 N. W. 353.

A mortgage on personal property is valid as between parties without witnesses. Machine Co. v. Lee, 4 S. D. 495, 57 N. W. 238; Fisher v. Porter, 11 S. D. 311, 77 N. W. 112; Peet v. Insurance Co., 7 S. D. 410, 64 N. W. 206.

No particular form of words is necessary to constitute a chattel mortgage. Esshom v. Hotel Co., 7 S. D. 74, 63 N. W. 229; Peet v. Insurance Co., 7 S. D. 410, 64 N. W. 206.

Lease of building containing clause giving a lien for rent on lessee's chattels in building not chattel mortgage. Kennedy v. Hull, 14 S. D. 234, 85 N. W. 223.

§ 6150. Lien special. Independent of possession. The lien of a mortgage is special, unless otherwise expressly agreed and is independent of possession. [Civ. C. 1877, § 1723; R. C. 1899, § 4700.]

§ 6151. What transfers deemed mortgage. Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act is to be deemed a mortgage, except when in the case of personal property, it is accompanied by an actual change of possession in which case it is deemed a pledge. [Civ. C. 1877, § 1724; R. C. 1899, § 4701.]

§ 6152. Bottomry and respondentia not affected. Contracts of bottomry or respondentia, although in the nature of mortgages are not affected by any of the provisions of this chapter. [Civ. C. 1877, § 1725; R. C. 1899, § 4702.]

§ 6153. When transfer may be shown to be mortgage. The fact that a transfer was made subject to a defeasance on a condition, may, for the purpose of showing such transfer to be a mortgage, be proved, except as against a subsequent purchaser or incumbrancer for value and without notice, though the fact does not appear by the terms of the instrument. [Civ. C. 1877, § 1726; R. C. 1899, § 4703.]

Evidence to prove deed absolute on its face a mortgage must be clear, convincing and satisfactory. Jasper v. Hazen, 4 N. D. 1, 58 N. W. 454.

One transferring property unconditionally is thereafter estopped from claiming it was a mortgage if transfer was relied upon as absolute deed by grantee McGuin v. Lee, 10 N. D. 160, 86 N. W. 714.

Evidence of a parol defeasance insufficient under established rule of proof required. Little v. Braun, 11 N. D. 410, 92 N. W. 800.

Deed is absolute unless proof is clear, convincing, satisfactory and specific that it was intended to be a mortgage. Northwestern Fire & Marine Ins. Co. v. Lough, 13 N. D. 601, 102 N. W. 160.

In order for party to claim benefit of section 6179 it must appear that he is purchaser or encumbrancer in good faith without notice. Murphy v. Bank, 13 S. D. 501, 83 N. W. 575.

A warranty deed given to secure payment of notes is a mortgage. Bradley v. Helgerson, 14 S. D. 593, 86 N. W. 634; Shimerda v. Wohlford, 13 S. D. 155, 82 N. W. 393; Merrill v. Hurley, 6 S. D. 592, 62 N. W. 958; Wells v. Geyer, 12 N. D. 316, 96 N. W. 289.

§ 6154. **What may be mortgaged.** Any interest in property which is capable of being transferred may be mortgaged. [Civ. C. 1877, § 1727; R. C. 1899, § 4704.]

Mortgage for future advances valid. Second mortgagee with notice, subject to first mortgage. Recording of second lien not notice to prior incumbrance. Bank v. Modine & Co., 7 N. D. 201, 73 N. W. 527.

§ 6155. **After acquired title subject to.** Title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt in like manner as if acquired before the execution. [Civ. C. 1877, § 1727; R. C. 1899, § 4705.]

Married woman executing mortgage to secure obligation signed by her and husband is estopped from afterwards acquiring title against mortgagee. Yerkes v. Hadley, 5 Dak. 324, 40 N. W. 340.

The amount to become due at any future time must be ascertainable from examination for note to be negotiable. Merrill v. Hurley, 6 S. D. 592, 62 N. W. 958.

§ 6156. **Not bound to perform act secured without covenant.** A mortgage does not bind the mortgagor personally to perform the act for the performance of which it is a security, unless there is an express covenant therein to that effect. [Civ. C. 1877, § 1727; R. C. 1899, § 4706.]

§ 6157. **Assigning debt carries security.** The assignment of a debt secured by mortgage carries with it the security. [Civ. C. 1877, § 1727; R. C. 1899, § 4707.]

§ 6158. **On property adversely held.** A mortgage may be created upon property held adversely to the mortgagor. A mortgage of property held adversely to the mortgagor takes effect from the time at which he or one claiming under him obtains possession of the property, but has precedence over every lien upon the mortgagor's interest in the property, created subsequently to the recording of the mortgage. [Civ. C. 1877, § 1728; R. C. 1899, § 4708.]

§ 6159. **May confer power of sale.** A power of sale may be conferred by a mortgage upon the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is a security. [Civ. C. 1877, § 1729; R. C. 1899, § 4709.]

§ 6160. **Such power a trust.** A power of sale under a mortgage is a trust and as to real property can be executed only in the manner prescribed by the code of civil procedure. [Civ. C. 1877, § 1730; R. C. 1899, § 4710.]

Must sell in manner pointed out in instrument. Everett v. Buchanan, 2 Dak. 249, 6 N. W. 439.

Trust for benefit of third person may be created by mortgage. Robinson v. McKinney, 4 Dak. 290, 29 N. W. 658.

A mortgage of real estate may be complete without power of sale, but unless containing such power cannot be foreclosed by advertisement. Grant Co. v. Mortgage Co., 3 S. D. 390, 53 N. W. 746.

Power of sale is a power coupled with an interest and not terminated with death of mortgagor. Reilly v. Phillips, 4 S. D. 604, 57 N. W. 780; Grandin v. Emmons, 10 N. D. 223, 86 N. W. 723.

Removal of building from mortgaged property does not destroy lien thereon after security on lot has been exhausted. Trust Co. v. Parmalee, 5 S. D. 341, 58 N. W. 811.

§ 6161. **Requisites of power of attorney to execute.** A power of attorney to execute a mortgage must be in writing subscribed, acknowledged or proved, certified and recorded in like manner as powers of attorney for grants of real property. [Civ. C. 1877, § 1730; R. C. 1899, § 4711.]

Power of attorney to sell and convey not power to mortgage. Morris v. Ewing, 8 N. D. 99, 76 N. W. 1047.

§ 6162. **Lien on everything grant would pass.** A mortgage is a lien upon everything that would pass by a grant of the property and upon nothing more. [Civ. C. 1877, § 1731; R. C. 1899, § 4712.]

§ 6163. Against all claiming under mortgagor. Exception. A mortgage is a lien upon the property mortgaged in the hands of every one claiming under the mortgagor subsequently to its execution, except purchasers and incumbrancers in good faith without notice and for value and except as otherwise provided by article 3 of this chapter. [Civ. C. 1877, § 1732; R. C. 1899, § 4713.]

Court of equity will restore senior mortgage satisfied by mistake to first lien where junior mortgagee had notice of its existence. Upton v. Hugos, 7 S. D. 476, 64 N. W. 523; Ricker v. Stott, 13 S. D. 208, 83 N. W. 47.

The rule relating to purchasers in good faith without notice does not apply to attaching creditors. Murphy v. Bank, 13 S. D. 501, 83 N. W. 575; Kohn v. Lapham, 13 S. D. 78, 82 N. W. 408.

§ 6164. Mortgagee not entitled to possession. A mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage; but after the execution of a mortgage the mortgagor may agree to such change of possession without a new consideration. No person whose interest is subject to the lien of a mortgage may do any act which will substantially impair the mortgagee's security. [Civ. C. 1877, § 1733; R. C. 1899, § 4714.]

A mortgage is a mere lien given as security and confers no right of possession before or after default. Possession cannot be taken until there is a valid foreclosure. McClory v. Ricks, 11 N. D. 38, 88 N. W. 1043.

A mortgagee's possession under an illegal foreclosure with the knowledge and acquiescence of the mortgagor is that of a trustee and he must account and surrender possession after net rents, issues and profits extinguish the debt and taxes paid. Finlayson v. Peterson, 11 N. D. 45, 89 N. W. 855.

A bill of sale executed to secure a debt constitutes a mortgage between the parties. Rosenbaum v. Foss, 4 S. D. 184, 56 N. W. 114.

Mortgagor entitled to possession of mortgaged property until divested of title. Shimerda v. Wohlford, 13 S. D. 155, 82 N. W. 393; Building & Loan Association v. Dowling, 10 S. D. 535, 74 N. W. 436; McKay v. Shotwell, 6 Dak. 124, 50 N. W. 622.

A receiver may be appointed pending foreclosure where property is insufficient security. Roberts v. Parker, 14 S. D. 323, 85 N. W. 591.

§ 6165. Foreclosure. A mortgagee may foreclose the right of redemption of the mortgagor in the manner prescribed by the code of civil procedure. [Civ. C. 1877, § 1734; R. C. 1899, § 4715.]

§ 6166. Record of assignment. How record operates. An assignment of a mortgage may be recorded in like manner as a mortgage and such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor. [Civ. C. 1877, § 1735; R. C. 1899, § 4716.]

An assignment of a real estate mortgage is a proper instrument for record. Merrill v. Luce, 6 S. D. 354, 61 N. W. 43.

§ 6167. Of what such record not notice. When the mortgage is executed as security for money due or to become due on a promissory note, bond or other instrument designated in the mortgage, the record of the assignment of the mortgage is not of itself notice to a mortgagor, his heirs or personal representatives so as to invalidate any payment made by them or either of them to the person holding such note, bond or other instrument. [Civ. C. 1877, § 1735; R. C. 1899, § 4717.]

Neglect to take and record an assignment cannot prejudice the rights of an innocent purchaser. Pickford v. Peebles, 7 S. D. 166, 63 N. W. 779.

§ 6168. Real estate mortgages, how discharged by certificate. A recorded mortgage must be discharged upon the record by the register of deeds having custody thereof on the presentation to him of a certificate of discharge, signed by the mortgagee, his executors, administrators, guardians, trustees, assigns or personal representatives, properly acknowledged or proved and certified as prescribed by the chapter on recording transfers, stating that the mortgage has been paid in full, or otherwise satisfied and discharged, and authorizing the officer to cancel the same of record, giving a brief description of the mortgage; provided, however, that any person acting as personal

representative of the mortgagee as aforesaid, must first file and have recorded a power of attorney in the register's office where such mortgage is recorded, showing his authority to discharge mortgages in behalf and for the mortgagee and in his name and stead. A certificate of the satisfaction of a mortgage may be made in substantially the following form:

This certifies that a certain mortgage executed by..... of.....mortgagor to.....of..... mortgagee dated the.....day of.....A. D. 19.. upon the.....(here describe the property covered by the mortgage) and recorded in the office of the register of deeds in and for the county of .....and state of North Dakota, in book.....of mortgages on page.....is paid and satisfied; and..... hereby authorize and require said register of deeds to discharge the same of record in his office.

Witness.....hand this.....day of.....A. D. 190..

(Acknowledgment.) [Civ. C. 1877, § 1735; R. C. 1899, § 4719; 1901, ch. 125; 1905, ch. 154.]

§ **6169. Discharge by foreign executor or administrator.** When an executor or administrator shall be appointed in any other state or foreign country, on the estate of any person not a resident of this state at the time of his decease, and no executor or administrator thereon shall have been appointed in this state, such foreign executor or administrator, upon filing in the office of the register of deeds of any county in which any mortgage held by the estate of such deceased person is filed or recorded an authenticated copy of his appointment, may execute, acknowledge and deliver a certificate of discharge of such mortgage the same as and with like effect as executors and administrators appointed under the laws of this state may do. [R. C. 1895, § 4720.]

§ **6170. Discharge by heir or legatee.** Any heir or legatee of such deceased person, residing within or without the state, upon recording in the office of the register of deeds an authenticated copy of the judgment or decree of the court, transferring to such heir or legatee the ownership of any such mortgage may, in like manner and with like effect, satisfy or release such mortgage. [R. C. 1895, § 4721.]

§ **6171. Discharge by foreign guardian of minor.** Any guardian appointed in any other state or foreign country of a minor holding and owning a mortgage upon property in this state, upon filing in the office of the register of deeds of the county in which the property is situated an authenticated copy of his appointment as guardian and the same proof of the ownership of such mortgage as is required in the last section, may in like manner and with like effect satisfy or release such mortgage. [R. C. 1895, § 4722.]

§ **6172. Such certificate must be recorded.** A certificate of the discharge of a mortgage and a proof or acknowledgment thereof must be recorded at length and a reference made in the record to the book and page where the mortgage is recorded and in the minute of the discharge made upon the record of the mortgage, to the book and page where the discharge is recorded. [Civ. C. 1877, § 1735; R. C. 1899, § 4723.]

Notary public is presumed to fill blanks in an acknowledgment. Jones v. Trust Co., 7 S. D. 122, 63 N. W. 553.

§ **6173. When mortgage satisfied mortgagee** must on demand discharge. **Penalty.** When any mortgage or lien upon property has been satisfied, the owner of such mortgage or lien must immediately on demand of the owner of the property execute and deliver to him a certificate of the discharge thereof, and must at the expense of the owner of the property acknowledge the execution thereof so as to entitle it to be recorded or he must enter satisfaction or cause satisfaction of such mortgage or lien to be entered of record; and any owner of any mortgage or lien, who refuses to execute and

deliver to the owner of the property covered by the mortgage or lien the certificate of discharge and to acknowledge the execution thereof or to enter satisfaction or cause satisfaction to be entered of the mortgage or lien as provided by law, is liable to the owner of such property or his assignee or legal representatives for all damages which he or they may sustain by reason of such refusal, and shall also forfeit to him or them the sum of one hundred dollars. [Civ. C. 1877, § 1735; R. C. 1895, § 4724.]

Tender of amount due and deposit of same in bank if not accepted acts as payment of note and makes this section operative. Kronebusch v. Raumin, 6 Dak. 243, 42 N. W. 656.

Where a party seeks to recover statutory penalty must rely on specific statute giving penalty. Greenberg v. Bank, 5 N. D. 483, 67 N. W. 597; Peckham v. Van Bergen, 10 N. D. 43, 84 N. W. 566.

Penalty to be recovered only upon a strict count upon failure to comply with request. Peckham v. Van Bergen, 10 N. D. 43, 84 N. W. 566.

Demand of satisfaction of mortgagee on payment of mortgage in another state does not make him liable to penalty. His liability will be amount of damage caused by failure to satisfy. Jones v. Trust Co., 7 S. D. 122, 63 N. W. 553.

Complaint to require mortgagee to execute, acknowledge and deliver a certificate entitled to record and pay damages and penalty, subject to demurrer in absence of allegation that expense has been paid or tendered. Mader et al, v. Plano Mfg. Co., 17 S. D. 553.

Article 2.—Mortgage of Real Property.

§ **6174. Form.** A mortgage of real property may be made in substantially the following form:

This mortgage made the.....day of....., in the year..... by A. B., of....., mortgagor, to C. D., of....., mortgagee, witnesseth:

That the mortgagor mortgages to the mortgagee (here describe the property) as security for the payment to him of.....dollars, on or before the.....day of....., in the year..... with interest thereon (or as security for the payment of an obligation, describing it, etc.)

A. B.

[Civ. C. 1877, § 1736; R. C. 1899, § 4725.]

§ **6175. When devisee must satisfy mortgage out of his property.** When real property, subject to a mortgage, passes by succession or will, the successor or devisee must satisfy the mortgage out of his own property without resorting to the executor or administrator of the mortgagor, unless there is an express direction in the will of the mortgagor that the mortgage shall be otherwise paid. [Civ. C. 1877, § 1737; R. C. 1899, § 4726.]

§ **6176. Executed, etc., like grant.** Mortgages of real property may be acknowledged or proved, certified and recorded in like manner and with like effect as grants thereof. [Civ. C. 1877, § 1738; R. C. 1899, § 4727.]

§ **6177. To whom record notice.** The record of a mortgage duly made operates as notice to all subsequent purchasers and incumbrancers. [Civ. C. 1877, § 1739; R. C. 1899, § 4728.]

§ **6178. Separate paper showing grant intended as mortgage must be recorded.** Every grant of real property or of any estate therein which appears by any other writing to be intended as a mortgage within the meaning of chapter 74 of this code must be recorded as a mortgage; and if such grant and other writing explanatory of its true character are not recorded together at the same time and place, the grantee can derive no benefit from such record. [Civ. C. 1877, § 1740; R. C. 1899, § 4729.]

§ **6179. Defeasance must be recorded.** When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees or persons having actual notice unless an instrument of defeasance duly executed and acknowledged, shall have been recorded in the office of the register of deeds

of the county where the property is situated. [Civ. C. 1877, § 1741; R. C. 1899, § 4730.]

See McKenna v. Whittaker, 9 S. D. 442, 69 N. W. 587.

ARTICLE 3.—MORTGAGE OF PERSONAL PROPERTY.

§ 6180. Form. A mortgage of personal property may be made in substantially the following form:

This mortgage made the.....day of....., in the year..... by A. B., of....., by occupation....., mortgagor, to C. D.,.....of....., by occupation a....., mortgagee, witnesseth:

That the mortgagor mortgages to the mortgagee (here describe the property) as security for the payment to him of.....dollars on (or before) the.....day of....., in the year....., with interest thereon (or security for the payment of a note or obligation describing it, etc.) A. B.

[Civ. C. 1877, § 1742; R. C. 1899, § 4731.]

Sufficiency of description. Bank v. Oium, 3 N. D. 193, 54 N. W. 1034; Nichols Shepard Co. v. Barnes, 3 Dak. 148, 14 N. W. 110; Bank v. Koechel, 8 S. D. 391, 66 N. W. 933; Russell & Co. v. Amundson, 4 N. D. 112, 59 N. W. 477; Crow v. Zollars, 11 S. D. 203, 76 N. W. 924; Bank v. Elevator Co., 14 S. D. 276, 85 N. W. 219; Coughran v. Sundback, 9 S. D. 483, 70 N. W. 644; Advance Thresher Co. v. Schmidt, 9 S. D. 489, 70 N. W. 646.

Owner of threshing machine may mortgage future earnings. Sykes v. Hannawalt, 5 N. D. 335, 65 N. W. 682; Reynolds v. Strong, 10 N. D. 81, 85 N. W. 987.

Unplanted crop may be mortgaged. Schweinberg v. Elevator Co., 9 N. D. 113, 81 N. W. 35; Donovan v. Elevator Co., 7 N. D. 513, 74 N. W. 809; Nichols Shepard Co. v. Barnes, 3 Dak. 148, 14 N. W. 110; Hostetter v. Elevator Co., 4 N. D. 357, 61 N. W. 49; Bank v. Mann et al, 2 N. D. 456, 51 N. W. 946; Bank v. Elevator Co., 6 Dak. 357, 43 N. W. 806; Bank v. Hanson, 3 N. D. 465, 57 N. W. 345; Best Brewing Co. v. Elevator Co., 5 Dak. 62, 37 N. W. 763.

Provision in lease making rent lien on furniture construed as chattel mortgage. Greeley v. Winsor, 1 S. D. 117, 45 N. W. 325; Peet v. Insurance Co., 7 S. D. 410, 64 N. W. 206; Esshom v. Hotel Co., 7 S. D. 74, 63 N. W. 229.

Description of machine must be definite to bind earnings paid without notice of existence of mortgage. Machine Co. v. Skau, 10 S. D. 636, 75 N. W. 199.

§ 6181. Conditional sales must be in writing and filed. All reservations of the title to personal property, as security for the purchase money thereof, shall, when the possession of such property is delivered to the vendee, be void as to subsequent creditors without notice and purchasers and incumbrancers in good faith and for value, unless such reservation is in writing and filed and indexed the same as a mortgage of personal property. In indexing such instruments the register of deeds shall treat the purchaser as mortgagor and the vendor as mortgagee. [R. C. 1895, § 4732.]

Failure to file contract of conditional sale, effect of. Thompson v. Armstrong, 11 N. D. 198, 91 N. W. 39.

§ 6182. Void as to whom, unless filed. A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith for value unless the original or an authenticated copy thereof is filed by depositing the same in the office of the register of deeds of the county where the property mortgaged, or any part thereof, is at such time situated. [Civ. C. 1877, § 1744; R. C. 1899, § 4733.]

Purchaser at mortgage sale of real estate cannot thereby acquire rights superior to subsequent mortgage on crop without notice. Bank v. Swan, 2 N. D. 225, 50 N. W. 357.

Mortgage on earnings of threshing rig must be filed, as against subsequent creditors. Sykes v. Hannawalt, 5 N. D. 335, 65 N. W. 682.

Failure to file does not render void as to mortgagor. Deering v. Hanson, 7 N. D. 288, 75 N. W. 249.

Good where made, good here. Wilson v. Rustad, 7 N. D. 330, 75 N. W 260.

Original must be on file in county where some property incumbered situate. Certified copy may be filed in other counties where property situate with same effect as original. Rosenbaum v. Foss, 4 S. D. 184, 56 N. W. 114; Kimball Co. v. Kirby, 4 S. D. 152, 55 N. W. 1110.

Words "In good faith for value" apply only to subsequent purchasers and incumbrances and not to creditors. Kimball v. Kirby, 4 S. D. 152, 55 N. W. 1110; Noyes v. Brace, 8 S. D. 190, 65 N. W. 1071.

Mortgage withheld from record to allow mortgagor to obtain credit fraudulent as to such subsequent creditors. Jewett v. Sundback, 5 S. D. 111, 58 N. W. 20.

Failure to promptly file chattel mortgage not a badge of fraud. Mercantile Co. v. Gardner, 5 S. D. 246, 58 N. W. 557.

Mortgage first executed but unrecorded subject to one subsequently executed without notice for value but first recorded. Walter A. Wood Co. v. Lee, 9 S. D. 69, 68 N. W. 170.

Chattel mortgage taken in foreign state not filed as required by such state not good against purchasers in state to which property is removed. Carroll v. Nisbet, 9 S. D. 497, 70 N. W. 634.

Execution levied on property covered by unrecorded mortgage is prior lien though execution debt was contracted prior to execution of mortgage. Pierson v. Hickey, 16 S. D. 46, 91 N. W. 339. (This was a divided opinion.)

§ 6183. **Filing, notice to whom.** The filing of a mortgage of personal property in conformity with the provisions of this article operates as notice thereof to all subsequent purchasers and incumbrancers of so much of said property as is at the time mentioned in the preceding section, situated in the county or counties wherein such mortgage or an authenticated copy thereof is filed. [Civ. C. 1877, § 1745; R. C. 1899, § 4734.]

§ 6184. **Where property in transit deemed to be.** For the purposes of this article property in transit from the possession of the mortgagee to the county of the residence of the mortgagor or to a location for use is during a reasonable time for transportation to be taken as situated in the county in which the mortgagor resides, or where it is intended to be used. For a like purpose personal property used in conducting the business of a common carrier is to be taken as situated in the county in which the principal office or place of business of the carrier is located. [Civ. C. 1877, § 1746; R. C. 1899, § 4735.]

§ 6185. **Valid only as to property in county. Filing in other counties.** A single mortgage of personal property embracing several things of such character, or so situated, that by the provisions of this article, separate mortgages upon them would be required to be filed in different counties is only valid in respect to the things as to which it is duly filed; but a copy of the original mortgage may be authenticated by the register of deeds in whose office it is filed, and such copy be filed in any other county with the same effect as to the property therein that the original could have been. [Civ. C. 1877, § 1747; R. C. 1899, § 4736.]

Valid only in county where original or copy filed. Kimball v. Kirby, 4 S. D. 152, 52 N. W. 1110; Rosenbaum v. Foss, 4 S. D. 184, 56 N. W. 114. (Last case reversed on other grounds, 7 S. D. 83.)

§ 6186. **How renewed.** A mortgage of personal property ceases to be valid as against creditors of the mortgagor, and subsequent purchasers or incumbrancers in good faith after the expiration of three years from the filing thereof, except as hereinafter provided, unless within ninety days next preceding the expiration of such term a copy of the mortgage and a statement of the amount of existing debt for which the mortgagee or his assignee claims a lien, sworn to and subscribed by him, his agent or attorney, are filed anew in the office of the register of deeds in the county in which the mortgage was originally filed, and in like manner the mortgage and statement of debt must be again filed every three years or it ceases to be valid as against the parties above mentioned; provided, that mortgages of the personal property belonging to street car companies, telephone companies, and telegraph companies need not be renewed. [Civ. C. 1877, § 1748; 1881, ch. 25, § 1; 1890, ch. 41, § 1; R. C. 1895, § 4737; 1905, ch. 60.]

§ 6187. **How executed.** A mortgage of personal property must be signed by the mortgagor in the presence of two persons who must sign the same as witnesses thereto, or acknowledge the execution of the same before some officer qualified to take acknowledgments, and no further proof is required to admit it to be filed. [Civ. C. 1877, § 1749; R. C. 1899, § 4738; 1903, ch. 133.]

Proof of execution not dispensed with. Lauder v. Proper, 6 Dak. 64, 50 N. W. 400.

Subscribing witnesses must be called to prove execution of mortgage contested or their absence as witnesses be accounted for. Brynjolfson v. Elevator Co., 6 N. D. 450, 71 N. W. 555.

Mortgagee disqualified as witness by reason of interest. Donovan v. Elevator Co., 8 N. D. 585, 80 N. W. 772.

In action between mortgagor and mortgagee not necessary to show mortgage was witnessed. J. I. Case Co. v. Olson, 10 N. D. 170, 86 N. W. 718.

Words "In presence of" and signed by two witnesses sufficient. Bank v. Elevator Co., 4 S. D. 409, 57 N. W. 77.

Witnesses required only to entitle it to be filed. Wood Co. v. Lee, 4 S. D. 495, 57 N. W. 238.

Mortgagee may sign as witness. Fisher v. Porter, 11 S. D. 311, 77 N. W. 112.

§ 6188. **Duty of register of deeds. Cancellation.** The register of deeds of each of the several counties must receive and file all such instruments as are offered to him and must keep the same in his office in regular and orderly file for the public information and must not permit them, or any of them, to be removed from his office until canceled. Every such mortgage may be canceled by the register of deeds upon the presentation to him of a receipt for the sum, money or property secured, or an acknowledgment of satisfaction thereof signed by the mortgagee. [Civ. C. 1877, § 1750; R. C. 1899, § 4739.]

§ 6189. **Registry index.** Every register of deeds with whom any such mortgage or authenticated copy thereof is filed must indorse a number upon the same in regular order together with the time of receiving the same and must enter the name of every party thereto in a book kept for that purpose alphabetically, placing mortgagors and mortgagees under a separate head and stating in separate columns, opposite each name, the number indorsed upon the mortgage, the date thereof and of the filing, the amount secured thereby, a brief of the substance thereof not otherwise entered and the time at which it is due. A mortgage is not to be deemed defectively filed by reason of any errors in the copy filed which do not tend to mislead a party interested; and the negligence of the officer with whom a mortgage is filed does not prejudice the rights of the mortgagee. [Civ. C. 1877, § 1751; R. C. 1899, § 4740.]

§ 6190. **When mortgagee may take and dispose of property.** If the mortgagor voluntarily removes or permits the removal of the mortgaged property from the county in which it was situated at the time it was mortgaged, the mortgagee may take possession and dispose of the property as a pledge for the payment of the debt, though the debt is not due. [Civ. C. 1877, § 1752; R. C. 1899, § 4741.]

Lien waived and mortgage defeated by consent of mortgagee to a private sale. Peterson v. St. Anthony & Dakota Elevator Co., 9 N. D. 55, 81 N. W. 59.

§ 6191. **Where ship mortgage recorded.** No mortgage of any ship or vessel, or part thereof, of the United States shall be valid against any person, other than the mortgagor, his heirs and devisees and persons having actual notice thereof, unless such mortgage is recorded in the office of the collector of customs where such vessel is registered or enrolled. [Civ. C. 1877, § 1756; R. C. 1899, § 4742.]

§ 6192. **Provisions inapplicable to ship mortgages.** Sections 6182 to 6190 inclusive of this article do not apply to any mortgage of a ship or vessel, or any part thereof, which is required as above by act of congress to be recorded in a particular place or manner. [Civ. C. 1877, § 1756; R. C. 1899, § 4743.]

CHAPTER 76.

PLEDGE.

§ **6193. Defined.** Pledge is a deposit of personal property by way of security for the performance of another act. [Civ. C. 1877, § 1757; R. C. 1899, § 4744.]

Shares of stock may be pledged as security. Van Cise v. Bank, 4 Dak. 485, 33 N. W. 897.

§ **6194. What contracts deemed pledge.** Every contract by which the possession of personal property is transferred as security only is to be deemed a pledge. [Civ. C. 1877, § 1758; R. C. 1899, § 4745.]

Retaining property of another for debt due does not constitute a pledge. Taylor v. Jones, 3 N. D. 235, 55 N. W. 593.

§ **6195. Lien dependent on possession.** The lien of a pledge is dependent on possession and no pledge is valid until the property pledged is delivered to the pledgee or to a pledge holder as hereinafter prescribed. [Civ. C. 1877, § 1759; R. C. 1899, § 4746.]

Lien of pledge is dependent upon possession. Willard v. Elevator Co., 10 N. D. 400, 87 N. W. 996.

§ **6196. Includes increase.** The increase of property pledged is pledged with the property. [Civ. C. 1877, § 1760; R. C. 1899, § 4747.]

§ **6197. Lien may be pledged.** One who has a lien upon property may pledge it to the extent of his lien. [Civ. C. 1877, § 1761; R. C. 1899, § 4748.]

§ **6198. By one allowed to assume apparent ownership.** One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it cannot set up his own title to defeat a pledge of the property made by the other to a pledgee, who received the property in good faith in the ordinary course of business and for value. [Civ. C. 1877, § 1762; R. C. 1899, § 4749.]

§ **6199. To secure another's obligation.** Property may be pledged as security for the obligation of another person than the owner and in so doing the owner has all the rights of a pledgor for himself except as hereinafter stated. [Civ. C. 1877, § 1763; R. C. 1899, § 4750.]

§ **6200. Deposit with pledge holder.** A pledgor and pledgee may agree upon a third person with whom to deposit the property pledged who, if he accepts the deposit, is called a pledge holder. [Civ. C. 1877, § 1764; R. C. 1899, § 4751.]

§ **6201. Withdrawal of property pledged for another.** One who pledges property as security for the obligation of another cannot withdraw the property pledged otherwise than as a pledgor for himself might; and, if he receives from the debtor a consideration for the pledge, he cannot withdraw it without his consent. [Civ. C. 1877, § 1765; R. C. 1899, § 4752.]

§ **6202. Exoneration of pledge holder.** A pledge holder for reward cannot exonerate himself from his undertaking; and a gratuitous pledge holder can do so only by giving reasonable notice to the pledgor and pledgee to appoint a new pledge holder and in case of their failure to agree by depositing the property pledged with some impartial person, who will then be entitled to a reasonable compensation for his care of the same. [Civ. C. 1877, § 1766; R. C. 1899, § 4753.]

§ **6203. Pledge holder must enforce pledgee's rights.** A pledge holder must enforce all the rights of the pledgee, unless authorized by him to waive them. [Civ. C. 1877, § 1767; R. C. 1899, § 4754.]

§ **6204. Liability of pledgee or pledge holder.** A pledgee, or a pledge holder for reward, assumes the duties and liabilities of a depositary for reward. [Civ. C. 1877, § 1768; R. C. 1899, § 4755.]

Use of property pledged forbidden unless consented to. Hawkins v. Hubbard, 2 S. D. 631, 56 N. W. 774.

§ **6205. Liability of gratuitous pledge holder.** A gratuitous pledge holder assumes the duties and liabilities of a gratuitous depositary. [Civ. C. 1877, § 1769; R. C. 1899, § 4756.]

§ **6206. Pledgee's rights on fraudulent misrepresentation of value.** When a debtor has obtained credit, or an extension of time by a fraudulent misrepresentation of the value of the property pledged by or for him, the creditor may demand a further pledge to correspond with the value represented; and in default thereof may recover his debt immediately, though it is not actually due. [Civ. C. 1877, § 1770; R. C. 1899, § 4757.]

§ **6207. Sale when performance due.** When performance of the act for which a pledge is given is due in whole or in part, the pledgee may collect what is due him by a sale of the property pledged, subject to the rules and exceptions hereinafter prescribed. [Civ. C. 1877, § 1771; R. C. 1899, § 4758.]

§ **6208. Demand necessary.** Before property pledged can be sold and after performance of the act for which it is security is due the pledgee must demand performance thereof from the debtor, if the debtor can be found. [Civ. C. 1877, § 1772; R. C. 1899, § 4759.]

§ **6209. Notice to pledgor of sale.** A pledgee must give actual notice to the pledgor of the time and place at which the property pledged will be sold at such a reasonable time before the sale as will enable the pledgor to attend. [Civ. C. 1877, § 1773; R. C. 1899, § 4760.]

§ **6210. Waiver of such notice.** Notice of sale may be waived by a pledgor at any time; but is not waived by a mere waiver of demand of performance. [Civ. C. 1877, § 1774; R. C. 1899, § 4761.]

§ **6211. How demand waived.** A debtor or pledgor waives a demand of performance as a condition precedent to a sale of the property pledged by a positive refusal to perform after performance is due, but cannot waive it in any other manner except by contract. [Civ. C. 1877, § 1775; R. C. 1899, § 4762.]

§ **6212. Sale by public auction.** The sale by a pledgee of property pledged must be made by public auction in the manner and upon the notice to the public usual at the place of sale in respect to auction sales of similar property and must be for the highest obtainable price. [Civ. C. 1877, § 1776; R. C. 1899, § 4763.]

Sale must be made at public auction after notice given. Stanford v. McGill, 6 N. D. 536, 72 N. W. 938; Everett v. Buchanan, 2 Dak. 249, 6 N. W. 439.

§ **6213. Evidence of debt.** A pledgee may collect when due any evidence of debt pledged to him; he may also sell any evidence of debt pledged to him to secure the performance of an original obligation, if at the time of making such original obligation the pledgor shall have authorized in writing such sale. Before such evidence of debt can be sold and after the maturity of the original obligation, the pledgee must demand, in writing, the performance thereof from the debtor if he can be found. Notice of the sale of such evidence of debt must be given by publication once, and at least six days prior to such sale, in a newspaper published at the place of sale, if there is one, otherwise in a newspaper in the county in which such sale is to be made, and if there is no newspaper in the county, or upon the written request of the pledgor, notice shall be given by posting the same in five public places in such county for at least ten days prior to such sale. The notice of sale must specify the names of the pledgor and pledgee and the assignee, if any, the date, maturity and amount of the original obligation and the amount claimed to be due thereon, a description of the evidence of debt to

be sold, which shall contain the names of the makers, the date and maturity of such obligation to be sold, and the time and place of sale. Such sale may be made by the pledgee, his agent or attorney. A report of such sale must be made and filed, substantially as required by section 7503 in chattel mortgage foreclosures, and when so filed shall have the same force and effect. [1897, ch. 109; R. C. 1899, § 4764.]

Cannot sell collateral but must collect it. Deering v. Russell, 5 N. D. 319, 65 N. W. 691.

§ **6214. When pledgor may require sale.** Whenever property pledged can be sold for a price sufficient to satisfy the claim of the pledgee, the pledgor may require it to be sold and its proceeds to be applied to such satisfaction when due. [Civ. C. 1877, § 1778; R. C. 1899, § 4765.]

§ **6215. Application of proceeds.** After a pledgee has lawfully sold property pledged, or otherwise collected its proceeds he may deduct therefrom the amount due under the principal obligation and the necessary expenses of sale and collection; and must pay the surplus to the pledgor on demand. [Civ. C. 1877, § 1779; R. C. 1899, § 4766.]

§ **6216. Same.** When property pledged is sold by order of the pledgor before the claim of the pledgee is due the latter may retain out of the proceeds all that can possibly become due under his claim until it becomes due. [Civ. C. 1877, § 1780; R. C. 1899, § 4767.]

§ **6217. When pledgee cannot purchase.** A pledgee or pledge holder cannot purchase the property pledged except by direct dealing with the pledgor. [Civ. C. 1877, § 1781; R. C. 1899, § 4768.]

§ **6218. Foreclosure.** Instead of selling property pledged as hereinbefore provided a pledgee may foreclose the right of redemption by a judicial sale under the direction of a competent court; and in that case may be authorized by the court to purchase at the sale. [Civ. C. 1877, § 1782; R. C. 1899, § 4769.]

CHAPTER 77.

BOTTOMRY.

§ **6219. Defined.** Bottomry is a contract by which a ship or its freightage is hypothecated as security for a loan, which is to be repaid only in case the ship survives a particular risk, voyage or period. [Civ. C. 1877, § 1783; R. C. 1899, § 4770.]

§ **6220. Hypothecation by owner of ship.** The owner of a ship may hypothecate it or its freightage upon bottomry for any lawful purpose and at any time and place. [Civ. C. 1877, § 1784; R. C. 1899, § 4771.]

§ **6221. By master for what only.** The master of a ship may hypothecate it upon bottomry only for the purpose of procuring repairs or supplies which are necessary for accomplishing the objects of the voyage or for securing the safety of the ship. [Civ. C. 1877, § 1785; R. C. 1899, § 4772.]

§ **6222. Same; when only.** The master of a ship can hypothecate it upon bottomry only, when he cannot otherwise relieve the necessities of the ship and is unable to reach adequate funds of the owner or to obtain any upon the personal credit of the owner and when previous communication with him is precluded by the urgent necessity of the case. [Civ. C. 1877, § 1786; R. C. 1899, § 4773.]

§ **6223. Hypothecation of freightage by master.** The master of a ship may hypothecate freightage upon bottomry under the same circumstances as those which authorize an hypothecation of the ship by him. [Civ. C. 1877, § 1787; R. C. 1899, § 4774.]

§ **6224. Interest higher than legal rate.** Upon a contract of bottomry the parties may lawfully stipulate for a rate of interest higher than that allowed by the law upon other contracts. But a competent court may reduce the rate stipulated when it appears unjustifiable and exorbitant. [Civ. C. 1877, § 1788; R. C. 1899, § 4775.]

§ **6225. When enforceable, though unauthorized.** A lender upon a contract of bottomry made by the master of a ship as such may enforce the contract though the circumstances necessary to authorize the master to hypothecate the ship did not in fact exist, if after due diligence and inquiry the lender had reasonable grounds to believe and did in good faith believe in the existence of such circumstances. [Civ. C. 1877, § 1789; R. C. 1899, § 4776.]

§ **6226. Certain stipulation as to liability void.** A stipulation in a contract of bottomry imposing any liability for the loan independent of the maritime risks is void. [Civ. C. 1877, § 1790; R. C. 1899, § 4777.]

§ **6227. Recovery in case of loss.** In case of a total loss of the thing hypothecated from a risk to which the loan was subject the lender upon bottomry can recover nothing; in case of a partial loss he can recover only to the extent of the net value to the owner of the part saved. [Civ. C. 1877, § 1791; R. C. 1899, § 4778.]

§ **6228. When loan due.** Unless it is otherwise expressly agreed a bottomry loan becomes due immediately upon the termination of the risk, although a term of credit is specified in the contract. [Civ. C. 1877, § 1792; R. C. 1899, § 4779.]

§ **6229. Lien lost by delay in enforcing.** A bottomry lien is independent of possession and is lost by omission to enforce it within a reasonable time. [Civ. C. 1877, § 1793; R. C. 1899, § 4780.]

§ **6230. Preferred to all liens except what.** A bottomry lien, if created out of a real or apparent necessity in good faith, is preferred to every other lien or claim upon the same thing, excepting only a lien for seamens' wages, a subsequent lien of material men for supplies or repairs indispensable to the safety of the ship and a subsequent lien for salvage. [Civ. C. 1877, § 1794; R. C. 1899, § 4781.]

§ **6231. When last preferred.** Of two or more bottomry liens on the same subject the latter in date has preference if created out of necessity. [Civ. C. 1877, § 1795; R. C. 1899, § 4782.]

CHAPTER 78.

RESPONDENTIA.

§ **6232. Defined.** Respondentia is a contract by which a cargo or some part thereof, is hypothecated as security for a loan, the repayment of which is dependent on maritime risks. [Civ. C. 1877, § 1796; R. C. 1899, § 4783.]

§ **6233. Owner may hypothecate.** The owner of the cargo may hypothecate it upon respondentia at any time and place and for any lawful purpose. [Civ. C. 1877, § 1787; R. C. 1899, § 4784.]

§ **6234. When master may.** The master of a ship may hypothecate its cargo upon respondentia only in a case in which he would be authorized to hypothecate the ship and freightage, but is unable to borrow sufficient money thereon for repairs or supplies, which are necessary for the successful accomplishment of the voyage; and he cannot do so even in such case if there is no reasonable prospect of benefitting the cargo thereby. [Civ. C. 1877, § 1798; R. C. 1899, § 4785.]

§ **6235. Other sections applicable.** The provisions of sections 6224 to 6231 apply equally to loans on respondentia. [Civ. C. 1877, § 1799; R. C. 1899, § 4786.]

§ 6236. **Owner of ship must repay owner of cargo.** The owner of a ship is bound to repay the owner of its cargo all which the latter is compelled to pay under a contract of respondentia made by the master in order to discharge its lien. [Civ. C. 1877, § 1800; R. C. 1899, § 4787.]

CHAPTER 79.

MECHANIC'S LIENS.

§ 6237. **Who may and for what.** Any person who shall perform any labor upon or furnish any materials, machinery or fixtures for the construction or repair of any work of internal improvement or for the erecting, alteration or repair of any buildings or other structures upon land, or in making any other improvements thereon, including fences, sidewalks, paving, wells, trees, grades, drains or excavations under a contract with the owner of such land, his agent, trustee, contractor or subcontractor, or with the consent of such owner, shall upon complying with the provisions of this chapter, have for his labor done, or materials, machinery or fixtures furnished, a lien upon such building, erection or improvement and upon the land belonging to such owner on which the same is situated or to improve which the work was done, or the things furnished, to secure the payment for such labor, material, machinery or fixtures; provided, that no person who furnishes any materials, machinery or fixtures as aforesaid, for a contractor or a subcontractor shall be entitled to file such lien unless he notify the owner of the land by registered letter previous to the completion of said contract that he has furnished such materials, machinery or fixtures. The owner shall be presumed to have consented to the doing of any such labor or the making of any such improvement, if at the time he had knowledge thereof, and did not give notice of his objection thereto to the person entitled to the lien. The provisions of this section and chapter shall not be construed to apply to claims or contracts for furnishing lightning rods or any of their attachments. [1899, ch. 109; R. C. 1899, § 4788.]

Lien not destroyed by repeal of law. Craig v. Herzman, 9 N. D. 140, 81 N. W. 288.

§ 6238. **Single contract for several buildings.** If labor is done or materials furnished under a single contract for several buildings, erections or improvements, the person furnishing the same shall be entitled to a lien therefor as follows:

1. If such buildings, erections or improvements are upon a single farm, tract or lot upon all such buildings, erections and improvements and the farm, tract or lot upon which the same are situated.

2. If such buildings, erections or improvements are upon separate farms, tracts or lots, upon all such buildings, erections and improvements and the farms, tracts or lots upon which the same are situated; but upon the foreclosure of such lien the court may in the cases provided for in this subdivision apportion the amount of the claim among the several farms, tracts or lots in proportion to the enhanced value of the same produced by means of such labor or materials, if such apportionment is necessary to protect the rights of third persons. [R. C. 1895, § 4789.]

§ 6239. **On railway contracts.** Every person who furnishes any labor, skill or material for constructing, altering or repairing any line of railway or any improvement or structure appertaining to any line of railway by virtue of any contract with the owner, his agent, contractor or subcontractor shall have a lien upon such line of railway and the right of way thereof and upon all bridges, depots, offices and other structures appertaining to such line of railway and all franchises, privileges and immunities granted to the

owner of such line of railway for the construction and operation thereof to secure the payment for such labor, skill and materials upon filing a statement of his demand therefor in accordance with the provisions of the next section within ninety days from the last day of the month in which such labor or material was furnished; but a failure to file the same within the time aforesaid shall not defeat the lien except to the extent specified in the next section. [C. Civ. P. 1877, § 657; R. C. 1895, § 4790.]

§ **6240. Account to be filed with clerk.** Every person, who wishes to avail himself of the provisions of this chapter, shall file with the clerk of the district court of the county or judicial subdivision in which the property to be charged with the lien is situated and within ninety days after all the things aforesaid shall have been furnished or the labor done a just and true account of the demand due him after allowing all credits and containing a correct description of the property to be charged with such lien and verified by affidavit; but a failure to file the same within the time aforesaid shall not defeat the lien, except as against purchasers or incumbrancers in good faith and for value whose rights accrue after the ninety days and before any claim for the lien is filed, or as against the owner except the amount paid to the contractor after the expiration of the ninety days and before the filing of the same. [C. Civ. P. 1877, § 662; R. C. 1895, § 4791.]

Description sufficient if it enables parties to identify property with reasonable certainty. Howe & Co. v. W. G. Smith et al, 6 N. D. 432, 71 N. W. 552.

Account sufficient upon which to base a lien, which gives total amount of contract and balance due. Turner v. St. John, 8 N. D. 245, 77 N. W. 340.

Honest mistake in account will not defeat lien. Jurat not necessary to validity of lien. Turner v. St. John, 8 N. D. 245, 77 N. W. 340.

§ **6241. Clerk's record of liens.** The clerk of the district court shall indorse upon every account the date of its filing and make an abstract thereof in a book to be kept by him for that purpose and properly indexed, containing the date of its filing, the name of the person filing the lien, the amount of such lien, the name of the person against whose property the lien is filed and a description of the property to be charged with the same. [C. Civ. P. 1877, § 663; R. C. 1895, § 4792.]

§ **6242. Priority of mechanic's liens.** Liens under the provisions of this chapter shall have priority in the following order:

1. For manual labor.
2. For materials.
3. Subcontractors, other than manual laborers.
4. Original contractors.

Liens in the same class filed within the ninety days shall share ratably in the security; but liens in the same class filed thereafter shall have priority in the order of the filing of the accounts thereof as aforesaid. Liens under the provisions of this chapter shall be preferred to all other liens or incumbrances upon such building, erection or other improvement and the land on which the same is situated, or to improve which the labor was done or things furnished, or either of them, filed or docketed subsequent to the commencement of such building, erection or other improvement. [C. Civ. P. 1877, § 664; R. C. 1895, § 4793.]

Mortgage executed after commencement of construction of building and before its completion subject to mechanic's lien if statute complied with. Priority may be waived by laches. Bastien v. Barras, 10 N. D. 29, 84 N. W. 559.

§ **6243. Land subject to lien.** The entire land upon which any such building, erection or other improvement is situated, or to improve which the labor was done or things furnished, including that portion of the same not covered therewith, shall be subject to all liens created by this chapter to the extent of all the right, title and interest owned therein by the owner thereof for whose immediate use or benefit such labor was done or things furnished and when the interest owned in such land by such owner of such building,

erection or other improvement is only a leasehold interest, the forfeiture of such lease for the nonpayment of rent or for noncompliance with any of the other stipulations therein shall not forfeit or impair such lien so far as it concerns such buildings, erections and improvements, but the same may be sold to satisfy such lien and be removed within thirty days after the sale thereof by the purchaser. [C. Civ. P. 1877, § 665; R. C. 1895, § 4794.]

Mortgage given before completion of building subject to mechanic's lien though contract for building may have been changed if building when completed is substantially same as contemplated. Haxtun Steam Co. v. Gordon et al, 2 N. D. 246, 50 N. W. 708.

Mechanic's lien. Priority of mortgage, when. Lumber Co. v. Danner, 3 N. D. 470, 57 N. W. 343.

Does not impair obligations of a subsisting mortgage. Craig v. Herzman, 9 N. D. 140, 81 N. W. 288.

The rule of prospective operation does not apply to statutes of procedure. Craig v. Herzman, 9 N. D. 140, 81 N. W. 288.

To foreclose lien upon building and sell apart from land must show leasehold interest or existing liens upon land. Gull River Lumber Co. v. Briggs, 9 N. D. 485, 84 N. W. 349.

§ **6244. Buildings on homesteads.** Whenever any work or labor is done, or materials furnished for the erection or construction of any building or improvement upon lands held or occupied under a filing under any of the land laws of the United States, and by virtue of any contract with the party so holding or occupying said lands, the party so furnishing such work or labor, or materials, shall upon compliance with the provisions of this chapter have a lien upon such building or improvement for the value of the work and labor, or materials, so furnished, and the party enforcing such lien may have such building or improvement sold on execution and may remove the same from such land within a time to be fixed by the court. [1901, ch. 101.]

Right to remove building from land covered by homestead filing. Mahon v. Surerus, 9 N. D. 57, 81 N. W. 64.

§ **6245. Action to enforce.** Any person having a lien by virtue of this chapter may bring an action to enforce the same in the district court in the county or judicial subdivision in which the property is situated, and any number of persons claiming liens against the same property may join in the same action and when separate actions are commenced the court may consolidate them. Whenever in the sale of the property subject to the lien there is a deficiency of the proceeds, judgment may be entered for the deficiency in like manner and with like effect as in actions for the foreclosure of mortgages. [C. Civ. P. § 667; 1883, ch. 83, § 1; R. C. 1895, § 4796; 1905, ch. 130.]

§ **6246. Requiring suit to be commenced.** Upon the written demand of the owner, his agent or contractor, served on the person holding the lien, requiring him to commence suit to enforce such lien, such suit shall be commenced within thirty days thereafter, if the debt for which the lien is security is due and if not due, within thirty days after the same becomes due or the lien shall be forfeited. [C. Civ. P. 1877, § 668; R. C. 1899, § 4797.]

§ **6247. Assignment of claims.** All claims for which liens may be or have been filed and rights of action to recover therefor under this chapter may be assigned by an instrument in writing and such assignment shall vest in the assignee all rights and remedies herein given, subject to all defenses that might have been interposed, if such assignment had not been made. [C. Civ. P. 1877, § 668; R. C. 1899, § 4797.]

§ **6248. Owner defined.** Every person for whose immediate use and benefit any building, erection or improvement is made, having the capacity to contract, including guardians of minors or other persons shall be included in the word "owner" thereof. [C. Civ. P. 1877, § 669; R. C. 1899, § 4798.]

Party residing on land is the owner. Mahon v. Surerus, 9 N. D. 57, 81 N. W. 64.

§ 6249. **Satisfaction filed when, where and how. Penalty.** Every holder or owner of a mechanic's lien shall within twenty days after the payment of the same cause to be filed a properly executed satisfaction of such lien and file the same with the clerk of the district court of the county in which such lien has been filed, which satisfaction shall be filed and entered by said clerk without fee or charge. Every person, firm or corporation failing to comply with the provisions of this section shall be subject to a fine of not less than ten or more than fifty dollars and in addition thereto the costs and damages sustained by reason of such failure. [C. Civ. P. 1877, § 670; R. C. 1895, § 4799; 1905, ch. 131.]

§ 6250. **Subcontractor defined.** All persons furnishing things or doing work provided for by this chapter shall be considered subcontractors, except such as have therefor contracts directly with the owner, proprietor, his agent or trustee. [C. Civ. P. 1877, § 671; R. C. 1899, 4800.]

§ 6251. **When taking collateral security does not impair right.** The taking of collateral or other security for an indebtedness, for which a lien might be claimed under the provisions of this chapter, shall in no way impair the right to such lien, unless such security shall be by express agreement given and received in lieu of such lien. [R. C. 1895, § 4801.]

CHAPTER 80.

BONDS FOR LABOR AND MATERIAL FOR PUBLIC BUILDINGS.

§ 6252. **Bonds from contractors on public improvements.** It shall be the duty of every public officer or board authorized to enter into a contract for the erection, repair, alteration or betterment of any public building or any other public improvements before entering into any such contract, to take from the contractor a good and sufficient bond for an amount at least equal to the price stated in the contract, conditioned to be void if the contractor and all subcontractors shall pay all bills and claims on account of labor or materials furnished in and about the performance of said contract, including all demands of subcontractors, said bond to stand as security for all such bills, claims and demands until the same are fully paid. The obligee in said bond shall be the state of North Dakota; but any person having any lawful claim against the contractor, or any subcontractor, on account of labor or materials, or both, furnished in and about the performance of said contract, may institute an action to recover the same in his own name upon said bond, in the same manner and with like effect as though the said bond were made payable to him. [1901, ch. 133, § 1.]

§ 6253. **Personally liable for bills.** Any officer and the members of any board who shall fail to take such a bond before entering into such a contract shall be personally liable for all such bills, claims and demands which shall not be paid within thirty days after the completion of the work. [1901, ch. 133, § 2.]

§ 6254. **Sureties.** When the penal sum of said bond is five thousand dollars or under, the same shall be signed by at least two sureties, each of whom shall justify in the full amount of said bond. When the penal sum of said bond is in excess of five thousand dollars and not greater than twenty thousand dollars, said bond shall be signed by at least four sureties, who shall justify in the amount thereof. And when said penal sum is in excess of twenty thousand dollars and not greater than fifty thousand dollars, said bond shall be signed by at least eight sureties, each of whom shall justify in at least one-half the amount of said bond; but it shall be sufficient in any case if said bond is signed by a reputable surety company authorized to enter into such an obligation. [1901, ch. 133, § 3.]

§ 6255. **Bond shall be filed.** Before said contract is entered into, said bond, duly signed and acknowledged, with the proper affidavits of justification attached thereto, shall be filed in the office of the clerk of the district court of the county in which such contract is to be performed, and approved by said clerk, to be kept as one of the permanent records of the office. [1901, ch. 133, § 4.]

CHAPTER 81.

MINER'S LIEN.

§ 6256. **Lien for work or material furnished.** Every miner or other person, who at the request of the owner, or his agent, of any lode, lead, ledge, mine or deposit bearing gold, cinnabar or copper, or of any coal bank or mine, or at the request of any contractor or subcontractor, shall perform any labor whatever on such mine or furnish any timber, rope, nails or any other materials for timbering shafts or levels for the mine owned by such owner, or who shall furnish any kind of materials for erecting any windlass, whims or any other hoisting apparatus or machinery, or for any car track, cars, tunnels, drifts or openings thereon, or shall perform any labor in any tunnel shall have a lien upon such lode, lead, ledge, mine, deposit, bank or tunnel to secure the payment of the same. [1879, ch. 41, § 1; R. C. 1895, § 4805.]

§ 6257. **Attested account to owner. Amount of claim deducted from payment to contractor.** Any miner or other person doing and performing any work or furnishing any material as specified in the last section, under a contract either express or implied between the owner of any mine or his agent and any contractor working on such mine, whether such work shall be performed or materials furnished as miner, laborer or otherwise whose demand for work so performed or materials so furnished has not been paid, may deliver to the owner of such mine or tunnel or to his agent or superintendent, an attested account of the amount in value of the work and labor thus performed or of the materials thus furnished and remaining unpaid, and thereupon such owner or his agent shall retain out of the first subsequent payments to such contractor the amount so due for such work and labor or materials furnished for the benefit of the person so performing or furnishing the same. [1879, ch. 41, § 2; R. C. 1895, § 4806.]

§ 6258. **Duty of owner when account presented.** Whenever any account for labor performed or materials furnished as specified in the last preceding section shall be placed in the hands of the owner of any mine or tunnel or his agent, it shall be the duty of such owner or agent to furnish such contractor with a copy of such papers, so that if there is any disagreement between such contractor or his subcontractor and the creditor of either, as the case may be, they may by amicable adjustment or by arbitration ascertain the sum due if any; and if such contractor or subcontractor shall not within ten days after the receipt of such papers give such owner or his agent written notice that he intends to dispute the claim, or if ten days after giving such notice he shall refuse or neglect to have the matter adjusted as aforesaid, he shall be considered as assenting thereto; and such owner or his agent may pay the same when it becomes due and for that purpose may deduct the amount out of any moneys due such contractor, who may in like manner deduct such amount from any money due by him to his subcontractors in case such account or demand is against such subcontractor for work and labor

performed or materials furnished as aforesaid. [1879, ch. 41, § 3; R. C. 1895, § 4807.]

§ **6259. Amount due contractors recovered from the owner.** The amount which may be due from any contractor to his creditor may be recovered from such owner by the creditor of such contractor in an action at law to the extent in value of any balance due by the owner to his contractor under the contract with him at the time of the notice first given as aforesaid, or subsequently according to such contract or under the same. [1879, ch. 41, § 4; R. C. 1895, § 4808.]

§ **6260. Account to be made and filed with clerk.** Any person entitled to a lien under this chapter shall make an account in writing of the items of labor, skill, machinery and material furnished, as the case may be, and after making oath thereto shall within sixty days from the time of completing such labor or furnishing the last item of machinery, materials or other things, file the same in the office of the clerk of the district court of the county or subdivision in which the lode, lead, ledge, mine, deposit, bank or tunnel may be situated, for or upon which labor, skill, machinery or material shall have been furnished; and also file at the same time a correct description of the property to be charged with such lien, which account and description so made and filed shall be recorded in a separate book to be provided for that purpose by such clerk of court, and thereupon the same shall from the time of the completion of the work of furnishing the last item of machinery or material, and for one year thereafter, operate as a lien on the property charged in such description; when any work and labor has been performed or materials furnished as aforesaid under a written contract, the same or a copy thereof shall be filed with such account and description; provided, that all lien claims for labor performed or materials furnished shall be concurrent liens upon the property charged, and shall be paid pro rata out of the proceeds arising from the sale thereof, if the same shall be sold or upon settlement without sale. [1879, ch. 41, § 5; R. C. 1899, § 4809.]

§ **6261. Foreclosure.** Any person holding such lien may foreclose the same in the same manner as a mechanic's lien; but in all actions instituted for the foreclosure of such lien, all persons claiming liens upon the property charged shall be made parties to such action, and the rights of all parties shall be determined by the court, and such order made in regard thereto as shall preserve and protect the rights of all parties. [1879, ch. 41, § 6; R. C. 1895, § 4810.]

§ **6262. Satisfaction must be granted when lien paid.** Any person who shall have filed his account and perfected his lien under the provisions of this chapter and shall have received satisfaction of his claim or demand and the legal cost of his proceedings thereunder, shall upon the request of any person interested, and within six days after such request, enter satisfaction of his lien in the office where such account and lien is of record, which shall forever thereafter discharge, defeat and release the same; and if any person holding a lien as aforesaid shall receive satisfaction as hereinbefore specified, or having been tendered the amount due on his claim or demand with legal costs, shall not within six days after receiving such satisfaction or tender of payment, enter satisfaction as aforesaid, he shall forfeit and pay to the persons aggrieved double the amount of damages which may have been sustained in consequence of such failure or neglect, if he shall have been requested in such case to enter satisfaction as aforesaid. [1879, ch. 41, § 7; R. C. 1899, § 4811.

§ **6263. Chapter applies to oil wells, etc.** The provisions of this chapter shall apply to oil wells, or springs, iron and lead mines, as well as all other mines not herein specified, so far as the same may be applicable. [1879, ch. 41, § 8; R. C. 1899, § 4812.

CHAPTER 82.

LIENS FOR KEEPING AND PASTURING STOCK.

§ **6264. Who may have.** Any farmer, ranchman or herder of cattle, tavern keeper or livery stable keeper, to whom any horses, mules, cattle or sheep shall be intrusted for the purpose of feeding, herding, pasturing or ranching shall have a lien upon said horses, mules, cattle or sheep for the amount that may be due for such feeding, herding, pasturing or ranching, and shall be authorized to retain possession of such horses, mules, cattle or sheep until the said amount is paid; provided, that these provisions shall not be construed to apply to stolen stock. [C. Civ. P. 1877, § 672; R. C. 1899, § 4813.]

Temporary possession of a horse does not vitiate lien. Welsh v. Barnes, 5 N. D. 277, 65 N. W. 675.

§ **6265. Lien only against owner.** The provisions of this chapter shall not be construed to give any farmer, ranchman or herder of cattle, tavern keeper or livery stable keeper any lien upon horses, mules, cattle or sheep put into their keeping for the purposes mentioned in the previous section, when said property was not owned by the person intrusting the same at the time of delivering them into the possession of said farmer, ranchman, herder, tavern keeper or livery stable keeper. [C. Civ. P. 1877, § 673; R. C. 1899, § 4814.]

§ **6266. Priority over other liens.** Such lien shall have priority over all other liens on such property for ten days after the receipt of the same and shall thereafter have priority over all other liens on such property, if the person to whom such property is intrusted as in this chapter provided shall within such ten days:

1. Serve upon the holder of an earlier lien upon such property, if known and a resident of this state, written notice that such property has been intrusted to him for some one of the purposes mentioned in section 6264, specifying which, and by whom; or,
2. If the residence of the holder of any such lien is unknown or he is not a resident of this state, publish for one week in some newspaper published in the county in which such property is being kept and if there is no such newspaper then in a newspaper published at the seat of government, a notice of the kind provided for in subdivision 1 of this section. [R. C. 1895, § 4815.]

CHAPTER 83.

LIENS FOR SERVICE OF SIRES.

§ **6267. Filing statement of pedigree prerequisite.** Every owner of a sire charging a service fee, in order to have a lien for service upon the offspring of any such sire under the provisions of this chapter, shall file a statement, verified by oath, to the best of his knowledge and belief, with the commissioner of agriculture and labor, giving the name, age, description and pedigree or breeding of such sire, so far as known, as well as the terms and conditions upon which he is advertised for service. [1899, ch. 146, § 1; R. C. 1899, § 4816.]

§ **6268. Certificate of commissioner of agriculture. Filing and posting.** The commissioner of agriculture and labor, upon receipt of the statement specified in the last section, shall issue a certificate to the owner thereof, who shall file a copy of such certificate with the register of deeds

of the county or counties in which such sire shall stand for service, and copies of such certificate shall also be posted conspicuously in all places where such sire shall stand for service, which certificate shall state the name, age, description, pedigree and ownership of such sire and the terms and conditions upon which the sire is advertised for service. Such certificate shall be procured and filed prior to the service of such sire, and all certificates procured and posted according to this section shall be operative as long as the terms and conditions remain the same. The original certificate shall follow the sire in all changes of ownership and all transfers shall be recorded in the office of the commissioner of agriculture and labor and a bill of sale filed with the register of deeds as is provided for the filing of the original certificate, and that the provisions of this chapter so far as relates to the filing of the statement aforesaid have been complied with, and the commissioner of agriculture and labor shall have the power to charge one dollar for each certificate and recording thereof, and twenty-five cents for all copies of certificates, and twenty-five cents for filing certificate with register of deeds, and twenty-five cents for recording each transfer. [1899, ch. 146, § 2; R. C. 1899, § 4817.]

§ **6269. Procedure to obtain lien.** The owner of any sire receiving such certificate shall have a lien upon the offspring of such sire and upon the female served, upon filing at any time within eight months after the service, in the office of the register of deeds of the county in which such female is kept at the time of service, a statement of the account thereof together with a description of the female served. Such lien shall exist for a period of three years from the date of filing the statement and shall have priority over all other liens and incumbrances upon the offspring and the female served. [1899, ch. 146, § 3; R. C. 1899, § 4818.]

§ **6270. Foreclosure.** After the expiration of nine months from the filing of the lien, or at any time after an attempt shall be made to dispose of the female, or remove her from the county, the lien may be enforced by a sale of the property covered thereby, upon the notice and in the manner provided for the foreclosure of mortgages upon personal property and the cost and fees for such foreclosure shall be the same as are provided in section 7507 of the code of civil procedure. [1899, ch. 146, § 4; R. C. 1899, § 4819.]

CHAPTER 84.

SEED LIEN.

§ **6271. Seed liens, who may have.** Any person who shall furnish to another seed to be sown or planted on the lands owned or contracted to be purchased, used, occupied or rented by him, shall upon filing the statement provided for in the next section, have a lien upon all the crop produced from the seed so furnished, to secure the payment of the purchase price thereof. [1887, ch. 150, § 1; R. C. 1895, § 4820; 1901, ch. 181.]

§ **6272. Procedure to obtain lien.** Any person entitled to a lien under this chapter shall within thirty days after the seed is furnished file in the office of the register of deeds of the county in which the seed is to be sown or planted a statement in writing, verified by oath, showing the kind and quantity of seed, its value, the name of the person to whom furnished and a description of the land upon which the same is to be or has been planted or sown. Unless the person entitled to the lien shall file such statement within the time aforesaid he shall be deemed to have waived his right thereto. [1887, ch. 150, § 3; R. C. 1895, § 4821.]

The "account in writing" must embrace description of land on which seed has been or is to be planted. Omission of description is fatal to the lien. Lavin v. Bradley, 1 N. D. 291, 47 N. W. 384.

§ **6273. Priority.** The lien given by this chapter, shall, as to the crops covered thereby, have priority over all other liens and incumbrances thereon except liens given by chapter 85. [1887, ch. 150, § 2; R. C. 1895, § 4822.]

CHAPTER 85.

THRESHING LIEN.

§ **6274. Who may have.** Any owner or lessee of a threshing machine who threshes grain for another therewith shall, upon filing the statement provided for in the next section, have a lien upon such grain for the value of his services in threshing the same from the date of the commencement of the threshing. [1889, ch. 88, § 1; R. C. 1895, § 4823.]

Proof necessary to establish lien. Martin v. Hawthorne, 5 N. D. 66, 63 N. W. 895.

See note 9 N. D. 630.

§ **6275. Procedure to obtain lien.** Any person entitled to a lien under this chapter shall, within thirty days after the threshing is completed, file in the office of the register of deeds of the county in which the grain was grown a statement in writing, verified by oath, showing the amount and quantity of grain threshed, the price agreed upon for threshing the same, the name of the person for whom the threshing was done and a description of the land upon which the grain was grown. Unless the person entitled to the lien shall file such statement within the time aforesaid he shall be deemed to have waived his right thereto. [1889, ch. 88, § 2; R. C. 1895, § 4824.]

Statement to be filed must contain description of land whereon grain was grown. Owners and operators of machine only entitled to lien. Parker v. Bank, 3 N. D. 87, 54 N. W. 313; Martin v. Hawthorn, 3 N. D. 412, 57 N. W. 87.

Failure to set forth "the amount and quantity of grain threshed" in statement filed with clerk of court fatal to lien. Moher v. Rasmusson, 12 N. D. 71, 95 N. W. 152.

§ **6276. Priority.** Such lien shall have priority over all other liens and incumbrances upon such grain. [1889, ch. 88, § 2; 1890, ch. 87, § 1; R. C. 1895, § 4825.]

CHAPTER 86.

FARM LABORER'S LIEN.

§ **6277. Who may have.** Any person who performs services for another in the capacity of farm laborer between the first day of April and the first day of December in any year, shall have a lien on all crops of every kind grown, raised or harvested by the person for whom the services were performed during said time as security for the payment of any wages due or owing to such persons for services so performed, and said lien shall have priority over all other liens, chattel mortgages or incumbrances, excepting, however, seed grain and threshers' liens; provided, that the wages for which a lien may be obtained must be reasonable and not in excess of that which is usually charged for the same kind of work in the locality where the labor is performed; provided, further, that in case any such person without cause quits his employment before the expiration of the time for which he is employed, or if he shall be discharged for cause, then he shall not be entitled to a lien as herein provided. [1895, ch. 63, § 1; R. C. 1899, § 4826.]

§ **6278. How lien obtained.** In order to acquire a lien, as specified in the preceding section, the person performing such services shall within thirty days after the services are fully performed, file in the office of the register of deeds of the county in which any of the real estate is situated

on which any crop is grown, on which a lien is claimed, an affidavit and notice, setting forth the terms of the employment, the name of the employer, the time when the services were commenced and when ended, the wages agreed upon, if any, and if not agreed upon, then the reasonable value of the same, the terms of payment, if any, and a description of the real estate on which any crop is grown, or has been grown, or harvested, on which a lien is claimed, the amount paid him, if any, and the amount remaining unpaid, and that said laborer claims a lien for the same. [1895, ch. 63, § 2; R. C. 1899, § 4827; 1901, ch. 87.]

§ **6279. Duty of register.** It shall be the duty of the register of deeds to file and enter said affidavit and notice in the manner required by law for filing and entering chattel mortgages, entering employers as mortgagors and laborers as mortgagees, and he shall be entitled to a fee of ten cents for filing the same. [1895, ch. 63, § 3; R. C. 1899, § 4828.]

§ **6280. Penalty for disposing of property covered by.** If the person for whom such services were performed fails to pay for the same when due, or if he shall sell, conceal or dispose of the property covered by said lien or any part thereof, then the owner of such lien shall have the right to take full and absolute possession of all the property covered by such lien and sell the same in the same manner and upon the notice provided by law for the foreclosure of chattel mortgages and the cost and fees for foreclosing shall be the same. [1895, ch. 63, § 4; R. C. 1899, § 4829.]

CHAPTER 87.

OTHER LIENS.

§ **6281. Vendor's lien on realty.** One who sells real property has a special or vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer. [Civ. C. 1877, § 1801; R. C. 1899, § 4830.]

Only seller of real estate has vendor's lien thereon. Bray v. Booker, 6 N. D. 526, 72 N. W. 933.

Vendor's lien waived by taking collateral security. Bray v. Booker, 8 N. D. 347, 79 N. W. 293.

§ **6282. When lien waived.** When a buyer of real property gives to the seller a written contract for payment of all or part of the price, an absolute transfer of such contract by the seller, waives his lien to the extent of the sum payable under the contract, but a transfer of such contract in trust to pay debts and return the surplus is not a waiver of the lien. [Civ. C. 1877, § 1802; R. C. 1899, § 4831.]

§ **6283. Certain liens subject to creditor's rights.** The liens defined in sections 6281 and 6285 shall be subject to the rights of subsequent creditors without notice, or purchasers or incumbrancers in good faith and for value. [Civ. C. 1877, § 1803; R. C. 1895, § 4832.]

§ **6284. Vendor's lien on personalty.** One who sells personal property has a special lien thereon, dependent on possession for its price, if it is in his possession when the price becomes payable; and may enforce his lien in like manner as if the property was pledged to him for the price. [Civ. C. 1877, § 1804; R. C. 1899, § 4833.]

§ **6285. Purchaser's lien on realty.** One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back in case of a failure of consideration. [Civ. C. 1877, § 1805; R. C. 1899, § 4834.]

§ **6286. Lien for improvement, carriage, etc., of personalty.** Every person who, while lawfully in possession of an article of personal property, renders

any service to the owner thereof by labor or skill employed for the protection, improvement, safe-keeping or carriage thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due to him from the owner for such service. [Civ. C. 1877, § 1806; R. C. 1899, § 4835.]

§ **6287. Factor's lien.** A factor has a general lien dependent on possession for all that is due to him as such upon all articles of commercial value that are intrusted to him by the same principal. [Civ. C. 1877, § 1807; R. C. 1899, § 4836.]

Factor's lien dependent upon possession. How waived. Possession question of fact. Rosenbaum v. Hayes, 8 N. D. 461, 79 N. W. 987; Rosenbaum v. Hayes, 5 N. D. 476, 67 N. W. 951; Rosenbaum v. Hayes, 10 N. D. 311, 86 N. W. 973.

§ **6288. Banker's lien.** A banker has a general lien dependent on possession upon all property in his hands belonging to a customer for the balance due to him from such customer in the course of the business. [Civ. C. 1877, § 1808; R. C. 1899, § 4837.]

Whether a bank having a general balance of a depositor should apply it on his note to the exoneration of a surety, discussed, but not decided, in Bank v. Humphrey, 6 S. D. 415, 61 N. W. 444.

§ **6289. Shipmaster's lien.** The master of a ship has a general lien independent of possession upon the ship and freightage for advances necessarily made, or liabilities necessarily incurred by him for the benefit of the ship, but has no lien for his wages. [Civ. C. 1877, § 1809; R. C. 1899, § 4838.]

§ **6290. Mate and seaman's lien for wages.** The mate and seamen of a ship have a general lien independent of possession upon the ship and freightage for their wages, which is superior to every other lien. [Civ. C. 1877, § 1810; R. C. 1899, § 4839.]

§ **6291. Officer's lien in attachment or execution.** An officer who levies an attachment or execution upon personal property acquires a special lien dependent on possession upon such property, which authorizes him to hold it until the process is discharged or satisfied, or a judicial sale of the property is had. [Civ. C. 1877, § 1811; R. C. 1899, § 4840.]

§ **6292. Lien of hotel keepers, etc.** Hotel, inn, boarding house and lodging house keepers shall have a lien upon the baggage and other property of their guests, boarders or lodgers, brought into such hotel, inn, boarding or lodging house by such guests, boarders or lodgers for the proper charges due from such guests, boarders or lodgers for their accommodation, board and lodging and room rent and such extras as are furnished at their request and the right to the possession of such baggage or other property until all such charges are paid. [Civ. C. 1877, § 1062; R. C. 1895, § 4841.]

§ **6293. Attorney's lien.** An attorney has a lien for a general balance of compensation in and for each case upon:

1. Any papers belonging to his client which have come into his hands in the course of his professional employment in the case for which the lien is claimed.
2. Money in his hands belonging to his client in the case.
3. Money due his client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed from the time of giving notice in writing to such adverse party or the attorney of such party, if the money is in the possession or under the control of such attorney, which notice shall state the amount claimed and in general terms for what services.
4. After judgment in any court of record such notice may be given and the lien made effective against the judgment debtor by entering the same in the judgment docket opposite the entry of the judgment. [R. C. 1899, § 4842.]

Lien for compensation extends to undertaking for payment of judgment. Priority. Notice of lien, upon whom binding. Clark v. Sullivan & Voss, 3 N.

D. 280, 55 N. W. 733; (For right of offset by surety see Clark v. Sullivan, 2 N. D. 103.) Leighton v. Severson, 8 S. D. 350, 66 N. W. 938.

Lien is dormant until actively asserted. Pirie v. Harkness, 3 S. D. 178, 56 N. W. 98; Hroch v. Aultman, Taylor Co., 3 S. D. 477, 54 N. W. 369.

Judgment on appeal for costs against plaintiff may be set off pro tanto against a similar judgment in the same action in plaintiff's favor, regardless of lien. Lindsay v. Pettigrew, 8 S. D. 244, 66 N. W. 321.

§ **6294. Release by bond.** Any person interested may release such lien by executing a bond in a sum double the amount claimed, or in such sum as may be fixed by a judge, payable to the attorney with security to be approved by the clerk of the court, conditioned to pay the amount finally due the attorney for his services, which amount may be ascertained by suit on the bond. Such lien will be released unless the attorney within ten days after demand therefor, furnishes any party interested a full and complete bill of particulars of the services and amount claimed for each item or written contract with the party for whom the services were rendered. [R. C. 1899, § 4843.]

§ **6295. Lien for repairs of personalty.** A person who makes, alters or repairs any article of personal property, at the request of the owner or legal possessor of the property, has a lien on the same for his reasonable charges for work done and materials furnished, and may retain possession of the same until the charges are paid. [Civ. C. 1877, § 1814; R. C. 1895, § 4844.]

Mechanic's lien for repairs properly perfected superior to prior mortgage lien. Gaar, Scott & Co. v. Clements, 4 N. D. 559, 62 N. W. 640.

CHAPTER 88.

FILING AND FORECLOSING LIENS ON PERSONAL PROPERTY.

§ **6296. Liens foreclosed, how.** Upon default being made in the payment of a debt secured by a lien upon personal property, such lien may be foreclosed upon the notice, and in the manner provided for the foreclosure of mortgages upon personal property, and the holder of such lien shall be entitled to the possession of the property covered thereby for the purpose of foreclosing the same. The costs and fees for such foreclosure shall be the same as are provided in section 7507 of the revised codes. A report of such foreclosure shall be made in the manner set forth in section 7503 of the revised codes; provided, that when the lien has not been filed in the office of any register of deeds, then a report of such sale shall be filed in the office of the register of deeds of the county wherein the property is sold. Such liens may also be foreclosed by action as provided in chapter 29 of the code of civil procedure. [R. C. 1895, § 4845; 1903, ch. 120.]

§ **6297. Duty of register of deeds as to liens filed.** It shall be the duty of the register of deeds to file and index any statement or lien upon personal property, required by law to be filed in his office, the same as a mortgage upon personal property, the person filing the lien being treated as mortgagee and the person against whom the lien is filed as mortgagor. [R. C. 1895, § 4846.]

CHAPTER 89.

STOPPAGE IN TRANSIT.

§ **6298. When authorized.** A seller or consignor of property, whose claim for its price or proceeds has not been extinguished, may, upon the insolvency of the buyer or consignee becoming known to him after parting with the

property, stop it while on its transit to the buyer or consignee, and resume possession thereof. [Civ. C. 1877, § 1815; R. C. 1899, § 4847.]

Right may exist when goods in warehouse. Powell v. McKechnie, 3 Dak. 319, 19 N. W. 410.

§ **6299. Insolvency defined.** A person is insolvent, within the meaning of the last section, when he ceases to pay his debts in the manner usual with persons of his business, or when he declares his inability or unwillingness to do so. [Civ. C. 1877, § 1816; R. C. 1899, § 4848.]

§ **6300. When transit ends.** The transit of property is at an end when it comes into the possession of the consignee, or into that of his agent, unless such agent is employed merely to forward the property to the consignee. [Civ. C. 1877, § 1817; R. C. 1899, § 4849.]

§ **6301. How effected.** Stoppage in transit can be effected only by notice to the carrier or depositary of the property, or by taking actual possession thereof. [Civ. C. 1877, § 1818; R. C. 1899, § 4850.]

§ **6302. Not rescission of sale.** Stoppage in transit does not of itself rescind a sale, but it is a means of enforcing the lien of the seller. [Civ. C. 1877, § 1819; R. C. 1899, § 4851.]

CHAPTER 90.

NEGOTIABLE INSTRUMENTS.

The following decisions have been made by the supreme court of this state under the negotiable instrument laws passed previous to 1899 and in force to July 1, 1905, which have now been repealed and therefore no sections have been designated:

School township warrants are not negotiable instruments in the sense that their negotiation will cut off all defenses to them existing against them in the hands of the payee. Bank v. School Township, 1 N. D. 26, 44 N. W. 1002.

As to what constitutes promissory note, and defense to action on, see National German American Bank v. Lang, 2 N. D. 66, 49 N. W. 414.

Where a purchaser of property gives his note therefor and afterwards rescinds the contract of sale on the ground of breach of warranty, he may recover the amount of the note and interest without first paying the same, where note is negotiated before maturity to an innocent purchaser for value. What judgment in such case should provide. Bona fide purchaser for value takes note free from such defense. Fahey v. Esterly Machine Co., 3 N. D. 220, 55 N. W. 580.

Bona fide purchasers charged with knowledge of all requirements of statute under which securities issued. People's Bank v. School District, 3 N. D. 496, 57 N. W. 787.

Compromise of a controversy is a good consideration for a promissory note. McGlynn v. Scott, 4 N. D. 18, 58 N. W. 460.

Provision for payment of exchange in addition to principal and interest in a municipal bond destroys its negotiability. Purchaser of a non-negotiable bond is protected by recitals of facts contained in a certificate thereto, made by a person authorized to determine the facts and make the certificate. Flagg v. School District, 4 N. D. 30, 58 N. W. 499.

Laches in pursuing legal remedies against the makers exonerates guarantors. Insolvency of the makers does not excuse laches in not foreclosing upon mortgage securities nor protracted delay in prosecuting their legal remedies upon collateral securities. Roberts, Throp & Co. v. Laughlin, 4 N. D. 167, 59 N. W. 967

County warrants are not negotiable instruments. Erskine v. Steele County, 4 N. D. 339, 60 N. W. 1050.

Provision in note for payment of expenses of collection including reasonable attorney's fees, destroys its negotiability. First National Bank v. Laughlin, 4 N. D. 391, 61 N. W. 473.

Erasure of a material part of note after delivery without consent of maker, if fraudulently done, extinguishes the note as a legal obligation and debt evidenced by it. First National Bank v. Laughlin, 4 N. D. 391, 61 N. W. 473.

Where a vendor took a note for the price payable to a third person and warranted the goods which proved worthless, the breach was a defense to an action by payee. McCormick Harvester Machine Co. v. Taylor, 5 N. D. 53, 63 N. W. 890.

Indorsement and delivery of note owned by corporation, by officers thereof, as collateral to officer's individual debt is prima facie illegal. As to paper not taken in due course of business, fraud and failure of consideration may be set up as defense. Security Bank v. Gingsland, 5 N. D. 263, 65 N. W. 697.

Failure to state the rate of interest to be paid separately in note will not alone make usurious and void under section 4, chapter 184, laws 1890. Folsom v. Kilbourne, 5 N. D. 402, 67 N. W. 291.

Payee of negotiable note indorses thereon guaranty of payment, purchaser is protected as "innocent purchaser" against defenses good between original parties. One who takes such paper in payment of antecedent debt within the rule. Dunham v. Peterson, 5 N. D. 414, 67 N. W. 293.

Purchaser of promissory note for full consideration before maturity takes in ordinary course of business, and the question of its being secured by chattel mortgage or that he bought in contemplation of foreclosure will not affect his bona fides. Christianson v. Farmers W. & H. Ass'n., 5 N. D. 438, 67 N. W. 300.

The holder of naked title to note is entitled to sue thereon. Seybold v. Grand Forks National Bank, 5 N. D. 460, 67 N. W. 682.

An agent intrusted with the collection of negotiable paper only must collect in cash, not in drafts or checks. Where owner indorses paper "for collection," it is notice that he has not parted with title but with possession only and for collection. Owner has right to trace funds. National Bank v. Johnson, 6 N. D. 180, 69 N. W. 49.

Certificate of protest prima facie evidence of presentment, demand and dishonor. Notice of dishonor, who entitled to; may be given by agent or sub-agent. Ashe v. Beasley, 6 N. D. 191, 69 N. W. 188.

Plaintiff must show note sued on was indorsed to him. Letters "P. J. S." on back of note do not raise presumption that note was indorsed by Pulaski, J. S. Vickery v. Burton, 6 N. D. 245, 67 N. W. 193.

Witnesses cannot testify generally as to value of commercial paper, but must confine evidence to facts which bear on actual value. Anderson v. Bank, 6 N. D. 296, 76 N. W. 296.

Notes placed in the hands of third person not to be delivered until maker so directed still remained in control of maker, and no title passed by delivery thereof. Replevin will not lie to recover notes in hands of third person without authority to deliver. Nichols & Shepard Co. v. Bank, 6 N. D. 404, 71 N. W. 135.

When fraud is proven in the procuring of a promissory note, the burden shifts, and to recover holder must prove he is innocent purchaser for value without notice and before maturity. Knowlton v. Schultz, 6 N. D. 417, 71 N. W. 550.

Prima facie the value of a negotiable instrument is what appears to be due on it. Anderson v. Bank, 6 N. D. 497, 76 N. W. 296.

A draft sent by mail and lost in transmission, which loss was not discovered for six months thereafter, although plaintiff in possession of notice from correspondent that draft had never reached destination, held, drawer discharged from liability. If drawer promises to pay after discharge, with full knowledge of facts, he thereby waives release from liability. The issuing of duplicate draft not in itself a waiver of release of liability; such a draft does not vary the terms of a written contract or constitute a new or additional contract. Bank v. Farnsworth, 7 N. D. 6, 76 N. W. 901.

Where a note has been indorsed by attorney in fact, fraud being shown and the burden of proof thereby shifted, assignee must show note was actually indorsed by payee or his actual attorney in fact, or recovery cannot be had. An allegation by maker "have no information sufficient to form a belief and therefore deny" plaintiff's allegations as to ownership of note, not being in form prescribed by code, does not operate as a denial. Massachusetts Loan & Trust Co. v. Twitchell, 7 N. D. 440, 75 N. W. 786.

An indorsee is not estopped from setting up the indorsement to himself or denying all agency on the part of the payee to collect the note where the maker paid the principal to the original payee while the note remained in the hands of the indorsee. Hollinshead v. Stuart, 8 N. D. 35, 77 N. W. 89.

Payment of negotiable paper to payee without its production and after transfer, no defense. Hollinshead v. Stuart, 8 N. D. 35, 77 N. W. 89.

Maker cannot safely pay the original creditor after transfer, although ignorant of the transfer. Hollinshead v. Stuart, 8 N. D. 35, 77 N. W. 89.

Increased rate of interest after maturity does not destroy negotiability. Hollinshead v. Stuart, 8 N. D. 35, 77 N. W. 89.

Note given in payment of intoxicating liquors sold in violation of the prohibition law, cannot be recovered upon. In an action on such note, proper for defendant to counterclaim for money paid plaintiff for the purchase of intoxicating liquors to

be sold within the state contrary to law. Oswald v. Moran, 8 N. D. 111, 77 N. W. 281.

Parol evidence of indorsement admissible to show purpose of indorsement, when. Dickinson v. Burke, 8 N. D. 118, 77 N. W. 279.

Extending the time of payment on original indebtedness is sufficient consideration for collateral paper. The original indebtedness is a sufficient consideration for collateral paper. Red River Valley National Bank v. Barnes, 8 N. D. 432, 79 N. W. 880.

Mere possession of a negotiable promissory note by another than the payee, which is not payable to bearer and unindorsed, is not prima facie evidence of ownership of such note. Shepard v. Hanson, 9 N. D. 249, 83 N. W. 20.

When fraud is shown in such case, burden is on plaintiff to establish that he is a good faith purchaser. Mooney v. Williams, 9 N. D. 329, 83 N. W. 237.

In an action on a negotiable note by an indorsee, fraud must be alleged and shown to throw on plaintiff the burden of proving he is a good faith holder. Ravicz v. Nickells, 9 N. D. 536, 84 N. W. 353.

Party in charge of office not agent of holder of negotiable promissory note where he has not the note in his possession. Corey v. Hunter, 10 N. D. 5, 84 N. W. 570; Hollinshead v. Stuart, 8 N. D. 35, 77 N. W. 89; Stolzman v. Wyman, 8 N. D. 108, 77 N. W. 285.

As to failure of consideration in note given for alleged defalcation, see Packham v. Van Bergen, 10 N. D. 43, 84 N. W. 566.

Pledgee of a negotiable promissory note who applied proceeds of a collateral note upon debt secured by such collateral note, in ignorance that the sum so received and applied was the proceeds of such note, and has not altered his position by reason of such ignorance, cannot thereafter enforce collection of such collateral note. Second National Bank of Winona v. Spottswood, 10 N. D. 114, 86 N. W. 359.

Maker of a negotiable promissory note pays at his peril to person not in possession of the note and without authority to collect it; but where the person not in possession of the note turns the money over to the holder, debt is discharged. Second National Bank of Winona v. Spottswood, 10 N. D. 114, 86 N. W. 359.

As to title to note where note is not payable or indorsed to holders, see Second National Bank of Winona v. Spottswood, 10 N. D. 114, 86 N. W. 359.

Good faith in purchase of note sustained by showing purchase before maturity for full value. First National Bank v. Flath, 10 N. D. 281, 86 N. W. 867.

Separate contemporaneous agreement between original parties as against indorsee without notice of the agreement, effect of. First National Bank v. Flath, 10 N. D. 281, 86 N. W. 867.

Good faith in the purchase of negotiable paper does not require the purchaser to make inquiries as to purpose for which given or as to the existence of possible defenses. First National Bank v. Flath, 10 N. D. 281, 86 N. W. 867.

Where a written instrument is by a material alteration converted into a negotiable promissory note, such note is void even in the hands of a bona fide holder. Porter v. Hardy, 10 N. D. 551, 88 N. W. 458.

Where certain persons signed a note negotiable in form and left it with agent of payee until performance of certain conditions before delivery, and the note was delivered before such conditions were fulfilled, it is a defense against the payee. Where payee transferred it by written guaranty of payment before maturity as security for a pre-existing debt, transferees not holders in due course under section 4884. Porter v. Andrus, 10 N. D. 558, 88 N. W. 567.

Transfer of promissory note carries with it the mortgage securing it. Brynjolfson v. Osthus, 12 N. D. 42, 96 N. W. 261.

Consideration of note given for the purchase price of land conveyed by warranty deed with covenants against incumbrances, is the title to the land free therefrom and not the covenants against them. Defense of total or partial failure of consideration may be interposed in an action on the promissory note in case of breach of the covenant against incumbrances where maker has paid them off. The extent of the failure of consideration in such case is amount paid in good faith in discharge of the incumbrances covenanted against in the deed. Defense of failure of consideration may be interposed in such case although maker retains possession of the land. Dahl v. Staake, 12 N. D. 325, 96 N. W. 353.

A negotiable promissory note void in the hands of the payee because it is a foreign corporation doing business in the state without having complied with our laws, may be enforced by the bona fide holder and indorsee for value before maturity without notice of the facts rendering it void in the hands of the payee, notwithstanding section 3265, revised codes 1899. The word "assign" as used in said section does not include the indorsee of negotiable note who takes the same before maturity for value and without notice of the defenses thereto. First National Bank of Commerce v. Pick, 13 N. D. 74, 99 N. W. 63.

Where a promissory note expresses on its face that it is payable at a certain store, a presentment of such note at such store for payment on the day of its maturity is a proper presentment to charge an indorser. Oral testimony may be used to supplement notary's certificate of presentment. Presentment at place of payment renders demand on maker unnecessary. Nelson v. Grondahl, 13 N. D. 363, 100 N. W. 1093.

Where surety pays a debt secured by chattel mortgage he becomes vested with the title to the note and mortgage. Thurston v. Osborne-McMillan Co., 13 N. D. 509, 101 N. W. 892.

The following decisions have been made by the supreme court of South Dakota on sections of the statute of that state analogous to sections of the revised codes of North Dakota of 1899 which were repealed in 1905:

§ 4853—A promissory note to be negotiable must be payable to "order" or "bearer." Searls v. Seipp, 6 S. D. 472, 61 N. W. 804.

To destroy the negotiability of a note by writing on back, words apparantly intended for that purpose must be used. Stipulation for additional rate of interest after maturity or provisions that note shall become due and payable before date of maturity or provisions that note shall become due and payable before date of maturity for failure to pay interest do not destroy negotiability. Merrill v. Hurley, 6 S. D. 592, 62 N. W. 958.

A void stipulation for attorney fees does not destroy negotiability. Chandler v. Kennedy, 8 S. D. 56, 65 N. W. 439; Bank v. Feeney, 9 S. D. 550, 70 N. W. 874.

Question of innocent purchaser of municipal bond decided in City of Pierre v. Dunscom, 106 Fed. 611; Insurance Co. v. Board, 62 Fed. 778; Board v. McLean, 106 Fed. 817.

The words "with interest from date until paid at 10 per cent, 8 if paid when due," destroys negotiability. Hegeler v. Comstock, 1 S. D. 138, 45 N. W. 33.

City warrants are subject to all defenses though in hands of innocent purchasers. Hubbell v. Town, 15 S. D. 55, 87 N. W. 520.

The words "with exchange and cost of collection" destroy negotiability of a note. Bank v. Basnier, 65 Fed. 58.

Agreement to pay costs destroys negotiability. Johnson v. Schar, 9 S. D. 536, 40 N. W. 838.

A note containing provisions which make uncertain amount necessary to satisfy at time of execution is non-negotiable. National Bank v. Feeney, 12 S. D. 156, 80 N. W. 186.

§ 4867—Indorsement carries presumption it was for value. Stone v. Crow, 2 S. D. 525, 51 N. W. 335.

Note unlawfully put in circulation does not carry presumption that it was "indorsed in due course." Landauer v. Implement Co., 10 S. D. 205, 76 N. W. 467; Dunn v. Bank, 11 S. D. 305, 77 N. W. 111.

§ 4876—Guarantor is estopped from denying signature of maker. Austin Tomlinson Co. v. Heiser, 6 S. D. 429, 61 N. W. 445.

Waiver of notice of dishonor must be in writing. Schmitz v. Mining Co., 8 S. D. 544, 67 N. W. 618.

§ 4884—Where it is shown that instrument was unlawfully put in circulation, burden is cast on holder to show good faith. Landauer v. Implement Co., 10 S. D. 205, 76 N. W. 467; Dunn v. Bank, 11 S. D. 305, 77 N. W. 111.

§ 4887—Demand when not necessary. Acme Harvester Co. v. Butterfield, 12 S. D. 91, 80 N. W. 170.

§ 4890—When not otherwise specified place where bill is drawn is place for presentment for payment. Warner v. Bank, 6 S. D. 152, 60 N. W. 746.

§ 4912—The obligation to a negotiable instrument may be extinguished "in like manner with that of parties to contracts generally." Taylor v. Bank, 6 S. D. 511, 62 N. W. 99.

§ 4941—"Due W. R. C. the sum of * * * payable at this office on 20th day of June, 1893, to him or order," should be construed as promissory note. Schmitz v. Mining Co., 8 S. D. 544, 67 N. W. 618.

Action on certificate of deposit does not mature until demand. Tobin v. McGinney, 15 S. D. 257, 88 N. W. 572.

§ 4970—This section embraces contracts with forfeitures for the sale of lands. Barnes v. Clement, 12 S. D. 270, 80 N. W. 301.

The negotiable instrument law now in force was first prepared by a committee of the American Bar Association on uniformity of laws. It is now in force in New York, Connecticut, Colorado, Florida, North Dakota and some other states. The law has been in force so short a time in this state, that few cases thereunder have ben passed upon by our supreme court. John J. Crawford, who as secretary of the committee compiled the law, has published

a work entitled "Crawford's Annotated Negotiable Instrument Law," which gives verbatum the several sections of our law and the decisions that have been made by New York and other state courts. A consultation of this work will give the seeker more information than any annotation that could legitimately be made herein.

§ 6303. **Instruments must conform to specific requirements.** An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer.
2. Must contain an unconditional promise or order to pay a sum certain in money.
3. Must be payable on demand, or at a fixed or determinable future time.
4. Must be payable to order or to bearer; and,
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

§ 6304. **Sum payable within the meaning of this chapter.** The sum payable is a sum certain within the meaning of this chapter, although it is to be paid:

1. With interest; or
2. By stated installments; or
3. By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; or
4. With exchange, whether at a fixed rate or at the current rate; or,
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

§ 6305. **Unqualified order or promise to pay.** An unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or
2. A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not conditional.

§ 6306. **Payable at determinable future time.** An instrument is payable at a determinable future time, within the meaning of this chapter, which is expressed to be payable:

1. At a fixed period after date or sight; or
2. On or before a fixed or determinable future time specified therein; or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

§ 6307. **When not negotiable.** An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or,
2. Authorizes a confession of judgment if the instrument be not paid at maturity; or
3. Waives the benefit of any law intended for the advantage or protection of the obligor; or
4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

§ 6308. **Validity and negotiable character.** The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or

2. Does not specify the value given, or that any value has been given therefor; or

3. Does not specify the place where it is drawn or the place where it is payable; or

4. Bears a seal; or

5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

§ 6309. **Payable on demand.** An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or

2. In which no time for payment is expressed.

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.

§ 6310. **Payable to order.** The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer or drawee; or
2. The drawee or maker; or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of several payees; or,
6. The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

§ 6311. **Payable to bearer.** The instrument is payable to bearer:

1. When it is expressed to be so payable; or
2. When it is payable to a person named therein or bearer; or
3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or
4. When the name of the payee does not purport to be the name of any person; or
5. When the only or last indorsement is an indorsement in blank.

§ 6312. **Instrument need not follow language of chapter.** The instrument need not follow the language of this chapter, but any terms are sufficient which clearly indicate an intention to conform to the requirements thereof.

§ 6313. **Where instrument is dated.** Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance or indorsement as the case may be.

§ 6314. **When instrument is not invalid.** The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

§ 6315. **Undated instruments.** Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.

§ 6316. **Incomplete blank may be filled up.** Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And

a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

§ 6317. **When incomplete instruments not valid.** Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

§ 6318. **Incomplete and revocable until delivery.** Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But when the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

§ 6319. **Ambiguous language.** Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain reference may be had to the figures to fix the amount.

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued.

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail.

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election.

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

§ 6320. **Liability of signer.** No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

§ 6321. **Signature may be made by agent.** The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

§ 6322. **Additions to signatures.** Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

§ 6323. **"Procuration."** A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

§ 6324. **Indorsement by corporation.** The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

§ 6325. **Forged signature.** Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.

§ 6326. **Consideration.** Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

§ 6327. **Value is consideration.** Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

§ 6328. **Value for consideration.** Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

§ 6329. **Lien on instruments.** Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

§ 6330. **Absence of consideration.** Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto whether the failure is an ascertained and liquidated amount or otherwise.

§ 6331. **Accommodation party.** An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

§ 6332. **Negotiation.** An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

§ 6333. **Indorsements.** The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words is a sufficient indorsement.

§ 6334. **Indorsement of entire instrument.** The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

§ 6335. **Special or blank indorsements.** An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

§ 6336. **Indorsement in blank.** A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

§ 6337. **May convert blank indorsement.** The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

§ 6338. **Restrictive indorsements.** An indorsement is restrictive which either:

1. Prohibits the further negotiation of the instrument; or,
2. Constitutes the indorsee the agent of the indorser; or,
3. Vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

§ 6339. **Rights of indorsee.** A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument.
2. To bring any action thereon that the indorser could bring.
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

§ 6340. **Qualified indorsement.** A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

§ 6341. **Conditional indorsement.** Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

§ 6342. **Payable to bearer.** Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

§ 6343. **Payable to order.** Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

§ 6344. **Indorsed as cashier.** Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he

is such officer; and may be negotiated by either the indorsement of the bank or corporation or the indorsement of the officer.

§ 6345. **Misspelled names.** Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he thinks fit, his proper signature.

§ 6346. **Negative personal liability.** Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

§ 6347. **Indorsements after date of maturity.** Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue.

§ 6348. **Presumption of indorsement.** Except where the contrary appears every indorsement is presumed prima facie to have been made at the place where the instrument is dated.

§ 6349. **Restrictive indorsement.** An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

§ 6350. **Privilege of holder.** The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

§ 6351. **Transfers without indorsement.** Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

§ 6352. **May reissue instruments.** When an instrument is negotiated back to a prior party, such party may, subject to the provisions of this chapter, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

§ 6353. **Holder of negotiable note may sue.** The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

§ 6354. **Holder of instrument. Conditions.** A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face.

2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.

3. That he took it in good faith and for value.

4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

§ 6355. **Where instrument payable on demand.** Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

§ 6356. **Where transferee receives notice.** Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

§ 6357. **Defective title, meaning of this chapter.** The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress, or

force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

§ 6358. **Notice of infirmity.** To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith.

§ 6359. **Instruments free from defects.** A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

§ 6360. **Negotiable instruments subject to same defenses.** In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to the holder.

§ 6361. **Prima facie holder.** Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some other person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

§ 6362. **Maker of negotiable instruments.** The maker of a negotiable instrument by making it engages that he will pay it according to its tenor; and admits the existence of the payee and his then capacity to indorse.

§ 6363. **Drawer may limit his liability.** The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentation the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

§ 6364. **Admissions of acceptor.** The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and,

2. The existence of the payee and his then capacity to indorse.

§ 6365. **Effect of signature upon an instrument.** A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

§ 6366. **Liability of indorser.** When a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

2. If the instrument is payable to the order of the maker or drawer or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

§ 6367. **Qualified indorsement, warrants.** Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be.

2. That he has good title to it.

3. That all prior parties had capacity to contract.

4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision 3 of this section do not apply to persons negotiating public or corporate securities, other than bills and notes.

§ 6368. **Indorsers without qualifications.** Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. The matters and things mentioned in subdivisions 1, 2 and 3 of the next preceding section; and,

2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

§ 6369. **All the liabilities incurred in certain cases.** Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

§ 6370. **Joint payees.** As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.

§ 6371. **Negotiation by agent.** Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section 6367, unless he discloses the name of his principal, and the fact that he is acting only as agent.

§ 6372. **Presentation for payment.** Presentation for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

§ 6373. **Where payable on demand.** Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

§ 6374. **Presentment, how made.** Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf.

2. At a reasonable hour on a business day.

3. At a proper place as herein defined.

4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

§ 6375. **Payment at proper place.** Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented.

2. Where no place of payment is specified but the address of the person to make payment is given in the instrument and it is there presented.

3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment.

4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

§ 6376. **Instrument must be exhibited.** The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

§ 6377. **Instrument payable at bank.** Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

§ 6378. **Where person primarily liable.** Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative if such there be, and if with the exercise of reasonable diligence, he can be found.

§ 6379. **Liability as partners.** Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

§ 6380. **Liability of persons not partners.** Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

§ 6381. **When presentment for payment not required.** Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

§ 6382. **Charge of indorser.** Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

§ 6383. **Delay in presentment, when excused.** Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

§ 6384. **Presentment, when dispensed with.** Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this chapter cannot be made.

2. Where the drawee is a fictitious person.

3. By waiver of presentment express or implied.

§ 6385. **When instrument is dishonored.** The instrument is dishonored by non-payment when:

1. It is duly presented for payment and payment is refused or cannot be obtained; or,

2. Presentment is excused and the instrument is overdue and unpaid.

§ 6386. **Dishonored by non-payment.** Subject to the provisions of this chapter, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder.

§ 6387. **Negotiable instrument payable at time fixed.** Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

§ 6388. **Payable after date.** Where the instrument is payable at a fixed period after date, after sight or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

§ 6389. **Instrument payable at bank.** Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

§ 6390. **Payment after maturity.** Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

§ 6391. **Notice of dishonor.** Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser and any drawer or indorser to whom such notice is not given is discharged.

§ 6392. **Notice by holder.** The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who upon taking it up would have a right to reimbursement from the party to whom the notice is given.

§ 6393. **Notice by agent.** Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

§ 6394. **Notice on behalf of holder.** Where notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

§ 6395. **In behalf of party, in certain cases.** Where notice is given by or on behalf of a party entitled to give notice, it inures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

§ 6396. **In case of dishonored instrument.** Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

§ 6397. **Misdescription does not vitiate.** A written notice need not be signed and an insufficient written notice may be supplemented and validated

by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

§ **6398. Written or oral notice.** The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

§ **6399. Notice of dishonor, to whom given.** Notice of dishonor may be given either to the party himself or to his agent in that behalf.

§ **6400. Notice to personal representative.** When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence, he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

§ **6401. In case of partners.** Where the parties to be notified are partners notice to any one partner is notice to the firm even though there has been a dissolution.

§ **6402. Joint parties.** Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

§ **6403. Bankruptcy or insolvency.** Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

§ **6404. Notice as soon as instrument is dishonored.** Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this chapter.

§ **6405. When notice must be given.** Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.
2. If given at his residence, it must be given before the usual hours of rest on the day following.
3. If sent by mail, it must be deposited in the post office in time to reach him in usual course on the day following.

§ **6406. How notice given.** Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.
2. If given otherwise than through the post office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post office within the time prescribed in the last subdivision.

§ **6407. How notice of dishonor given.** Where notice of dishonor is duly addressed and deposited in the post office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

§ **6408. Notice in post office.** Notice is deemed to have been deposited in the post office when deposited in any branch post office or in any letter box under the control of the post office department.

§ **6409. Notice to antecedent parties.** Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

§ **6410. Notice must be sent to proper address.** Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the post office nearest to his place of residence, or to the post office where he is accustomed to receive his letters; or,
2. If he live in one place, and have his place of business in another, notice may be sent to either place; or,
3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this chapter, it will be sufficient, though not sent in accordance with the requirements of this section.

§ 6411. **Notice of dishonor may be waived.** Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

§ 6412. **Waiver binding.** Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

§ 6413. **Definition of "waiver."** A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.

§ 6414. **Notice of dishonor, when dispensed with.** Notice of dishonor is dispensed with when after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

§ 6415. **Delay in giving notice.** Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

§ 6416. **When notice not required.** Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person.
2. Where the drawee is a fictitious person or a person not having capacity to contract.
3. Where the drawer is the person to whom the instrument is presented for payment.
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument.
5. Where the drawer has countermanded payment.

§ 6417. **Notice not required to be given an indorser in certain cases.** Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument.
2. Where the indorser is the person to whom the instrument is presented for payment.
3. Where the instrument was made or accepted for his accommodation.

§ 6418. **Non-acceptance.** Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

§ 6419. **In case of omission.** An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

§ 6420. **Protested for non-acceptance.** Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment as the case may be; but protest is not required, except in the case of foreign bills of exchange.

§ **6421. When negotiable discharged.** A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor.
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.
3. By the intentional cancellation thereof by the holder.
4. By any other act which will discharge a simple contract for the payment of money.
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

§ **6422. Discharged, secondarily.** A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument.
2. By the intentional cancellation of his signature by the holder.
3. By the discharge of a prior party.
4. By a valid tender of payment made by a prior party.
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.
6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.

§ **6423. Secondarily liable.** Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and,
2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

§ **6424. Holder may renounce his rights.** The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

§ **6425. Cancellation.** A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

§ **6426. Negotiable instruments, when altered.** Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

§ **6427. Alterations or changes.** Any alteration which changes:

1. The date.
2. The sum payable, either for principal or interest.
3. The time or place of payment.
4. The number or the relations of the parties.
5. The medium or currency in which payment is to be made.

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

§ 6428. **Bill of exchange. Form and interpretation.** A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

§ 6429. **Does not operate as an assignment.** A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof and the drawee is not liable on the bill unless and until he accepts the same.

§ 6430. **Joint drawees.** A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

§ 6431. **Inland or exchange bill.** An inland bill of exchange is a bill which is, or on its face purports to be both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

§ 6432. **Drawer and drawee.** Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

§ 6433. **Referee in case of need.** The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit.

§ 6434. **Acceptance of a bill.** The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

§ 6435. **Holder of a bill.** The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill and if such request is refused, may treat the bill as dishonored.

§ 6436. **Acceptor not necessarily bound.** Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

§ 6437. **Unconditional promise.** An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

§ 6438. **Drawee allowed twenty-four hours.** The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance if given dates as of the day of presentation.

§ 6439. **When drawee destroys bill.** Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

§ 6440. **May be accepted before being signed.** A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the

absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

§ **6441. Acceptance, general or qualified.** An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

§ **6442. General acceptance.** An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere.

§ **6443. Qualified acceptance.** An acceptance is qualified which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated.
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn.
3. Local, that is to say, an acceptance to pay only at a particular place.
4. Qualified as to time.
5. The acceptance of some one or more of the drawees, but not of all.

§ **6444. Holder may refuse qualified acceptance.** The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressedly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto.

§ **6445. Acceptance, where made.** Presentment for acceptance must be made:

1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or,
2. Where the bill expressly stipulates that it shall be presented for acceptance; or,
3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

§ **6446. Holder must accept or negotiate.** Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so, the drawer and all indorsers are discharged.

§ **6447. Presentment must be made at reasonable hour.** Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and:

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only.
2. Where the drawee is dead, presentment may be made to his personal representative.
3. Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

§ **6448. Bills may be presented any day except holidays.** A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections 6374 and 6387.

When Saturday is not otherwise a holiday presentment for acceptance may be made before twelve o'clock noon on that day.

§ 6449. **Payments, when excused.** Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

§ 6450. **Dishonored by non-acceptance.** Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance, in either of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.
2. Where after the exercise of reasonable diligence, presentment cannot be made.
3. Where although presentment has been irregular, acceptance has been refused on some other ground.

§ 6451. **When dishonored.** A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance and such an acceptance as is prescribed by this chapter is refused or cannot be obtained; or,
2. When presentment for acceptance is excused and the bill is not accepted.

§ 6452. **When bill is not accepted.** Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

§ 6453. **Right of recourse.** When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.

§ 6454. **Protest for non-payment.** Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

§ 6455. **Protest must be attached to bill.** The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it and must specify:

1. The time and place of presentment.
2. The fact that presentment was made and the manner thereof.
3. The cause or reason for protesting the bill.
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

§ 6456. **Protest, how made.** Protest may be made by:

1. A notary public; or,
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

§ 6457. **Protest must be made on day of dishonor.** When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

§ 6458. **At place where dishonored.** A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other that the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

§ **6459. Protest for non-payment.** A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

§ **6460. Acceptor, in case he is a bankrupt.** Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

§ **6461. When protest dispensed with.** Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

§ **6462. Bills lost or destroyed.** Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

§ **6463. Acceptance for honor.** Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security and is not overdue, any person not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

§ **6464. Must be in writing.** An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

§ **6465. Acceptance, when deemed for the honor of the drawer.** Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

§ **6466. Acceptor, when liable to the holder.** The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

§ **6467. What the acceptor for honor engages to do.** The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided, it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

§ **6468. Bill payable after sight.** Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

§ **6469. Dishonored bill, when accepted for honor.** Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

§ **6470. Presentment for payment, how made.** Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.
2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section 6406.

§ **6471. Delay in making presentment.** The provisons of section 6383 apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

§ 6472. **When protested for non-payment.** When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

§ 6473. **Payment for honor.** Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

§ 6474. **Notarial act of honor.** The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it.

§ 6475. **Founded on a declaration.** The notarial act of honor must be founded on a declaration made by the payee for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

§ 6476. **In case two or more persons offer to pay a bill.** Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

§ 6477. **Where a bill has been paid for honor.** Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

§ 6478. **Where holder refuses to receive payment.** Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

§ 6479. **Rights of payer for honor.** The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

§ 6480. **Bills drawn in sets.** Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill.

§ 6481. **Two or more parts of set.** Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

§ 6482. **Two or more parts indorsed.** Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

§ 6483. **Acceptance may be written.** The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

§ 6484. **Acceptor liable to holder, when.** When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

§ 6485. **When the whole bill is discharged.** Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

§ 6486. **Negotiable promissory note.** A negotiable promissory note within the meaning of this chapter is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to

bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

§ 6487. **A check defined.** A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this chapter applicable to a bill of exchange payable on demand apply to a check.

§ 6488. **Check must be presented within reasonable time.** A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

§ 6489. **Certified checks.** Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance.

§ 6490. **Drawer, when not liable.** Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.

§ 6491. **Check does not operate as an assignment.** A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

§ 6492. **Negotiable instruments law.** This chapter shall be known as the Negotiable Instruments Law.

§ 6493. **Definitions of terms.** In this chapter, unless the context otherwise requires:

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counter-claim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means the transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

§ 6494. **Person primarily liable on instrument.** The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.

§ 6495. **"Reasonable" and "unreasonable" time.** In determining what is a "reasonable time" or an "unreasonable time" regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

§ 6496. **Sundays or holidays.** Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or a holiday, the act may be done on the next succeeding secular or business day.

§ 6497. **When provisions of chapter apply.** The provisions of this chapter do not apply to negotiable instruments made and delivered prior to the taking effect hereof.

§ 6498. **Rules of the law merchant govern.** In any case not provided for in this chapter the rules of the law merchant shall govern.

Note:—Chapter 88, civil code, revised codes of 1899, the old law relating to Negotiable Instruments, was repealed by chapter 138, laws of 1905, with the proviso "that all actions that are now pending under the provisions of said chapter shall in no manner be affected by this repeal." This chapter, 90 (chapter 100 of civil code, revised codes of 1899), takes the place of said chapter 88.

CHAPTER 91.

BILLS OF EXCHANGE.

ARTICLE 1.—FORM AND INTERPRETATION OF A BILL.

§ 6499. **Defined.** A bill of exchange is an instrument, negotiable in form, by which one, who is called the drawer, requests another called the drawee to pay a specified sum of money. [Civ. C. 1877, § 1882; R. C. 1899, § 4914.]

§ 6500. **Additional drawee.** A bill of exchange may give the name of any person in addition to the drawee to be resorted to in case of need. [Civ. C. 1877, § 1883; R. C. 1899, § 4915.]

§ 6501. **Drawn in parts.** A bill of exchange may be drawn in any number of parts, each part stating the existence of the others and all forming one set. [Civ. C. 1877, § 1884; R. C. 1899, § 4916.]

§ 6502. **Bound to execute in three parts.** An agreement to draw a bill of exchange binds the drawer to execute it in three parts, if the other party to the agreement desires it. [Civ. C. 1877, § 1885; R. C. 1899, § 4917.]

§ 6503. **Presentment, etc., of one sufficient.** Presentment, acceptance or payment of a single part in a set of a bill of exchange is sufficient for the whole. [Civ. C. 1877, § 1886; R. C. 1899, § 4918.]

§ 6504. **Where payable.** A bill of exchange is payable:

1. At the place where by its terms it is made payable; or,
2. If it specifies no place of payment, then at the place to which it is addressed; or,
3. If it is not addressed to any place, then at the place of residence or business of the drawee, or wherever he may be found. If the drawee has no place of business, or if his place of business or residence cannot with reasonable diligence be ascertained, presentment for payment is excused and the bill may be protested for non-payment. [Civ. C. 1877, § 1887; R. C. 1899, § 4919.]

As between drawer and payee, the place of performance is the place where bill is drawn. Warner v. Bank, 6 S. D. 152, 60 N. W. 746.

§ 6505. **Drawer's rights.** The rights and obligations of the drawer of a bill of exchange are the same as those of the first indorser of any other negotiable instrument. [Civ. C. 1877, § 1888; R. C. 1899, § 4920.]

ARTICLE 2.—DAYS OF GRACE.

§ 6506. **No days of grace.** Days of grace are not allowed. [Civ. C. 1877, § 1889; R. C. 1895, § 4921.]

ARTICLE 3.—PRESENTMENT FOR ACCEPTANCE.

§ 6507. **When presented. Refusal dishonors bill.** At any time before a bill of exchange is payable the holder may present it to the drawee for acceptance and if the acceptance is refused the bill is dishonored. [Civ. C. 1877, § 1890; R. C. 1899, § 4922.]

§ 6508. **How made.** Presentment for acceptance must be made in the following manner as nearly as by reasonable diligence it is practicable:

1. The bill must be presented by the holder or his agent.
2. It must be presented on a business day and within reasonable hours.

3. It must be presented to the drawee, or, if he is absent from his place of residence or business, to some person having charge thereof or employed therein; and,

4. The drawee on such presentment may postpone his acceptance or refusal until the next day. If the drawee has no place of business, or if his place of business or residence cannot with reasonable diligence be ascertained, presentment for acceptance is excused and the bill may be protested for non-acceptance. [Civ. C. 1877, § 1891; R. C. 1899, § 4923.]

§ 6509. **Excused as to others if refused by one.** Presentment for acceptance to one of several joint drawees and refusal by him dispenses with presentment to the others. [Civ. C. 1877, § 1892; R. C. 1899, § 4924.]

§ 6510. **Not dishonored without presentment to drawee in need.** A bill of exchange which specifies a drawee in case of need must be presented to him for acceptance or payment as the case may be, before it can be treated as dishonored. [Civ. C. 1877, § 1893; R. C. 1899, § 4925.]

§ 6511. **Of bill payable specified time after sight.** When a bill of exchange is payable at a specified time after sight, the drawer and indorsers are exonerated if it is not presented for acceptance within ten days after the time which would suffice with ordinary diligence to forward it for acceptance, unless presentment is excused. [Civ. C. 1877, § 1894; R. C. 1899, § 4926.]

Article 4.—Acceptance.

§ 6512. **Must be in writing.** An acceptance of a bill must be made in writing by the drawee or by an acceptor for honor; and may be made by the acceptor writing his name across the face of the bill with or without other words. [Civ. C. 1877, § 1895; R. C. 1899, § 4927.]

§ 6513. **May be treated as dishonored if acceptance qualified.** The holder of a bill of exchange, if entitled to an acceptance thereof, may treat the bill as dishonored, if the drawee refuses to write across its face an unqualified acceptance. [Civ. C. 1877, § 1896; R. C. 1899, § 4928.]

§ 6514. **What sufficient acceptance.** The holder of a bill of exchange may without prejudice to his rights against prior parties, receive and treat as a sufficient acceptance:

1. An acceptance written upon any part of the bill, or upon a separate paper.

2. An acceptance qualified so far only as to make the bill payable at a particular place within the city or town in which, if the acceptance was unqualified, it would be payable.

3. A refusal by the drawee to return the bill to the holder after presentment; in which case the bill is payable immediately without regard to its terms. [Civ. C. 1877, § 1897; R. C. 1899, § 4929.]

§ 6515. **When acceptance upon separate instrument binding.** The acceptance of a bill of exchange by a separate instrument binds the acceptor to one, who upon the faith thereof has the bill for value or other good consideration. [Civ. C. 1877, § 1898; R. C. 1899, § 4930.]

§ 6516. **When unconditional promise to accept sufficient.** An unconditional promise in writing to accept a bill of exchange is a sufficient acceptance thereof, in favor of every person who upon the faith thereof has taken the bill for value or other good consideration. [Civ. C. 1877, § 1899; R. C. 1899, § 4931.]

§ 6517. **When acceptance may be canceled.** The acceptor of a bill of exchange may cancel his acceptance at any time before delivering the bill to the holder and before the holder has with the consent of the acceptor transferred his title to another person who has given value for it upon the faith of such acceptance. [Civ. C. 1877, § 1900; R. C. 1899, § 4932.]

§ 6518. **What acceptance admits.** The acceptance of a bill of exchange admits the signature of the drawer, but does not admit the signature of any indorser to be genuine. [Civ. C. 1877, § 1901; R. C. 1899, § 4933.]

Article 5.—Acceptance or Payment for Honor.

§ 6519. **When.** On the dishonor of a bill of exchange by the drawee, and, in case of a foreign bill after it has been duly protested, it may be accepted or paid by any person for the honor of any party thereto. [Civ. C. 1877, § 1902; R. C. 1899, § 4934.]

§ 6520. **Holder is bound to accept payment but not acceptance.** The holder of a bill of exchange is not bound to allow it to be accepted for honor, but is bound to accept payment for honor. [Civ. C. 1877, § 1903; R. C. 1899, § 4935.]

§ 6521. **How made. Reimbursement.** An acceptor or payer for honor must write a memorandum upon the bill, stating therein for whose honor he accepts or pays and must give notice to such parties with reasonable diligence of the fact of such acceptance or payment. Having done so he is entitled to reimbursement from such parties and from all parties prior to them. [Civ. C. 1877, § 1904; R. C. 1899, § 4936.]

§ 6522. **Presentment and notice of dishonor of bill so accepted.** A bill of exchange which has been accepted for honor must be presented at its maturity to the drawee for payment and notice of its dishonor by him must be given to the acceptor for honor in like manner as to an indorser; after which the acceptor for honor must pay the bill. [Civ. C. 1877, § 1905; R. C. 1899, § 4937.]

§ 6523. **Acceptance does not excuse notice.** The acceptance of a bill of exchange for honor does not excuse the holder from giving notice of its dishonor by the drawee. [Civ. C. 1877, § 1906; R. C. 1899, § 4938.]

Article 6.—Presentment for Payment.

§ 6524. **At place specified by bill.** If a bill of exchange is by its terms payable at a particular place and is not accepted on presentment, it must be presented at the same place for payment when presentment for payment is necessary. [Civ. C. 1877, § 1907; R. C. 1899, § 4939.]

§ 6525. **At place fixed by acceptance.** A bill of exchange, accepted payable at a particular place, must be presented at that place for payment when presentment for payment is necessary and need not be presented elsewhere. [Civ. C. 1877, § 1908; R. C. 1899, § 4940.]

§ 6526. **Of bill payable at sight.** If a bill of exchange payable at sight or on demand without interest is not duly presented for payment within ten days after the time in which it could with reasonable diligence be transmitted to the proper place for such presentment, the drawer and indorsers are exonerated, unless such presentment is excused. [Civ. C. 1877, § 1909; R. C. 1899, § 4941.]

As to time of payment, see Bank v. Farnsworth, 7 N. D. 6, 72 N. W. 901; Warner v. Bank, 6 S. D. 152, 60 N. W. 746.

§ 6527. **Mere delay does not exonerate.** Mere delay in presenting a bill of exchange payable with interest at sight or on demand does not exonerate any party thereto. [Civ. C. 1877, § 1910; R. C. 1899, § 4942.]

Article 7.—Excuse of Presentment and Notice.

§ 6528. **Incapacity to accept.** The presentment of a bill of exchange for acceptance is excused if the drawee has not capacity to accept it. [Civ. C. 1877, § 1911; R. C. 1899, § 4943.]

§ 6529. **Delay from uncontrollable cause.** Delay in the presentment of a bill of exchange for acceptance is excused when caused by circumstances

over which the holder has no control. [Civ. C. 1877, § 1912; R. C. 1899, § 4944.]

§ 6530. By drawee's forbidding acceptance and payment. Presentment of a bill of exchange for acceptance or payment and notice of its dishonor are excused as to the drawer if he forbids the drawee to accept or the acceptor to pay the bill; or if at the time of drawing he had no reason to believe that the drawee would accept or pay the same. [Civ. C. 1877, § 1913; R. C. 1899, § 4945.]

Article 8.—Foreign Bills.

§ 6531. Inland bill defined. An inland bill of exchange is one drawn and payable within this state. All others are foreign. [Civ. C. 1877, § 1914; R. C. 1899, § 4946.]

§ 6532. Notice of dishonor only by protest. Notice of the dishonor of a foreign bill of exchange can be given only by notice of its protest. [Civ. C. 1877, § 1915; R. C. 1899, § 4947.]

§ 6533. Protest made by whom. Protest must be made by a notary public if with reasonable diligence one can be obtained; and if not, then by any reputable person in the presence of two witnesses. [Civ. C. 1877, § 1916; R. C. 1899, § 4948.]

§ 6534. Form of protest. Protest must be made by an instrument in writing, giving a literal copy of the bill of exchange with all that is written thereon, or annexing the original; stating the presentment and the manner in which it was made, the presence or absence of the drawee or acceptor, as the case may be, the refusal to accept or to pay, or the inability of the drawee to give a binding acceptance; and in case of refusal, the reason as igned, if any; and finally protesting against all the parties to be charged. [Civ. C. 1877, § 1917; R. C. 1899, § 4949.]

§ 6535. Where protest made. A protest for non-acceptance must be made in the city or town in which the bill is presented for acceptance and a protest for non-payment, in the city or town in which it is presented for payment. [Civ. C. 1877, § 1918; R. C. 1899, § 4950.]

§ 6536. When protest must be noted. A protest must be noted on the day of the presentment or on the next business day, but it may be written out at any time thereafter. [Civ. C. 1877, § 1919; R. C. 1899, § 4951.]

§ 6537. Protest by what excused. The want of protest of a foreign bill of exchange or delay in making the same is excused in like cases with the want or delay of presentment. [Civ. C. 1877, § 1920; R. C. 1899, § 4952.]

§ 6538. Notice of, how given. Notice of protest must be given in the same manner as notice of dishonor, except that it may be given by the notary who makes the protest. [Civ. C. 1877, § 1921; R. C. 1899, § 4953.]

§ 6539. When notice of dishonor same as inland bill. If a foreign bill of exchange on its face waives protest, notice of dishonor may be given to any party thereto in like manner as of an inland bill, except that if any indorser of such a bill expressly requires protest to be made by a direction written on the bill at or before his indorsement, protest must be made and notice thereof given to him and to all subsequent indorsers. [Civ. C. 1877, § 1922; R. C. 1899, § 4954.]

§ 6540. Requisites to reimbursement on payment for dishonor. One who pays a foreign bill of exchange for honor must declare before payment in the presence of a person authorized to make protest for whose honor he pays the same in order to entitle him to reimbursement. [Civ. C. 1877, § 1923; R. C. 1899, § 4955.]

§ 6541. To whom and when damages allowed. Damages are allowed as hereinafter prescribed as a full compensation for interest accrued before notice of dishonor, re-exchange, expenses and all other damages in favor of holders for value only upon bills of exchange drawn or negotiated within

this state and protested for non-acceptance or non-payment. [Civ. C. 1877, § 1924; R. C. 1899, § 4956.]

§ **6542. Rates of damages.** Damages are allowed under the last section upon bills drawn upon any person:

1. If drawn upon any person in this state, two dollars upon each one hundred dollars of the principal sum specified in the bill.

2. If drawn upon any person out of this state, but in the states of Nebraska, Iowa, Minnesota, South Dakota, Wisconsin, Illinois, Missouri and Montana, three dollars upon each one hundred dollars of the principal sum specified in the bill.

3. If drawn upon any person in any of the United States or territories other than those above named, five dollars upon each one hundred dollars of the principal sum specified in the bill.

4. If drawn upon any person in any place in a foreign country, ten dollars upon each one hundred dollars of the principal sum specified in the bill.

And from the time of notice of dishonor and demand of payment lawful interest must be allowed upon the aggregate amount of the principal sum specified in the bill and the damages mentioned as above. [Civ. C. 1877, § 1925; R. C. 1899, § 4957.]

§ **6543. How damages estimated in United States' money; in foreign money.** If the amount of a protested bill of exchange is expressed in money of the United States, damages are estimated upon such amount without regard to the rate of exchange. If the amount of a protested bill of exchange is expressed in foreign money, damages are estimated upon the value of a similar bill at the time of protest in the place nearest to the place where the bill was negotiated and where such bills are currently sold. [Civ. C. 1877, §§ 1926, 1927; R. C. 1899, § 4958.]

CHAPTER 92.

PROMISSORY NOTES.

§ **6544. Defined.** A promissory note is an instrument negotiable in form whereby the signer promises to pay a specified sum of money. [Civ. C. 1877, § 1928; R. C. 1899, § 4959.]

§ **6545. When a bill of exchange deemed note.** An instrument in the form of a bill of exchange, but drawn upon and accepted by the drawer himself, is to be deemed a promissory note. [Civ. C. 1877, § 1929; R. C. 1899, § 4960.]

§ **6546. Bill accepted by other than drawee becomes note.** A bill of exchange, if accepted with the consent of the owner by a person other than the drawee or an acceptor for honor, becomes in effect the promissory note of such person and all prior parties thereto are exonerated. [Civ. C. 1877, § 1930; R. C. 1899, § 4961.]

§ **6547. Other laws applicable.** Chapter 90 and sections 6506 and 6527 of this code apply to promissory notes. [Civ. C. 1877, § 1931; R. C. 1899, § 4962.]

§ **6548. When indorsers exonerated on sight or demand note.** If a promissory note, payable on demand or at sight without interest, is not duly presented for payment within six months from its date, the indorsers thereof are exonerated unless such presentment is excused. [Civ. C. 1877, § 1932; R. C. 1899, § 4963.]

CHAPTER 93.

CHECKS.

§ 6549. **Defined.** A check is a bill of exchange drawn upon a bank or banker, or a person described as such upon the face thereof, and payable on demand without interest. [Civ. C. 1877, § 1933; R. C. 1899, § 4964.]

§ 6550. **Subject to provisions on bills. Exceptions.** A check is subject to all the provisions of this code concerning bills of exchange, except that:

1. The drawer and indorsers are exonerated by delay in presentment only to the extent of the injury which they suffer thereby.
2. An indorsee after its apparent maturity, but without actual notice of its dishonor, acquires a title equal to that of an indorsee before such period.
3. No days of grace are allowed on checks. [Civ. C. 1877, § 1934; R. C. 1899, § 4965.]

CHAPTER 94.

BONDS, BANK NOTES AND CERTIFICATES OF DEPOSIT.

§ 6551. **Bank note negotiable after payment.** A bank note remains negotiable even after it has been paid by the maker. [Civ. C. 1877, § 1935; R. C. 1899, § 4966.]

§ 6552. **Title by transfer before and after dishonor equal.** A transferee of a bond, bank note or certificate of deposit after its apparent maturity or actual dishonor within his knowledge acquires a title equal to that of a transferee before such event. [Civ. C. 1877, § 1936; R. C. 1899, § 4967.]

Certificate of deposit does not mature until returned, and limitation does not run against it, nor can action be maintained until demand. Tobin v. McKinney, 15 S. D. 257, 88 N. W. 572.

CHAPTER 95.

GENERAL PROVISIONS.

§ 6553. **Benefit of provisions of law may be waived.** Except when it is otherwise declared, the provisions of the foregoing fifty-seven chapters of this code in respect to the rights and obligations of parties to contracts are subordinate to the intention of the parties, when ascertained in the manner prescribed by the articles on the interpretation of contracts; and the benefit thereof may be waived by any party entitled thereto, unless such waiver would be against public policy. [Civ. C. 1877, § 1937; R. C. 1899, § 4968.]

CHAPTER 96.

RELIEF IN GENERAL.

§ 6554. **Compensation defined. In what cases relief given.** As a general rule compensation is the relief or remedy provided by the law of this state for the violation of private rights and the means of securing their observance;

and specific and preventive relief may be given in no other cases than those specified in chapter 97 of this code. [Civ. C. 1877, § 1938; R. C. 1899, § 4969.]

§ 6555. **Conditions of relief from forfeiture.** Whenever by the terms of an obligation a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom upon making full compensation to the other party, except in case of a grossly negligent, willful or fraudulent breach of duty. [Civ. C. 1877, § 1939; R. C. 1899, § 4970.]

CHAPTER 97.

COMPENSATORY RELIEF.

Article 1.—Damages in General.

§ 6556. **Damages for any injury.** Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages. [Civ. C. 1877, § 1940; R. C. 1899, § 4971.]

Negligence which did not contribute to the injury or contributed but slightly insufficient to defeat recovery. Mares v. N. P. Ry. Co., 3 Dak. 336, 21 N. W. 5. Affirmed in 123 U. S. 710.

As to malicious prosecution see Kolka v. Jones, 6 N. D. 461, 71 N. W. 558; Root v. Rose, 6 N. D. 575, 72 N. W. 1022.

The question of the liability of one sued for placing obstructions in street causing personal injury is for jury. In determining whether or not one is guilty of contributory negligence, his acts must be measured by acts of an ordinary prudent person under similar circumstances. Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427.

As to contributory negligence, negligence, employer's liability for defective appliances, proximate cause. See Cameron v. G. N. Ry. Co., 8 N. D. 124, 77 N. W. 1016.

For civil suit for malicious prosecution see Kaeppler v. Bank, 8 N. D. 406, 79 N. W. 869.

A school treasurer indorsing an illegal warrant knowing it as such is personally liable on same. Whitbeck v. Sees, 10 S. D. 417, 73 N. W. 915.

§ 6557. **Detriment defined.** Detriment is a loss or harm suffered in person or property. [Civ. C. 1877, § 1941; R. C. 1899, § 4972.]

§ 6558. **Damages resulting after action commenced.** Damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof or certain to result in the future. [Civ. C. 1877, § 1942; R. C. 1899, § 4973.]

§ 6559. **Interest on damages.** Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law or by the act of the creditor from paying the debt. [Civ. C. 1877, § 1943; R. C. 1899, § 4974.]

§ 6560. **When interest in discretion of jury.** In an action for the breach of an obligation not arising from contract and in every case of oppression, fraud or malice interest may be given in the discretion of the jury. [Civ. C. 1877, § 1944; R. C. 1899, § 4975.]

Allowance of interest is within the discretion of the jury. Uhe v. C., M. & St. P. Ry. Co., 3 S. D. 563, 54 N. W. 601; 4 S. D. 505, 57 N. W. 484; Johnson v. N. P. Ry., 1 N. D. 354, 48 N. W. 227; Bailey v. C., M. & St. P. Ry., 3 S. D. 531, 54 N. W. 596.

§ 6561. **When accepting principal waives interest.** Accepting payment of the whole principal as such waives all claims to interest, unless interest

is expressly provided for in the contract. [Civ. C. 1877, § 1945; R. C. 1895, § 4976.]

§ 6562. When jury may give exemplary damages. In any action for the breach of an obligation not arising from contract, when the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury in addition to the actual damages may give damages for the sake of example and by way of punishing the defendant. [Civ. C. 1877, § 1946; R. C. 1899 § 4977.]

Actual malice essential to punitive damage. Wrege v. Jones, 13 N. D. 267, 100 N. W. 705.

Widow suing liquor dealer and bondsmen for loss of support caused by intoxication and resulting death of husband, not entitled to exemplary damages. Garrigan v. Thompson et al, 17 S. D. 132.

Where compensatory damages only are claimed and no evidence from which malice could be presumed, error to instruct jury it might award punitive damages. Baxter v. Campbell, 17 S. D. 475.

Article 2.—Measure of Damages.

§ 6563. Compensation for detriment proximately caused or naturally resulting. Damages must be certain. For the breach of an obligation arising from contract the measure of damages, except when otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin. [Civ. C. 1877, §§ 1947, 1948; R. C. 1899, § 4978.]

Sureties on attachment bond not liable for damages to credit or business. Thompson v. Webber, 4 Dak. 240, 29 N. W. 671.

Damages from exposure through failure to thresh grain too remote. See note. Hayes v. Cooley, 13 N. D. 204, 100 N. W. 250.

Contract itself must furnish measure of damages and cannot exceed the amount party could have gained by full performance of contract on both sides. Cranmer v. Kohn, 7 S. D. 247, 64 N. W. 125; Davis v. Tubbs, 7 S. D. 488, 64 N. W. 534.

Damages must be clearly ascertainable, not speculative. Hudson v. Archer, 9 S. D. 240, 68 N. W. 541.

Jury judge of amount of damages for breach of contract. Nebraska Land Co. v. Burris, 10 S. D. 430, 73 N. W. 919.

Person fraudulently representing wrong location of real estate as correct is liable for damage actually sustained. Roberts v. Holliday, 10 S. D. 576, 74 N. W. 1034.

Rental value for time building is vacant measure of damage for failure to complete building at time specified. Seim v. Krause, 13 S. D. 530, 83 N. W. 583.

§ 6564. To pay money, amount due with interest. The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation with interest thereon. [Civ. C. 1877, § 1949; R. C. 1899, § 4979.]

Measure of damage is interest on amount detained. North Star Boot & Shoe Co. v. Stebbins, 3 S. D. 540, 54 N. W. 593.

§ 6565. Dishonor of foreign bills. For the dishonor of foreign bills of exchange the damages are prescribed by sections 6542 and 6543 of this code. [Civ. C. 1877, § 1950; R. C. 1899, § 4980.]

§ 6566. For breach of covenants in grants. The detriment caused by the breach of a covenant of seizin, of right to convey, of warranty or of quiet enjoyment in a grant of an estate in real property is deemed to be:

1. The price paid to the grantor, or if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore at the time of the grant to the value of the whole property.

2. Interest thereon for the time during which the grantee derived no benefit from the property, not exceeding six years; and,

3. Any expense properly incurred by the covenantee in defending his possession. [Civ. C. 1877, § 1951; R. C. 1899, § 4981.]

Covenants running with land are warranty and further assurance. Gale v. Frazer, 4 Dak. 196, 30 N. W. 138.

For case giving normal damages under this section see Bowne v. Walcott, 1 N. D. 415, 48 N. W. 336.

Damages for breach of covenant. Statutory rule not inflexible. Bowne v. Wolcott, 1 N. D. 415, 48 N. W. 336.

Where in covenant of seisin, grantor covenants "for his heirs, executors and administrators," no action will lie against grantor for breach. For breach of covenant of seisin, damages limited to consideration paid and interest. Bowne v. Wolcott, 1 N. D. 497, 48 N. W. 336.

Vendee may recover on contract to convey land after payment out of crops thereon as for money had and received. Measure of damages is money paid on the contract. Kicks, Adm., v. Bank of Lisbon, 12 N. D. 576, 98 N. W. 408.

Measure of damages on breach of contract. Kicks, Adm., v. Bank of Lisbon, 12 N. D. 576, 98 N. W. 408.

Covenants against incumbrances not embraced within statute. Louseau v. Threlstad, 14 S. D. 257, 85 N. W. 189.

§ 6567. **Against incumbrances.** The detriment caused by the breach of a covenant against incumbrances in a grant of an estate in real property is deemed to be the amount which has been actually expended by the covenantee in extinguishing either the principal or interest thereof; not exceeding in the former case a proportion of the price paid to the grantor, equivalent to the relative value at the time of the grant of the property affected by the breach as compared with the whole; or, in the latter case, interest on a like amount. [Civ. C. 1877, § 1952; R. C. 1899, § 4982.]

If plaintiff when he sues on a covenant against incumbrances has extinguished, he is entitled to recover price he paid for it. Dahl v. Stakke, 12 N. D. 325, 96 N. W. 353.

§ 6568. **Of agreement to convey realty.** The detriment caused by the breach of an agreement to convey an estate in real property is the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach and the expenses properly incurred in examining the title with interest thereon, and in preparing to enter upon the land and the amount paid on the purchase price, if any, with interest thereon from the time of the breach. [Civ. C. 187, § 1953; R. C. 1895, § 4983.]

Only damages alleged in complaint are recoverable for breach of contract in sale of real estate. Narregang v. Trust Co., 7 S. D. 574, 64 N. W. 1128; Coats v. Arthur, 5 S. D. 274, 58 N. W. 675.

§ 6569. **To buy realty.** The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller under the contract over the value of the property. [Civ. C. 1877, § 1954; R. C. 1895, § 4984.]

See Barnes v. Clement, 8 S. D. 421, 66 N. W. 810.

§ 6570. **Of agreement to deliver personalty not fully paid for.** The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer over the amount which would have been due to the seller under the contract, if it had been fulfilled. [Civ. C. 1877, § 1955; R. C. 1899, § 4985.]

Measure of damages for breach of contract for exchange of personal property. Talbot v. Boyd, 11 N. D. 81, 88 N. W. 1026.

§ 6571. **Same when fully paid for.** The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has been fully paid to him in advance, is deemed to be the same as in case of a wrongful conversion. [Civ. C. 1877, § 1956; R. C. 1899, § 4986.]

Note owned jointly and converted to use of one owner, other may sue for conversion. Grigsby v. Day, 9 S. D. 585, 70 N. W. 881.

§ 6572. Of buyer to pay for personalty when title in him. The detrim caused by the breach of a buyer's agreement to accept and pay for perso property, the title to which is vested in him, is deemed to be the contract pr [Civ. C. 1877, § 1957; R. C. 1899, § 4987.]

See Dowagiac Mfg. Co. v. Higinbotham, 15 S. D. 547, 91 N. W. 330.

§ 6573. Same when title not in buyer. The detriment caused by breach of a buyer's agreement to accept and pay for personal property, title to which is not vested in him is deemed to be:

1. If the property has been resold pursuant to section 6284 the excess any, of the amount due from the buyer under the contract, over the net ceeds of the resale; or,

2. If the property has not been resold in the manner prescribed by sec 6284 the excess, if any, of the amount due from the buyer under the cont over the value to the seller together with the excess, if any, of the expe properly incurred in carrying the property to market over those wh would have been incurred for the carriage thereof, if the buyer had accep it. [Civ. C. 1877, § 1958; R. C. 1899, § 4998.]

See Stanford v. McGill, 6 N. D. 536, 72 N. W. 938; Minneapolis Threshing Mac Co. v. McDonald, 10 N. D. 408, 87 N. W. 993.

Where the property has been delivered to the vendee, the title being reserve vendor as security, the vendor may waive title and sue for purchase price. Br ing such action is a waiver. Dowagiac Mfg. Co. v. Mahon & Robinson, 13 N 516, 101 N. W. 903.

§ 6574. Breach of warranty of title to personalty. The detriment cau by the breach of a warranty of the title of personal property sold is dee to be the value thereof to the buyer, when he is deprived of its possess together with any costs which he has become liable to pay in an action brou for the property by the true owner. [Civ. C. 1877, § 1959; R. C. 1899, § 49

§ 6575. Same of quality of personalty. The detriment caused by breach of warranty of the quality of personal property is deemed to be excess, if any, of the value which the property would have had at the t to which the warranty referred if it had been complied with, over its ac value at that time. [Civ. C. 1877, § 1960; R. C. 1899, § 4990.]

Held reversible error to allow defendant's counsel to ask witness to testif value of a machine on assumption it was useless when evidence clearly sho that it could be and was used. Aultman & Co. v. Ginn, 1 N. D. 402, 48 N. W.

Continued use of machinery may defeat rescission of contract but will destroy right to plead breach of warranty. Minnesota Thresher Mfg. Co Hanson, 3 N. D. 81, 54 N. W. 311.

Where purchaser of property gives his note therefor and afterwards resc the contract of sale for breach of warranty, he may recover amount of note interest without paying same where note negotiated before maturity. Provis in judgment in such case. Fahey v. Esterly Machine Co., 3 N. D. 220, 55 N 580.

Rule of damages for breach of warranty. Fargo Gas & Coke Co. v. F Gas & Electric Co., 4 N. D. 219, 59 N. W. 1066; Western Twine Co. v. Wrigh S. D. 521, 78 N. W. 942; Hermon v. Silver, 15 S. D. 476, 90 N. W. 141; Seiberlin Mortinson, 9 S. D. 576, 70 N. W. 835.

Failure to return machine as agreed, see Minnesota Thresher Co. v. Lincol N. D. 410, 61 N. W. 145.

Breach of executory contract of sale. Stanford v. McGill, 6 N. D. 536, 72 N 938.

Question of value of property cannot be established by opinion witness ha to its value to him. Aultman & Co. v. Ferguson, 8 S. D. 458, 66 N. W. 1081.

§ 6676. Same of fitness of personalty. The detriment caused by the bre of a warranty of the fitness of an article of personal property for a partic purpose is deemed to be that which is defined by the last section, toge with a fair compensation for the loss incurred by an effort in good faith use it for such purpose. [Civ. C. 1877, § 1961; R. C. 1899, § 4991.]

§ 6577. Breach of carrier's obligation to accept freight, etc. The detrim caused by the breach of a carrier's obligation to accept freight, message

passengers is deemed to be the difference between the amount which he had a right to charge for the carriage and the amount it would be necessary to pay for the same service when it ought to be performed. [Civ. C. 1877, § 1962; R. C. 1899, § 4992.]

§ 6578. **Same to deliver freight, etc.** The detriment caused by the breach of a carrier's obligation to deliver freight, when he has not converted it to his own use, is deemed to be the value thereof at the place and on the day at which it should have been delivered, deducting the freightage to which he would have been entitled if he had completed the delivery. [Civ. C. 1877, § 1963; R. C. 1899, § 4993.]

§ 6579. **For detriment caused by carrier's delay.** The detriment caused by a carrier's delay in the delivery of freight is deemed to be the depreciation in the intrinsic value of the freight during the delay and also the depreciation, if any, in the market value thereof, otherwise than by reason of a depreciation in the intrinsic value at the place where it ought to have been delivered and between the day at which it ought to have been delivered and the day of its actual delivery. [Civ. C. 1877, § 1964; R. C. 1899, § 4994.]

§ 6580. **Breach of warranty of agent's authority.** The detriment caused by the breach of a warranty of an agent's authority is deemed to be the amount which could have been recovered and collected from his principal if the warranty had been complied with and the reasonable expenses of legal proceedings taken in good faith to enforce the act of the agent against his principal. [Civ. C. 1877, § 1965; R. C. 1899, § 4995.]

Unauthorized agent liable as principal and for costs. Kennedy v. Stonehouse, 13 N. D. 232, 100 N. W. 258.

§ 6581. **Of promise to marry.** The damages for the breach of a promise of marriage rest in the sound discretion of the jury. [Civ. C. 1877, § 1966; R. C. 1899, § 4996.]

Article 3.—Damages for Wrongs.

§ 6582. **Compensation for detriment proximately caused, anticipated or not.** For the breach of an obligation not arising from contract the measure of damages, except when otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. [Civ. C. 1877, § 1967; R. C. 1899, § 4997.]

In action to recover specific personal property jury may award exemplary damages sustained through fraud, malice or oppression, by way of punishing defendant. Holt v. Van Eps, 1 Dak. 198, 46 N. W. 689.

Municipal corporation not liable for exemplary damages. Larson v. Grand Forks, 3 Dak. 307, 19 N. W. 414.

Liable even when injury is proximate, though not reasonably anticipated. Ouverson v. City of Grafton, 5 N. D. 281, 65 N. W. 676; Chacey v. City of Fargo, 5 N. D. 173, 64 N. W. 932.

Only when fraud or malice exists can jury assess exemplary damages. Lindblom v. Sonstelie, 10 N. D. 140, 86 N. W. 357.

§ 6583. **For wrongful occupation of realty.** The detriment caused by the wrongful occupation of real property in cases not embraced in sections 6584, 6590, 6591 and 6592 is deemed to be the value of the use of the property for the time of such occupation, not exceeding six years next preceding the commencement of the action or proceeding to enforce the right to damages and the costs, if any, of recovering the possession. [Civ. C. 1877, § 1968; R. C. 1899, § 4998.]

Landlord may recover though land used without agreement to pay rent. Parkinson v. Shew, 12 S. D. 171, 80 N. W. 189; Hegar v. DeGroat, 3 N. D. 354, 56 N. W. 150; Olsen v. Huntamer, 6 S. D. 364, 61 N. W. 479.

Owner of unoccupied land may sue for trespass. Owner may sue on the case for damage to his reversionary interest. Owner of equitable title may sue. Russell v. Meyer, 7 N. D. 335, 75 N. W. 262,

§ 6584. **For willful detention of realty.** For willfully holding over real property by a person who entered upon the same as guardian or trustee for an infant, or by right of an estate terminable with any life or lives after the termination of the trust or particular estate without the consent of the party immediately entitled after such termination, the measure of damages is the value of the profits received during such holding over. [Civ. C. 1877, § 1969; R. C. 1899, § 4999.]

§ 6585. **For conversion of personalty.** The detriment caused by the wrongful conversion of personal property is presumed to be:

1. The value of the property at the time of the conversion with the interest from that time; or,

2. When the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict without interest, at the option of the injured party; and,

3. A fair compensation for the time and money properly expended in pursuit of the property. [Civ. C. 1877, § 1970; 1885, ch. 42, § 1; R. C. 1899, § 5000.]

Damage for conversion highest market value. Pickert v. Rugg, 1 N. D. 230, 46 N. W. 446; Thompson v. Schaetzel, 6 Dak. 284, 42 N. W. 765.

Action cannot be maintained unless plaintiff was in, or had a legal right to, possession of property converted at time of conversion. Parker v. Bank, 3 N. D. 87, 54 N. W. 313.

Owner may waive tort and sue for benefits received by wrong-doer, but intent to waive tort must appear upon face of pleading. Braithwaite v. Akin, 3 N. D. 365, 56 N. W. 133.

Owner may waive the tort and treat conversion as purchase. Election of remedies; waiver of tort; sale of notes to self. Choses in action presumed to be worth what appears to be due. Anderson v. Bank, 5 N. D. 80, 64 N. W. 114; Anderson v. Bank, 5 N. D. 451, 67 N. W. 821; Anderson v. Bank, 6 N. D. 479, 72 N. W. 916.

Can recover no damages when he suffers none as a result of the wrongful act of which he complains. Lovejoy v. Bank, 5 N. D. 623, 67 N. W. 956.

Demand on agent sufficient as to owner. Seymour v. Elevator Co., 6 N. D. 444, 71 N. W. 132.

As to best and secondary evidence in action for conversion see Kelly v. Elevator Co., 7 N. D. 343, 75 N. W. 264.

Where there is no evidence of the value of the wheat at time of the demand or when shipped out of the state, there can be no recovery. Towne v. Elevator Co., 8 N. D. 200, 77 N. W. 608.

Delay of eleven months in prosecution defeats highest market value. First National Bank of Fargo v. Minneapolis & Northern Elevator Co., 8 N. D. 430, 79 N. W. 874.

In conversion highest market value is measure of damages. First National Bank of Fargo v. Red River Valley National Bank, 9 N. D. 319, 83 N. W. 221.

Reasonable diligence in commencing action, can be questioned. Bank v. Bank, 9 N. D. 319, 83 N. W. 221.

By demanding interest plaintiff elects to have damage assessed under first paragraph. Rosum v. Hodges, 1 S. D. 308, 47 N. W. 140; Torrey v. Peck, 13 S. D. 538, 83 N. W. 585; Straw v. Jenks, 6 Dak. 414, 43 N. W. 941.

Damage for conversion of note is amount converted and interest. Gillespie v. Evans, 10 S. D. 234, 72 N. W. 576.

§ 6586. **Presumption cannot be repelled.** The presumption declared by the last section cannot be repelled in favor of one whose possession was wrongful from the beginning by his subsequent application of the property to the benefit of the owner without his consent. [Civ. C. 1877, § 1971; R. C. 1899, § 5001.]

§ 6587. **For conversion by superior lien holder.** One having a mere lien on personal property cannot recover greater damages for its conversion from one having a right thereto superior to his after his lien is discharged than the amount secured by the lien and the compensation allowed by section 6585 for loss of time and expenses. [Civ. C. 1877, § 1972; R. C. 1899, § 5002.]

One who has a special interest in property can recover damages upon proof of such special interest. Bank v. Bank, 8 N. D. 504, 76 N. W. 504.

§ 6588. For seduction. The damages for seduction rest in the sound discretion of the jury. [Civ. C. 1877, § 1973; R. C. 1899, § 5003.]

Unmarried woman has no action for her own seduction. Father can maintain action for seduction of minor child. Ingwaldson v. Skrivseth, 7 N. D. 388, 75 N. W. 772.

§ 6589. Exemplary for injuries for animals. For wrongful injuries to animals, being subjects of property, committed willfully or by gross negligence in disregard of humanity, exemplary damages may be given. [Civ. C. 1877, § 1974; R. C. 1899, § 5004.]

§ 6590. For tenant's failure to surrender premises. For the failure of a tenant to give up the premises held by him, when he has given notice of his intention to do so, the measure of damages is double the rent which he ought otherwise to pay. [Civ. C. 1877, § 1975; R. C. 1899, § 5005.]

§ 6591. For tenant's willful holding over. For willfully holding over real property by a tenant after the end of his term and after notice to quit has been duly given and demand of possession made the measure of damages is double the yearly value of the property for the time of withholding in addition to compensation for the detriment occasioned thereby. [Civ. C. 1877, § 1976; R. C. 1899, § 5006.]

§ 6592. For forcible exclusion from realty. For forcibly ejecting or excluding a person from the possession of real property the measure of damages is three times such a sum as would compensate for the detriment caused to him by the act complained of. [Civ. C. 1877, § 1977; R. C. 1899, § 5007.]

To authorize recovery of treble damages entry must be forcible. It is enough if force is present, threatened, and justly feared. Wegner v. Lubenow, 12 N. D. 95, 95 N. W. 442.

Settler upon public land forcibly excluded therefrom may recover three times actual damages. Olson v. Huntamer, 6 S. D. 364, 61 N. W. 479.

§ 6593. For wrongful injuries to timber. For wrongful injuries to timber, trees or underwood upon the land of another, or removal thereof, the measure of damages is three times such a sum as would compensate for the actual detriment, except when the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser, or when the wood was taken by the authority of highway officers for the purposes of a highway; in which case the damages are a sum equal to the actual detriment. [Civ. C. 1877, § 1978; R. C. 1899, § 5008.]

Article 4.—General Provisions.

§ 6594. What value of property to seller deemed to be. In estimating damages the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer and at such time after the breach of the contract as would have sufficed with reasonable diligence for the seller to effect a resale. [Civ. C. 1877, § 1979; R. C. 1899, § 5009.]

Measure of damages is established by this section unless seller proceeds under section 6284. Stanford v. McGill, 6 N. D. 536, 72 N. W. 938.

Measure of damages is difference between contract price and market value at time and place of refusal to accept. Machine Co. v. McDonald, 10 N. D. 408, 87 N. W. 933.

§ 6595. What to buyer or owner. In estimating damages, except as provided by sections 6596 and 6597, the value of property to a buyer or owner thereof deprived of its possession is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession and at such time after the breach of duty upon which his right to damages is founded as would suffice

with reasonable diligence for him to make such a purchase. [Civ. C. 1877, § 1980; R. C. 1899, § 5010.]

Conversion. Damages. Highest market value. Pickert v. Rugg, 1 N. D. 230, 46 N. W. 446.

Not applicable to property the market value of which cannot be determined. Patterson v. Plummer, 10 N. D. 95, 86 N. W. 111.

§ 6596. When peculiar value to person deemed value. When certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer. [Civ. C. 1877, § 1981; R. C. 1899, § 5011.]

§ 6597. Value of title papers. For the purpose of estimating damages the value of an instrument in writing is presumed to be equal to that of the property to which it entitles its owner. [C. Civ. 1877, § 1982; R. C. 1899, § 5012.]

Choses in action presumed to be worth full value. Anderson v. Bank, 6 N. D. 497, 72 N. W. 916.

So far as applicable national bank certificates of stock, presumptive value of such stock is its par or nominal value. Patterson v. Plummer, 10 N. D. 95, 86 N. W. 111.

In absence of evidence to the contrary, law presumes amount appearing to be due upon promissory note to be its value. Cosard v. Bunker, 2 S. D. 294, 50 N. W. 84; Grigsby v. Day, 9 S. D. 585, 70 N. W. 881; Wylly v. Grigsby, 11 S. D. 491, 78 N. W. 957.

§ 6598. When exclusive of exemplary damages. The damages prescribed by this chapter are exclusive of exemplary damages and interest except when those are expressly mentioned. [Civ. C. 1877, § 1983; R. C. 1899, § 5013.]

§ 6599. Cannot recover more than would be gained by performance. Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides except in the cases specified in the subdivisions on exemplary damages and penal damages and in sections 6581, 6588 and 6589. [Civ. C. 1877, § 1984; R. C. 1899, § 5014.]

Contract itself must furnish measure of damages. Cranmer v. Kohn, 7 S. D. 247, 64 N. W. 125; Bowers v. Graves & Vinton Co., 8 S. D. 385, 66 N. W. 931.

§ 6600. Damages must be reasonable. Damages must in all cases be reasonable and when an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages contrary to substantial justice, no more than reasonable damages can be recovered. [Civ. C. 1877, § 1985; R. C. 1899, § 5015.]

See Keith v. Haggart, 4 Dak. 438, 33 N. W. 465.

§ 6601. Nominal damages. When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages. [Civ. C. 1877, § 1986; R. C. 1899, § 5016.]

Nominal damages recoverable for breach of duty though no substantial rights are violated. Wylly v. Grigsby, 11 S. D. 491, 78 N. W. 957.

Article 5.—Specific and Preventive Relief.

§ 6602. When specific relief given. Specific or preventive relief may be given in the cases specified in this and the following two articles and no others. [Civ. C. 1877, § 1987; R. C. 1899, § 5017.]

§ 6603. How given. Specific relief is given:

1. By taking possession of a thing and delivering it to a claimant.
2. By compelling a party himself to do that which ought to be done; or,
3. By declaring and determining the rights of parties, otherwise than by an award of damages. [Civ. C. 1877, § 1988; R. C. 1899, § 5018.]

Instrument may be canceled. Nation v. Cameron, 2 Dak. 347, 11 N W. 525.

§ 6604. **How preventive relief given.** Preventive relief is given by prohibiting a party from doing that which ought not to be done. [Civ. C. 1877, § 1989; R. C. 1899, § 5019.]

§ 6605. **Neither given to enforce penal law.** Neither specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance, nor to enforce a penalty or forfeiture in any case. [Civ. C. 1877, § 1990; R. C. 1899, § 5020.]

This and preceding section have no application in action to quiet title and recover land. Pier v. Lee, 14 S. D. 600, 86 N. W. 642.

Article 6.—Possession of Real and Personal Property.

§ 6606. **Method of recovery.** A person entitled to specific real property by reason, either of a perfected title, or of a claim to title which ought to be perfected, may recover the same in the manner prescribed by the code of civil procedure, either by a judgment for its possession to be executed by the sheriff, or by a judgment requiring the other party to perfect the title and to deliver possession of the property. [Civ. C. 1877, § 1991; R. C. 1899, § 5021.]

§ 6607. **Method of recovery.** A person entitled to the immediate possession of specific personal property may recover the same in the manner provided by the code of civil procedure. [Civ. C. 1877, § 1992; R. C. 1899, § 5022.]

§ 6608. **Specific delivery compellable.** Any person having the possession or control of a particular article of personal property of which he is not the owner may be compelled specifically to deliver it to the person entitled to its immediate possession. [Civ. C. 1877, § 1993; R. C. 1899, § 5023.]

Article 7.—Specific Performance of Obligations.

§ 6609. **When compelled.** Except as otherwise provided in this article the specific performance of an obligation may be compelled. [Civ. C. 1877, § 1994; R. C. 1899, § 5024.]

Courts of equity will neither decree nor enforce specific performance of contracts requiring the determination of questions of fact for each alleged violation. Kidd v. McGinnis, 1 N. D. 331, 48 N. W. 221.

Specific performance decreed in case of Plummer v. Kelly, 7 N. D. 88, 73 N. W. 70.

Conditions may be varied, when. Ross v. Page, 11 N. D. 458, 92 N. W. 822.

Consideration and mutual assent in contract essential to specific performance. Kastor v. Mason, 13 N. D. 107, 99 N. W. 1083.

§ 6610. **Remedy mutual. When neither can be compelled.** Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance. [Civ. C. 1877, § 1995; R. C. 1899, § 5025.]

At time when deed should be delivered specific perforamnce is only action maintainable before suit is brought for price. Shelly v. Mikkelson, 5 N. D. 22, 63 N. W. 210.

Specific performance denied, when. Mahon v. Leech, 11 N. D. 181, 90 N. W. 807; Wadge v. Kittleson, 12 N. D. 462, 97 N. W. 856.

Specific performance decreed when contract is mutual both as to obligation and remedy. Peterson v. Dibble, 12 N. D. 572, 98 N. W. 411.

An order for specific performance is presumed to be based on competent evidence, when. Block v. Donovan, 13 N. D. 1, 99 N. W. 72.

Parties to contract must be able to perform "completely, or nearly so." Bank v. Kellogg, 4 S. D. 312, 56 N. W. 1071.

Acceptance of withdrawal of offer binds both parties. Townsend v. Kennedy, 6 S. D. 47, 60 N. W. 164.

§ 6611. **Presumption as to relief for not transferring.** It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation and that the breach of an agreement to

transfer personal property can be thus relieved. [Civ. C. 1877, 1899, § 5026.]

Vendee cannot be required to accept land while vendor has Bank v. Kellogg, 4 S. D. 312, 56 N. W. 1071.

Contract for 99 year lease of realty regarded as contract to property; cannot be adequately relieved by pecuniary compensa Spear, 12 S. D. 108, 80 N. W. 166.

§ 6612. Specific performance compelled though contract si one. A party who has signed a written contract may be compell to perform it, though the other party has not signed it, if the l formed or offers to perform it on his part and the case is oth for enforcing specific performance. [Civ. C. 1877, § 1997; R. C.

Contract for sale of realty is enforceable against vendor, even t by seller only. Gira v. Harris, 14 S. D. 537, 86 N. W. 624; McPhers S. D. 611, 74 N. W. 1057.

§ 6613. Compelled though penalty imposed or damages liquid tract otherwise proper to be specifically enforced may be t though a penalty is imposed or the damages are liquidated and the party in default is willing to pay the same. [Civ. C. R. C. 1899, § 5028.]

§ 6614. What obligations cannot be enforced. The followi cannot be specifically enforced:

1. An obligation to render personal service.
2. An obligation to employ another in personal service.
3. An agreement to submit a controversy to arbitration.
4. An agreement to perform an act which the party has not p to perform when required to do so.
5. An agreement to procure the act or consent of the wife of t party or of any other third person; or,
6. An agreement, the terms of which are not sufficiently ce the precise act which is to be done clearly ascertainable. [Civ. C R. C. 1899, § 5029.

§ 6615. When it cannot be enforced against one. Specific cannot be enforced against a party to a contract in any of the fo

1. If he has not received an adequate consideration for th
2. If it is not as to him just and reasonable.
3. If his assent was obtained by misrepresentation, conceal vention or unfair practice of any party to whom performance due under the contract, or by any promise of such party which substantially fulfilled; or,
4. If his assent was given under the influence of mistake, mis or surprise, except that when the contract provides for compen of mistake, a mistake within the scope of such provision ma sated for and the contract specifically enforced in other respe to be so enforced. [Civ. C. 1877, § 2000; R. C. 1899, 5030.]

§ 6616. Same in favor of one. Specific performance canno in favor of a party who has not fully and fairly performed all precedent on his part to the obligation of the other party, ex failure to perform is only partial and either entirely immater of being fully compensated, in which case specific performance pelled upon full compensation being made for the default. § 2001; R. C. 1899, § 5031.]

Substantial compliance with terms of builder's contract entitle pay although there are unintentional defects. Aldrich v. Wilmar 54 N. W. 811; Hulst v. Benevolent Ass'n., 9 S. D. 144, 68 N. W. 200.

Vendee of 7-foot binder not obliged to receive and pay for Osborne Co. v. Martin, 4 S. D. 297, 56 N. W. 905.

An agreement to convey land containing words "by good and ranty deed" not complied with by deed which excepts a mortgag Arnett, 4 S. D. 615, 57 N. W. 915.

§ **6617. Cannot be when title imperfect.** An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give to the buyer a title free from reasonable doubt. [Civ. C. 1877, § 2002; R. C. 1899, § 5032.]

Purchaser cannot be compelled to accept deed where there is an apparent cloud on title. Easton v. Lockhart, 10 N. D. 181, 86 N. W. 697; Bank v. Kellogg, 4 S. D. 312, 56 N. W. 1071; Godfrey v. Rosenthal, 17 S. D. 452, 97 N. W. 365.

In purchases of entry under townsite law action may be maintained for error of county judge in executing deed. MacVeagh v. Burns, 2 S. D. 83, 48 N. W. 835.

§ **6618. When enforced against subsequent holder.** Whenever an obligation in respect to real property would be specifically enforced against a particular person it may be in like manner enforced against any other person claiming under him by a title created subsequently to the obligation, except a purchaser or incumbrancer in good faith and for value and except also that any such person may exonerate himself by conveying all his estate to the person entitled to enforce the obligation. [Civ. C. 1877, § 2003; R. C. 1899, § 5033.]

ARTICLE 8.—REVISION AND RESCISSION OF CONTRACTS.

§ **6619. For fraud or mistake.** When through fraud, or mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved so as to express that intention so far as it can be done without prejudice to rights acquired by third persons in good faith and for value. [C. Civ. 1877, § 2004; R. C. 1899, § 5034.]

Written contract for conveyance of title may be reformed, when. Littlejohn v. Creamery Co., 14 S. D. 312, 85 N. W. 588.

§ **6620. Intention to make equitable agreement presumed.** For the purpose of revising a contract it must be presumed that all the parties thereto intended to make an equitable and conscientious agreement. [Civ. C. 1877, § 2005; R. C. 1899, § 5035.]

§ **6621. Court may inquire what instrument was intended to mean.** In revising a written instrument the court may inquire what the instrument was intended to mean and what were intended to be its legal consequences and is not confined to the inquiry what the language of the instrument was intended to be. [Civ. C. 1877, § 2006; R. C. 1899, § 5036.]

§ **6622. First revised, then enforced.** A contract may be first revised and then specifically enforced. [Civ. C 1877, § 2007; R. C. 1899, § 5037.]

§ **6623. When adjudged.** The rescission of a written contract may be adjudged on the application of a party aggrieved:

1. In any of the cases mentioned in section 5378; or,
2. When the contract is unlawful for causes not apparent upon its face and the parties were not equally in fault; or,
3. When the public interest will be prejudiced by permitting it to stand.

[Civ. C. 1877, 2008; R. C. 1899, § 5038.]

§ **6624. Not for mere mistake.** Recission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same condition as if the contract had not been made. [Civ. C. 1877, § 2009; R. C. 1899, § 5039.]

§ **6625. Compensation may be required.** On adjudging the rescission of a contract the court may require the party to whom such relief is granted to make any compensation to the other which justice may require. [C. Civ. 1877, § 2010; R. C. 1899, § 5040.]

ARTICLE 9.—CANCELLATION OF INSTRUMENTS.

§ **6626. When adjudged.** When a written instrument, or the record thereof, may cause injury to a person against whom such instrument is void or voidable, such instrument may, in an action brought by the party injured, be

adjudged void and the same be ordered to be delivered up for cancellation and the record thereof canceled, whether extrinsic evidence is necessary to show its invalidity or not. [Civ. C. 1877, § 2011; R. C. 1895, § 5041.]

Complaint should state facts showing plaintiff is entitled to relief demanded. Nation v. Cameron, 2 Dak. 347, 11 N. W. 525.

Where invalidity appears upon the face of an instrument it is not a cloud on title. Morris v. McKnight, 1 N. D. 266, 47 N. W. 375; Grant County v. Mortgage Co., 3 S. D. 390, 53 N. W. 746.

To cancel a deed for alteration evidence must be clear, strong and convincing. Riley v. Riley, 9 N. D. 580, 84 N. W. 347.

Junior mortgagee may maintain action to cancel prior mortgage void as to him. Rosenbaum v. Foss, 4 S. D. 184, 56 N. W. 114.

An instrument which requires evidence to show its invalidity is not "invalid on its face." Rosenbaum v. Foss, 4 S. D. 184, 56 N. W. 114; Brace v. Van Eps, 12 S. D. 191, 80 N. W. 197.

For cancellation of lis pendens, see Hale v. Grigsby, 12 S. D. 198, 80 N. W. 199.

§ 6627. Partial cancellation. When an instrument is evidence of different rights or obligations it may be canceled in part and allowed to stand for the residue. [Civ. C. 1877, § 2013; R. C. 1899, § 5042.]

Article 10.—Preventive Relief.

§ 6628. How granted. Preventive relief is granted by injunction, provisional or final. [Civ. C. 1877, § 2014; R. C. 1899, § 5043.]

§ 6629. Provisional injunctions. Provisional injunctions are regulated by the code of civil procedure. [Civ. C. 1877, § 2015; R. C. 1899, § 5044.]

§ 6630. When final injunction granted. Except when otherwise provided by this chapter, a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant:

1. When pecuniary compensation would not afford adequate relief.
2. When it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief.
3. When the restraint is necessary to prevent a multiplicity of judicial proceedings; or,
4. When the obligation arises from a trust. [Civ. C. 1877, § 2016; R. C. 1899, § 5045.]

§ 6631. When injunction not granted. An injunction cannot be granted:

1. To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings.
2. To stay proceedings in a court of the United States.
3. To stay proceedings in any other state upon a judgment of a court of that state.
4. To prevent the execution of a public statute by officers of the law for the public benefit.
5. To prevent the breach of a contract, the performance of which could not be specifically enforced.
6. To prevent the exercise of a public or private office in a lawful manner by the person in possession.
7. To prevent a legislative act by a municipal corporation. [Civ. C. 1877, § 2017; R. C. 1899, § 5046; 1901, ch. 108.]

Preliminary mandatory injunction cannot be granted pending action of ejectment. Catholicon Co. v. Ferguson, 7 S. D. 503, 64 N. W. 539; Cole v. Cady, 2 Dak. 29, 3 N. W. 322.

Will not lie against submission of constitutional amendment. State ex rel Cranmer v. Thorson, 9 S. D. 149, 68 N. W. 202.

One holding prima facie title to office will not be restrained pending litigation. State ex rel Adams v. Herreid, 10 S. D. 109, 71 N. W. 319.

Not granted to restrain execution sale when no showing of insolvency is made. Beatty v. Smith, 14 S. D. 24, 84 N. W. 208.

Owner cannot obtain possession of property by action of ouster where injunction has been issued restraining further proceedings pending appeal. Dennett v. Reisdorfer, 15 S. D. 466, 90 N. W. 138.

CHAPTER 98.

SPECIAL RELATIONS OF DEBTOR AND CREDITOR.

ARTICLE 1.—GENERAL PRINCIPLES.

§ **6632. Debtor defined.** A debtor within the meaning of this chapter is one who by reason of an existing obligation is or may become liable to pay money to another whether such liability is certain or contingent. [Civ. C. 1877, § 2018; R. C. 1899, § 5047.]

Sureties on bonds are debtors within meaning of this section. Conner v. Corson, 13 S. D. 550, 83 N. W. 588.

§ **6633. Creditor defined.** A creditor within the meaning of this chapter is one in whose favor an obligation exists by reason of which he is or may become entitled to the payment of money. [Civ. C. 1877, § 2019; R. C. 1899, § 5048.]

§ **6634. Fraud only vitiates debtor's contract.** In the absence of fraud every contract of a debtor is valid against all his creditors existing or subsequent, who have not acquired a lien on the property affected by such contract. [Civ. C. 1877, § 2020; R. C. 1899, § 5049.]

Transfer of funds made in good faith before judgment not fraudulent. McLaughlin v. Bank, 6 Dak. 406, 43 N. W. 715.

§ **6635. Creditors may be preferred.** A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another. [Civ. C. 1877, § 2021; R. C. 1899, § 5050.]

Debtor can prefer by giving chattel mortgages. Creation of lien does not create trust fund. Cutter v. Pollock, 4 N. D. 205, 59 N. W. 1062.

Debtor may prefer creditor in absence of fraud. Red River Bank v. Barnes, 8 N. D. 432, 79 N. W. 880; Meyer Boot & Shoe Co. v. Shenkberg Co., 11 S. D. 620, 80 N. W. 126; Jones v. Meyer, 7 S. D. 152, 63 N. W. 773; Church v. Foley, 10 S. D. 74, 71 N. W. 759; Sandwich Mfg. Co. v. Max, 5 S. D. 125, 58 N. W. 14; Jewett v. Downs, 6 S. D. 319, 60 N. W. 76; First National Bank v. North, 2 S. D. 480, 51 N. W. 96.

§ **6636. Order of resort among creditors.** When a creditor is entitled to resort to each of several funds for the satisfaction of his claim and another person has an interest in or is entitled as a creditor to resort to some, but not all of them, the latter may require the former to seek satisfaction from those funds to which the latter has no such claim so far as it can be done without impairing the right of the former to complete satisfaction and without doing injustice to third persons. [Civ. C. 1877, § 2022; R. C. 1899, § 5051.]

Order of resort among creditors. See Bank v. Moline, Milburn, Stoddard Co., 7 N. D. 201, 73 N. W. 727.

ARTICLE 2.—FRAUDULENT INSTRUMENTS AND TRANSFERS.

§ **6637. Transfers with intent to defraud creditors void.** Every transfer of property or charge thereon made, every obligation incurred and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands is void against all creditors of the debtor and their successors in interest and against any persons upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor. [Civ. C. 1877, § 2023; R. C. 1899, § 5052.]

Certain instructions given in case under this section reviewed. Young v. Harris, 4 Dak. 367, 32 N. W. 97.

Conveyance by insolvent with secret trust void as to attaching creditors. Newell v. Wagness, 1 N. D. 62, 44 N. W. 1014; Bank v. Crawford, 4 Dak. 167, 28 N. W. 855.

Assignment for benefit of creditors with reservation of exemptions not fraudulent. Red River Bank v. Freeman, 1 N. D. 196, 46 N. W. 36.

Conveyance with sole object to secure honest debt not fraudulent. Paulson v Ward, 4 N. D. 100, 58 N. W. 792.

Conveyances to defraud a creditor void as to all. Daisy Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271; Shauer v. Alerton, 151 U. S. 607; Burt v. Gotzain, 102 Fed. 937.

Fraudulent grantee cannot hold land as security for advances. Daisy Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271; Shaner v. Alterton, 151 U. S. 607; Burt v. Gotzam, 102 Fed. 937.

Fraudulent conveyances. Knowledge of grantee. Suspicious circumstances exciting inquiry. Transfer to relative raises no presumption of fraud. Fluegel Jr., v. Henschel, 7 N. D. 276, 74 N. W. 996.

Intent governs in transfer of real estate fraudulently. Dalrymple v. Trust Co., 9 N. D. 306, 83 N. W. 245.

For action to set aside fraudulent conveyance, see Soly v. Aasen, 10 N. D. 108, 86 N. W. 108.

As to assignment of threshing lien, see Faber v. Wagner, 10 N. D. 287, 86 N. W. 963.

As to chattel mortgage, see Bergman v. Jones, 10 N. D. 520, 88 N. W. 284.

Consent of mortgagor for mortgagee to sell property for his own benefit raises presumption of fraud. Greely v. Winsor, 1 S. D. 117, 55 N. W. 325.

As to sufficiency of allegations in complaint and answer under this section, see Probert v. McDonald, 2 S. D. 495, 51 N. W. 212.

A conveyance of homestead from husband to wife, not fraudulent conveyance. First State Bank v. O'Leary, 13 S. D. 204, 83 N. W. 45.

§ 6638. Transfer of personalty without change of possession presumed fraudulent. Every sale made by a vendor of personal property in his possession or under his control and every assignment of personal property, unless the same is accompanied by an immediate delivery and followed by an actual and continued change of possession of the property sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor or assignor, or subsequent purchasers or incumbrancers in good faith and for value, unless those claiming under such sale or assignment make it appear that the same was made in good faith and without any intent to hinder, delay or defraud such creditors, purchasers or incumbrancers. [Civ. C. 1877, § 2024; 1893, ch. 78, § 1; R. C. 1895, § 5053.]

Vendee may be in possession by agent and that agent may be seller if the possession be such as to advise creditors of the change of title in the property. Grady v. Baker, 3 Dak. 296, 19 N. W. 417.

Filing chattel mortgage is equivalent to actual delivery. Reichert v. Simons, 6 Dak. 239, 42 N. W. 657.

Possession question of fact for jury. Rosenbaum v. Hayes, 8 N. D. 461, 79 N. W. 987.

Assignment free from fraud in inception is not invalidated by subsequent fraudulent acts. Wright v. Lee, 10 S. D. 263, 72 N. W. 895.

Open and visible possession of personal property must accompany transfer or it will be void as to creditors. Schauer v. Allerton, 151 U. S. 607; Conrad v. Smith, 6 N. D. 337, 70 N. W. 815; State v. Elevator Co., 6 N. D. 41, 68 N. W. 81; Conrad v. Smith, 2 N. D. 408, 51 N. W. 720; First National Bank v. Comfort, 4 Dak. 167, 28 N. W. 855; Howard v. Dwight, 8 S. D. 398, 66 N. W. 935; Greely v. Winsor, 13 Dak. 117, 45 N. W. 325; Longley v. Daly, 1 S. D. 257, 46 N. W. 247; Black Hills Co. v. Gardiner, 5 S. D. 246, 58 N. W. 557; Noyes v. Belding, 6 S. D. 629, 62 N. W. 953; Morrison v. Oium, 3 N. D. 76, 54 N. W. 288.

§ 6639. When only act of debtor void for fraud. A creditor can avoid the act or obligation of his debtor for fraud only when the fraud obstructs the enforcement by legal process of his right to take the property affected by the transfer or obligation. [Civ. C. 1877, § 2025; R. C. 1899, § 5054.]

Excess of value of security over debt secured raises no presumption of fraud on that account. Black Hills Co. v. Gardiner, 5 S. D. 246, 58 N. W. 557.

§ 6640. When fraudulent intent question of fact. In all cases arising under section 5043 or under the provisions of this chapter the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be ad-

judged fraudulent solely on the ground that it was not made for a valuable consideration. [Civ. C. 1877, § 2026; R. C. 1899, § 5055.]

Fraudulent intent must be alleged and made to appear. Dalrymple v. Trust Co., 9 N. D. 306, 83 N. D. 245.

See Bank v. Calkins, 12 S. D. 411, 81 N. W. 732; Bank v. McMillan, 9 S. D. 227, 68 N. W. 537; Provert v. McDonald, 2 S. D. 495, 51 N. W. 212; Gaynes v. White, 1 S. D. 434, 47 N. W. 524; Bergman v. Jones, 10 N. D. 520, 88 N. W. 284.

CHAPTER 99.

NUISANCE.

ARTICLE 1.—GENERAL PRINCIPLES.

§ **6641. Nuisance defined.** A nuisance consists in unlawfully doing an act or omitting to perform a duty, which act or omission either:

1. **Annoys, injures** or endangers the comfort, repose, health or safety of others; or,
2. **Offends decency**; or,
3. **Unlawfully** interferes with, obstructs or tends to obstruct or renders dangerous for passage any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or,
4. **In any way** renders other persons insecure in life or in the use of property. [Civ. C. 1877, § 2047; R. C. 1899, § 5056.]

The question of nuisance or no nuisance is always a question of fact. Teinen v. Lally, 10 N. D. 153, 86 N. W. 356.

§ **6642. Public nuisance.** A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal. [Civ. C. 1877, § 2048; R. C. 1899, § 5057.]

§ **6643. Private nuisance.** Every nuisance not included in the definition of the last section is private. [Civ. C. 1877, § 2049; R. C. 1899, § 5058.]

§ **6644. Nothing done under authority of statute deemed nuisance.** Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance. [Civ. C. 1877, § 2050; R. C. 1899, § 5059.]

§ **6645. Liability of successive owners not abating.** Every successive owner of property who neglects to abate a continuing nuisance upon or in the use of such property created by a former owner is liable therefor in the same manner as the one who first created it. [Civ. C. 1877, § 2051; R. C. 1899, § 5060.]

§ **6646. Right to damages not prejudiced by abatement.** The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence. [Civ. C. 1877, § 2052; R. C. 1899, § 5061.]

ARTICLE 2.—PUBLIC NUISANCE.

§ **6647. Not legalized by lapse of time.** No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right. [Civ. C. 1877, § 2053; R. C. 1899, § 5062.]

§ **6648. Remedies against.** The remedies against a public nuisance are:

1. Indictment.
2. A civil action; or,
3. Abatement. [Civ. C. 1877, § 2054; R. C. 1899, § 5063.]

A municipal corporation may under proper circumstances invoke the aid of a court of equity to restrain, prohibit or suppress a public nuisance. City of Huron v. Bank, 8 S. D. 449, 66 N. W. 819.

§ **6649. Indictment.** The remedy by indictment is regulated by the penal code and the code of criminal procedure. [Civ. C. 1877, § 2055; R. C. 1899, § 5064.]

§ 6650. **Civil action.** A private person may maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise. [Civ. C. 1877, § 2056; R. C. 1899, § 5065.]

§ 6651. **Abated by public officer.** A public nuisance may be abated by any public body or officer authorized thereto by law. [Civ. C. 1877, § 2057; R. C. 1899, § 5066.]

§ 6652. **By private person.** Any person may abate a public nuisance which is specially injurious to him by removing or, if necessary, destroying the thing which constitutes the same without committing a breach of the peace or doing unnecessary injury. [Civ. C. 1877, § 2058; R. C. 1899, § 5067.]

Article 3.—Private Nuisances.

§ 6653. **Remedies against.** The remedies against a private nuisance are:

1. A civil action; or,
2. Abatement. [Civ. C. 1877, § 2059; R. C. 1899, § 5068.]

§ 6654. **How person may abate.** A person injured by a private nuisance may abate it by removing or, if necessary, destroying the thing which constitutes the nuisance without committing a breach of the peace or doing unnecessary injury. [Civ. C. 1877, § 2060; R. C. 1899, § 5069.]

§ 6655. **When notice required.** When a private nuisance results from a mere omission of the wrongdoer and cannot be abated without entering upon his land, reasonable notice must be given to him before entering to abate it. [Civ. C. 1877, § 2061; R. C. 1899, § 5070.]

CHAPTER 100.

MAXIMS OF JURISPRUDENCE.

§ 6656. **How to be used and applied.** The maxims of jurisprudence hereinafter set forth are intended not to qualify any of the foregoing provisions of this code, but to aid in their just application. [Civ. C. 1877, § 2062; R. C. 1877, § 2078; R. C. 1899, § 5071.]

§ 6657. When the reason of a rule ceases, so should the rule itself. [Civ. C. 1877, § 2063; R. C. 1899, § 5072.]

Approved in Braithwaite v. Akin, 2 N. D. 57, 49 N. W. 419; **Meade Co. v. Hoehn,** 12 S. D. 468, 81 N. W. 886; Trotter v. Life Ass'n., 9 S. D. 596, 70 N. W. 843; **Troy** Mining Co. v. White, 10 S. D. 475, 74 N. W. 887.

§ 6658. When the reason is the same the rule should be the same. [Civ. C. 1877, § 2064; R. C. 1899, § 5073.]

§ 6659. One must not change his purpose to the injury of another. [Civ. C. 1877, § 2065; R. C. 1899, § 5074.]

§ 6660. Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement. [Civ. C. 1877, § 2066; R. C. 1899, § 5075.]

§ 6661. One must so use his own rights as not to infringe upon the rights of another. [Civ. C. 1877, § 2067; R. C. 1899, § 5076.]

§ 6662. He who consents to an act is not wronged by it. [Civ. C. 1877, § 2068; R. C. 1899, § 5077.]

§ 6663. Acquiescence in error takes away the right of objecting to it. [Civ. C. 1877, § 2069; R. C. 1899, § 5078.]

§ 6664. No one can take advantage of his own wrong. [Civ. C. 1877, § 2070; R. C. 1899, § 5079.]

§ 6665. He who has fraudulently dispossessed himself of a thing may be treated as if he still had possession. [Civ. C. 1877, § 2071; R. C. 1899, § 5080.]

§ 6666. He who can and does not forbid that which is done on his behalf is deemed to have bidden it. [Civ. C. 1877, § 2072; R. C. 1899, § 5081.]

§ 6667. No one should suffer by the act of another. [Civ. C. 1877, § 2073; R. C. 1899, § 5082.]

§ 6668. He who takes the benefit must bear the burden. [Civ. C. 1877, § 2074; R. C. 1899, § 5083.]

§ 6669. One who grants a thing is presumed to grant also whatever is essential to its use. [Civ. C. 1877, § 2075; R. C. 1899, § 5084.]

§ 6670. For every wrong there is a remedy. [Civ. C. 1877, § 2076; R. C. 1899, § 5085.]

§ 6671. Between those who are equally in the right or equally in the wrong the law does not interpose. [Civ. C. 1877, § 2077; R. C. 1899, § 5086.

§ 6672. Between rights otherwise equal the earliest is preferred. [C. Civ. 1877, § 2078; R. C. 1899, § 5087.]

§ 6673. No man is resposible for that which no man can control. [Civ. C. 1877, § 2079; R. C. 1899, § 5088.]

§ 6674. The law helps the vigilant before those who sleep on their rights. [Civ. C. 1877, § 2080; R. C. 1899, § 5089.]

§ 6675. The law respects form less than substance. [Civ. C. 1877, § 2081; R. C. 1899, § 5090.]

See Henderson v. Hughes Co., 13 S. D. 576, 83 N. W. 682.

§ 6676. That which ought to have been done is to be regarded as done in favor of him to whom and against him from whom performance is due [Civ. C. 1877, § 2082; R. C. 1899, § 5091.]

§ 6677. That which does not appear to exist is to be regarded as if it did not exist. [Civ. C. 1877, § 2083; R. C. 1899, § 5092.]

§ 6678. The law never requires impossibilities. Civ. C. 1877, § 2084; R. C. 1899, § 5093.]

See Woods v. Sheldon, 9 S. D. 392, 69 N. W. 602.

§ 6679. The law neither does nor requires idle acts. [Civ. C. 1877, § 2085; R. C. 1899, § 5094.]

See Kirby v. Telegraph Co., 7 S. D. 623, 65 N. W. 37; Troy Mining Co. v. White, 10 S. D. 475, 74 N. W. 236; Loftis v. Shipping Ass'n., 8 S. D. 201, 65 N. W. 1076; **Magowan v.** Groneweg, 16 S. D. 29, 91 N. W. 335.

§ 6680. The law disregards trifles. [Civ. C. 1877, § 2086; R. C 1899, § 5095.]

§ 6681. Particular expressions qualify those which are general. [Civ. C. 1877. § 2087; R. C. 1899, § 5096.]

§ 6682. Contemporaneous exposition is in general the best. [Civ. C. 1877, § 2088; R. C. 1899, § 5097.]

§ 6683. The greater contains the less. [Civ. C. 1877, § 2089; R. C. 1899, § 5098.]

§ 6684. Superfluity does not vitiate. [Civ. C. 1877, § 2090; R. C. 1899, § 5099.]

§ 6685. That is certain which can be made certain. [Civ. C. 1877, § 2091; R. C. 1899, § 5100.]

§ 6686. Time does not confirm a void act. [Civ. C. 1877, § 2092; R. C. 1899, § 5101.]

§ 6687. The incident follows the principal, not the principal the incident. [Civ. C. 1877, § 2093; R. C. 1899, § 5102.]

§ 6688. An interpretation which gives effect is preferred to one which makes void. [Civ. C. 1877, § 2094; R. C. 1899, § 5103.]

§ 6689. Interpretation must be reasonable. [C. Civ. 1877, § 2095; 1899, § 5104.]

§ 6690. When one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer. [Civ. C. 1877, § 2096; R. C. 1899, § 5105.]

See Sweatman v. Deadwood, 9 S. D. 380, 69 N. W. 582; Reed v. Kellogg, 8 S. D. 596, 67 N. W. 687; Carroll v. Nesbit, 9 S. D. 497, 70 N. W. 634.

CHAPTER 101.

DEFINITIONS AND GENERAL PROVIS

§ 6691. Words to be understood in their ordinary se any statute are to be understood in their ordinary sense, trary intention plainly appears and except also that th explained are to be understood as thus explained. [Ci R. C. 1899, § 5106.]

See Kennedy v. Hull, 14 S. D. 234, 85 N. W. 223; State 64 N. W. 548.

§ 6692. Word defined by statute has always same m the meaning of a word or phrase is defined in any statu applicable to the same word or phrase wherever it occurs, trary intention plainly appears. [Civ. C. 1877, § 2098;

§ 6693. Degrees of care. There are three degrees of c mentioned in this code, namely, slight, ordinary and great the former. [Civ. C. 1877, § 2099; R. C. 1899, § 5108.]

§ 6694. Degrees defined. Slight care or diligence is ordinary prudence usually exercise about their own affa ance; ordinary care or diligence is such as they usually own affairs of ordinary importance; and great care or they usually exercise about their own affairs of great in 1877, § 2100; R. C. 1899, § 5109.]

§ 6695. Degrees of negligence. There are three de mentioned in this code, namely, slight, ordinary and gross the former. [Civ. C. 1877, § 2101; R. C. 1899, § 5110.]

§ 6696. Degrees defined. Slight negligence consists i care and diligence; ordinary negligence, in the want of diligence; and gross negligence, in the want of slight [Civ. C. 1877, § 2102; R. C. 1899, § 5111.]

§ 6697. What children includes. The term children i birth and by adoption. [Civ. C. 1877, § 2103; R. C. 1899

§ 6698. Debtor and creditor. Except as defined and of this code every one who owes to another the performa is called a debtor and the one to whom he owes it is called 1877, § 2104; R. C. 1899, § 5113.]

§ 6699. Good faith. Good faith consists in an honest from taking any unconscientious advantage of anothe forms or technicalities of law together with an absence c belief of facts which would render the transaction uncon 1877, § 2105; R. C. 1899, § 5114.]

Good faith purchase. Gress v. Evans, 1 Dak. 387, 46 N. Bank, 150 U. S. 231.

Good faith question for jury. Merchant v. Pielke, 10 N Frederick v. Fergen, 15 S. D. 541, 91 N. W. 328; State v. 83 N. W. 869.

§ 6700. Notice classified. Notice is either actual or co 1877, § 2106; R. C. 1899, § 5115.]

§ 6701. Actual notice. Actual notice consists in ex a fact. [Civ. C. 1877, § 2107; R. C. 1899, § 5116.]

§ 6702. Constructive notice. Constructive notice is no law to a person not having actual notice. [Civ. C. 1877, § 5117.]

§ **6703. What deemed constructive notice.** Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself. [Civ. C. 1877, § 2109; R. C. 1899, § 5118.]

Purchaser of municipal securities is charged with knowledge of all requirements of law under which issued. People's Bank v. School Dist., 3 N. D. 496, 57 N. W. 787; Livingston v. School Dist., 9 S. D. 345, 69 N. W. 15; Brown v. Bon Homme County, 1 S. D. 216, 46 N. W. 173.

That which puts a prudent man on inquiry is constructive notice. Doran v. Dazey, 5 N. D. 167, 64 N. W. 1023; Meyer v. Elevator Co. 12 S. D. 172, 80 N. W. 189; Weber v. Tschetter, 1 S. D. 205, 46 N. W. 201.

One having actual notice of unrecorded mortgage is charged therewith. Betts v. Letcher, 1 S. D. 182, 46 N. W. 193.

§ **6704. False notice cannot become valid.** A notice which is false when given is not valid by the subsequent happening of the event. [Civ. C. 1877, § 2110; R. C. 1899, § 5119.]

§ **6705. Valuation.** Whenever the word "valuation" is used in any law, as a basis on which the salary of a county officer is fixed, it shall mean the valuation of the county as fixed by the state board of equalization for the preceding year, and all salaries based on such valuation shall begin January first. [1903, ch. 203.]

§ **6706. "Paper."** The word "paper" means any flexible material upon which it is usual to write. [Civ. C. 1877, § 2111; R. C. 1899, § 5120.]

§ **6707. "Person."** The word "person" except when used by way of contrast, includes not only human beings, but bodies politic or corporate. [Civ. C. 1877, § 2112; R. C. 1899, § 5121.]

§ **6708. "Several."** The word "several" in relation to number means two or more. [Civ. C. 1877, § 2113; R. C. 1899, § 5122.]

§ **6709. "Third persons."** The words "third persons" include all who are not parties to the obligation or transaction concerning which the phrase is used. [Civ. C. 1877, § 2114; R. C. 1899, § 5123.]

§ **6710. Holidays.** Holidays are every Sunday; the first day of January, which is New Year's day; the twelfth day of February, which is the birthday of Abraham Lincoln; the twenty-second day of February, which is the birthday of George Washington; the fourth day of July, which is the anniversary of the Declaration of Independence; the twenty-fifth day of December, which is Christmas day; the thirtieth day of May, which is Memorial day; every day on which an election is held throughout the state, and every day appointed by the president of the United States or by the governor of this state for a public fast, thanksgiving or holiday.]1897, ch. 86, § 1; R. C. 1899, § 5124.]

What are legal holidays. State v. Currie, 8 N. D. 545, 80 N. W. 475; State ex rel Anderson v. Falley, 9 N. D. 464, 83 N. W. 913.

§ **6711. When following day holiday.** If the first day of January, the twelfth day of February, the twenty-second day of February, the fourth day of July, the thirtieth day of May, or the twenty-fifth day of December falls upon a Sunday, the Monday following shall be the holiday. [1897, ch. 86, § 2; R. C. 1899, § 5125.]

§ **6712. Business days.** All other days than those mentioned in the last two sections are to be deemed business days for all purposes. [Civ. C. 1877, § 2117; R. C. 1899, § 5126.]

§ **6713. Act due on holiday performed on next day.** Whenever an 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 falls upon a holiday, such act may be performed upon the next business day with the same effect as if it had been performed upon the day appointed. [Civ. C. 1877, § 2118; R. C. 1899, § 5127.]

Not applicable to certificates of nomination to public office. Anderson v. Falley, 9 N. D. 464, 83 N. W. 913.

§ 6714. Usage. Usage is a reasonable and lawful public custom concerning transactions of the same nature as those which are to be affected thereby, existing at the place where the obligation is to be performed, and either known to the parties or so well established, general and uniform that they must be presumed to have acted with reference thereto. [Civ. C. 1877, § 2119; R. C. 1899, § 5128.]

§ 6715. "Usual." "Customary." The words "usual" and "customary" mean "according to usage." [Civ. C. 1877, § 2120; R. C. 1899, § 5129.]

§ 6716. Valuable consideration. A valuable consideration is a thing of value parted with, or a new obligation assumed at the time of obtaining a thing, which is a substantial compensation for that which is obtained thereby. It is also called simply "value." [Civ. C. 1877, § 2121; R. C. 1899, § 5130.]

§ 6717. "Verdict." The word "verdict" includes not only the verdict of a jury, but also the finding upon the facts of a judge or of a referee appointed to determine the issues in a cause. [Civ. C. 1877, § 2122; R. C. 1899, § 5131.]

Findings of the court constitute part of the judgment roll. Colonial Mortgage Co. v. Bradley, 4 S. D. 158, 55 N. W. 1108.

§ 6718. "Year." "Month." The word "year" means a calendar year and "month" a calendar month. Fractions of a year are to be computed by the number of months, thus: half a year is six months. Fractions of a day are to be disregarded in computations which include more than one day and involve no questions of priority. [Civ. C. 1877, § 2123; R. C. 1899, § 5132.]

§ 6719. Masculine includes what. Words used in the masculine gender include the feminine and neuter. [Civ. C. 1877, § 2124; R. C. 1899, § 5133.]

§ 6720. Singular includes what. Words used in the singular number include the plural and the plural the singular, except when a contrary intention plainly appears. [Civ. C. 1877, § 2125; R. C. 1899, § 5134.]

§ 6721. Other definitions. Words used in the present tense include the future as well as the present; the word "oath" includes "affirmation;" and every mode of oral statement under oath or affirmation is embraced by the term "testify," and every written one in the term "depose;" "signature" or "subscription" includes mark, when the person cannot write, his name being written near it and written by a person who writes his own name as a witness. The following words also have the signification attached to them in this section, unless otherwise apparent from the context:

1. The word "property" includes property, real and personal.
2. The words "real property" are coextensive with lands, tenements and hereditaments.
3. The words "personal property" include money, goods, chattels, things in action and evidences of debt.
4. The word "will" includes codicils. [Civ. C. 1877, § 2126; R. C. 1899, § 5135.]

Judgments are included in the term "personal property." McLaughlin v. Alexander, 2 S. D. 226, 49 N. W. 99.

§ 6722. "Compound interest." The words "compound interest" mean interest added to the principal as the former becomes due and thereafter made to bear interest. [Civ. C. 1877, § 2127; R. C. 1899, § 5136.]

§ 6723. "Written" and "printed." The words "writing" and "written" include "printing" and "printed" except in the case of signatures and when the words are used by way of contrast to printing. Writing may be made in any manner, except that when a person entitled to require the execution of a writing demands that it be made with ink it must be so made. [Civ. C. 1877, § 2128; R. C. 1899, § 5137.]

§ 6724. Code excludes common law. The rule of the common law that statutes in derogation thereof are to be strictly construed has no application

to this code. This code establishes the law of this state respecting the subjects to which it relates; and its provisions are to be liberally construed with a view to effect its objects and to promote justice. Whenever this code is cited, enumerated, referred to or amended it may be designated simply as "the civil code," adding, when necessary, the number of the section. [Civ. C. 1877, § 2129; R. C. 1899, § 5138.]

Liberal constructions should be adopted. Pinkerton v. Le Beau, 3 S. D. 440, 54 N. W. 97; Kingman v. O'Callahan, 4 S. D. 628, 57 N. W. 912; Landauer v. Conklin, 3 S. D. 462, 54 N. W. 322; Tripp v. City of Yankton, 10 S. D. 516, 74 N. W. 447.

§ 6725. **Seal.** When the seal of a court, public officer, or person is required by law to be affixed to any process, commission, paper or instrument, the word "seal" includes an impression of such seal upon the paper alone as well as upon wax or a wafer affixed thereto. [Civ. C. 1877, § 2130; R. C. 1899, § 5139.]

§ 6726. **Majority power.** Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority. [Civ. C. 1877, § 2131; R. C. 1899, § 5140.]

Legal quorum. Turnquist v. Cass Co. 11 N. D. 514, 92 N. W. 852.
As to approval of bond, see State ex rel Ayers v. Kipp, 10 S. D. 495, 74 N. W. 440.

§ 6727. **Repeal does not revive.** Whenever any act of the legislative assembly is repealed, which repealed a former act, such former act shall not thereby be revived, unless it shall be expressly so provided. [Civ. C. 1877, § 2132; R. C. 1899, § 5141.]

§ 6728. **Effect of repeal.** The repeal of any statute by the legislative assembly shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability. [Civ. C. 1877, § 2133; R. C. 1899, § 5142.]

Penalties not affected by repeal, when. Bank v. Lemke, 3 N. D. 154, 54 N. W. 919; Wells County v. McHenry, 7 N. D. 246, 7 N. W. 241.

§ 6729. **Successive weeks construed.** Whenever in any act or statute of the state of North Dakota, providing for the publication of notices, the phrase "successive weeks" is used, the word weeks shall be construed to mean calendar weeks and the publication upon any day in such week shall be sufficient publication for that week; provided, that at least five days shall intervene between such publications and all publications heretofore or hereafter made in accordance with the provisions of this section shall be deemed legal and valid. [1889, ch. 38, § 1; R. C. 1895, § 5143.]

"Successive weeks" construed. Finlayson v. Peterson, 5 N. D. 587, 67 N. W. 953.

§ 6730. **Fiscal year.** The fiscal year for the state of North Dakota shall commence on the first day of July and end on the thirtieth day of June each year and all reports required annually or biennially of any state officer or from any private corporation, unless specifically otherwise provided, shall be made to and include the thirtieth day of June preceding and all accounts of such officers shall be closed and balanced to that date. [1893, ch. 67, § 1; R. C. 1895, § 5144.]