

# CIVIL CODE

## CHAPTER 1.

### GENERAL DEFINITIONS AND DIVISIONS.

§ 4326. **Title.** This act shall be known as the civil code of the state of North Dakota. [R. C. 1905, § 4001; Civ. C. 1877, § 1; R. C. 1899, § 2689.]

§ 4327. **Origin of law.** Law is a rule of property and of conduct prescribed by the sovereign power. [R. C. 1905, § 4002; Civ. C. 1877, § 2; R. C. 1899, § 2690.]

§ 4328. **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. [R. C. 1905, § 4003; Civ. C. 1877, § 3; R. C. 1899, § 2691.]

§ 4329. **Common law divided.** The common law is divided into:

1. Public law, or the law of nations.
2. Domestic or municipal law. [R. C. 1905, § 4004; Civ. C. 1877, § 4; R. C. 1899, § 2692.]

§ 4330. **Evidence of same.** The evidence of the common law is found in the decisions of the tribunals. [R. C. 1905, § 4005; Civ. C. 1877, § 5; R. C. 1899, § 2693.]

§ 4331. **Codes exclude common law.** In this state there is no common law in any case where the law is declared by the codes. [R. C. 1905, § 4006; Civ. C. 1877, § 6; R. C. 1899, § 2694.]

Common law inapplicable to bring case within scope and purview of Civil Code. *Banbury v. Sherin*, 4 S. D. 88, 55 N. W. 723; *McClain v. Williams*, 11 S. D. 227, 76 N. W. 930, 49 L.R.A. 610, 74 A. S. R. 791; *Garrison v. Purdy*, 3 D. 178, 14 N. W. 100.

On rule of evidence as to evidence to be used as standard for comparison. *Mississippi Lumber & Coal Co. v. Kelly*, 19 S. D. 577, 104 N. W. 265, 9 A. & E. Ann. Cas. 449.

Challenge to array in civil cases lies as at common law, although not provided for by Code of Civil Procedure. *Jones v. Woodwarth*, 24 S. D. 583, 124 N. W. 844, Ann. Cas. 1912A, 1134.

§ 4332. **Classification of civil rights.** All original civil rights are either:

1. Rights of person; or,
2. Rights of property. [R. C. 1905, § 4007; Civ. C. 1877, § 7; R. C. 1899, § 2695.]

§ 4333. **Rights, how waived.** Rights of property and of person may be waived, surrendered or lost by neglect in the cases provided by law. [R. C. 1905, § 4008; Civ. C. 1877, § 8; R. C. 1899, § 2696.]

§ 4334. **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. [R. C. 1905, § 4009; Civ. C. 1877, § 9; R. C. 1899, § 2697.]

## CHAPTER 2.

## PERSONS.

§ 4335. **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. [R. C. 1905, § 4010; Civ. C. 1877, § 10; R. C. 1899, § 2698.]

Infant female as reaching majority at age of 18 years, in relation to action to recover land under section 54 of Code of Civil Procedure. *Ford v. Ford*, 24 S. D. 644, 124 N. W. 1108.

As to similar provision in Cal. Civ. Code, § 26, see *Ganahl v. Soher*, 2 Cal. Unrep. 415, 5 Pac. 80.

§ 4336. **Adults.** All other persons are adults. [R. C. 1905, § 4011; Civ. C. 1877, § 11; R. C. 1899, § 2699.]

§ 4337. **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. [R. C. 1905, § 4012; Civ. C. 1877, § 12; R. C. 1899, § 2700.]

Homicide in killing of unborn child. 63 L.R.A. 908.

Conflict of laws as to rights of after-born children under will. 2 L.R.A.(N.S.) 467.

Devises of life estates to unborn children of living persons as contravening rule against perpetuities. 6 L.R.A.(N.S.) 330.

Capacity of child en ventre sa mere to take under devise or bequest to "children," etc. 1 B. R. C. 582.

Marketability of title subject to defeat by birth of person not in being. 38 L.R.A.(N.S.) 35.

Divestiture of estates of persons not in being. 8 L.R.A.(N.S.) 49; 42 L.R.A.(N.S.) 439.

Omission of children from will as affecting right to probate. 34 L.R.A.(N.S.) 966.

Conflict of laws as to disinheritance. 2 L.R.A.(N.S.) 459.

Admissibility of extrinsic circumstances in ascertaining intention of testator in respect to disinheriting an after-born child. 13 L.R.A.(N.S.) 781.

Infant en ventre sa mere as grantee in deed. 44 L.R.A. 489.

As to similar provision in Cal. Civ. Code, § 29, see *Lehmann v. Schmidt*, 87 Cal. 15, 25 Pac. 161; *Daubert v. Western Meat Co.*, 139 Cal. 480, 96 Am. St. Rep. 154, 69 Pac. 297, 73 Pac. 244.

§ 4338. **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. [R. C. 1905, § 4013; Civ. C. 1877, § 15; R. C. 1899, § 2701.]

Conflict of laws relating to age of majority. 17 Am. Dec. 180.

Care which must be exercised in dealing with infant. 49 Am. St. Rep. 406.

As to similar provision in Cal. Civ. Code, § 33, see *Re Cahill*, 74 Cal. 52, 15 Pac. 364; *Taylor v. Hill*, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922.

§ 4339. **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. [R. C. 1905, § 4014; Civ. C. 1877, § 16; R. C. 1899, § 2702.]

As to legal effect of infant's contract. *Luce v. Jestrab*, 12 N. D. 548, 97 N. W. 848.

Contracts of infants. 18 Am. St. Rep. 573.

Infant's contract of suretyship. 18 Am. St. Rep. 614.

Power of infants to bind themselves by contracts of apprenticeship. 34 Am. Dec. 538; 18 Am. St. Rep. 626.

Execution of power of appointment by infants. 64 L.R.A. 907.

Binding effect of stipulation in contract, as to time for suit thereon. 1 L.R.A.(N.S.) 525.

Lack of parent or guardian as enlarging infant's capacity to contract for other than necessities. 36 L.R.A.(N.S.) 57.

Effect of part performance of contract for services by infants. 24 L.R.A. 233.

Infants as partners. 18 Am. St. Rep. 601.

Estoppel in pais, as applied to infants. 44 Am. Dec. 285.

As to similar provision in Cal. Civ. Code, § 34, see *Magee v. Welsh*, 18 Cal. 155; *Hastings v. Dollarhide*, 24 Cal. 195.

**§ 4340. Minor's contracts.** In all cases other than those specified in sections 4341 and 4342 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 afterward; 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. [R. C. 1905, § 4015; 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.

Minor over 18 years of age may avoid contract of suretyship by disaffirming same. *Helland v. Colton State Bank*, 20 S. D. 325, 106 N. W. 60.

Avoidance of contracts by infants. 13 Am. Dec. 131; 18 Am. St. Rep. 659.

Bills by infants to impeach or avoid decrees. 112 Am. St. Rep. 198.

Avoidance by infant of brokerage agency. 41 L.R.A.(N.S.) 1219.

Avoidance by infant of release of cause of action ex delicto. 11 L.R.A.(N.S.) 690.

Effect upon title to property purchased by infant of his disaffirmance, after majority, of his executory contract to pay for the same. 8 L.R.A.(N.S.) 104.

Infant's right to repudiate contract for services and sue on quantum meruit. 15 L.R.A. 211.

Right of infant to rescind purchase of corporate stock. 28 L.R.A.(N.S.) 128.

Right of woman to disaffirm marriage settlement executed while she was an infant. 12 L.R.A.(N.S.) 1184.

Disaffirmance by married infant of deeds in which their husbands joined. 44 Am. Rep. 272.

Effect of infant's retaining an account to render it an account stated. 29 L.R.A.(N.S.) 340.

Necessity of returning consideration in order to disaffirm infant's contract. 26 L.R.A. 177; 62 Am. Dec. 734; 46 Am. Rep. 317.

Survival of infant's right to disaffirm contract. 43 L.R.A.(N.S.) 714.

Ratification of contracts by infants after coming of age. 28 Am. Rep. 30; 18 Am. St. Rep. 606, 610; 53 L.R.A. 365.

Possession after majority as affirmation of lease by infant. 47 L.R.A.(N.S.) 547.

As to similar provisions in Cal. Civ. Code, § 35, see *Combs v. Hawes*, 2 Cal. Unrep. 555, 8 Pac. 597; *Hastings v. Dollarhide*, 24 Cal. 195; *Butler v. Hyland*, 89 Cal. 575, 26 Pac. 1108; *Whyte v. Rosencrantz*, 123 Cal. 634, 69 Am. St. Rep. 90, 56 Pac. 436.

**§ 4341. 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. [R. C. 1905, § 4016; Civ. C. 1877, § 18; R. C. 1899, § 2704.]

Contracts for necessaries and their effect. 18 Am. St. Rep. 606, 643.

Liability of infant upon negotiable paper given for necessaries. 12 L.R.A. 859.

Liability of infant husband for necessaries furnished wife while living with him. 65 L.R.A. 550.

Must the plaintiff in an action against an infant for necessaries furnished show them actually to have been required. 1 B. R. C. 156.

Bicycles as necessaries. 47 L.R.A. 307.

Liability of infant for services of attorneys at law. 44 L.R.A.(N.S.) 411; 96 Am. St. Rep. 731.

As to similar provision in Cal. Civ. Code, § 36, see *Whyte v. Rosencrantz*, 123 Cal. 634, 69 Am. St. Rep. 90, 56 Pac. 436.

**§ 4342. Nor statutory contracts.** A minor cannot disaffirm an obligation, otherwise valid, entered into by him under the express authority or direction of a statute. [R. C. 1905, § 4017; Civ. C. 1877, § 19; R. C. 1899, § 2705.]

As to similar provision in Cal. Civ. Code, § 37, see *Whyte v. Rosencrantz*, 123 Cal. 634, 69 Am. St. Rep. 90, 56 Pac. 436.

**§ 4343. 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. [R. C. 1905, § 4018; Civ. C. 1877, § 20; R. C. 1899, § 2706.]

As to being applicable to contracts made while party is temporarily intoxicated. *Spoonheim v. Spoonheim*, 14 N. D. 380, 104 N. W. 845.

Defense of insanity is not established in action on contract unless evidence shows that defendant was "person entirely without understanding." *Wood v. Pehrsson*, 21 N. D. 357, 130 N. W. 1010.

Who deemed to be insane persons. 29 Am. Dec. 38.

Marriage of insane persons. 79 Am. St. Rep. 376.

Capacity to make contract as affected by mental conditions. 3 L.R.A.(N.S.) 174.

Renewal of obligations by incompetent persons. 34 L.R.A. 274.

Right of bona fide holder of promissory note of insane person. 35 L.R.A. 161.

Effect of insanity of party to revoke warrant of attorney to confess judgment. 13 L.R.A. 797.

Validity of contract executed after insanity in pursuance of an obligation assumed while sane. 14 L.R.A.(N.S.) 962.

Insanity of servant executing release on accepting benefits of relief fund. 11 L.R.A.(N.S.) 201.

What circumstances will charge one with notice that other contracting party is of unsound mind. 31 L.R.A.(N.S.) 1159.

Effect upon liability of surety of principal's incapacity to contract. 20 L.R.A.(N.S.) 1000.

Statute of frauds as affecting guaranty of contract of person under disability. 33 L.R.A. 359.

Conveyance of homestead during insanity by one of spouses. 13 L.R.A.(N.S.) 430.

Right of devisee or legatee to attack conveyance or transfer by testator. 30 L.R.A.(N.S.) 194.

Mental incapacity of grantor as rendering title unmarketable. 38 L.R.A.(N.S.) 26.

Validity of deed by incompetent person. 19 L.R.A. 489.

Validity of contract made with intoxicated person. 54 L.R.A. 440; 2 L.R.A.(N.S.) 666; 25 L.R.A. (N. S.) 596.

Right to affirmative relief in equity from contract on ground that it was procured from complainant while intoxicated. 17 L.R.A.(N.S.) 1066.

As to similar provision in Cal. Civ. Code, § 38, see *Harris v. Harris*, 59 Cal. 620; *More v. Calkins*, 85 Cal. 177, 24 Pac. 729; *Castro v. Geil*, 110 Cal. 292, 52 Am. St. Rep. 84, 42 Pac. 804; *Jacks v. Estee*, 139 Cal. 507, 73 Pac. 247.

**§ 4344. 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. [R. C. 1905, § 4019; Civ. C. 1877, § 21; R. C. 1899, § 2707.]

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

May deed of real property executed by an incompetent not judicially declared such be avoided in action at law. 19 L.R.A.(N.S.) 461.

Contracts of insane persons, and when and how may be avoided. 15 Am. Dec. 361; 21 Am. Rep. 29; 71 Am. St. Rep. 425.

Right to enforce mortgage given by incompetent person who had not been declared such. 42 L.R.A.(N.S.) 343.

As to similar provision in Cal. Civ. Code, § 39, see *More v. Calkins*, 85 Cal. 177, 24 Pac. 729; *Castro v. Geil*, 110 Cal. 292, 52 Am. St. Rep. 84, 42 Pac. 804; *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820.

**§ 4345. 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. [R. C. 1905, § 4020; Civ. C. 1877, § 22; R. C. 1899, § 2708.]

Adjudication of insanity as showing want of capacity to execute contracts, make wills and the like. 140 Am. St. Rep. 346.

Testamentary capacity at the time of giving instructions for will as affecting measure of capacity which must exist at time of execution. 2 B. R. C. 41.

Power of one lacking testamentary capacity to revoke will. 18 L.R.A.(N.S.) 99.

As to similar provision in Cal. Civ. Code, § 40, see *Re Johnson*, 57 Cal. 529; *Kellogg v. Cochran*, 87 Cal. 192, 12 L.R.A. 104, 25 Pac. 677.

**§ 4346. 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. [R. C. 1905, § 4021; Civ. C. 1877, § 23; R. C. 1899, § 2709.]

Civil liability of infant for and for deceit and false representations. 33 Am. Dec. 179; 37 Am. Rep. 413; 42 Am. St. Rep. 753.

Estoppel of an infant by his fraud. 57 L.R.A. 684.

Liability of an infant as trustee or officer. 57 L.R.A. 688.

Infant's acts in inducing another to enter into contract with him by representing that he is of age as constituting offense of false pretenses. 24 L.R.A.(N.S.) 1101.

Infant's tort in inducing a contract. 57 L.R.A. 675.

Infant's tort in the performance of a contract. 57 L.R.A. 680; 35 L.R.A.(N.S.) 574.

Responsibility of infant for crime. 70 Am. Dec. 496.

Civil liability of insane persons for torts or negligence. 26 L.R.A. 153; 42 L.R.A.(N.S.) 83; 42 Am. St. Rep. 753.

Liability of insane person for libel or slander. 26 L.R.A. 154; 42 L.R.A.(N.S.) 85.

Liability of lunatic for torts of committee, guardian or employe. 42 L.R.A.(N.S.) 87.

Insanity of member as affecting decision of lodge against him. 49 L.R.A. 371.

§ 4347. **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. [R. C. 1905, § 4022; Civ. C. 1877, § 24; R. C. 1899, § 2710.]

§ 4348. **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. [R. C. 1905, § 4023; Civ. C. 1877, § 25; R. C. 1899, § 2711.]

Admission and waivers by representatives of infants in actions. 32 L.R.A. 671.

Judgments against infants. 13 Am. Dec. 159.

—how to correct and avoid them when they are erroneous or voidable. 89 Am. Dec. 185.

Judgments for or against insane persons. 130 Am. St. Rep. 841.

As to similar provision in Cal. Civ. Code, § 42, see *Re Cahill*, 74 Cal. 52, 15 Pac. 364; *Crawford v. Neal*, 56 Cal. 321.

§ 4349. **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. [R. C. 1905, § 4024; Civ. C. 1877, § 26; R. C. 1895, § 2713.]

Validity of divorce according to Indian customs. 35 L.R.A.(N.S.) 795.

## CHAPTER 3.

### PERSONAL RIGHTS.

§ 4350. **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. [R. C. 1905, § 4025; Civ. C. 1877, § 27; R. C. 1899, § 2713.]

As to similar provision in Cal. Civ. Code, § 43, see *Lewis v. Terry*, 111 Cal. 39, 31 L.R.A. 220, 52 Am. St. Rep. 146, 43 Pac. 398; *Dittrich v. Gobey*, 119 Cal. 599, 51 Pac. 962; *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847.

§ 4351. **Defamation.** Defamation is effected by:

1. Libel; or,

2. Slander. [R. C. 1905, § 4026; Civ. C. 1877, § 28; R. C. 1899, § 2714.]

§ 4352. **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. [R. C. 1905, § 4027; Civ. C. 1877, § 29; R. C. 1899, § 2715.]

Charge of false affidavits to commence case, not libelous per se. *Casselman v. Winship*, 3 D. 292, 19 N. W. 412.

As to what constitutes libel. *Lauder v. Jones*, 13 N. D. 525, 101 N. W. 907.

Name of libeled party need not appear in libelous publication to constitute libel. *Baron v. Smith*, 19 S. D. 50, 101 N. W. 1105.

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.

Language charging person with deception in conduct of his business, but that he was guilty of unfair dealing was libelous. *Ramharter v. Olson*, 26 S. D. 499, 128 N. W. 806, Ann. Cas. 1913B, 253.

General rules applicable to. 4 Am. Dec. 348.

When charge of offense committed in another state is actionable. 9 Am. Dec. 613.

Newspaper libel. 15 Am. St. Rep. 333.

Liability of newspaper proprietor or manager for libel published without his knowledge or consent. 26 L.R.A. 779.

Libel laws as infringement of freedom of press. 32 L.R.A. 831.

Common-law rights of author of libelous work. 51 L.R.A. 360.

Right to compel publisher of libel to disclose source of information. 12 L.R.A.(N.S.) 630.

Criticisms of writings as libel. 28 L.R.A. 670.

Libel or slander by filing lien. 16 L.R.A. 625.

Giving one an indefinite rating, or refusal to give any rating, in a mercantile agency, as a libel. 25 L.R.A.(N.S.) 1021.

Libel by written charge with reference to plaintiff's business. 4 L.R.A.(N.S.) 977.

Blacklisting dealer as libel. 49 L.R.A. 612; 8 L.R.A.(N.S.) 783.

Placing scurrilous or defamatory matter upon outside covering of mail as offense against postal laws. 33 L.R.A.(N.S.) 800.

Laudatory or ironical article as libel. 4 L.R.A.(N.S.) 861.

Is article susceptible of libelous meaning rendered nonlibelous by the fact that it would not be understood in a libelous sense by those acquainted with the plaintiff. 18 L.R.A.(N.S.) 622.

Libel by publication of photograph as that of another person. 6 L.R.A.(N.S.) 919.

Publication of one's photograph in connection with scandalous matter concerning another. 35 L.R.A.(N.S.) 595.

Right of action for use of photographs or name for advertising purposes. 24 L.R.A.(N.S.) 991; 34 L.R.A.(N.S.) 1137.

Expressions or comments without misstating facts as libel. 28 L.R.A. 667.

Publication by aggrieved party making known to third person contents of libelous letter. 15 L.R.A.(N.S.) 1141.

Addressing letter to attorney or agent of plaintiff as publication for purposes of libel. 21 L.R.A.(N.S.) 33.

Communication to stenographer or clerk as publication of libel. 1 B. R. C. 455.

Transmission of libelous matter by postcard or telegraph as publication. 1 B. R. C. 464.

Liability of telegraph company for handling libelous message. 9 L.R.A.(N.S.) 140; 37 L.R.A.(N.S.) 861.

Libel of a class or number of persons. 70 Am. St. Rep. 754.

Right of one not specially named to maintain action for libel or slander based on charges made against a class or group of persons to which he belongs. 23 L.R.A.(N.S.) 726; 25 L.R.A.(N.S.) 382; 42 L.R.A.(N.S.) 870.

Criminal liability for agent's act. 41 L.R.A. 653.

Right of corporation to sue for libel or slander. 2 L.R.A.(N.S.) 741.

—for libel affecting its property. 52 L.R.A. 526.

Liability of corporation for libel or slander. 115 Am. St. Rep. 721.

—criminal responsibility. 2 B. R. C. 249.

Liability of officers of a corporation for its libelous publications. 28 L.R.A. 427.

Liability of husband and wife for wife's libel or slander. 30 L.R.A. 521.

Injunction against libel or slander. 35 Am. St. Rep. 675.

—against publishing or circulating statements relative to industrial disputes by labor union. 32 L.R.A. 1013.

Truth as defense to action for libel or slander. 21 L.R.A. 502; 31 L.R.A.(N.S.) 132.

Defense that defendant did not originate, but merely repeated, the defamatory charge. 55 Am. St. Rep. 611.

Mutual vituperation or defamation as affecting remedy for libel or slander. 28 L.R.A. 721.

Damages in action for libel, what are proper elements of. 72 Am. Dec. 421.

Venue in actions for. 15 Am. Dec. 224.

Province of judge and jury in prosecutions for. 13 Am. St. Rep. 625.

Effect of admission to change burden of proof and right to open and close in action for libel. 61 L.R.A. 538, 547, 556.

See also annotation to following section.

As to similar provision in Cal. Civ. Code, § 45, see *Dixon v. Allen*, 69 Cal. 527, 11 Pac. 179; *Bettner v. Holt*, 70 Cal. 270, 11 Pac. 713; *Tonini v. Cevasco*, 114 Cal. 266, 46 Pac. 103; *Schomberg v. Walker*, 132 Cal. 224, 64 Pac. 290.

**§ 4353. 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. [R. C. 1905, § 4028; Civ. C. 1877, § 30; R. C. 1899, § 2716.]

Distinction between libel and slander. *Barron v. Smith*, 19 S. D. 50, 101 N. W. 1105.

What words actionable per se. 1 Am. Dec. 448; 12 Am. Dec. 39; 41 Am. Rep. 590; 116 Am. St. Rep. 802.

Applying vile epithets to man. 28 L.R.A.(N.S.) 85.

Insulting passenger by suggesting that he belongs in colored compartment as an actionable wrong. 32 L.R.A.(N.S.) 206.

Stating that a white person is a negro, or of negro blood. 36 L.R.A.(N.S.) 974.

What is publication of slander. 12 Am. St. Rep. 78.

Charging one with refusal to pay debt as libel or slander. 3 L.R.A.(N.S.) 339.

Libel or slander by imputing to one not in business nonpayment of debts or want of credit. 42 L.R.A.(N.S.) 515.

Liability of corporation for slander by an agent or employe. 21 L.R.A.(N.S.) 873.

As to similar provision in Cal. Civ. Code, § 46, see *Haskins v. Jordan*, 123 Cal. 157, 55 Pac. 786; *Jarman v. Rea*, 137 Cal. 339, 70 Pac. 216.

1. In slander, proof of special damages unnecessary where complainant is charged with indictable offense. *Bedtkey v. Bedtkey*, 15 S. D. 310, 89 N. W. 479.

Charging solicitation to crime. 25 L.R.A. 435.

Informal communication with respect to criminal charge. 4 L.R.A.(N.S.) 149; 32 L.R.A.(N.S.) 740.

3. Expressions or comments as to public or professional men without misstating facts. 28 L.R.A. 674.

Liability to individual for general reflection upon the business in which he is engaged. 5 L.R.A.(N.S.) 480.

Right to recover for slander or libel affecting one in his business or professional capacity, as affected by his own violation of law in respect thereof. 33 L.R.A.(N.S.) 90.

Libel or slander by imputing incompetency to physician. 26 L.R.A. 325.

Slander in charging woman with unchastity causing loss of business. 24 L.R.A.(N.S.) 598.

Libel or slander by charging one with exacting excessive compensation for goods or services. 40 L.R.A.(N.S.) 79.

Oral charge of insolvency against a merchant. 4 L.R.A.(N.S.) 973.

Expressions or comments as to officers or candidates without misstating facts. 28 L.R.A. 672.

Charging public official with graft in public contracts. 5 L.R.A.(N.S.) 498.

Charging acceptance of bribe. 3 L.R.A.(N.S.) 1139.

Libel by charging the raising or disbursing of campaign funds. 2 L.R.A.(N.S.) 691.

What words uttered concerning clergyman are actionable per se. 28 L.R.A.(N.S.) 152.

Liability growing out of the giving or refusing of information affecting the character or reputation of servant. 4 L.R.A.(N.S.) 1092.

4. Slander and libel in charging woman with unchastity. 24 L.R.A.(N.S.) 577.

Actionable character of epithets that impute immorality to a woman. 4 L.R.A.(N.S.) 560.

Truth of charge of adultery or fornication, as a defense to a civil action for libel or slander. 31 L.R.A. (N.S.) 146.

See also annotation to preceding section.

**§ 4354. 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. [R. C. 1905, § 4029; Civ. C. 1877, § 31; R. C. 1899, § 2717.]

Publication of matters affecting candidate's fitness for office privileged, unless actual malice or want of probable cause is shown. *Boucher v. Clark Pub. Co.*, 14 S. D. 72, 84 N. W. 237; *Ross v. Ward*, 14 S. D. 240, 85 N. W. 182.

Publication of matters affecting candidate's fitness for office not libelous without proof of express malice, though unjust and too severe. *Myers v. Longstaff*, 14 S. D. 98, 84 N. W. 233.

Newspaper article concerning professional conduct of practicing physician is not privileged communication. *Root v. Dutcher*, 23 S. D. 70, 120 N. W. 772.

Justification in actions of libel and slander. 91 Am. St. Rep. 285.

Privileged communications, expressions or statements. 2 Am. Dec. 431; 15 Am. Dec. 232; 31 Am. Rep. 708; 104 Am. St. Rep. 110.

Necessity that the plea of justification or privilege correspond to the words imputed to the defendant by the complaint. 28 L.R.A.(N.S.) 551.

Repetition of privileged statement as evidence of malice. 42 L.R.A.(N.S.) 1109.

May malice, which will preclude qualified privilege, be inferred from publication alone. 12 L.R.A.(N.S.) 91.

Burden of showing good faith in making privileged communication. 3 L.R.A.(N.S.) 696.

What publications concerning candidates for office are justifiable. 86 Am. Dec. 88.

Privileged communication as to unchastity of woman. 24 L.R.A.(N.S.) 613.

Privilege as affected by extent of publication. 20 L.R.A.(N.S.) 363.

As to similar provision in Cal. Civ. Code, § 47, see *Preston v. Frey*, 91 Cal. 107, 27 Pac. 533; *Schomberg v. Walker*, 132 Cal. 224, 64 Pac. 290.

1. Reports of police officers as privileged communications. 30 L.R.A.(N.S.) 315.

Privilege of school superintendent or other officer in reporting to school authorities upon character of teacher. 30 L.R.A.(N.S.) 200.

Privileged character of complaints to public officer against subordinate. 27 L.R.A.(N.S.) 1041.

Privileged character of official report by executive or administrative officer. 5 L.R.A.(N.S.) 163.

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

Libel in judicial proceedings. 123 Am. St. Rep. 631.

Attorney's liability for words spoken at a trial. 17 Am. Dec. 194.

Privilege of witness as to defamatory testimony. 22 L.R.A. 836, 6 Am. St. Rep. 825.

Privilege of informal communication with respect to criminal charge. 4 L.R.A.(N.S.) 149; 32 L.R.A.(N.S.) 740.

To what proceedings in court does privilege of publication attach. 16 L.R.A.(N.S.) 953.

Privilege as to proceedings of grand jury. 32 L.R.A.(N.S.) 785.

Privilege as to proceedings for impeachment or removal of public officers. 25 L.R.A.(N.S.) 455.

Libel by defamatory words in pleading. 22 L.R.A. 649; 13 L.R.A.(N.S.) 820.

3. Privilege of gratuitous report on financial responsibility and integrity. 42 L.R.A.(N.S.) 520.

Report of mercantile agency as a privileged communication. 36 L.R.A.(N.S.) 452; 2 B. R. C. 215.

— as affected by extent of publication. 20 L.R.A.(N.S.) 366.

Privileged communications as to character or reputation of servant. 4 L.R.A.(N.S.) 1104.

Qualified privilege as to communications to employer with respect to employe. 16 L.R.A.(N.S.) 1017.

Privilege of communications between principal and agent. 36 L.R.A.(N.S.) 449.

Qualified privilege of communication between members of an association or of a private corporation. 26 L.R.A.(N.S.) 1080.

Privilege of statements by physician or surgeon. 38 L.R.A.(N.S.) 69.

4. Privilege as affected by extent of publication. 20 L.R.A.(N. S.) 361.



Report of meeting of private corporation as subject of privilege. 19 L.R.A.(N.S.) 863.  
Is the publication of pleadings or other papers, before any hearing has been had thereon, privileged. 12 L.R.A.(N.S.) 188; 38 L.R.A.(N.S.) 913.

Addition of extrinsic defamatory matter in communicating report as affecting privilege. 36 L.R.A.(N.S.) 146.

May malice which will preclude qualified privilege be inferred from publication alone. 12 L.R.A.(N.S.) 91.

**§ 4355. 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.

[R. C. 1905, § 4030; Civ. C. 1877, § 32; R. C. 1899, § 2718.]

As to similar provision in Cal. Civ. Code, § 49, see *Boyson v. Thorn*, 98 Cal. 578, 21 L.R.A. 233, 33 Pac. 492; *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847.

2. As to right of wife to maintain action for alienation of husband's affections. *King v. Hanson*, 3 N. D. 85, 99 N. W. 1085.

Wife's right to sue for alienation of husband's affection. 28 Am. St. Rep. 217; 46 Am. St. Rep. 472.

Right of wife, under modern married women's acts, to sue for alienation of the affections of her husband. 4 L.R.A.(N.S.) 643; 29 L.R.A.(N.S.) 842.

Conspiracy to alienate husband's affections. 3 L.R.A.(N.S.) 470.

Liability of parent for causing separation of husband and wife. 9 L.R.A.(N.S.) 322.

Effect of fact that husband or wife of plaintiff in action for alienation of affections was the active and aggressive party. 16 L.R.A.(N.S.) 742.

Action for alienation of wife's affections. 44 Am. St. Rep. 845.

Liability of person who interferes between master and servant to cause the latter to be discharged or the former to be deserted. 11 Am. St. Rep. 474.

Inducing servant to quit work, when actionable. 22 Am. Rep. 485; 59 Am. Rep. 720.

3. Order of arrest may be issued in action by father for seduction of minor daughter. *State ex rel. Nyhus v. Ross*, 24 N. D. 586, 139 N. W. 1051.

What constitutes seduction. 44 Am. Dec. 162; 8 Am. St. Rep. 870; 76 Am. St. Rep. 659.

By whom may action for seduction be maintained. 4 Am. Dec. 403; 64 L.R.A. 622.

Right of one in loco parentis to maintain action for seduction of an illegitimate. 35 L.R.A.(N.S.) 1062.

Loss of service as element in action by father for seduction of child. 14 L.R.A. 700.

Seduction of divorced woman or widow. 21 L.R.A.(N.S.) 265.

Effect of fact that intercourse was accomplished by force to defeat action for seduction. 18 L.R.A.(N.S.) 587.

Effect of fact that the husband or wife of plaintiff in an action for criminal conversation was the active and aggressive party. 16 L.R.A.(N.S.) 742.

Evidence of defendant's pecuniary circumstances in action for seduction. 36 Am. Rep. 445.

Evidence of character of parent or child in parent's action for seduction. 14 L.R.A.(N.S.) 750.

Evidence of character of husband or wife in action for criminal conversation. 14 L.R.A.(N.S.) 749.

**§ 4356. 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. [R. C. 1905, § 4031; Civ. C. 1877, § 33; R. C. 1899, § 2719.]

## CHAPTER 4.

### MARRIAGE CONTRACT.

**§ 4357. 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. [R. C. 1905, § 4032; 1890, ch. 91, § 1; R. C. 1899, § 2720.]

Common-law marriages are no longer recognized as valid. *Schumacher v. Great Northern R. Co.*, 23 N. D. 231, 136 N. W. 85.

Words "the marriage relation shall be entered into \* \* \* only as provided by law" are mandatory and prohibitive. *Schumacher v. Great Northern R. Co.*, 23 N. D. 231, 136 N. W. 85.

What constitutes marriage. 69 Am. Dec. 615.

Common-law marriage. 124 Am. St. Rep. 104.

—effect of statute. 2 L.R.A.(N.S.) 353.

Sufficiency and validity of marriage by the law of nature. 77 Am. Dec. 606.

Law governing validity of marriage. 57 L.R.A. 155; 11 L.R.A.(N.S.) 1082; 17 L.R.A.(N.S.) 800; 26 L.R.A.(N.S.) 179; 28 L.R.A.(N.S.) 753; 43 L.R.A.(N.S.) 355.

How proof of marriage is to be made. 22 Am. Dec. 157.

Competency and sufficiency of evidence of marriage. 57 Am. Rep. 451.

Effect of contracting or dissolution of marriage after initiation but before consummation of, right under homestead entry. 7 L.R.A.(N.S.) 967.

Effect of marriage upon wife's status as an alien. 22 L.R.A. 148.

How far marriage of infant works emancipation. 16 L.R.A. 578; 24 L.R.A.(N.S.) 160.

Effect of injured party's marriage to one of several joint tort feasons to release all. 58 L.R.A. 307.

Effect of marrying witness in order to prevent her from testifying. 67 L.R.A. 499.

Effect of intermarriage between debtor and creditor upon indebtedness. 21 L.R.A.(N.S.) 683.

As to similar provision in Cal. Civ. Code, § 55, see *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Wadsworth v. Wadsworth*, 81 Cal. 182, 15 Am. St. Rep. 38, 22 Pac. 648; *Mott v. Mott*, 82 Cal. 413, 22 Pac. 1140; *Kilburn v. Kilburn*, 89 Cal. 46, 23 Am. St. Rep. 447, 26 Pac. 636; *People v. Beevers*, 99 Cal. 286, 33 Pac. 844, 9 Am. Crim. Rep. 139; *People v. Lehmann*, 104 Cal. 633, 38 Pac. 422; *Norman v. Norman*, 121 Cal. 620, 42 L.R.A. 343, 66 Am. St. Rep. 74, 54 Pac. 143.

**§ 4358. 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. [R. C. 1905, § 4033; 1897, ch. 4; R. C. 1899, § 2721.]

Proof of, by parol evidence; record evidence not required. *Mathews v. Silvander*, 14 S. D. 505, 85 N. W. 998.

Conflict of laws as to validity of marriage of persons under age of consent. 57 L.R.A. 172.

Validity of marriage of persons of nonage. 22 L.R.A.(N.S.) 1202.

Effect of parents' consent on marriage of persons of nonage. 22 L.R.A.(N.S.) 1206.

As to similar provision in Cal. Civ. Code, § 56, see *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345; *People v. Kehoe*, 123 Cal. 224, 69 Am. St. Rep. 52, 55 Pac. 911.

**§ 4359. 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. [R. C. 1905, § 4034; 1890, ch. 91, § 3; R. C. 1895, § 2722.]

Conflict of laws as to incestuous marriage. 57 L.R.A. 166.

**§ 4360. 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. [R. C. 1905, § 4035; 1890, ch. 91, § 6; R. C. 1895, § 2723.]

As to annulment of marriage where one of the parties separated from but did not divorce former spouse. *Mickels v. Fennell*, 15 N. D. 188, 107 N. W. 53.

When marriage void and when voidable. 44 Am. Dec. 54.

Validity of agreement to marry where one of the parties is already married. 1 B. R. C. 917.

Conflicting presumptions as to validity of former marriage. 16 L.R.A.(N.S.) 104.

Second marriage being shown, on whom rests burden of proving termination or continuance of the first. 89 Am. St. Rep. 198.

Effect of right to appeal from divorce decree on party's right to remarry. 17 L.R.A. 573.

Effect of removal of impediment to marriage after parties have begun cohabitation. 3 L.R.A.(N.S.) 244.

Effect of a void marriage. 96 Am. St. Rep. 267.

As to similar provision in Cal. Civ. Code, § 61, *Jackson v. Jackson*, 94 Cal. 446, 29 Pac. 957; *Re Wood*, 137 Cal. 129, 69 Pac. 900; *Buelna v. Ryan*, 139 Cal. 630, 73 Pac.

466; Re Harrington, 140 Cal. 244, 98 Am. St. Rep. 51, 73 Pac. 1000; Deyoe v. Superior Ct., 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28.

§ 4361. 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 by 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 the county judge of the county in which either one of the contracting parties resides, 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 where the license originally was issued, 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. [1907, ch. 172; R. C. 1905, § 4036; 1890, ch. 91, § 7; R. C. 1895, § 2724.]

Conflict of laws as to manner or form of solemnizing marriage. 57 L.R.A. 155; 11 L.R.A.(N.S.) 1082; 17 L.R.A.(N.S.) 800; 26 L.R.A.(N.S.) 179; 28 L.R.A.(N.S.) 753.

Presumption from marriage ceremony. 14 L.R.A. 540; 16 L.R.A.(N.S.) 98; 34 L.R.A.(N.S.) 940.

Effect of ceremonial marriage to overcome presumption arising from cohabitation and reputation. 16 L.R.A.(N.S.) 102.

Effect upon duly solemnized marriage of absence of license required by statute. 15 L.R.A.(N.S.) 463.

Presumption of marriage license. 14 L.R.A. 541.

§ 4362. 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 an 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. Provided that the inquiry above mentioned on oath relative to the legality of such contemplated marriage, and the examination of other witnesses upon oath may be taken and sworn to before a notary public, or other officer authorized to administer oaths and if such affidavits are deemed sufficient by the county judge to whom such application is made, such statements and application shall be considered of the same force and effect as if taken personally before said county judge. Provided further that the county judge shall retain on file in his office all papers and records pertaining to such marriage license. [1911, ch. 186; R. C. 1905, § 4037; 1890, ch. 91, § 8; R. C. 1899, § 2725.]

§ 4363. 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, }  
County of .....}ss.:

To any person authorized by law to perform the marriage 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.

[R. C. 1905, § 4038; 1890, ch. 91, § 9; R. C. 1899, § 2726.]

§ 4364. 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. [R. C. 1905, § 4039; 1890, ch. 91, § 10; R. C. 1899, § 2727.]

§ 4365. Indian marriage contracts valid. Indians contracting marriage according to the Indian custom and cohabiting as man and wife shall be deemed legally married. [R. C. 1905, § 4040; 1890, ch. 91, § 13; R. C. 1899, § 2728.]

§ 4366. 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. [R. C. 1905, § 4041; 1890, ch. 91, § 14; R. C. 1899, § 2729.]

By what laws validity of marriage determined. 8 Am. Dec. 133.

Validity of marriage when solemnized out of the state. 18 Am. Rep. 521.

Validity of marriage when contracted by residents of a state in violation of its laws beyond its boundaries. 60 Am. St. Rep. 941.

§ 4367. 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. [R. C. 1905, § 4042; 1890, ch. 91, § 15; R. C. 1895, § 2730.]

Record or certified copy of certificate of marriage is not only evidence to prove marriage, but that original certificate itself is also evidence thereof. State v. Walsh, 25 S. D. 30, 125 N. W. 295.

§ 4368. 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. [R. C. 1905, § 4043; Civ. C. 1877, § 54; R. C. 1895, § 2731.]

Residence of one year is not prerequisite to maintenance of action to annul marriage. *Montague v. Montague*, 25 S. D. 471, 30 L.R.A.(N.S.) 745, 127 N. W. 639, Ann. Cas. 1912C, 591.

Marriage between first cousins, valid in state where contracted and where parties were then domiciled, cannot be annulled by courts of this state. *Garcia v. Garcia*, 25 S. D. 645, 32 L.R.A.(N.S.) 424, 127 N. W. 586, Ann. Cas. 1912C, 621.

What is void marriage. 79 Am. St. Rep. 361.

Annulment of marriage on publication where defendant is absent from the country. 19 L.R.A. 820.

Antenuptial pregnancy or unchastity as a ground of divorce or annulment of marriage. 18 L.R.A. 375.

Effect of conviction and sentence upon marriage relation. 31 L.R.A. 515.

Compelling division of property accumulated during void marriage. 68 Am. St. Rep. 375.

Effect of annulment of marriage on property held by the entireties. 30 L.R.A. 333.

Division of property upon the annulment of marriage. 36 L.R.A.(N.S.) 844.

Division of community property upon the annulment of marriage. 36 L.R.A.(N.S.) 845.

Alimony in suit to annul marriage. 3 L.R.A.(N.S.) 192.

Right to temporary alimony on annulment of marriage. 26 L.R.A.(N.S.) 500.

Power, upon annulling a marriage, to require man to provide for support of woman or child. 5 L.R.A.(N.S.) 767.

Condonation of loathsome disease as defense to action for annulment of marriage. 5 L.R.A.(N.S.) 729.

As to similar provision in Cal. Civ. Code, § 82, see *People v. Beevers*, 99 Cal. 286, 33 Pac. 844, 9 Am. Crim. Rep. 139; *Linebaugh v. Linebaugh*, 137 Cal. 26, 69 Pac. 616.

2. As to annulment of marriage where one of the parties separated from but did not divorce former spouse. *Mickels v. Fennell*, 15 N. D. 188, 107 N. W. 53.

Effect of marriage during continuance of prior valid marriage. 46 Am. Dec. 130.

3. Annulment of marriage of person while insane. 40 L.R.A. 744.

Fraud which will warrant annulment of marriage. 24 Am. Rep. 453.

Fraud in contracting by a pregnant woman. 44 Am. Rep. 104.

Misrepresentations or concealment as to one's physical or mental condition as ground for annulment of marriage. 13 L.R.A.(N.S.) 996.

Misrepresentation as to disposition or general character as ground for annulment of marriage. 30 L.R.A.(N.S.) 301.

5. Effect of duress to avoid marriage. 43 L.R.A. 814.

What constitutes duress for which marriage may be annulled. 27 L.R.A.(N.S.) 803.

Right to avoid marriage entered into, to escape prosecution for seduction, upon ground of duress. 16 L.R.A.(N.S.) 938.

6. Power to compel plaintiff in suit for annulment of marriage to submit to a physical examination. 14 L.R.A. 466.

**§ 4369. 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. [R. C. 1905, § 4044; Civ. C. 1877, § 55; R. C. 1895, § 2732.]

As to annulment of marriage where one of the parties separated from, but did not divorce, former spouse. *Mickels v. Fennell*, 15 N. D. 188, 107 N. W. 53.

**§ 4370. Children legitimate.** When a marriage is annulled children begotten before the judgment are legitimate and succeed to the estate of both parents. [R. C. 1905, § 4045; Civ. C. 1877, § 56; R. C. 1895, § 2733.]

As to similar provision in Cal. Civ. Code, § 84, see *Re Wardell*, 57 Cal. 484; *Adams v. Adams*, 154 Mass. 290, 13 L.R.A. 275, 28 N. E. 260.

**§ 4371. 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. [R. C. 1905, § 4046; Civ. C. 1877, § 57; R. C. 1899, § 2734.]

Applicable only to actions where voidable marriage is annulled for fraud or force. *Mickels v. Fennell*, 15 N. D. 188, 107 N. W. 53.

**§ 4372. 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. [R. C. 1905, § 4047; Civ. C. 1877, § 58; R. C. 1899, § 2735.]

Decrees of nullity and their effect. 65 Am. Dec. 355.

Conclusiveness as to third persons of decree in suit for annulment of marriage as to facts adjudicated as distinguished from status established. 38 L.R.A.(N.S.) 559.

## CHAPTER 5.

### REGULATING MARRIAGES.

**§ 4373. Persons prohibited from marrying.** No woman under the age of forty-five years, or man of any age, except he marry a woman over the age of forty-five years, either of whom is a common drunkard, habitual criminal, epileptic, imbecile, feeble minded person, idiot or insane person, or person who has theretofore been afflicted with hereditary insanity, or is afflicted with pulmonary tuberculosis in its advanced stages, or any contagious venereal disease, shall hereafter intermarry or marry any other person within this state. [1913, ch. 207, § 1.]

Marriage of person while insane. 40 L.R.A. 737.

Mental capacity essential to a valid marriage. 38 L.R.A.(N.S.) 818.

Effect of recovery of sanity after commencement of cohabitation between parties married while one of them was insane. 3 L.R.A.(N.S.) 247.

**§ 4374. Performance of marriage ceremony between certain persons prohibited.** No clergyman or other officer authorized by law to solemnize marriages within this state shall hereafter perform a marriage ceremony uniting persons in matrimony, either of whom is an epileptic, imbecile, feeble minded person, common drunkard, insane person, habitual criminal or person afflicted with pulmonary tuberculosis in its advanced stages, or any contagious venereal disease, unless the female party to such marriage is over the age of forty-five years. [1913, ch. 207, § 2.]

**§ 4375. Affidavits to obtain marriage license.** The county judge, before a marriage license is issued, shall require each applicant therefor to file in his office upon blanks to be provided by the county for that purpose, an affidavit of at least one duly licensed physician other than the person seeking the license, showing that the contracting parties are not feeble minded, imbeciles, epileptics, insane persons, common drunkards, or persons afflicted with pulmonary tuberculosis in its advanced stages, provided, that in addition, the affidavit as to the male contracting party shall show that such male is not afflicted with any contagious venereal disease. He shall also require an affidavit of some disinterested, credible person, showing that said persons are not habitual criminals; the female is over the age of eighteen years and the male is over the age of twenty-one years, unless the consent in writing is obtained of the father, mother or other guardian of the person for whom the license is required in cases where the female is under the age of eighteen years and the male is under the age of twenty-one years, provided, that no consent shall be given, nor license issued, unless such female be over the age of fifteen years. Said affidavit may be subscribed and sworn to before any person authorized to administer oaths.

Any one knowingly swearing falsely to the statements contained in the affidavit mentioned in this article shall be deemed guilty of perjury and punished as provided by the laws of the state of North Dakota. [1913, ch. 207, § 3.]

§ 4376. **License or marriage of intoxicated persons prohibited.** A license to marry shall not be issued to one under the influence of intoxicating liquor at the time of making application for license, and no marriage ceremony shall be performed when either or both of the contracting parties are under the influence of intoxicating liquor or any narcotic drug. [1913, ch. 207, § 4.]

Effect of intoxication on marriage. 34 L.R.A. 87.

§ 4377. **Physician's fee for examination and affidavit.** For making an examination of either of the contracting parties to a marriage, and the affidavit required in this act, a physician may charge a fee of not to exceed two dollars. [1913, ch. 207, § 5.]

§ 4378. **Penalty for violation of foregoing provisions.** Any person violating any of the provisions of this article, or any person knowingly swearing falsely to any of the statements contained in the affidavits mentioned in this act, shall be punished by a fine of not less than fifty dollars or more than five hundred dollars, or by imprisonment in the county jail not over thirty days or by both such fine and imprisonment. [1913, ch. 207, § 6.]

## CHAPTER 6.

### DISSOLUTION OF MARRIAGE.

ARTICLE 1. CAUSES FOR GRANTING DIVORCE, §§ 4379-4386.

2. CAUSES FOR DENYING DIVORCE, §§ 4387-4400.

3. GENERAL PROVISIONS, §§ 4401-4406.

#### ARTICLE 1.—CAUSES FOR GRANTING DIVORCE.

§ 4379. **Marriage. How dissolved.** Marriage is dissolved only:

1. By the death of one of the parties; or,
2. By a 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 except in accordance with the decree of the court granting the divorce.

It shall be the duty of the court granting a divorce to specify in the order for judgment whether either or both of the parties shall be permitted to marry, and if so when, and the court shall have jurisdiction to modify the decree of divorce at any time so as to permit one or both of the parties to marry, if in his discretion he shall deem it right. [1911, ch. 183; R. C. 1905, § 4048; Civ. C. 1877, § 59; R. C. 1895, § 2736; 1901, ch. 70.]

Effect of dissolution of marriage after initiation but before consummation of rights under homestead entry. 7 L.R.A.(N.S.) 967.

As to similar provision in Cal. Civ. Code, § 90, see *Re Wood*, 137 Cal. 129, 69 Pac. 900; *Linebaugh v. Linebaugh*, 137 Cal. 26, 69 Pac. 616.

2. Agreement by husband to deed land in return for mutual settlement and bill is not collusive and void. *Burgess v. Burgess*, 17 S. D. 44, 95 N. W. 279.

Effect of judgment decreeing divorce is to restore parties to state of unmarried persons, excepting only prohibition against remarriage within three months. *Luick v. Arends*, 21 N. D. 614, 132 N. W. 353.

Jurisdiction over absent citizens in suits for divorce. 53 Am. St. Rep. 182.

Power of courts to require submission to physical examination of person in suits for divorce. 3 Am. St. Rep. 556.

Validity of divorce according to Indian custom. 35 L.R.A.(N.S.) 795.

When and to what extent can decree of divorce be attacked after the death of one or both of the parties. 125 Am. St. Rep. 230; 57 L.R.A. 583; 1 L.R.A.(N.S.) 551.

Decree against plaintiff in suit for divorce as bar to subsequent divorce action. 26 L.R.A.(N.S.) 577.

Conclusiveness, as to third persons, of decree in suit for divorce as to the facts adjudicated, as distinguished from the status established. 38 L.R.A.(N.S.) 559.

Judgment in civil action as evidence, in a criminal prosecution, to prove divorce obtained before alleged bigamous marriage. 26 L.R.A.(N.S.) 465.

Effect of decree of divorce. 65 Am. Dec. 355.

—upon conveyance by husband to wife. 69 L.R.A. 379.

—on property held by the entireties. 30 L.R.A. 333; 10 L.R.A.(N.S.) 463.

—on community property, in absence of adjudication. 11 L.R.A.(N.S.) 103.

—on wife's right to insurance upon husband's life. 50 L.R.A. 552.

—to revoke gift by will. 69 L.R.A. 940.

—on right to take under gift to "husband," "wife," or "widow." 33 L.R.A.(N.S.) 826.

—of decree granted in another state. 7 Am. Dec. 206; 26 Am. Rep. 31.

—on dower. 15 L.R.A. 542; 59 L.R.A. 181.

—on property rights generally. 59 L.R.A. 178.

—of foreign decree. 21 Am. Dec. 747.

—upon dower. 41 L.R.A.(N.S.) 219.

—extraterritorial effect. 83 Am. St. Rep. 616; 94 Am. St. Rep. 553.

—of divorce rendered upon constructive service. 18 L.R.A.(N.S.) 647.

Settlement of property rights between husband and wife on account of divorce as implied revocation of will. 20 L.R.A.(N.S.) 1073.

Divorced wife as a "dependent" within restrictions as to beneficiaries of mutual benefit associations. 2 L.R.A.(N.S.) 655.

**§ 4380. 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. [R. C. 1905, § 4049; 1899, ch. 77; R. C. 1899, § 2737; 1901, ch. 71, § 1.]

Statutory causes for divorce in the different states. 65 Am. Dec. 708.

Impotency as a ground for. 28 Am. Dec. 447; 116 Am. St. Rep. 241.

Antenuptial pregnancy or unchastity as ground for divorce. 18 L.R.A. 375.

Insanity as a ground for divorce. 34 L.R.A. 161; 39 L.R.A. 264.

Mental incapacity at time of marriage as ground. 40 L.R.A. 741.

As to similar provision in Cal. Civ. Code, § 92, see *Waldron v. Waldron*, 85 Cal. 251, 9 L.R.A. 487, 24 Pac. 649, 858.

1. Insanity as affecting adultery. 34 L.R.A. 162; 47 Am. Dec. 469.

Effect of complainant's knowledge of spouse's antenuptial unchastity as a bar to a divorce for subsequent adultery. 23 L.R.A.(N.S.) 240

Cruelty as recriminatory defense to subsequent adultery. 39 L.R.A.(N.S.) 1135.

Desertion as recriminatory defense to subsequent adultery. 39 L.R.A.(N.S.) 1135.

2. Cruelty as ground for divorce. 29 Am. Dec. 674; 73 Am. Dec. 619; 40 Am. Rep. 463; 51 Am. Rep. 736; 65 Am. St. Rep. 69.

Insanity as affecting cruelty. 34 L.R.A. 164.

3. Desertion as ground for divorce. 119 Am. St. Rep. 617.

6. Effect on right to divorce of an appeal from conviction. 31 L.R.A. 518.

Effect of commutation of the sentence or of a pardon. 31 L.R.A. 519; 7 L.R.A.(N.S.) 272.

Conviction in another state. 31 L.R.A. 519.

Retroactive effect of statute as to effect of conviction and sentence upon the marriage relation. 31 L.R.A. 520.

Right to divorce where crime is prior to marriage. 31 L.R.A. 520.

Conviction as cruelty, justifying divorce. 31 L.R.A. 521.

Conviction as a bar to divorce by the party convicted. 31 L.R.A. 521.

**§ 4381. 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. [R. C. 1905, § 4050; Civ. C. 1877, § 60; R. C. 1899, § 2738.]

Insanity as affecting adultery. 34 L.R.A. 162; 47 Am. Dec. 469.

**§ 4382. 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. [R. C. 1905, § 4051; Civ. C. 1877, § 60; R. C. 1899, § 2739.]

Mental suffering as ground for divorce in absence of bodily injury. *Mahnken v. Mahnken*, 9 N. D. 188, 82 N. W. 870.

False charges of husband's marital infidelity not ground for divorce where conduct gave wife reason to believe that charges were true. *McAllister v. McAllister*, 7 N. D. 324, 75 N. W. 256.



Desertion is not absence from family dwelling caused by cruelty or threats of bodily harm. *Pollock v. Pollock*, 9 S. D. 48, 68 N. W. 176.

Sufficiency of evidence to warrant granting of decree of divorce. *DeRoche v. DeRoche*, 13 N. D. 17, 94 N. W. 767, 1 A. & E. Ann. Cas. 221.

Drunkenness as affecting cruel and inhuman treatment. 34 L.R.A. 454.

Charge of adultery as cruelty. 18 L.R.A.(N.S.) 303; 34 L.R.A.(N.S.) 360.

Conviction as cruelty entitling to divorce. 31 L.R.A. 521.

Bringing another woman into home as cruel and inhuman treatment. 2 L.R.A.(N.S.) 669.

Relations between one spouse and relatives of the other as affecting the question of cruelty. 13 L.R.A.(N.S.) 222; 34 L.R.A.(N.S.) 759.

Profanity and obscenity as ground for divorce, as cruel and inhuman treatment. 12 L.R.A.(N.S.) 820.

As to similar provision in Cal. Civ. Code, § 94, see *Waldron v. Waldron*, 85 Cal. 251, 9 L.R.A. 487, 24 Pac. 649, 858; *White v. White*, 86 Cal. 219, 24 Pac. 996; *Barnes v. Barnes*, 95 Cal. 171, 16 L.R.A. 660, 30 Pac. 298; *Smith v. Smith*, 124 Cal. 651, 57 Pac. 573.

**§ 4383. 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. [R. C. 1905, § 4052; Civ. C. 1877, § 60; R. C. 1899, § 2740.]

Wife remaining at home while husband leaves without returning, cannot be charged with desertion in absence of cruelty or threats causing husband to leave. *Barrett v. Barrett*, 20 S. D. 210, 105 N. W. 463.

What constitutes desertion. 138 Am. St. Rep. 146.

Effort to induce spouse to return home as a condition of desertion. 39 L.R.A.(N.S.) 1119.

Relations between one spouse and relatives of the other as affecting the question of desertion. 13 L.R.A.(N.S.) 222; 34 L.R.A.(N.S.) 759.

Conviction as desertion justifying divorce. 31 L.R.A. 520.

Drunkenness as affecting desertion. 34 L.R.A. 457.

Insanity as affecting abandonment. 34 L.R.A. 164.

Computation of period of abandonment as affected by insanity of defendant 16 L.R.A.(N.S.) 1071.

Charges of adultery as abandonment. 18 L.R.A.(N.S.) 310.

As to similar provision in Cal. Civ. Code, § 95, see *Benkert v. Benkert*, 32 Cal. 467; *Towle v. Matheus*, 130 Cal. 574, 62 Pac. 1064.

1. Refusal of marital intercourse as ground for divorce. 14 L.R.A. 685.

As to similar provision in Cal. Civ. Code, § 96, see *Fink v. Fink*, 137 Cal. 559, 70 Pac. 628; *Vosburg v. Vosburg*, 136 Cal. 195, 68 Pac. 694.

3. 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.

Desertion by forcing spouse to leave marital home. 29 L.R.A.(N.S.) 614.

6. As to similar provision in Cal. Civ. Code, § 101, see *Sargent v. Sargent*, 106 Cal. 541, 39 Pac. 931; *McMullin v. McMullin*, 140 Cal. 112, 73 Pac. 808.

7. As to similar provision in Cal. Civ. Code, § 102, see *Andrews v. Runyon*, 65 Cal. 629, 4 Pac. 669; *McMullin v. McMullin*, 123 Cal. 653, 56 Pac. 554; *Sweasey v. Sweasey*, 126 Cal. 123, 58 Pac. 456.

8. Right of husband to choose place and mode of living. *Currie v. Look*, 14 N. D. 482, 106 N. W. 131.

Refusal of wife to follow husband, on change of domicil, as desertion. 4 L.R.A.(N.S.) 145.

**§ 4384. Willful neglect defined.** Willful neglect is the neglect of the husband to provide for his wife the common necessities of life, he having the ability to do so; or it is the failure to do so by reason of idleness, profligacy or dissipation. [R. C. 1905, § 4053; Civ. C. 1877, § 60; R. C. 1899, § 2741.]

As to similar provision in Cal. Civ. Code, § 105, see *Wagner v. Wagner*, 104 Cal. 293, 37 Pac. 935.

**§ 4385. 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. [R. C. 1905, § 4054; Civ. C. 1877, § 60; R. C. 1895, § 2742.]

Morphine habit reasonably and necessarily caused by using it to alleviate pain, is not ground for divorce. *Rindlaub v. Rindlaub*, 19 N. D. 352, 125 N. W. 479.

Drunkenness as a ground for divorce. 34 L.R.A. 449.

Who is an habitual drunkard within the meaning of divorce laws. 6 L.R.A.(N.S.) 914; 40 L.R.A.(N.S.) 655.

Pleadings and proof in action for divorce on ground of drunkenness. 34 L.R.A. 452.

Morphinism as ground for divorce. 39 L.R.A. 264.

**§ 4386. 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. [R. C. 1905, § 4055; 1899, ch. 77; R. C. 1899, § 2743; 1901, ch. 73, § 2.]

Computation of period of abandonment as affected by insanity of defendant. 16 L.R.A.(N.S.) 1071.

Insanity as affecting abandonment and failure to support. 34 L.R.A. 164.

#### ARTICLE 2.—CAUSES FOR DENYING DIVORCE.

**§ 4387. 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. [R. C. 1905, § 4056; Civ. C. 1877, § 61; R. C. 1899, § 2744.]

Insanity as defense against divorce. 34 L.R.A. 166.

Conviction as bar to divorce by party convicted. 31 L.R.A. 521.

1. Connivance as a bar to divorce. 120 Am. St. Rep. 520.

2. Agreement by husband to deed land in return for mutual settlement and bill, is not collusive and void. *Burgess v. Burgess*, 17 S. D. 44, 95 N. W. 279.

Attack on decree of divorce by party colluding in its procurement. 60 L.R.A. 297, 305.

Fraud and collusion in appearance by nonresident in divorce case. 23 L.R.A. 288.

3. Condonation of desertion as defense to divorce action. 39 L.R.A.(N.S.) 1121, 1126.

Condonation of loathsome disease as defense to action for divorce or annulment of marriage. 5 L.R.A.(N.S.) 729.

Effect of complainant's knowledge of spouse's antenuptial unchastity as a bar to divorce for subsequent adultery. 23 L.R.A.(N.S.) 240.

**§ 4388. 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. [R. C. 1905, § 4057; Civ. C. 1877, § 61; R. C. 1899, § 2745.]

As to collusive divorce. *Clopton v. Clopton*, 11 N. D. 212, 91 N. W. 46.

What is not connivance in adultery. 54 Am. Rep. 492.

As to similar provision in Cal. Civ. Code, § 112, see *Thomson v. Thomson*, 121 Cal. 11, 53 Pac. 403.

**§ 4389. 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. [R. C. 1905, § 4058; 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, 95 N. W. 279.

In order to constitute collusion there must be misrepresentation in court by agreement, which makes it appear that acts constituting cause for divorce have been committed when such acts have not been committed. *Wiemer v. Wiemer*, 21 N. D. 371, 130 N. W. 1015.

As to similar provision in Cal. Civ. Code, § 114, see *Beard v. Beard*, 65 Cal. 354, 4 Pac. 229; *Thomson v. Thomson*, 121 Cal. 11, 53 Pac. 403.

**§ 4390. Condonation defined.** Condonation is the conditional forgiveness of a matrimonial offense constituting a cause of divorce. [R. C. 1905, § 4059; Civ. C. 1877, § 61; R. C. 1899, § 2747.]

**§ 4391. 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. [R. C. 1905, § 4060; Civ. C. 1877, § 61; R. C. 1899, § 2748.]

Cruelty not condoned by subsequent cohabitation without express agreement and such agreement is revoked by subsequent cruelty. *Taylor v. Taylor*, 5 N. D. 58, 63 N. W. 893.

Forgiving party must be treated with kindness, or condonation is void. *Gardner v. Gardner*, 9 N. D. 192, 82 N. W. 872.

**§ 4392. 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. [R. C. 1905, § 4061; Civ. C. 1877, § 61; R. C. 1899, § 2749.]

**§ 4393. 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. [R. C. 1905, § 4062; Civ. C. 1877, § 61; R. C. 1899, § 2750.]

Recriminatory defenses in suits for. 15 Am. Dec. 211; 86 Am. St. Rep. 333.

Husband's adultery as preventing him from relying on wife's adultery as defense to an action for support. 19 L.R.A.(N.S.) 468.

Desertion or cruelty as a recriminatory defense to subsequent adultery. 39 L.R.A.(N.S.) 1135.

Condoned adultery as recriminative bar to divorce for adultery on part of condoning party. 90 Am. Dec. 611.

**§ 4394. 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. [R. C. 1905, § 4063; Civ. C. 1877, § 62; R. C. 1899, § 2751.]

**§ 4395. 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. [R. C. 1905, § 4064; Civ. C. 1877, § 63; R. C. 1899, § 2752.]

**§ 4396. 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. [R. C. 1905, § 4065; Civ. C. 1877, § 65; 1881, ch. 29, § 1; R. C. 1899, § 2753.]

**§ 4397. Only statutory limitations.** There are no limitations of time for commencing actions for divorce except such as are contained in the foregoing section. [R. C. 1905, § 4066; Civ. C. 1877, § 66; R. C. 1895, § 2754.]

**§ 4398. 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. [R. C. 1905, § 4067; 1899, chs. 75, 76; R. C. 1899, § 2755.]

"Residence" construed to mean the same as "domicil," and must be in good faith. *Smith v. Smith*, 7 N. D. 404, 75 N. W. 783; *Smith v. Smith*, 10 N. D. 219, 86 N. W. 721.

Attempt of husband pending suit for divorce by wife to acquire domicil for purpose of divorce in other state. *Streitwolf v. Streitwolf*, 181 U. S. 179, 45 L. ed. 807, 21 S. Ct. R. 553.

Not necessary to serve order of publication in any cases except divorce cases. *Allen v. Richardson*, 16 S. D. 390, 92 N. W. 1075.

Substantial compliance with statutory provisions as to residence must be shown. *Grant v. Grant*, 6 S. D. 147, 60 N. W. 743.

Resident of other state cannot acquire domicil in this state simply by coming within state and remaining the requisite period. *Graham v. Graham*, 9 N. D. 88, 81 N. W. 44.

Applicable only to divorce actions. *Allen v. Richardson*, 16 S. D. 390, 92 N. W. 1075.

Does not apply to action for annulment of marriage, and residence of one year is not prerequisite to maintenance of such action. *Montague v. Montague*, 25 S. D. 471, 30 L.R.A.(N.S.) 745, 127 N. W. 639, Ann. Cas. 1912C, 591.

Is not unconstitutional as not being within powers reserved to state, and is not in conflict with federal constitution. *Pugh v. Pugh*, 25 S. D. 7, 32 L.R.A.(N.S.) 954, 124 N. W. 959.

**§ 4399. 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. [R. C. 1905, § 4068; Civ. C. 1877, § 68; R. C. 1899, § 2756.]

As to similar provision in Cal. Civ. Code, § 129, see *Re Wickes*, 128 Cal. 270, 49 L.R.A. 138, 60 Pac. 867; *McGrew v. Mutual L. Ins. Co.*, 132 Cal. 85, 84 Am. St. Rep. 20, 64 Pac. 103.

**§ 4400. 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. [R. C. 1905, § 4069; Civ. C. 1877, § 69; R. C. 1899, § 2757.]

Allegation of marriage in complaint admitted in defendant's answer, and testified to by plaintiff, sufficiently proved without corroboration. *Clopton v. Clopton*, 11 N. D. 212, 91 N. W. 46.

Testimony of plaintiff in divorce action as to intermarriage of parties need not be corroborated where it is alleged and admitted in pleadings. *Clopton v. Clopton*, 11 N. D. 212, 91 N. W. 46.

Slight corroboration is necessary to sustain decree of divorce, where facts and circumstances are such as to preclude any possibility of collusion. *Tuttle v. Tuttle*, 21 N. D. 503, 131 N. W. 460, Ann. Cas. 1913B, 1.

As to similar provision in Cal. Civ. Code, § 130, see *Johnson v. Superior Ct.*, 63 Cal. 578; *Beard v. Beard*, 65 Cal. 354, 4 Pac. 229; *Cooper v. Cooper*, 88 Cal. 45, 25 Pac. 1062; *Venzke v. Venzke*, 94 Cal. 225, 29 Pac. 499; *Foley v. Foley*, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122; *Andrews v. Andrews*, 120 Cal. 184, 52 Pac. 298; *McMullin v. McMullin*, 140 Cal. 112, 73 Pac. 808.

#### ARTICLE 3.—GENERAL PROVISIONS.

**§ 4401. 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. [R. C. 1905, § 4070; Civ. C. 1877, § 70; R. C. 1899, § 2758.]

Action for separate maintenance may be maintained, and court may require defendant to provide counsel fees and temporary support. *Milliron v. Milliron*, 9 S. D. 181, 68 N. W. 286, 62 Am. St. Rep. 863; *Bueter v. Bueter*, 1 S. D. 94, 45 N. W. 208, 8 L.R.A. 562.

Power, in absence of statute, to decree alimony or maintenance independently of proceedings for divorce. 38 L.R.A.(N.S.) 950.

Wife's right to maintain suit for maintenance, independent of divorce. 77 Am. St. Rep. 228.

As to similar provision in Cal. Civ. Code, § 136, see *Hagle v. Hagle*, 68 Cal. 588, 9 Pac. 842; *Hagle v. Hagle*, 74 Cal. 608, 16 Pac. 518; *Peyre v. Peyre*, 79 Cal. 336, 21 Pac. 838; *Anderson v. Anderson*, 124 Cal. 48, 71 Am. St. Rep. 17, 56 Pac. 630, 57 Pac. 81; *Sweasey v. Sweasey*, 126 Cal. 123, 58 Pac. 456.

**§ 4402. Alimony pending action.** When an action for divorce is pending, the court may in its discretion, require either party thereto to pay as alimony any money necessary for the support of the other party thereto, or children of the marriage, or to prosecute or defend the action. [1911, ch. 184; R. C. 1905, § 4071; Civ. C. 1877, § 71; R. C. 1899, § 2759.]

Temporary alimony will be denied when marriage is denied. *Barden v. Barden*, 4 S. D. 305, 56 N. W. 1069.

As to power of court to make allowance pendente lite in divorce action. *Mosher v. Mosher*, 16 N. D. 269, 12 L.R.A.(N.S.) 820, 125 Am. St. Rep. 654, 113 N. W. 99.

Embraces entire subject-matter of allowance of alimony, etc., pendente lite. *State ex rel. Hagert v. Templeton*, 18 N. D. 525, 25 L.R.A.(N.S.) 234, 123 N. W. 283.

Order for temporary alimony not inhibitive of further order. *Grant v. Grant*, 5 S. D. 1, 57 N. W. 948; *Vert v. Vert*, 3 S. D. 619, 54 N. W. 655.

Order for temporary alimony should be served on husband personally. *Scott v. Scott*, 9 S. D. 125, 68 N. W. 194.

Husband not liable to action for attorney's services rendered in suit by wife for divorce. *Sears v. Siverson*, 22 S. D. 74, 115 N. W. 519.

On suit money or attorney's fees as specific part of temporary alimony. *Boyle v. Boyle*, 19 N. D. 522, 126 N. W. 229.

Supreme court has jurisdiction to grant temporary alimony and suit money pending appeal, although circuit court may grant such relief. *Wells v. Wells*, 26 S. D. 70, 127 N. W. 636.

Allowances of suit money in divorce action should be made payable to wife and not to attorney. *Bailey v. Bailey*, 22 N. D. 553, 134 N. W. 747.

On right of husband to alimony in divorce action. *Hagert v. Hagert*, 22 N. D. 290, 38 L.R.A.(N.S.) 966, 133 N. W. 1035.

Power to award temporary alimony or counsel fees pending attempt to set aside decree of divorce or separation. 24 L.R.A.(N.S.) 1015.

Wife's liability for legal services in divorce suit. 24 L.R.A. 634; 34 L.R.A.(N.S.) 1080.

Alimony pendente lite or counsel fees in suit for divorce when marriage is denied. 25 L.R.A.(N.S.) 387.

Husband's liability for services rendered to wife in divorce suit. 24 L.R.A. 629.

Liability of husband on wife's contract for attorneys' fees in divorce proceedings. 13 L.R.A.(N.S.) 244.

Power of court to allow attorneys' fees in divorce suit after reconciliation of parties. 36 L.R.A.(N.S.) 1001.

Validity of agreement to pay attorney a percentage of amount obtained as alimony. 33 L.R.A.(N.S.) 1074.

Liability of guardian for suit money in divorce proceedings against ward. 15 L.R.A.(N.S.) 1034.

Jurisdiction to award temporary alimony, suit money and counsel fee pending an appeal in divorce suit. 27 L.R.A.(N.S.) 712.

Allowance of suit money to husband. 25 L.R.A.(N.S.) 234.

As to similar provision in Cal. Civ. Code, § 137, see *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345; *Turner v. Turner*, 80 Cal. 141, 22 Pac. 72; *Ex parte Spencer*, 83 Cal. 460, 17 Am. St. Rep. 266, 23 Pac. 395; *Mudd v. Mudd*, 98 Cal. 320, 33 Pac. 114; *Storke v. Storke*, 99 Cal. 621, 34 Pac. 339; *Loveren v. Loveren*, 100 Cal. 493, 35 Pac. 87; *Rose v. Rose*, 109 Cal. 544, 42 Pac. 452; *Hite v. Hite*, 124 Cal. 389, 45 L.R.A. 793, 71 Am. St. Rep. 82, 57 Pac. 227; *Sweasey v. Sweasey*, 126 Cal. 123, 58 Pac. 456; *Anderson v. Anderson*, 137 Cal. 225, 68 Pac. 1061.

**§ 4403. Temporary support and maintenance.** In all actions brought to enforce the obligations established by law for the support or maintenance of either party to a marriage in an action of divorce, the court shall have authority, in its discretion, to require the defendant therein to pay such sum or sums of money as it may deem necessary for the temporary support and maintenance of the plaintiff and to prosecute the action. [1911, ch. 185.]

**§ 4404. 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. [R. C. 1905, § 4072; Civ. C. 1877, § 72; R. C. 1899, § 2760.]

Decree awarding alimony may be modified when conditions have changed. *Greenleaf v. Greenleaf*, 6 S. D. 348, 61 N. W. 42.

Allowance to wife may be in gross sum, instead of periodical payments. *Williams v. Williams*, 6 S. D. 284, 61 N. W. 38.

Payment of alimony may be enforced. *Allison v. Allison*, 5 S. D. 216, 58 N. W. 563.

Decree may be modified so as to require payment of fixed sum, and may make same a lien on homestead, and direct that it be sold. *Harding v. Harding*, 16 S. D. 406, 92 N. W. 1080.

In a divorce granted to husband, no allowance for wife's support can be made; a decree for payment of monthly sum not enforceable by attachment for contempt. *Glynn v. Glynn*, 8 N. D. 233, 77 N. W. 594.

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, 92 N. W. 1080.

Jurisdiction of court to award custody of children after prayer for divorce has been withdrawn or dismissed. 35 L.R.A.(N.S.) 1159.

Effect of death of parent to whom custody of child was awarded upon rights of surviving parent. 20 L.R.A.(N.S.) 171.

Effect of provision in decree of divorce or separation on right of parent to custody of child. 41 L.R.A.(N.S.) 597.

Custody of children when interstate or international elements involved. 59 L.R.A. 177.

Jurisdiction to award custody of child temporarily within the state but domiciled elsewhere. 10 L.R.A.(N.S.) 690.

Recognition of right, emanating from foreign power, to the custody and control of a child. 7 L.R.A.(N.S.) 306.

Removal of child from jurisdiction of court during divorce proceedings. 58 L.R.A. 939.

Extraterritorial effect of judgment awarding custody of children. 39 L.R.A.(N.S.) 988.

As to similar provision in Cal. Civ. Code, § 138, see *Schammel v. Schammel*, 105 Cal. 258, 38 Pac. 729; *Younger v. Younger*, 106 Cal. 377, 39 Pac. 779; *Gaston v. Gaston*, 114 Cal. 542, 55 Am. St. Rep. 86, 46 Pac. 609; *McKay v. Superior Ct.*, 120 Cal. 143, 40 L.R.A. 585, 52 Pac. 147; *McKay v. McKay*, 125 Cal. 65, 57 Pac. 677; *Shattuck v. Shattuck*, 135 Cal. 192, 67 Pac. 45; *Vosburg v. Vosburg*, 137 Cal. 493, 70 Pac. 473.

**§ 4405. Support.** When divorce is granted, the court shall make such equitable distribution of the property of the parties thereto as may seem just and proper and may compel either of such parties to provide for the maintenance of the children of the marriage, and make such suitable allowances to the other party for support during life or for a shorter period as to the court may seem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects. [1911, ch. 184; R. C. 1905, § 4073; 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 cannot be enforced by contempt proceedings. *Glynn v. Glynn*, 8 N. D. 233, 77 N. W. 594.

Alimony may be granted in gross sum. *De Roche v. De Roche*, 12 N. D. 17, 94 N. W. 767, 1 A. & E. Ann. Cas. 221.

Court may modify divorce decree to require husband to support child in custody of wife, although not claimed in original complaint. *Marks v. Marks*, 22 S. D. 453, 118 N. W. 694.

Court may modify divorce decree on husband's default, by requiring payment of certain sum to be lien on homestead. *Harding v. Harding*, 16 S. W. 406, 92 N. W. 1080.

Order for maintenance, etc., where divorce is granted for offense of husband, may be enforced by appointment of receiver, or by any other remedy applicable to case. *Drake v. Drake*, 27 S. D. 329, 131 N. W. 294.

Supreme court may require payment of temporary alimony and suit money pending appeal by husband from allowance of permanent alimony. *Tuttle v. Tuttle*, 26 S. D. 95, 127 N. W. 637.

On power of court to grant permanent alimony before divorce is decreed. *Boyle v. Boyle*, 19 N. D. 522, 126 N. W. 229.

Alimony and its allowance. 60 Am. Dec. 664.

Award of alimony on constructive service. 16 L.R.A. 234; 59 L.R.A. 178; 9 L.R.A.(N.S.) 593.

Husband's prospects as basis for alimony. 4 L.R.A.(N.S.) 909.

Right of wife against whom an absolute divorce is granted to permanent alimony. 20 L.R.A.(N.S.) 421; 30 L.R.A.(N.S.) 73.

Liability of guardian for alimony in divorce proceedings instituted by or against the ward. 15 L.R.A.(N.S.) 1034.

Assignability of decree for alimony. 7 L.R.A.(N.S.) 179.

Liability of alimony for debts. 32 L.R.A.(N.S.) 270.

Judgment for alimony as a fixed liability for purposes of bankruptcy act. 54 L.R.A. 369.

Power of court to decree alimony after the granting of a divorce. 88 Am. Dec. 657.

Independent suit for alimony after decree of divorce. 21 L.R.A. 677.

Valid divorce granted in one state as affecting independent suit for alimony in another. 34 L.R.A.(N.S.) 1106.

Power of court to create and enforce liens for alimony. 102 Am. St. Rep. 700.

Validity of provision in decree for alimony declaring a lien on husband's personalty. 30 L.R.A.(N.S.) 1062.

Money decree for permanent alimony or separate maintenance as lien on real property. 25 L.R.A.(N.S.) 132.

Failure to pay alimony or allowance for support granted by decree of divorce as a criminal offense. 42 L.R.A.(N.S.) 1055.

Contempt proceedings to enforce payment of alimony. 137 Am. St. Rep. 875; 24 L.R.A. 433.

Enforcement of payment of alimony by imprisonment. 37 Am. St. Rep. 763; 34 L.R.A. 665; 17 L.R.A.(N.S.) 1140.

Remedy for the enforcement against decedent's estate of alimony which had accrued prior to his death. 18 L.R.A.(N.S.) 257.

Enforcing award of alimony in another state. 59 L.R.A. 178.

Equitable jurisdiction to enforce a foreign decree for alimony. 9 L.R.A.(N.S.) 1071.

Action to recover installments of alimony accruing under a decree rendered in another state. 9 L.R.A.(N.S.) 1168; 28 L.R.A.(N.S.) 1068.

Effect of wife's subsequent adultery upon an allowance of alimony. 19 L.R.A. 811.

Adultery while insane as affecting claim for alimony. 34 L.R.A. 164.

Effect of intermarriage of parties to a divorce upon the right to alimony or provision in lieu of alimony. 3 L.R.A.(N.S.) 923.

Effect of second marriage upon obligation to pay alimony. 62 L.R.A. 975.

Does alimony terminate on the death of the husband. 2 L.R.A.(N.S.) 232.

Validity of agreement made after divorce as a substitute for an award of alimony. 35 L.R.A.(N.S.) 1167.

Validity of anticipatory contract making provision for wife in the event of her obtaining a divorce for subsequent fault of husband. 23 L.R.A.(N.S.) 880.

Allowance of alimony to husband. 34 L.R.A. 110; 25 L.R.A.(N.S.) 234.

Power, on annulling marriage, to require man to provide for support of child. 5 L.R.A.(N.S.) 767.

Recovery by mother against father for money expended in support of children after divorce. 38 L.R.A.(N.S.) 509.

Father's liability for support of children as affected by decree awarding custody to mother. 2 L.R.A.(N.S.) 851; 47 Am. St. Rep. 314.

Duty of father to support child awarded to mother by decree of divorce silent as to maintenance. 114 Am. St. Rep. 700.

As to similar provision in Cal. Civ. Code, § 139, see *Everett v. Everett*, 52 Cal. 383; *Robinson v. Robinson*, 79 Cal. 511, 21 Pac. 1095; *Re Spencer*, 82 Cal. 110, 23 Pac. 37; *Ex parte Spencer*, 83 Cal. 460, 17 Am. St. Rep. 266, 23 Pac. 395; *Howell v. Howell*, 104 Cal. 45, 43 Am. St. Rep. 70, 37 Pac. 770, 772; *Schammel v. Schammel*, 105 Cal. 256, 38 Pac. 729; *Gaston v. Gaston*, 114 Cal. 542, 55 Am. St. Rep. 86, 46 Pac. 609; *Huellmantel v. Huellmantel*, 124 Cal. 583, 57 Pac. 582; *McKay v. McKay*, 125 Cal. 65, 57 Pac. 677.

**§ 4406. Security, separate estate. Homestead.** The court may require such party to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter and may enforce the same by 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 the decree of divorce may assign the homestead or such part thereof as may to the court seem just, to the innocent party either absolutely or for a limited period, according to the facts in the case and in consonance with law relating to homesteads. The disposition of the homestead by the court and all orders and decrees touching the alimony and maintenance of either party to a marriage 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. [1911, ch. 184; R. C. 1905, § 4074; Civ. C. 1877, § 74; R. C. 1899, § 2762.]

As providing for appeals from all orders and decrees touching alimony and maintenance. *Tonn v. Tonn*, 16 N. D. 17, 111 N. W. 609.

Divorced wife retains no right in homestead unless so decreed. *Brady v. Kreuger*, 8 S. D. 464, 66 N. W. 1083, 59 Am. St. Rep. 771.

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.

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

Husband not liable to action for attorney's services rendered in suit by wife for divorce. *Sears v. Siverson*, 22 S. D. 74, 115 N. W. 519.

Effect of divorce on homestead. 23 L.R.A. 239; 16 L.R.A.(N.S.) 114.

—on partition of homestead. 4 L.R.A.(N.S.) 786.

—on "family" under homestead and exemption laws. 4 L.R.A.(N.S.) 396.

Effect of dissolution of marriage after initiation but before consummation of right under homestead entry. 7 L.R.A.(N.S.) 967.

Money decree for permanent alimony or separate maintenance as lien on homestead. 25 L.R.A.(N.S.) 137.

As to similar provision in Cal. Civ. Code, §§ 140, 146, see *Eslinger v. Eslinger*, 47 Cal. 62; *Cummings v. Cummings*, 75 Cal. 434, 17 Pac. 442; *Simpson v. Simpson*, 80 Cal. 237, 22 Pac. 167; *Neary v. Godfrey*, 102 Cal. 338, 36 Pac. 655; *Huellmantel v. Huellmantel*, 117 Cal. 407, 49 Pac. 574; *Re James*, 124 Cal. 653, 57 Pac. 578, 1008; *Gorman v. Gorman*, 134 Cal. 378, 66 Pac. 313; *Petaluma Sav. Bank v. Superior Ct.*, 111 Cal. 488, 44 Pac. 177; *Gaston v. Gaston*, 114 Cal. 542, 55 Am. St. Rep. 86, 46 Pac. 609; *Murray v. Murray*, 115 Cal. 266, 37 L.R.A. 626, 56 Am. St. Rep. 97, 47 Pac. 37; *Storke v. Storke*, 116 Cal. 47, 47 Pac. 869, 48 Pac. 121.



## CHAPTER 7.

## HUSBAND AND WIFE.

**§ 4407. Mutual relations.** Husband and wife contract toward each other obligations of mutual respect, fidelity and support. [R. C. 1905, § 4075; Civ. C. 1877, § 75; R. C. 1899, § 2763.]

If husband assents to opening of highway across homestead, he having title wife's assent will be presumed. *Centerville Twp. v. Jenter*, 25 S. D. 314, 126 N. W. 575.

Separate action by infirm husband against wife will lie to compel wife to support him when she is amply able to do so. *Hagert v. Hagert*, 22 N. D. 290, 38 L.R.A.(N.S.) 966, 133 N. W. 1035.

Misconduct of wife as affecting gift to her before, and in consideration of, marriage. 6 L.R.A.(N.S.) 785.

Marital misconduct of one spouse as avoiding gift by other. 35 L.R.A.(N.S.) 124.

As to similar provision in Cal. Civ. Code, § 155, see *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345; *Mott v. Mott*, 82 Cal. 413, 22 Pac. 1140; *Livingston v. Conant*, 5 Cal. Unrep. 933, 51 Pac. 859; *Martin v. Southern P. Co.*, 130 Cal. 285, 62 Pac. 515.

**§ 4408. 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. [R. C. 1905, § 4076; 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 not "head of family" for purpose of claiming exemptions of personalty. *Ness v. Jones*, 10 N. D. 587, 88 N. W. 706.

Wife may be head of family, and so able to claim exemptions from her separate estate. *Linander v. Longstaff*, 7 S. D. 157, 63 N. W. 775.

Married woman, living with her husband, must show affirmatively that she heads the family to recover exempt property. *Blount v. Medbery*, 16 S. D. 562, 94 N. W. 428

Domicile of wife, when different from that of her husband. 84 Am. St. Rep. 27.

**§ 4409. Duty to support.** The husband must support himself and his wife out of his property or by his labor. The wife must support 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. [R. C. 1905, § 4077; Civ. C. 1877, § 77; R. C. 1899, § 2765.]

Separate action by infirm husband against wife will lie to compel wife to support him when she is amply able to do so. *Hagert v. Hagert*, 22 N. D. 290, 38 L.R.A.(N.S.) 966, 133 N. W. 1035.

Wife not bound to reimburse county for husband's maintenance in insane asylum. *Hamlin County v. Tauer*, 18 S. D. 295, 100 N. W. 430.

Offense of desertion or failure to provide for wife or family as affected by residence of parties. 47 L.R.A.(N.S.) 218.

Conveyance of property in contemplation of, but before negotiations for, marriage, as a fraud. 9 L.R.A.(N.S.) 955.

Right of wife to relief against conveyance or transfer made or contemplated by her husband in fraud of her support. 18 L.R.A.(N.S.) 1147.

Recovery by mother against father for money expended in support of children. 38 L.R.A.(N.S.) 508.

Failure to support wife as desertion entitling her to divorce. 29 L.R.A.(N.S.) 618.

Validity of antenuptial contract by one party to support the other. 15 L.R.A.(N.S.) 491.

Liability of husband for necessities furnished wife while living with him. 47 L.R.A.(N.S.) 279.

Liability of wife for necessities. 31 Am. Rep. 697.

Implied liability of wife for family expenses; rules in various states. 15 L.R.A. 717.

When separate estate of married woman is chargeable with debts of herself and husband. 72 Am. Dec. 513.

**§ 4410. Separate property. Dwelling.** Except as mentioned in section 4409, 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. [R. C. 1905, § 4078; Civ. C. 1877, § 78; R. C. 1899, § 2766.]

Gratuitous contribution of husband's time and skill to management of wife's property creates no title in him to its profits. *Olson v. O'Connor*, 9 N. D. 504, 84 N. W. 359.

Wife not answerable for assault and battery committed by husband, though employed by her and occupying same homestead. *Curtis v. Dinneen*, 4 D. 245, 30 N. W. 148.

**§ 4411. 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. [R. C. 1905, § 4079; 1899, ch. 100; R. C. 1899, § 2767.]

As authorizing wife to maintain action in her own name. *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085.

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

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

May deal with each other as if unmarried; conveyance directly to wife valid. *Johnson v. Brauch*, 9 S. D. 116, 68 N. W. 173, 62 Am. St. Rep. 857; *Williams v. Harris*, 4 S. D. 22, 54 N. W. 926, 46 Am. St. Rep. 753.

Wife executing promissory note with husband is liable thereon, though note given for husband's individual debt. *Col. 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; *Col. U. S. Mortgage Co. v. Stevens*, 8 N. D. 265, 55 N. W. 578; *Granger v. Roll*, 6 S. D. 611, 62 N. W. 970.

Wife may employ husband as servant. *Curtis v. Dinneen*, 4 D. 245, 30 N. W. 148.

Wife joining in mortgage upon husband's property to secure his debt is a surety. *People's Bank v. Francis*, 8 N. D. 369, 79 N. W. 853.

Conveyance of homestead by husband to wife in fraud of creditors passes no title. *Kettleschlager v. Ferrick*, 12 S. D. 455, 81 N. W. 889.

Husband may deal with wife; may pay her an honest debt. *Kolbe v. Harrington*, 15 S. D. 263, 88 N. W. 572.

The husband's fraudulent intent in transferring land to wife will not defeat the transfer, unless wife has knowledge of fraud. *First State Bank v. O'Leary*, 13 S. D. 204, 83 N. W. 45; *Hewett v. Usher*, 11 S. D. 512, 78 N. W. 993; *Williams v. Harris*, 4 S. D. 22, 54 N. W. 926, 46 Am. St. Rep. 753.

Choses in action of wife, antenuptial and postnuptial. 46 Am. Dec. 47.

Right of husband to prevent wife engaging in a separate business in competition with his own business. 32 L.R.A.(N.S.) 837.

Title by adverse possession as between husband and wife. 18 Am. St. Rep. 113.

Conveyances and contracts between husband and wife. 99 Am. Dec. 599.

— from husband to wife. 88 Am. Dec. 54; 133 Am. St. Rep. 607; 69 L.R.A. 353.

— from wife to husband. 9 Am. St. Rep. 323; 20 L.R.A. 702.

Enforcing in equity against married women defectively executed or acknowledged writings. 19 Am. Dec. 230.

Antenuptial contracts between husband and wife, effect of. 73 Am. St. Rep. 898.

Partnership in business between husband and wife. 31 Am. St. Rep. 935.

Powers of attorney by married woman. 84 Am. St. Rep. 761.

Right of husband or wife to compensation for services rendered to each other. 15 L.R.A. 215.

Agreements to compensate each other for services or to relinquish claims on the other's earnings. 58 Am. St. Rep. 492.

Married woman's liability upon covenants of warranty. 43 Am. Dec. 426.

Estoppel against married women. 57 Am. St. Rep. 169.

— by covenants in their deeds. 49 Am. Rep. 87.

Conflict of laws as to the liability of married women. 46 Am. St. Rep. 446.

— as to capacity of wife to become surety for husband. 57 L.R.A. 513.

Obligation purporting to be that of married woman as principal, which, to knowledge of payee or obligee, is used to discharge debt of third person, as a contract of suretyship. 18 L.R.A.(N.S.) 81.

Power of married woman, under statute giving her sole control of her separate estate, to become surety for one other than her husband. 17 L.R.A.(N.S.) 676.

Proof of husband's agency for wife by evidence of similar acts by husband. 17 L.R.A.(N.S.) 223.

Gift by wife to husband, when inferable from use by him of the income of real property. 58 Am. Rep. 261.

Investment by husband in his own name of wife's separate property in real estate as gift to husband. 6 L.R.A.(N.S.) 381; 26 L.R.A.(N.S.) 161.

Investment by husband in his own name of wife's separate property in real estate as creating a trust in her favor. 6 L.R.A.(N.S.) 381; 26 L.R.A.(N.S.) 161.

Does expectation of one spouse on making gift to other that latter will allow former to share in benefits of the property raise implied trust to that effect. 24 L.R.A.(N.S.) 1043.

When resulting trust arises in favor of husband or wife. 127 Am. St. Rep. 252.

Suits between husband and wife, when maintainable. 73 Am. St. Rep. 268.

Right of wife to sue husband for personal tort. 6 L.R.A.(N.S.) 191; 30 L.R.A.(N.S.) 1153.

Husband's right to sue wife for personal tort. 23 L.R.A.(N.S.) 699.

As to similar provision in Cal. Civ. Code, §§ 158, 159, see Parry v. Kelley, 52 Cal. 334; Marlow v. Barlew, 53 Cal. 456; Butler v. Baber, 54 Cal. 178; Schuler v. Savings & L. Soc., 64 Cal. 397, 1 Pac. 479; Sacramento Lumber Co. v. Wagner, 67 Cal. 293, 7 Pac. 705; Goad v. Moulton, 67 Cal. 536, 8 Pac. 63; Burkle v. Levy, 70 Cal. 250, 11 Pac. 643; Schuyler v. Broughton, 70 Cal. 282, 11 Pac. 719; Re Noah, 73 Cal. 583, 2 Am. St. Rep. 823, 15 Pac. 287; Tolman v. Smith, 74 Cal. 345, 16 Pac. 189; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; Burkett v. Burkett, 78 Cal. 310, 3 L.R.A. 781, 12 Am. St. Rep. 58, 20 Pac. 715; Carter v. McQuade, 83 Cal. 274, 23 Pac. 348; Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957; Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358; Bogart v. Woodruff, 96 Cal. 609, 31 Pac. 618; Schwarze v. Mahoney, 97 Cal. 131, 31 Pac. 908; Porter v. Bucher, 98 Cal. 454, 33 Pac. 335; Wren v. Wren, 100 Cal. 276, 38 Am. St. Rep. 287, 34 Pac. 775; Dimond v. Sanderson, 103 Cal. 97, 37 Pac. 189; Re Davis, 106 Cal. 453, 39 Pac. 756; Glas v. Glas, 114 Cal. 566, 55 Am. St. Rep. 90, 46 Pac. 667; Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Jones v. Lamont, 118 Cal. 499, 62 Am. St. Rep. 251, 50 Pac. 766; Re Winslow, 121 Cal. 92, 53 Pac. 362; Yoakam v. Kingery, 126 Cal. 30, 58 Pac. 324; Newman v. Freitas, 129 Cal. 283, 50 L.R.A. 548, 61 Pac. 307; Freiermuth v. Steigleman, 130 Cal. 392, 80 Am. St. Rep. 138, 62 Pac. 615; Stiles v. Cain, 134 Cal. 170, 66 Pac. 231; Hamilton v. Hubbard, 134 Cal. 603, 65 Pac. 321, 66 Pac. 860; McDougall v. McDougall, 135 Cal. 316, 67 Pac. 778; Farmers' & M. Bank v. De Shorb, 137 Cal. 685, 70 Pac. 771; McDonald v. Randall, 139 Cal. 246, 72 Pac. 997.

**§ 4412. 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. [R. C. 1905, § 4080; Civ. C. 1877, § 80; R. C. 1895, § 2768.]

Husband and wife may contract to live apart and release interest of each in property of the other. *Aspey v. Barry*, 13 S. D. 220, 83 N. W. 91.

Agreement by husband to deed land in return for mutual settlement and bill is not collusive and void. *Burgess v. Burgess*, 17 S. D. 44, 95 N. W. 279.

Agreements for separation and their validity. 90 Am. Dec. 367; 83 Am. St. Rep. 859. Validity of agreement between husband and wife renouncing marital rights. 12 L.R.A.(N.S.) 848.

Wife's right to sue husband on separation agreement. 5 L.R.A.(N.S.) 613.

**§ 4413. Separation.** The mutual consent of the parties is a sufficient consideration for such an agreement as is mentioned in the last section. [R. C. 1905, § 4081; Civ. C. 1877, § 81; R. C. 1899, § 2769.]

**§ 4414. Separate and mutual rights and liabilities.** 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; provided, however, that husband and wife shall be jointly and severally liable for any debts contracted by either while living together, for necessary household supplies of food, clothing and fuel for themselves and family, and for the education of their minor children.

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 curtesy upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband. [1907, ch. 136; R. C. 1905, § 4082; Civ. C. 1877, § 83; 1893, ch. 52, § 2; R. C. 1899, § 2770.]

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.

Wife is not answerable for tort committed by husband. *Curtis v. Dinneen*, 4 D. 245, 30 N. W. 148.

Husband answerable for illegal sale with his knowledge and consent of intoxicants by wife. *State v. Rozum*, 8 N. D. 548, 80 N. W. 477; *State v. Ekanger*, 8 N. D. 559, 80 N. W. 482.

Liability of wife for crime committed in presence of and with assent of husband. *Neys v. Taylor*, 12 S. D. 488, 81 N. W. 901.

Power to contract not dependent upon existence or nonexistence of separate property. *Col. U. S. Mort. Co. v. Bradley*, 4 S. D. 158, 55 N. W. 1108.

Business conducted by and in the name of the wife. 84 Am. Dec. 753.

Validity of judgments as against married women. 134 Am. St. Rep. 927.

Presumption of coercion by husband. 106 Am. St. Rep. 725.

1. Effect of married women's acts upon husband's liability for wife's torts. 14 L.R.A. (N.S.) 1003; 25 L.R.A. (N.S.) 840.

Liability of community property for torts of wife. 36 L.R.A. (N.S.) 88.

Liability of husband and wife for wife's libel or slander. 30 L.R.A. 521.

2. Judgment against wife for necessary household supplies is valid, and statute is constitutional. *Banner Mercantile Co. v. Hendricks*, 24 N. D. 16, 138 N. W. 993.

As to similar provision in Cal. Civ. Code, §§ 168, 169, see *Spreckels v. Spreckels*, 116 Cal. 339, 36 L.R.A. 497, 58 Am. St. Rep. 170, 48 Pac. 228; *Melvin v. State*, 121 Cal. 16, 53 Pac. 416; *Loring v. Stewart*, 79 Cal. 200, 21 Pac. 651.

3. Antenuptial debts of married women and liability of husbands therefor. 60 Am. Dec. 259.

Validity of husband's express promise to pay debt previously contracted by wife. 7 L.R.A. (N.S.) 1048.

Effect of intermarriage between debtor and creditor upon the indebtedness. 21 L.R.A. (N.S.) 683.

Liability of community property for antenuptial indebtedness. 19 L.R.A. 235.

4. As to similar provision in Cal. Civ. Code, § 171, see *Butler v. Baber*, 54 Cal. 178; *Melvin v. State*, 121 Cal. 16, 53 Pac. 416.

Conveyance by husband to wife as creating separate estate. 69 L.R.A. 370.

Enforcement of wife's liability under statute of another state for a debt contracted by her husband. 17 L.R.A. (N.S.) 426.

Liability of married woman for legal services in divorce suit. 24 L.R.A. 634; 34 L.R.A. (N.S.) 1080.

Liability of estate of married woman for funeral expenses. 33 L.R.A. 662.

Mechanics' lien on building erected by husband on wife's land. 62 L.R.A. 374.

Liability of separate estate of wife for her funeral expenses. 6 L.R.A. (N.S.) 917; 37 L.R.A. (N.S.) 754.

Injunction against execution sale of wife's property for husband's debts. 30 L.R.A. 112, 118.

Right of husband's creditors to reach fruits of his management of, or services in connection with wife's separate estate or business. 21 L.R.A. (N.S.) 1124.

5. Estates of dower and curtesy are unknown to our law. *Fore v. Fore*, 2 N. D. 260, 50 N. W. 712.

Power of legislature to destroy right of curtesy. 19 L.R.A. 256.

Power of legislature to increase dower rights. 17 L.R.A. (N.S.) 319.

**§ 4415. Wife's necessities.** 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. [R. C. 1905, § 4083; Civ. C. 1877, § 84; R. C. 1899, § 2771.]

Husband not liable to action for attorney's services rendered in suit by wife for divorce. *Sears v. Siverson*, 22 S. D. 74, 115 N. W. 519.

Agency of wife to act for husband and charge him for necessities. 98 Am. St. Rep. 627.

What are necessities. 10 Am. Dec. 462.

Necessaries for which husband is chargeable. 98 Am. St. Rep. 627.

Liability of husband for money loaned to wife to buy necessities. 23 L.R.A. 132.

Husband's liability for services rendered to wife in divorce suit. 24 L.R.A. 629.

Conclusiveness as to third persons in action for necessities of decree in suit for divorce or annulment as to facts adjudicated as distinguished from status established. 38 L.R.A. (N.S.) 560.

Liability of husband for necessities furnished wife while living with him. 65 L.R.A. 529.

Liability of married woman for necessities purchased by her. 33 L.R.A. (N.S.) 426.

As to similar provision in Cal. Civ. Code, § 174, see *Nissen v. Bendixsen*, 69 Cal. 521, 11 Pac. 29; *Re Weringer*, 100 Cal. 345, 34 Pac. 825; *St. Vincent's Inst. v. Davis*, 129 Cal. 20, 61 Pac. 477.

**§ 4416. 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. [R. C. 1905, § 4084; Civ. C. 1877, § 85; R. C. 1899, § 2772.]

As to similar provision in Cal. Civ. Code, § 175, see *Heney v. Sargent*, 54 Cal. 396.

**§ 4417. 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 encumber 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. [R. C. 1905, § 4085; 1883, ch. 68, § 1; R. C. 1899, § 2773.]

Validity of conveyance or incumbrance of homestead by wife after abandonment by husband. 36 L.R.A.(N.S.) 1024.

Conveyance of homestead by husband after abandonment by wife. 8 L.R.A.(N.S.) 565.

**§ 4418. 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. [R. C. 1905, § 4086; 1883, ch. 68, § 2; R. C. 1899, § 2774.]

**§ 4419. 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. [R. C. 1905, § 4087; 1883, ch. 68, § 3; R. C. 1899, § 2775.]

## CHAPTER 8.

### PARENT AND CHILD.

**§ 4420. Legitimacy presumed.** All children born in wedlock are presumed to be legitimate. [R. C. 1905, § 4088; Civ. C. 1877, § 86; R. C. 1899, § 2776.]

Divorced husband whose interest in wife's estate is contingent on death of their minor child, cannot contest her will. *Halde v. Schultz*, 17 S. D. 465, 97 N. W. 369.

**§ 4421. 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. [R. C. 1905, § 4089; Civ. C. 1877, § 87; R. C. 1899, § 2777.]

Effect of subsequent marriage of parents on antenuptial issue. 13 L.R.A. 275.

As to similar provision in Cal. Civ. Code, §§ 194, 215, see *Re Wood*, 137 Cal. 129, 69 Pac. 900; *Re Wardell*, 57 Cal. 484.

**§ 4422. Who may dispute presumption.** The presumption of legitimacy can be disputed only by the husband or wife or the descendant of one or both of them. Illegitimacy in such case may be proved like any other fact. [R. C. 1905, § 4090; Civ. C. 1877, § 88; R. C. 1899, § 2778.]

Evidence of husband or wife as to illegitimacy of child born in marriage. 72 Am. Dec. 649; 69 Am. St. Rep. 571.

Competency of woman to testify as to nonaccess of husband. 3 L.R.A.(N.S.) 619.

Evidence of declarations to show maternity of illegitimate child. 11 L.R.A.(N.S.) 1052.

Admissibility of declarations of relatives of claimant to prove legitimacy or relationship of illegitimate. 36 L.R.A.(N.S.) 533.

Admissibility of declarations of person since deceased against his or her own marriage. 15 L.R.A.(N.S.) 190.

Proof necessary to establish bastardy of child born to married woman. 36 L.R.A.(N.S.) 255.

**§ 4423. 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. [R. C. 1905, § 4091; Civ. C. 1877, § 89; R. C. 1899, § 2779.]

Divorce decree directing husband to "provide, care for, maintain and educate" minor son does not change statutory duty. *Glynn v. Glynn*, 8 N. D. 233, 77 N. W. 594.

Support of an adult child as an advancement. 22 L.R.A.(N.S.) 1165.

Parent's duty to support as affected by child's property interests. 57 L.R.A. 729.

Liability of parent for necessities furnished minor child who is living away from the parent's home. 40 L.R.A.(N.S.) 488.

Criminal liability for neglect of child causing death. 61 L.R.A. 290.

— for failure to support child where support is furnished by others. 32 L.R.A.(N.S.) 841.

— for failure to provide child with medical attendance and remedies. 1 B. R. C. 747.

Effect of failure to provide medical attendance for infant to render one guilty of manslaughter. 6 L.R.A.(N.S.) 685.

Religious belief as excuse for failure to furnish medical aid to child. 36 L.R.A.(N.S.) 633.

Liability of father for support of child awarded to mother in a decree of divorce. 47 Am. St. Rep. 314; 114 Am. St. Rep. 700.

As to similar provision in Cal. Civ. Code, § 196, see *Ex parte Miller*, 109 Cal. 643, 42 Pac. 428; *Re Campbell*, 130 Cal. 380, 62 Pac. 613.

**§ 4424. 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. [R. C. 1905, § 4092; Civ. C. 1877, § 90; R. C. 1899, § 2780.]

Father's right to custody of child. 34 Am. Rep. 698; 40 Am. Rep. 327.

How custody of child to be determined on habeas corpus. 20 Am. Dec. 330.

Parent's right to custody of child and proceedings to vindicate. 2 Am. St. Rep. 183.

Action by parent for taking away of child. 13 Am. Dec. 715.

Liability for enticement of minor from parent's service. 1 L.R.A.(N.S.) 205.

Parent's right to will custody of child. 2 L.R.A.(N.S.) 203.

Effect of father's attempt to appoint guardian for child against the surviving wife. 13 L.R.A.(N.S.) 288.

Denial of custody of child to parent for its well-being. 41 L.R.A.(N.S.) 564.

Placing one's child in another's custody as implying contract not to reclaim child. 16 L.R.A.(N.S.) 1004.

Effect of contract on parent's right to custody of child. 41 L.R.A.(N.S.) 578.

As to similar provision in Cal. Civ. Code, § 197, see *Re Campbell*, 130 Cal. 380, 62 Pac. 613.

**§ 4425. Of illegitimate child.** The mother of an illegitimate unmarried minor is entitled to its custody, services and earnings. [R. C. 1905, § 4093; Civ. C. 1877, § 91; R. C. 1899, § 2781.]

Right of mother or reputed father to custody or control of illegitimate. 65 L.R.A. 689.

**§ 4426. 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. [R. C. 1905, § 4094; Civ. C. 1877, § 92; R. C. 1899, § 2782.]

Parent's right to furnish support out of child's estate. 16 Am. Dec. 661.

Power of equity over estates of infants. 98 Am. Dec. 733.

**§ 4427. Control of property.** The parent as such has no control over the property of the child. [R. C. 1905, § 4095; Civ. C. 1877, § 93; R. C. 1899, § 2783.]

**§ 4428. 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. [R. C. 1905, § 4096; Civ. C. 1877, § 94; R. C. 1899, § 2784.]

Chastisement of child by parent, when criminal and prohibited. 59 Am. Rep. 286.

Homicide by excessive or improper chastisement of child. 60 L.R.A. 801.

Liability of parent or custodian for assault by punishment of child. 21 L.R.A. (N.S.) 216.

As to similar provision in Cal. Civ. Code, § 203, see *Ex parte Miller*, 109 Cal. 643, 42 Pac. 428.

**§ 4429. 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. [R. C. 1905, § 4097; Civ. C. 1877, § 95; R. C. 1899, § 2785.]

Emancipation of infant. 35 Am. Rep. 117; 113 Am. St. Rep. 113.

How far marriage of infant works emancipation. 16 L.R.A. 578; 24 L.R.A. (N.S.) 160.

**§ 4430. 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. [R. C. 1905, § 4098; Civ. C. 1877, § 96; R. C. 1895, § 2786.]

**§ 4431. 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. [R. C. 1905, § 4099; Civ. C. 1877, § 97; R. C. 1899, § 2787.]

County may recover against children for necessaries furnished to indigent and helpless father. *McCook County v. Kammos*, 7 S. D. 558, 64 N. W. 1123, 58 Am. St. Rep. 854, 31 L.R.A. 461.

Obligation of child to support parent. 117 Am. St. Rep. 128.

Right of parent to sue child for support. 4 L.R.A. (N.S.) 1153.

Right of child who supports parent at request of other children to recover therefor from the latter. 27 L.R.A. (N.S.) 683.

As to similar provision in Cal. Civ. Code, § 206, see *Anderson v. Anderson*, 124 Cal. 48, 71 Am. St. Rep. 17, 56 Pac. 630, 57 Pac. 81.

**§ 4432. 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. [R. C. 1905, § 4100; Civ. C. 1877, § 98; R. C. 1899, § 2788.]

**§ 4433. 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. [R. C. 1905, § 4101; Civ. C. 1877, § 99; R. C. 1899, § 2789.]

Claim of relative for support of minor not enforceable at common law. *Flugel v. Henschel*, 6 N. D. 205, 69 N. W. 195.

Maintenance and education of child, claim of parent or one standing in loco parentis for furnishing. 57 Am. Dec. 226.

Recovery by mother against father for money expended in support of children. 38 L.R.A. (N.S.) 508.

Right of one who employs minor without parents' consent to allowance on account of expenditures for necessaries. 9 L.R.A. (N.S.) 411.

**§ 4434. 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. [R. C. 1905, § 4102; Civ. C. 1877, § 100; R. C. 1899, § 7890.]

Stepchildren and stepparents, mutual rights and obligations of. 53 Am. Dec. 345.

Stepchildren as members of the family of insured. 3 L.R.A.(N.S.) 334.

Stepchild as "dependent" within restriction as to beneficiaries of mutual benefit associations. 2 L.R.A.(N.S.) 653; 36 L.R.A.(N.S.) 208.

Implied agreement to pay for services rendered to stepparents. 11 L.R.A.(N.S.) 885.

Authority of stepchild to bind parent by contracts other than those for necessities. 39 L.R.A.(N.S.) 885.

Stepparent's liability for necessities furnished stepchild. 42 L.R.A.(N.S.) 535.

§ 4435. **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. [R. C. 1905, § 4103; Civ. C. 1877, § 101; R. C. 1899, § 2791.]

Boy living with grandfather as with a father has no implied contract for wages.

Murphy v. Murphy, 1 S. D. 318, 47 N. W. 142.

§ 4436. **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. [R. C. 1905, § 4104; Civ. C. 1877, § 102; R. C. 1899, § 2792.]

§ 4437. **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. [R. C. 1905, § 4105; Civ. C. 1877, § 103; R. C. 1899, § 2793.]

§ 4438. **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. [R. C. 1905, § 4106; Civ. C. 1877, § 104; R. C. 1899, § 2794.]

Parent's right to remove child from state. 58 L.R.A. 937.

§ 4439. **Not liable for acts of other.** Neither parent nor child is answerable as such for the act of the other. [R. C. 1905, § 4107; Civ. C. 1877, § 105; R. C. 1899, § 2795.]

Liability of father for damages caused by minor's negligent use of gun. Johnson v. Glidden, 11 S. D. 237, 76 N. W. 933.

Parent is not liable in damages for torts of child committed without his knowledge, and not in course of his employment as child. Fanton v. Byrum, 26 S. D. 366, 34 L.R.A.(N.S.) 501, 128 N. W. 325, 1 N. C. C. A. 812.

Liability of father for acts of his child. 50 Am. Rep. 583; 74 Am. St. Rep. 801.

Parent's liability for torts of minor child. 10 L.R.A.(N.S.) 933.

Liability where automobile is being driven by child. 41 L.R.A.(N.S.) 775.

§ 4440. **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 4461. [R. C. 1905, § 4108; Civ. C. 1877, § 106; R. C. 1895, § 2796.]

Denial of custody of child to parent for its well-being. 41 L.R.A.(N.S.) 564.

Removal of child from state by parent. 58 L.R.A. 937.

Custody of infants when their parents are separated. 34 Am. Rep. 698.

Taking of child by or at instance of one parent from custody of other as kidnapping. 32 L.R.A.(N.S.) 845.

Effect of father's attempt to appoint guardian for child against the surviving wife. 13 L.R.A.(N.S.) 288.

Jurisdiction to award custody of child temporarily within the state, but domiciled elsewhere. 10 L.R.A.(N.S.) 690.

Recognition of right, emanating from foreign power, to the custody and control of a child. 7 L.R.A.(N.S.) 306.



## CHAPTER 9.

## ADOPTION.

**§ 4441. 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. [R. C. 1905, § 4109; Civ. C. 1877, § 107; R. C. 1899, § 2797.]

Agreement with parent of child to be adopted, that it shall have share in property of adopting parent, cannot be avoided by will or otherwise. *Quinn v. Quinn*, 5 S. D. 328, 58 N. W. 808.

Adoptive parent may inherit real property owned by adopted child. *Calhoun v. Bryant*, 28 S. D. 266, 133 N. W. 266.

Adoption by one person of the children of another. 39 Am. St. Rep. 210.

Effect of adoption upon kindred of person adopting. 109 Am. St. Rep. 674.

Adoption of adult under statute providing for adoption of "child." 12 L.R.A. (N.S.) 884.

Conflict of laws as to adoption of child. 65 L.R.A. 186.

Enforceability of contract to give child share of estate in consideration of surrender of child to promisor, as affected by noncompliance with statute prescribing mode of adoption. 8 L.R.A. (N.S.) 1130.

As to similar provision in Cal. Civ. Code, § 221, see *Re Jessup*, 81 Cal. 408, 6 L.R.A. 594, 21 Pac. 976, 22 Pac. 742, 1028; *Re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407.

**§ 4442. Relative age limited.** A person adopting a child must be at least ten years older than the person adopted. [R. C. 1905, § 4110; Civ. C. 1877, § 108; R. C. 1899, § 2798.]

As to similar provision in Cal. Civ. Code, § 223, see *Re Johnson*, 98 Cal. 531, 21 L.R.A. 380, 33 Pac. 460; *Re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407.

**§ 4443. 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. [R. C. 1905, § 4111; Civ. C. 1877, § 109; R. C. 1899, § 2799.]

**§ 4444. Consent of parents, guardian or county commissioners.** 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 as hereinafter provided. 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. If a child under the age of four years has been in the sole care of persons other than its parents, with or without their consent or approval for the period of two years or over, and if its parent or parents have refused or neglected to support such child, then and in that case it may be legally adopted by the person 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. If a child has been abandoned by its parent or parents for a period of at least two years or if the parent or parents of such child have refused or neglected to provide for its care or support for such period and if such child has in the meantime become a public charge upon the county in which it resides and has remained such for a period of at least two years, then and in such case it may be legally adopted without the consent of its parent or parents upon due proof of the fact of such abandonment or neglect for the period above specified and upon the consent of the board of county commissioners of the county wherein such child resides given at one of its regular meetings. In case the child has no parent living or the consent of the parent is not necessary under the provisions of this section and no other provision is made in this article for the obtaining of consent to such adoption,

such consent 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. [1911, ch. 3; R. C. 1905, § 4112; Civ. C. 1877, § 110; 1891, ch. 4, § 2; R. C. 1895, § 2800; 1903, ch. 124.]

Order of adoption may be made when mother has abandoned her illegitimate child for one year. *Richards v. Matteson*, 8 S. D. 77, 65 N. W. 428.

Constitutionality of statute permitting adoption of child without consent of parents. 18 L.R.A.(N.S.) 326.

Necessity of parent's consent to adoption of illegitimate child. 30 L.R.A.(N.S.) 152.

As to similar provision in Cal. Civ. Code, § 224, see *Re Wardell*, 57 Cal. 484; *Re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407.

**§ 4445. When child must consent.** The consent of a child, if over the age of ten years, is necessary to its adoption. [R. C. 1905, § 4113; Civ. C. 1877, § 111; 1891, ch. 4, § 3; R. C. 1895, § 2801.]

**§ 4446. 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. [R. C. 1905, § 4114; 1897, ch. 1; R. C. 1899, § 2802.]

As to similar provision in Cal. Civ. Code, § 226, see *Ex parte Clark*, 87 Cal. 638, 25 Pac. 967; *Re Johnson*, 98 Cal. 531, 21 L.R.A. 380, 33 Pac. 460; *Re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407.

**§ 4447. 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. [R. C. 1905, § 4115; 1891, ch. 4, § 5; R. C. 1899, § 2803.]

**§ 4448. 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. [R. C. 1905, § 4116; 1891, ch. 4, § 6; R. C. 1895, § 2804.]

Adoptive parent may inherit real property owned by adopted child. *Calhoun v. Bryant*, 28 S. D. 266, 133 N. W. 266.

Legal status of adopted child. 17 L.R.A. 435.

Right of adopted children to inherit. 118 Am. St. Rep. 684.

Inheritance by or from adopted child. 17 L.R.A. 435.

Law governing. 65 L.R.A. 186.

Right of adopted child to inherit property from a relative of its adoptive parent. 17 L.R.A. 435; 8 L.R.A.(N.S.) 117; 33 L.R.A.(N.S.) 139.

Right of child adopted in other state to take under local statute of descent or distribution. 21 L.R.A.(N.S.) 679; 25 L.R.A.(N.S.) 1285.

Do terms "child," "children," "issue," etc., in statutes governing distribution of decedent's estate include adopted children. 30 L.R.A.(N.S.) 914.

Do terms "child," "children," "issue," etc., in a will include adopted children. 27 L.R.A.(N.S.) 1158.

Right of adopted children to take parents' homestead. 56 L.R.A. 54.

Sufficiency of relationship by adoption to sustain action for death. 16 L.R.A.(N.S.) 199.

Presumption and burden of proof as to undue influence respecting gifts inter vivos to adopted child. 35 L.R.A.(N.S.) 949.

As to similar provision in Cal. Civ. Code, § 228, see *Re Wardell*, 57 Cal. 484; *Re Newman*, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; *Younger v. Younger*, 106 Cal. 377, 39 Pac. 779; *Re Taylor*, 131 Cal. 180, 63 Pac. 345.

**§ 4449. 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. [R. C. 1905, § 4117; 1891, ch. 4, § 7; R. C. 1899, § 2805.]

Right of parties to adoption proceeding, or their privies, to attack decree of adoption. 30 L.R.A. (N.S.) 159.

**§ 4450. 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. [R. C. 1905, § 4118; Civ. C. 1877, § 116; R. C. 1899, § 2806.]

Adopting parent must be domiciled within state when act of adoption occurs; legal effect same as adoption by decree of court. *Eddie v. Eddie*, 8 N. D. 376, 79 N. W. 856, 73 Am. St. Rep. 765.

As to similar provision in Cal. Civ. Code, § 230, see *Re Pico*, 52 Cal. 84; *Re Wardell*, 57 Cal. 484; *Re Jessup*, 81 Cal. 408, 6 L.R.A. 594, 21 Pac. 976, 22 Pac. 742, 1028; *Blythe v. Ayres*, 86 Cal. 532, 19 L.R.A. 40, 31 Pac. 915; *Garner v. Judd*, 6 Cal. Unrep. 675, 64 Pac. 1076; *Re De Laveaga*, 142 Cal. 158, 75 Pac. 790.

## CHAPTER 10.

### GUARDIAN AND WARD.

**§ 4451. Guardian defined.** A guardian is a person appointed to take care of the person or property of another. [R. C. 1905, § 4119; Civ. C. 1877, § 117; R. C. 1899, § 2807.]

**§ 4452. Ward defined.** The person over whom, or over whose property a guardian is appointed, is called his ward. [R. C. 1905, § 4120; Civ. C. 1877, § 118, R. C. 1899, § 2808.]

**§ 4453. Guardians classified.** Guardians are either:

1. General; or,
2. Special. [R. C. 1905, § 4121; Civ. C. 1877, § 119; R. C. 1899, § 2809.]

**§ 4454. 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. [R. C. 1905, § 4122; Civ. C. 1877, § 120; R. C. 1899, § 2810.]

**§ 4455. Special guardian.** Every other is a special guardian. [R. C. 1905, § 4123; Civ. C. 1877, § 121; R. C. 1899, § 2811.]

**§ 4456. 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. [R. C. 1905, § 4124; Civ. C. 1877, § 122; R. C. 1899, § 2812.]

Parent's right to appointment as guardian of minor child. 33 L.R.A. (N.S.) 869.

Right of mother or reputed father to guardianship of illegitimate child. 65 L.R.A. 695.

As to similar provision in Cal. Civ. Code, § 241, see *Murphy v. Superior Ct.*, 84 Cal. 592, 24 Pac. 310; *Re Campbell*, 130 Cal. 380, 62 Pac. 613.

**§ 4457. 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. [R. C. 1905, § 4125; Civ. C. 1877, § 123; R. C. 1899, § 2813.]

**§ 4458. 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. [R. C. 1905, § 4126; Civ. C. 1877, § 124; R. C. 1899, § 2814.]

**§ 4459. 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. [R. C. 1905, § 4127; Civ. C. 1877, § 125; R. C. 1899, § 2815.]

Nonresident minors and proceedings to transmit their property to foreign guardians. 95 Am. Dec. 666.

**§ 4460. Court appointing has exclusive jurisdiction.** In all cases the court making the appointment of a guardian has exclusive jurisdiction to control him. [R. C. 1905, § 4128; Civ. C. 1877, § 126; R. C. 1899, § 2816.]

**§ 4461. 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. [R. C. 1905, § 4129; Civ. C. 1877, § 127; R. C. 1899, § 2817.]

Selection of guardian is very largely in discretion of court. *Engle v. Yorks*, 7 S. D. 254, 64 N. W. 132.

As to similar provision in Cal. Civ. Code, § 246, see *Re Campbell*, 130 Cal. 380, 62 Pac. 613; *Re Van Loan*, 142 Cal. 423, 76 Pac. 37.

**§ 4462. 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. [R. C. 1905, § 4130; Civ. C. 1877, § 127; R. C. 1899, § 2818.]

Parental relations only disturbed when well-being of child requires it. *Engle v. Yorks*, 7 S. D. 254, 64 N. W. 132.

Denial of custody of child to parent for its well-being. 41 L.R.A.(N.S) 564.

**§ 4463. Guardian's power.** A guardian appointed by a court has power over the person and property of the ward unless otherwise ordered. [R. C. 1905, § 4131; Civ. C. 1877, § 128; R. C. 1899, § 2819.]

Common-law powers of guardians. 89 Am. St. Rep. 257.

Powers of guardian in chancery and at the common law. 18 Am. Dec. 689.

Waiver by guardian of service of process on minor. 95 Am. Dec. 461.

Testamentary guardians and their powers. 29 Am. Dec. 712.

Right of guardian to remove infant from the state. 58 L.R.A. 931.

**§ 4464. 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. [R. C. 1905, § 4132; Civ. C. 1877, § 129; R. C. 1899, § 2820.]

**§ 4465. 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. [R. C. 1905, § 4133; Civ. C. 1877, § 130; R. C. 1899, § 2821.]

Guardian cannot loan, lease or invest ward's property without court's order. *Dalrymple v. Loan Co.*, 9 N. D. 306, 83 N. W. 245.

Existence of guardianship as showing want of capacity to execute contracts, make wills, and the like. 140 Am. St. Rep. 346.

Expenditure in excess of income of ward, when authorized. 49 Am. Dec. 657.

Notice of application for sale by guardian as affecting the validity of sale. 120 Am. St. Rep. 148.

Notice of application by guardian for leave to sell infant's real estate as jurisdictional. 8 L.R.A.(N.S.) 1215.

Guardian's right to have judgment set aside. 54 L.R.A. 761.

Admissions and waivers by guardian in actions. 32 L.R.A. 671.

Right of guardian to surrender insurance policy in favor of ward. 35 L.R.A.(N.S.) 1123.

—to enter appearance of ward. 32 L.R.A. 684.

—to submit cause of action for arbitration. 70 L.R.A. 175.

—to compromise infant's cause of action for personal injuries. 21 L.R.A.(N.S.) 338.

—to maintain ejectment. 18 L.R.A. 789.

—to adeem legacy. 28 L.R.A.(N.S.) 401.

—to carry on business on behalf of estate. 40 L.R.A.(N.S.) 204.

Right to mechanics' lien for improvements made on infant's land by authority of guardian. 15 L.R.A.(N.S.) 1159.

**§ 4466. Nature of the relation.** The relation of guardian and ward is confidential and is subject to the provisions of the chapter on trusts. [R. C. 1905, § 4134; Civ. C. 1877, § 131; R. C. 1899, § 2822.]

Personal liability of guardians. 75 Am. Dec. 447.

Leases executed by ward to guardian, when voidable. 25 Am. Rep. 728.

**§ 4467. 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. [R. C. 1905, § 4135; Civ. C. 1877, § 132; R. C. 1899, § 2823.]

Deceased guardian, method of compelling settlement of accounts by. 8 Am. St. Rep. 684.

**§ 4468. 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. [R. C. 1905, § 4136; Civ. C. 1877, § 133; R. C. 1899, § 2824.]

**§ 4469. 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. [R. C. 1905, § 4137; Civ. C. 1877, § 134; R. C. 1899, § 2825.]

County court may on parent's application set aside order surrendering child to children's home association. *McFall v. Simmons*, 12 S. D. 562, 81 N. W. 898.

Petition for such order will be denied when parent is leading immoral life. *State v. Children's Home Society*, 10 N. D. 493, 88 N. W. 273.

**§ 4470. 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. [R. C. 1905, § 4138; Civ. C. 1877, § 135; R. C. 1899, § 2826.]

**§ 4471. 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. [R. C. 1905, § 4139; Civ. C. 1877, § 136; R. C. 1899, § 2827.]

**§ 4472. 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. [R. C. 1905, § 4140; Civ. C. 1877, § 137; R. C. 1899, § 2828.]

Right of ward to maintain action at law against guardian for guardianship funds, after termination of guardianship, but before settlement of account. 26 L.R.A.(N.S.) 789.

§ 4473. **When discharge granted.** A guardian appointed by a court is not entitled to his discharge until one year after the ward's majority. [R. C. 1905, § 4141; Civ. C. 1877, § 138; R. C. 1899, § 2829.]

§ 4474. **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. [R. C. 1905, § 4142; Civ. C. 1877, § 139; R. C. 1899, § 2830.]

## CHAPTER 11.

### MASTER AND SERVANT.

§ 4475. **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. [R. C. 1905, § 4143; Civ. C. 1877, § 140; R. C. 1895, § 2831.]

Contracts of infants for the purposes of binding themselves as apprentices. 34 Am. Dec. 538; 18 Am. St. Rep. 626.

Effect of death on contract of apprentices. 23 L.R.A. 707.

Proprietary interest of master in earnings of apprentices. 5 L.R.A.(N.S.) 1154.

Damages recoverable in action by master for injury to apprentices. 32 L.R.A.(N.S.)

38.

Duty to furnish medical aid to apprentices. 28 L.R.A. 555; 4 L.R.A.(N.S.) 49.

§ 4476. **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. [R. C. 1905, § 4144; Civ. C. 1877, § 141; R. C. 1899, § 2832.]

§ 4477. **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. [R. C. 1905, § 4145; Civ. C. 1877, § 142; R. C. 1899, § 2833.]

§ 4478. **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. [R. C. 1905, § 4146; Civ. C. 1877, § 143; R. C. 1895, § 2834.]

§ 4479. **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. [R. C. 1905, § 4147; Civ. C. 1877, § 144; R. C. 1899, § 2835.]

§ 4480. **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. [R. C. 1905, § 4148; Civ. C. 1877, § 145; R. C. 1899, § 2836.]

§ 4481. **Consideration.** If there is any pecuniary consideration for an indenture of apprenticeship on either part it must be stated therein. [R. C. 1905, § 4149; Civ. C. 1877, § 146; R. C. 1899, § 2837.]

§ 4482. **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. [R. C. 1905, § 4150; Civ. C. 1877, § 147; R. C. 1899, § 2838.]

§ 4483. **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. [R. C. 1905, § 4151; Civ. C. 1877, § 148; R. C. 1899, § 2839.]

§ 4484. **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. [R. C. 1905, § 4152; Civ. C. 1877, § 149; R. C. 1899, § 2840.]

§ 4485. **Acknowledgment.** Every indenture under section 4484 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. [R. C. 1905, § 4153; Civ. C. 1877, § 150; R. C. 1899, § 2841.]

§ 4486. **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 4485. [R. C. 1905, § 4154; Civ. C. 1877, § 151; R. C. 1899, § 2842.]

§ 4487. **When indenture void.** No indenture or contract for the service of an apprentice is binding upon him unless made as hereinbefore prescribed. [R. C. 1905, § 4155; Civ. C. 1877, § 152; R. C. 1899, § 2843.]

§ 4488. **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. [R. C. 1905, § 4156; Civ. C. 1877, § 153; R. C. 1895, § 2844.]

§ 4489. **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. [R. C. 1905, § 4157; Civ. C. 1877, § 154; R. C. 1895, § 2845.]

§ 4490. **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 consideration for exercising his vocation in any place after his term of service has expired. [R. C. 1905, § 4158; Civ. C. 1877, § 155; R. C. 1899, § 2846.]

§ 4491. **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. [R. C. 1905, § 4159; Civ. C. 1877, § 156; R. C. 1899, § 2847.]

§ 4492. **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. [R. C. 1905, § 4160; Civ. C. 1877, § 157; R. C. 1899, § 2848.]

§ 4493. **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. [R. C. 1905, § 4161; Civ. C. 1877, § 158; R. C. 1899, § 2849.]

## CHAPTER 12.

### CORPORATIONS.

- ARTICLE 1. THE CREATION OF CORPORATIONS, §§ 4494-4516.**
2. ANNUAL REPORTS OF CORPORATE EXISTENCE, §§ 4517-4523.
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  4. CORPORATE POWERS, §§ 4533-4559.
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#### ARTICLE 1.—THE CREATION OF CORPORATIONS.

§ 4494. **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. [R. C. 1905, § 4162; Civ. C. 1877, § 373; R. C. 1899, § 2850.]

What constitutes de facto corporation. 118 Am. St. Rep. 253.

As to similar provision in Cal. Civ. Code, § 283, see *Johnson v. Goodyear Min. Co.*, 127 Cal. 4, 47 L.R.A. 338, 78 Am. St. Rep. 17, 59 Pac. 304.

§ 4495. **Reserved power of legislative assembly.** Every grant of corporate power is subject to alteration, suspension or repeal in the discretion of the legislative assembly. [R. C. 1905, § 4163; Civ. C. 1877, § 375; R. C. 1899, § 2851.]

§ 4496. **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. [R. C. 1905, § 4164; Civ. C. 1877, § 376; R. C. 1899, § 2852.]

Receipt of benefits from contract with corporation estops from denying corporate existence. *Building & Loan Asso. v. Chamberlain*, 4 S. D. 271, 56 N. W. 897; *School Dist. v. Alderson*, 6 D. 145, 41 N. W. 466; *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706.



Whether corporation has exceeded its authority in purchasing real estate can be inquired into only by state. *Gilbert v. Hole*, 2 S. D. 164, 49 N. W. 1.

Attempted incorporation of bank creates simply a partnership, in absence of law under which banking corporation might be formed. *Davis v. Stevens*, 104 Fed. 235.

Statute presupposes a de facto corporation; it does not preclude private persons from denying existence, de jure or de facto, of alleged corporation. *Davis v. Stevens*, 104 Fed. 235.

Due incorporation of bank cannot be inquired into in action by depositor to recover amount of deposit from incorporators after bank's insolvency. *Mason v. Stevens*, 16 S. D. 320, 92 N. W. 424.

**§ 4497. 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. [R. C. 1905, § 4165; Civ. C. 1877, § 377; R. C. 1899, § 2853.]

**§ 4498. Corporations classified.** Corporations are either:

1. Public; or,

2. Private. [R. C. 1905, § 4166; Civ. C. 1877, § 378; R. C. 1899, § 2854.]

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

**§ 4499. 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. [R. C. 1905, § 4167; 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.

**§ 4500. Private. Purposes.** All corporations not public are private. Private corporations may be formed for any purpose for which individuals may lawfully associate themselves. [R. C. 1905, § 4168; Civ. C. 1877, § 380; R. C. 1895, § 2856.]

Corporation organized under N. D. Rev. Codes 1899, as private corporation. *Arrison v. Company D*, N. D. N. G., 12 N. D. 554, 98 N. W. 83, 1 A. & E. Ann. Cas. 368.

Restricting membership of association to persons belonging to certain fraternal order does not change the fact that it is a corporation. *Masonic Association v. Taylor*, 2 S. D. 324, 50 N. W. 93.

**§ 4501. Articles.** The instrument by which a private corporation is formed is called "Articles of Incorporation." [R. C. 1905, § 4169; Civ. C. 1877, § 381; R. C. 1895, § 2857.]

**§ 4502. 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. [R. C. 1905, § 4170; Civ. C. 1877, § 384; 1887, ch. 35, § 1; 1893, ch. 39, § 1; R. C. 1895, § 2858.]

Defective formation of corporation and its consequences. 33 Am. St. Rep. 176.

**§ 4503. 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 two hundred thousand dollars. [1909, ch. 65; R. C. 1905, § 4171; 1899, ch. 53; R. C. 1899, § 2859.]

Right of private persons to contest the power of a corporation to take or hold property. 32 L.R.A. 293; 9 L.R.A.(N.S.) 689.

**§ 4504. 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. [R. C. 1905, § 4172; Civ. C. 1877, § 385; R. C. 1895, § 2860.]

**§ 4505. 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. [R. C. 1905, § 4173; Civ. C. 1877, § 386; R. C. 1395, § 2861.]

As to similar provision in Cal. Civ. Code, § 290, see *People ex rel. Schlinder v. Flint*, 64 Cal. 49, 28 Pac. 495; *Thomas v. Placerville Gold Quartz Min. Co.*, 65 Cal. 600, 4 Pac. 641; *Chapman v. Doray*, 89 Cal. 52, 26 Pac. 605; *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368; *Porter v. Lassen County Land & Cattle Co.*, 127 Cal. 261, 59 Pac. 563; *People ex rel. Weatherly v. Golden Gate Lodge No. 6, B. P. O. E.*, 128 Cal. 257, 60 Pac. 865.

**§ 4506. 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. [R. C. 1905, § 4174; Civ. C. 1877, § 387; R. C. 1895, § 2862.]

**§ 4507. Articles. Railways, etc.** The articles of incorporation of railway corporations shall be in compliance with section 4610; of insurance corporations, in compliance with section 4837; of fraternal associations or corporations, in compliance with section 5018; of banking corporations, in compliance with section 5148. [R. C. 1905, § 4175; R. C. 1895, § 2863.]

**§ 4508. 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. [R. C. 1905, § 4176; Civ. C. 1877, § 388; R. C. 1895, § 2864.]

As to similar provision in Cal. Civ. Code, § 292, see *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236; *People ex rel. Weatherly v. Golden Gate Lodge No. 6, B. P. O. E.*, 128 Cal. 257, 60 Pac. 865; *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386.

**§ 4509. 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 manufacturing of dairy products, agricultural fair associations, corporations whose capital stock does not exceed five thousand dollars, formed for the purchase and maintenance of male animals for the improvement of stock, corporations whose capital stock does not exceed two thousand dollars, formed for the purchase of musical instruments, music and uniforms for bands of musicians, and corporations whose capital stock does not exceed five thousand dollars, formed for the purpose of purchasing or leasing grounds and erecting thereon the necessary fences, buildings and seats and purchasing the necessary equipments for the use of base ball clubs, foot ball teams and other athletic associations when composed of nonsalaried members or players, shall at or before the filing of the articles of incorporation pay into the state treasury the sum of twenty-five dollars for the first twenty-five thousand dollars, or fraction thereof, of the capital stock of such corporation, and the sum of fifty dollars for twenty-five thousand dollars up to fifty thousand dollars 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. [1911, ch. 105; 1909, ch. 64; R. C. 1905, § 4177; 1890, ch. 139, § 1; 1891, ch. 105, § 1; R. C. 1895, § 2865; 1905, ch. 67.]

**§ 4510. 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. [R. C. 1905, § 4178; 1890, ch. 139, § 2; R. C. 1895, § 2866.]

**§ 4511. 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 4509, 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. [R. C. 1905, § 4179; 1890, ch. 139, § 3; R. C. 1895, § 2867.]

**§ 4512. 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. [R. C. 1905, § 4180; Civ. C. 1877, § 389; 1885, ch. 35, § 1; R. C. 1899, § 2868.]

No capital stock need be actually subscribed or paid in at time articles are filed. *Singer Mfg. Co. v. Peck*, 9 S. D. 29, 67 N. W. 947.

Incorporated club whose articles provide that members shall not be liable for corporate debts, is owner of liquor sold by club. *State v. Mudie*, 28 S. D. 41, 115 N. W. 107.

**§ 4513. 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. [R. C. 1905, § 4181; 1899, ch. 52; R. C. 1899, § 2869.]

**§ 4514. 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. [R. C. 1905, § 4182; Civ. C. 1877, § 391; R. C. 1899, § 2870.]

Duly authenticated copies of articles of incorporation from secretary of state and county register of deeds established corporate existence of a foreign corporation. *Dowagiac Mfg. Co. v. Higinbotham*, 15 S. D. 547, 91 N. W. 330.

**§ 4515. 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 incorporators and their successors are called members. [R. C. 1905, § 4183; Civ. C. 1877, § 392; R. C. 1899, § 2871.]

Incorporated club whose articles provide that members shall not be liable for corporate debts is owner of liquor sold by club. *State v. Mudie*, 22 S. D. 41, 115 N. W. 107.

As to similar provision in Cal. Civ. Code, § 298, see *Smith v. San Francisco & N. P. R. Co.*, 115 Cal. 584, 35 L.R.A. 309, 56 Am. St. Rep. 119, 47 Pac. 582.

**§ 4516. 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. [R. C. 1905, § 4184; Civ. C. 1877, § 393; R. C. 1899, § 2872.]

As to similar provision in Cal. Civ. Code, § 313, see *Market Street R. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *Smith v. San Francisco & N. P. R. Co.*, 115 Cal. 584, 35 L.R.A. 309, 56 Am. St. Rep. 119, 47 Pac. 582.

## ARTICLE 2.—ANNUAL REPORTS OF CORPORATE EXISTENCE.

**§ 4517. 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. R. C. 1905, § 4185; 1905, ch. 65, § 1.]

**§ 4518. 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. [R. C. 1905, § 4186; 1905, ch. 65, § 2.]

**§ 4519. Charters validated. Reports filed with the secretary of state.** All corporations heretofore organized under the laws of the state of North Dakota, whose charters have become forfeited and cancelled under the provisions of section 4518, by reason of the failure to make and file with the secretary of state reports as in said section required, be, and the same hereby are, validated for all purposes; upon condition, however, that all corporations desiring to come under the provisions hereof shall on or before the first day of August, 1913, make and file with the said secretary of state full and complete reports as in said section prescribed, pay a penalty of ten dollars and all arrearages in fees, and the charter of any corporation complying with the provisions of this statute within said period is hereby declared valid in all respects. [1913, ch. 110.]

Laws 1911, ch. 103, provided as follows: "All corporations heretofore organized under the laws of the state of North Dakota, whose charters have become forfeited and cancelled under the provisions of section 4186 of the Revised Codes of 1905 [section 4518 herein] by reason of the failure to make and file with the secretary of state, reports as in said section required, be and the same hereby are validated for all purposes upon condition, however, that all corporations desiring to come under the provisions hereof shall on or before the first day of August, 1911, make and file with the said secretary of state, full and complete reports as in said section prescribed, and the charter of any corporation complying with the provisions of this statute within said period is hereby declared valid in all respects." A similar validating act is Laws 1907, ch. 54.

**§ 4520. 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 cancelled upon the records in the office of the secretary of state. [R. C. 1905, § 4187; 1905, ch. 65, § 3.]

**§ 4521. 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 4518, 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. [R. C. 1905, § 4188; 1905, ch. 65, § 4.]

§ 4522. **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. [R. C. 1905, § 4189; 1905, ch. 65, § 5.]

§ 4523. **Fees, how disposed of.** The secretary of state shall keep an accurate account of all moneys coming to his department, and shall turn over and pay to the state treasurer any and all moneys for fees collected by him under the provisions of this article. Such fees must be paid in advance, and when collected must be paid into the state treasury at the end of each month and placed to the credit of the general fund. [1913, ch. 106.]

#### ARTICLE 3.—CORPORATE STOCK.

§ 4524. **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. [R. C. 1905, § 4191; Civ. C. 1877, § 395; R. C. 1899, § 2873.]

Nature and validity of subscription to stock. 136 Am. St. Rep. 736.

Distinction between subscriptions and offers or agreements to subscribe. 81 Am. Dec. 392.

Liability of stockholders upon subscription for stock. 40 Am. Dec. 358; 93 Am. St. Rep. 349.

Validity of subscription induced by false statements that certain other persons were to invest in the enterprise. 29 L.R.A.(N.S.) 477.

Withdrawal of subscription to stock. 33 L.R.A. 593.

Rescission of subscription for fraud and misrepresentation in procuring it. 33 L.R.A. 721.

—after insolvency of corporation. 31 L.R.A.(N.S.) 900.

Effect of promoter's fraud on corporation's right against subscriber. 25 L.R.A. 100.

§ 4525. **Books opened for subscriptions.** After the secretary of state issues the certificates of incorporation as provided in section 4512, 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 [10] of this chapter. [R. C. 1905, § 4192; Civ. C. 1877, § 396; R. C. 1895, § 2874.]

The reference at the conclusion of this section to "article 7 of this chapter" is incorrect. It should be "article 10." The error originated in R. C. 1895, § 2824, which has a marginal reference to Civ. C., § 396, and the latter correctly refers to the article constituting article 10 in the present compilation. The error in R. C. 1895 was repeated in R. C. 1899, § 2874.

§ 4526. **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. [R. C. 1905, § 4193; Civ. C. 1877, § 397; R. C. 1899, § 2875.]

Lien of corporation on stock. 11 Am. Dec. 581.

Action by corporation for unpaid balance of subscription after sale of forfeited stock. 1 L.R.A.(N.S.) 902.

§ 4527. **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. [R. C. 1905, § 4194; Civ. C. 1877, § 398; R. C. 1895, § 2876.]

Pledgee of stock in whose name it stands on corporate records may vote it. *Re Argus Print Co.*, 1 N. D. 434, 48 N. W. 347, 12 L.R.A. 781, 26 Am. St. Rep. 639.

Stock may be pledged; priority of transfer over judgment creditor. *Van Cise v. Bank*, 4 D. 485, 33 N. W. 897; *Doty v. Bank*, 3 N. D. 9, 53 N. W. 77.

Transfer under execution sale. *Van Cise v. Bank*, 4 D. 485, 33 N. W. 897.

Directors may not without consent of all stockholders dispose of original stock except on full payment of its par value, or under provisions for its payment in by-laws. *Anderson v. Scandia Mining Syndicate*, 26 S. D. 558, 128 N. W. 1016.

Right of pledgee of stock without transfer on corporate books is superior to that of subsequent attaching creditor of pledgor. *State Bkg. & T. Co. v. Taylor*, 25 S. D. 581, 29 L.R.A.(N.S.) 523, 127 N. W. 590.

Mandamus lies to compel record of transfer of corporate stock on corporation's books by officers. *Amidon v. Florence Farmers' Elevator Co.*, 28 S. D. 24, 132 N. W. 166.

To what extent may transfers of stock be restricted. 57 Am. St. Rep. 379.

Duty of corporation to transfer stock on books. 136 Am. St. Rep. 1027.

Mandamus to compel transfer of stock. 51 Am. Rep. 798.

Power of court to compel foreign corporation to register transfer of stock. 3 L.R.A.(N.S.) 551.

Right to the aid of equity to compel a corporation to transfer on its books stock acquired in aid of a conspiracy. 24 L.R.A.(N.S.) 108.

Duty of corporation as to transfer of stock held in trust. 15 L.R.A. 643.

Right of corporation to refuse to transfer stock on its books because of objections of former holder. 27 L.R.A.(N.S.) 200.

Validity of pledge or transfer of stock of corporation when not made in books of company, as against attachments, executions or subsequent transfers. 67 L.R.A. 656; 20 L.R.A.(N.S.) 996.

**§ 4528. 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 officials 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. [R. C. 1905, § 4195; Const. § 138; R. C. 1899, § 2877.]

Right of corporation itself to complain that property purchased by it was of less value than the stock issued in exchange therefor, in the absence of actual fraud. 19 L.R.A.(N.S.) 115.

Payment for corporate stock with unpatented formula or invention. 16 L.R.A.(N.S.) 520.

Payment for stock by transfer of property as protection against liability to creditors of corporation. 42 L.R.A. 593.

**§ 4529. 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. 1905, § 4196; R. C. 1895, § 2878.]

Commercial paper as payment of subscription to stock. 35 L.R.A.(N.S.) 80.

§ 4530. **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. [R. C. 1905, § 4197; Civ. C. 1877, § 399; R. C. 1895, § 2879.]

Fraudulent and overissued stock. 87 Am. St. Rep. 847.

§ 4531. **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. [R. C. 1905, § 4198; Civ. C. 1877, § 400; 1893, ch. 10, § 1; R. C. 1899, § 2880.]

Corporation in failing circumstances cannot borrow money to purchase its shares. *Adams & Westlake Co. v. Deyette*, 5 S. D. 418, 59 N. W. 214, 49 Am. St. Rep. 887; *Adams & Westlake Co. v. Deyette*, 8 S. D. 119, 65 N. W. 471, 59 Am. St. Rep. 751, 31 L.R.A. 497; *Tolman v. Mica Co.*, 4 D. 4, 22 N. W. 505.

Directors may not without consent of all stockholders dispose of original stock except on full payment of its par value, or under provisions for its payment in by-laws. *Anderson v. Scandia Mining Syndicate*, 26 S. D. 558, 128 N. W. 1016.

Conceding that contract by corporation in selling stock to repurchase it at buyer's option is ultra vires, it does not follow that statute renders void the condition under which purchaser may rescind. *Sweeny v. United Underwriters Co.*, 29 S. D. 576, 137 N. W. 379.

In suit on note given for corporate stock, it is no defense that defendant tendered back stock, with notice of rescission, and demanded return of note. *German Mercantile Co. v. Metz*, 21 N. D. 230, 130 N. W. 221.

Power of corporation to deal in its own stock. 18 L.R.A. 254.

Right of corporation to purchase its own shares of stock. 61 L.R.A. 621; 25 L.R.A. (N.S.) 50; 30 L.R.A.(N.S.) 694; 33 Am. St. Rep. 339.

§ 4532. **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. [R. C. 1905, § 4199; Civ. C. 1877, § 401; R. C. 1899, § 2881.]

Dividends and rights and remedies of stockholders with respect thereto. 99 Am. Dec. 761.

Right of creditor of stockholder to share in dividends. 41 L.R.A.(N.S.) 999.

Right to dividends on transfer of stock. 45 L.R.A. 392.

Right, as between life tenant and remainderman, in dividends or distributions made by corporations. 45 L.R.A. 394; 12 L.R.A.(N.S.) 768; 35 L.R.A.(N.S.) 563; 24 Am. Rep. 169; 54 Am. Rep. 264; 118 Am. St. Rep. 162.

Right to increased stock and stock dividends as between owner of capital and income. 16 L.R.A. 461.

#### ARTICLE 4.—CORPORATE POWERS.

§ 4533. **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 hereinafore 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 regulation of its affairs and for the transfer of its stock.

7. 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. [R. C. 1905, § 4200; Civ. C. 1877, § 402; R. C. 1895, § 2882.]

As to similar provision in Cal. Civ. Code, § 354, see *McKiernan v. Lenzen*, 56 Cal. 61; *Anglo-California Bank v. Grangers' Bank*, 63 Cal. 359; *Underhill v. Santa Barbara Land Bldg. & Improv. Co.*, 93 Cal. 300, 28 Pac. 1049; *Bates v. Coronado Beach Co.*, 109 Cal. 160, 41 Pac. 855; *Vercoutere v. Golden State Land Co.*, 116 Cal. 410, 48 Pac. 375; *San Luis Water Co. v. Estrada*, 117 Cal. 168, 48 Pac. 1075; *Granite Gold Min. Co. v. Maginness*, 118 Cal. 131, 50 Pac. 269; *Savings Bank v. Barrett*, 126 Cal. 413, 58 Pac. 914.

2. Complaint must allege that plaintiff is corporation, or state facts showing that it is artificial person with capacity to sue. *McConnon v. Laursen*, 22 N. D. 604, 135 N. W. 213.

Right of corporation to sue for libel. 2 L.R.A.(N.S.) 741.

3. Corporate seal, adoption of and effect and necessity for its use. 50 Am. St. Rep. 150.

Effect of seal as evidence. 64 Am. St. Rep. 260.

From what contracts may seal be omitted. 13 Am. Dec. 561.

Seal as affecting negotiability of bill or note of corporation. 35 L.R.A. 606.

4. Capacity of corporation to take title to real property. 94 Am. Dec. 381.

Right to locate mining claim. 7 L.R.A.(N.S.) 816.

How and by whom may conveyances by corporation be executed. 23 Am. Dec. 743.

Conveyance by corporation of land held adversely. 35 L.R.A.(N.S.) 748.

Power to deal in stock of other corporations. 18 L.R.A. 252; 28 Am. Rep. 15; 36 Am. St. Rep. 134.

Corporations as beneficiaries of charitable bequest. 14 L.R.A.(N.S.) 140; 37 L.R.A.(N.S.) 1019.

8. Ultra vires contracts of corporations. 13 Am. Dec. 108; 70 Am. St. Rep. 156.

Contracts forbidden by their charters or other statutes. 51 Am. Dec. 341.

Power to borrow money. 111 Am. St. Rep. 309.

Power to give evidence of indebtedness and security therefor. 111 Am. St. Rep. 309.

Power of corporation to issue accommodation paper. 9 L.R.A.(N.S.) 193.

Commercial paper of corporation as payment of corporate debt. 35 L.R.A.(N.S.) 79.

Liability under continuing guaranty running to corporation for goods sold or credits extended after a change in the corporation. 14 L.R.A.(N.S.) 1231.

Power of corporation organized for the manufacture and sale of liquor to enter into contracts of guaranty or suretyship on behalf of its customers, or prospective customers. 27 L.R.A.(N.S.) 186.

Liability of corporation on contracts of promoters. 26 L.R.A. 544.

Enforceability of loan to private corporation, which alone, or in connection with existing indebtedness, exceeds the corporation's power to incur indebtedness. 11 L.R.A.(N.S.) 598.

9. Corporation as trustee for charitable trust. 14 L.R.A.(N.S.) 111; 37 L.R.A.(N.S.) 1011.

Power of corporation to insure life of officer for benefit of corporation. 16 L.R.A.(N.S.) 1020.

Practice of law or medicine by corporation. 32 L.R.A.(N.S.) 56.

**§ 4534 By-laws. Who adopt. When.** 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 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; provided, however, that any corporation incorporated in this state after the taking effect of this act may by its articles of incorporation provide that each stockholder shall have only one vote on any question arising at any of its stockholders' meetings regardless of the amount of stock owned; provided, further, that any corporation may amend its articles of incorporation at any time and adopt such provisions of unit vote by a unanimous vote of all stockholders owning stock in such corporation. [1911, ch. 104; R. C. 1905, § 4201; Civ. C. 1877, § 403; R. C. 1895, § 2883.]

Secretary can recover for extra services without showing by by-laws that services pertain to duties of office. *Edwards v. Railway Co.*, 4 D. 549, 33 N. W. 100.

By-laws, what may adopt. 85 Am. Dec. 617.

Mandamus to enforce provision of by-laws of corporation. 32 L.R.A. 575.

As to similar provision in Cal. Civ. Code, § 301, see *McFadden v. Los Angeles County*, 74 Cal. 571, 16 Pac. 397; *Vercoutere v. Golden State Land Co.*, 116 Cal. 410, 48 Pac. 375; *Wells v. Black*, 117 Cal. 157, 37 L.R.A. 619, 59 Am. St. Rep. 162, 48 Pac. 1090.

**§ 4535. 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. [R. C. 1905, § 4202; Civ. C. 1877, § 404; R. C. 1899, § 2884.]

Limitations on power to enact by-laws. 43 Am. St. Rep. 152.

By-laws restricting transfer of stock. 27 L.R.A. 271.

Effect of by-law requiring transfer of stock on books. 67 L.R.A. 672.

Effect of by-law on stockholder's right to inspect corporate books. 20 L.R.A.(N.S.) 196.

Lien by by-law on corporate stock as notice of lien to pledgee or assignee. 39 L.R.A.(N.S.) 295.

As to similar provision in Cal. Civ. Code, § 303, see *Wickersham v. Brittan*, 93 Cal. 34, 15 L.R.A. 106, 28 Pac. 792, 29 Pac. 51; *People's Home Sav. Bank v. Superior Ct.*, 104 Cal. 649, 29 L.R.A. 844, 43 Am. St. Rep. 147, 38 Pac. 452; *Market Street R. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

3. Right to vote by proxy under by-laws. 18 L.R.A. 584; 29 L.R.A. 845.

4. Regulation by by-laws of elections by private corporations. 18 L.R.A. 582.

Modification by by-law of quorum for meeting of stockholders. 21 L.R.A. 175.

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

6. By-law to compel acceptance of office. 24 L.R.A. 492.

**§ 4536. Religious corporations, how officered.** In addition to the provisions of section 4535, 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. [R. C. 1905, § 4203; 1901, ch. 146.]

**§ 4537. 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. [R. C. 1905, § 4204; Civ. C. 1877, § 405; R. C. 1899, § 2885.]

Effect of by-laws as notice. 25 L.R.A. 48.

**§ 4538. 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 4534. [R. C. 1905, § 4205; Civ. C. 1877, § 406; R. C. 1895, § 2886.]

**§ 4539. 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. [R. C. 1905, § 4206; 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.

**§ 4540. 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 4547, 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. [R. C. 1905, § 4207; Civ. C. 1877, § 406; R. C. 1895, § 2888.]

Pledgee may vote pledged stock. Re Argus Print. Co., 1 N. D. 434, 48 N. W. 347, 12 L.R.A. 781, 26 Am. St. Rep. 639.

Voting by proxy. 27 Am. Dec. 60.

As to similar provision in Cal. Civ. Code, § 307, see *Wickersham v. Brittan*, 93 Cal. 34, 15 L.R.A. 106, 28 Pac. 792, 29 Pac. 51; *Dulin v. Pacific Wood & Coal Co.*, 103 Cal. 357, 35 Pac. 1045, 37 Pac. 207; *Market Street R. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *Smith v. San Francisco & N. P. R. Co.*, 115 Cal. 584, 47 Pac. 450, 1 Am. Neg. Rep. 9; *Krause v. Durbrow*, 127 Cal. 681, 60 Pac. 438.

**§ 4541. 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. [R. C. 1905, § 4208; 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.

Stock transferable to qualify person as director if not made for fraudulent purposes. *Re Argus Print. Co.*, 1 N. D. 434, 48 N. W. 347, 12 L.R.A. 781, 26 Am. St. Rep. 639.

Power to bring suit is in board of directors. *Minnehaha County v. Thorne*, 6 S. D. 449, 61 N. W. 688.

Officers not bound by contracts unauthorized by directors. *Des Moines Mfg. Co. v. Milling Co.*, 9 S. D. 542, 70 N. W. 839.

Bank not liable for fraud of its officer in individual capacity in securing release of mortgage upon land sold bank. *Staples v. Bank*, 8 S. D. 222, 66 N. W. 314.

Cashier cannot contract for purchase of merchandise for bank. *N. S. Shoe Co. v. Stebbins*, 2 S. D. 74, 48 N. W. 833.

Adoption of promoter's agreement may be by implication. *Huron Printing Co. v. Kittleson*, 4 S. D. 520, 57 N. W. 233; *Dedrick v. Mortgage Co.*, 12 S. D. 59, 80 N. W. 153.

Officers cannot diminish capital in anticipation of insolvency. *Adams & Westlake Co. v. Deyette*, 8 S. D. 119, 65 N. W. 471, 59 Am. St. Rep. 751, 31 L.R.A. 497.

Validity of contracts between a director and his corporation. 139 Am. St. Rep. 598.

Liability of corporation on negotiable paper executed by officer or agent. 21 L.R.A. (N.S.) 1046.

Standard or degree of care of directors of a corporation. 55 L.R.A. 752.

Liability of directors for acts in excess of their power. 55 L.R.A. 758.

—for their own acts and omissions with respect to matters within their authority. 55 L.R.A. 761.

—for permitting business before capital stock is all subscribed. 35 L.R.A. (N.S.) 453.

—for corporate debts where they sell the entire corporate property and distribute the proceeds. 26 L.R.A. (N.S.) 267.

—for personal injuries resulting from tort. 39 L.R.A. (N.S.) 901.

—to corporation for amount it has been compelled to pay because of their tort. 40 L.R.A. (N.S.) 1102.

Jurisdiction of equity over suits by corporation or its representative to hold the directors liable for losses occasioned by their fraud, bad faith or negligence. 8 L.R.A. (N.S.) 739.

As to similar provision in Cal. Civ. Code, § 305, see *Salfield v. Sutter County Land Improv. & R. Co.*, 94 Cal. 546, 29 Pac. 1105; *Rozecrans Gold Min. Co. v. Morey*, 111 Cal. 114, 43 Pac. 585; *Pacific Bank v. Stone*, 121 Cal. 202, 53 Pac. 634; *Savings Bank v. Barrett*, 126 Cal. 413, 58 Pac. 914; *Porter v. Lassen County Land & Cattle Co.*, 127 Cal. 261, 59 Pac. 563; *Brown v. Valley View Min. Co.*, 127 Cal. 630, 60 Pac. 424; *Curtin v. Salmon River Hydraulic Gold Min. & Ditch Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552; *Bassett v. Fairchild*, 132 Cal. 637, 52 L.R.A. 611, 61 Pac. 791, 64 Pac. 1082.

**§ 4542. 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. [R. C. 1905, § 4209; Civ. C. 1877, § 408; R. C. 1895, § 2890.

Right to appoint receiver on failure of corporation to elect officers. 20 L.R.A. 213.

As to similar provision in Cal. Civ. Code, § 306, see *Smith v. Los Angeles Immigration & Land Co-op. Asso.*, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677; *Alta Silver*

Min. Co. v. Alta Placer Min. Co., 78 Cal. 629, 21 Pac. 373; Wickersham v. Brittan, 93 Cal. 34, 15 L.R.A. 106, 28 Pac. 792, 29 Pac. 51; Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024; Pacific Bank v. Stone, 121 Cal. 202, 53 Pac. 634; Porter v. Lassen County Land & Cattle Co., 127 Cal. 261, 59 Pac. 563; Bank of National City v. Johnston, 6 Cal. Unrep. 418, 60 Pac. 776.

**§ 4543. 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 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 and 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; provided, further, that the above limitation as to the creation of debts shall not apply to certificates and debentures issued by investment companies for the creation of an investment fund where the holder of such certificates or debentures shall by the terms of the same, participate in the earnings of such investment fund. [1909, ch. 63; R. C. 1905, § 4210; Civ. C. 1877, § 409; 1889, ch. 81, § 1; R. C. 1895, § 2891.]

As to similar provision in Cal. Civ. Code, § 309, see Kohl v. Lilienthal, 81 Cal. 378, 6 L.R.A. 520, 20 Pac. 401, 22 Pac. 689; Excelsior Water & Min. Co. v. Pierce, 90 Cal. 131, 27 Pac. 44; Underhill v. Santa Barbara Land Bldg. & Improv. Co., 93 Cal. 300, 28 Pac. 1049; Market Street R. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225; Vercoetere v. Golden State Land Co., 116 Cal. 410, 48 Pac. 375; Sacramento Bank v. Pacific Bank, 124 Cal. 147, 45 L.R.A. 863, 71 Am. St. Rep. 36, 56 Pac. 787; Santa Rosa Nat. Bank v. Barnett, 125 Cal. 407, 58 Pac. 85; Schaake v. Eagle Automatic Can Co., 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759.

**§ 4544. 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. [R. C. 1905, § 4211; Civ. C. 1877, § 409; R. C. 1895, § 2892.]

**§ 4545. 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. [R. C. 1905, § 4212; Civ. C. 1877, § 409; R. C. 1895, § 2893.]

False statements in reports required by statute to be made to public officers as basis of action by individuals at common law for deceit against directors personally. 6 L.R.A. (N.S.) 872.

**§ 4546. 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 4534, 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. [R. C. 1905, § 4213; Civ. C. 1877, § 410; R. C. 1899, § 2894.]

Part of board of directors cannot hold special meeting without previous notice at branch office, and transfer practically all the corporate property. *Summers v. Glenwood G. & S. Min. Co.*, 15 S. D. 20, 86 N. W. 749.

Right of attorney-general or other representative of state to maintain suit or proceeding to remove officers of private corporation. 18 L.R.A.(N.S.) 672.

Power of directors to remove their own appointee who is one of the class of officers to whom the management of the business is confided. 23 L.R.A.(N.S.) 1293.

**§ 4547. 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. [R. C. 1905, § 4214; Civ. C. 1877, § 411; R. C. 1895, § 2895.]

Irrevocable proxies. 56 Am. St. Rep. 138.

As to similar provision in Cal. Civ. Code, § 312, see *Wright v. Central California Colony Water Co.*, 67 Cal. 532, 8 Pac. 70; *Wickersham v. Brittan*, 93 Cal. 34, 15 L.R.A. 106, 28 Pac. 792, 29 Pac. 51; *People's Home Sav. Bank v. Superior Ct.*, 104 Cal. 649, 29 L.R.A. 844, 43 Am. St. Rep. 147, 38 Pac. 452; *Market Street R. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *San Diego, O. T. & P. B. R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 33 L.R.A. 788, 44 Pac. 333; *Smith v. San Francisco & N. P. R. Co.*, 115 Cal. 584, 35 L.R.A. 309, 56 Am. St. Rep. 119, 47 Pac. 582; *Krause v. Durbrow*, 127 Cal. 681, 60 Pac. 438.

**§ 4548. 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 4546. [R. C. 1905, § 4215; Civ. C. 1877, § 412; R. C. 1899, § 2896.]

**§ 4549. 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. [R. C. 1905, § 4216; Civ. C. 1877, § 412; R. C. 1899, § 2897.]

As to similar provision in Cal. Civ. Code, § 315, see *Wickersham v. Brittan*, 93 Cal. 84, 15 L.R.A. 106, 28 Pac. 792, 29 Pac. 51; *Dulin v. Pacific Wood & Coal Co.*, 103 Cal. 357, 35 Pac. 1045, 37 Pac. 207; *Whitehead v. Sweet*, 126 Cal. 67; 58 Pac. 376.

§ 4550. **Where meetings held.** The meetings of the stockholders and boards 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. [R. C. 1905, § 4217; 1897, ch. 116; R. C. 1899, § 2898.]

§ 4551. **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. [R. C. 1905, § 4218; 1895, ch. 36, § 1; R. C. 1899, § 2899.]

§ 4552. **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. [R. C. 1905, § 4219; Civ. C. 1877, § 412; R. C. 1899, § 2900.]

Provision as to giving notice of meeting not mandatory; a meeting when all are present may be legal. *Troy Min. Co. v. White*, 10 S. D. 475, 74 N. W. 236, 42 L.R.A. 549.

Validity of acts done at meetings not properly called. 18 Am. Dec. 102.

When special, notice to attend meeting may be omitted. 3 Am. St. Rep. 69.

As to similar provision in Cal. Civ. Code, § 320, see *Granger v. Original Empire Mill & Min. Co.*, 59 Cal. 678; *Smith v. Dorn*, 96 Cal. 73, 30 Pac. 1024; *Stockton Combined Harvester & Agri. Works v. Houser*, 109 Cal. 1, 41 Pac. 809; *Curtin v. Salmon River Hydraulic Gold Min. & Ditch Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552; *Rolley v. Campbell*, 134 Cal. 175, 66 Pac. 220.

§ 4553. **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. [R. C. 1905, § 4220; Civ. C. 1877, § 412; R. C. 1899, § 2901.]

§ 4554. **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. [R. C. 1905, § 4221; Civ. C. 1877, § 413; 1879, ch. 9, § 1; R. C. 1895, § 2902.]

Stockholder's liability is limited to amount due upon his stock. *Busby v. Riley*, 6 S. D. 401, 61 N. W. 164.

Creditors cannot unite distinct and independent claim in one action. *South Ben. Toy Co. v. Ins. Co.*, 4 S. D. 173, 56 N. W. 98.

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

President of corporation engaged in loaning money presumed to have authority to transfer promissory note by indorsement. *Merrill v. Hurley*, 6 S. D. 592, 62 N. W. 953.

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.

Liability upon subscriptions to stock. 40 Am. Dec. 358.

Effect of transfer of stock by subscriber. 14 Am. Dec. 264.

Enforcement of stockholders' liability in other state. 37 Am. St. Rep. 168.

Liability of stockholders to creditors of corporation. 3 Am. St. Rep. 806.

Liability of persons holding stock as collateral. 1 Am. St. Rep. 783; 68 Am. St. Rep. 542.

Liability of stockholders for debts of corporation. 43 Am. Dec. 694; 49 Am. Dec. 308; 99 Am. Dec. 432.

Liability of members of incorporated religious society for its debts. 69 L.R.A. 256.

Liability of stockholders of insolvent insurance company. 38 L.R.A. 110.

Effect of forfeiture of stock on stockholder's personal liability as to unpaid assessments. 27 L.R.A. 314.

Does statutory liability of stockholder or officer for debts of corporation include liability for torts. 22 L.R.A. (N.S.) 256.

Personal liability of executor, administrator or trustee on corporate stock belonging to estate or trust, but standing in his name. 30 L.R.A. (N.S.) 1092.

Issuance of stock at discount as affecting stockholder's liability for debts. 8 L.R.A. (N.S.) 263.

Effect of creditor's knowledge that stock was improperly issued as full paid upon his right to resort to holder of same. 8 L.R.A. (N.S.) 271.

As to similar provision in Cal. Civ. Code, § 322, see *Sonoma Valley Bank v. Hill*, 59 Cal. 107; *Faymonville v. McCoullough*, 59 Cal. 285; *Harmon v. Page*, 62 Cal. 448; *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110; *Derby v. Stevens*, 64 Cal. 287, 30 Pac. 820; *Bidwell v. Babcock*, 87 Cal. 29, 25 Pac. 752; *Potter v. Dear*, 95 Cal. 578, 30 Pac. 777; *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; *Kennedy v. California Sav. Bank*, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846; *Borland v. Nevada Bank*, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737; *Griffin & S. Co. v. Magnolia & H. Fruit Cannery Co.*, 107 Cal. 378, 40 Pac. 495; *Brown v. Merrill*, 107 Cal. 446, 48 Am. St. Rep. 145, 40 Pac. 557; *Winona Wagon Co. v. Bull*, 108 Cal. 1, 40 Pac. 1077; *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418; *J. I. Case Plow Works v. Montgomery*, 115 Cal. 380, 47 Pac. 108; *Grimwood v. Barry*, 118 Cal. 274, 50 Pac. 430; *Myers v. Sierra Valley Stock & Agri. Asso.*, 122 Cal. 669, 55 Pac. 689; *Sacramento Bank v. Pacific Bank*, 124 Cal. 147, 45 L.R.A. 863, 71 Am. St. Rep. 36, 56 Pac. 787; *Johnson v. Bank of Lake*, 125 Cal. 6, 73 Am. St. Rep. 17, 57 Pac. 664; *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407, 58 Pac. 85; *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319; *Wells, F. & Co. v. Enright*, 127 Cal. 669, 49 L.R.A. 647, 60 Pac. 439; *Hurlburt v. Arthur*, 140 Cal. 103, 98 Am. St. Rep. 17, 73 Pac. 734.

§ 4555. **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. [R. C. 1905, § 4222; Civ. C. 1877, § 414; R. C. 1895, § 2903.]

§ 4556. **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. [R. C. 1905, § 4223; Civ. C. 1877, § 415; R. C. 1895, § 2904.]

§ 4557. **Powers of corporation. 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; provided, that the capital stock of any railway company organized under the laws of this state may be increased to such an amount as may by its stockholders be deemed necessary for the purchase or construction of any railroad which it may be legally empowered to purchase or construct; for additions to or improvements of its railroad or property; for additional equipment which may be necessary in the operation of its railroad and for real estate that may be needed by said corporation for railway purposes, by a majority vote of all its stock, in person or by proxy at any annual meeting, or at any meeting called by its directors for that purpose, by a notice in writing to each stockholder, to be served on him personally or by depositing the same in the post office, postage paid, properly directed to him at the post office nearest his usual place of residence at least forty days prior to such meeting. Such notice shall state the time and place of such meeting, its object and the amount to which it is proposed to increase such capital stock. No vote in favor of such increase shall take effect until the proceedings of such meeting, showing the names of all of the stockholders voting therefor and the amount of stock owned by each, shall be entered upon the records of such corporation. Every such corporation so increasing its capital stock, shall file with the secretary of state, whenever issues of stock shall be made under this section,



a report showing the amount issued and the purposes to which it has been, or is to be, devoted, which report shall be verified by the oath of the president or the general manager thereof and of the chief engineer.

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, except as hereinbefore provided, 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 the 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. [1907, ch. 53; R. C. 1905, § 4224; Civ. C. 1877, § 416; R. C. 1899, § 2905.]

Right of existing stockholder to subscribe for increase of capital stock. 13 L.R.A. (N.S.) 969.

Injunction against reduction of capital stock. 1 L.R.A. (N.S.) 571.

Reduction of preferred, guaranteed and interest-bearing stock. 27 L.R.A. 151.

As to similar provision in Cal. Civ. Code, § 359, see *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638; *Market Street R. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377; *Boyd v. Heron*, 125 Cal. 453, 58 Pac. 64; *Richardson v. Chicago Packing & Provision Co.*, 6 Cal. Unrep. 606, 63 Pac. 74.

**§ 4558. Kind of stock.** Every corporation shall have power to create two or more kinds of stock of such classes, with such designations, preferences and voting powers, or restriction or qualification thereof, as shall be stated and expressed in the articles of incorporation; and preferred stock may, if desired, be made subject to redemption at no less than par, at a fixed time and price, to be expressed in the certificate thereof; and the holders thereof shall be entitled to receive and the corporation shall be bound to pay thereon a fixed yearly dividend, to be expressed in the certificate, payable quarterly, half yearly or yearly before any dividend shall be set apart or paid on the common stock, and such dividends may be made cumulative. [1909, ch. 61.]

**§ 4559. 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. 1905, § 4225; R. C. 1895, § 2906.]

#### ARTICLE 5.—CORPORATE RECORDS.

**§ 4560. 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. [R. C. 1905, § 4226; Civ. C. 1877, § 417; R. C. 1899, § 2907.]

Legislature cannot limit or interfere with transferability of national bank stock. *Doty v. Bank*, 3 N. D. 9, 53 N. W. 77, 17 L.R.A. 259.

Transfer of pledged stock need not be made on books. *Van Cise v. Bank*, 4 D. 485, 33 N. W. 897.

Is not public registration act and right of pledgee of corporate stock is superior to that of subsequent attaching creditor of pledgor. *State Bkg. & T. Co. v. Taylor*, 25 S. D. 577, 29 L.R.A.(N.S.) 523, 127 N. W. 590.

Mandamus lies to compel record of transfer of corporate stock on corporation's books by officers. *Amidon v. Florence Farmers' Elevator Co.*, 28 S. D. 24, 132 N. W. 166.

Conclusiveness of records and the power to amend. 13 Am. St. Rep. 550.

Effect of failure to enter resolutions and acts in records. 74 Am. Dec. 309.

Right to inspect corporate books. 45 L.R.A. 446; 20 L.R.A.(N.S.) 185; 30 L.R.A.(N.S.) 291; 42 L.R.A.(N.S.) 332.

Right of stockholder to inspect books and remedies for its enforcement. 107 Am. St. Rep. 674.

May the right of a stockholder in a corporation, to inspect the books of the corporation, be delegated to an agent. 2 B. R. C. 976.

Power to compel production of corporate books to aid in assessing holder of stocks or his estate. 8 L.R.A.(N.S.) 788.

As to similar provision in Cal. Civ. Code, §§ 377, 378, see *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047; *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889.

#### ARTICLE 6.—AMENDING ARTICLES OF INCORPORATION.

**§ 4561. 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 4557.

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. [R. C. 1905, § 4227; 1893, ch. 40, § 1; R. C. 1895, § 2908.]

§ 4562. **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 4561. [R. C. 1905, § 4228; R. C. 1895, § 2909.]

#### ARTICLE 7.—CHANGING CORPORATE NAME.

§ 4563. **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 4557.

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. [R. C. 1905, § 4229; 1893, ch. 41, § 1; R. C. 1895, § 2910.]

Change in name of corporation by amendment has no effect upon its identity. *Peever Mercantile Co. v. State Mut. F. Asso.*, 23 S. D. 1, 119 N. W. 1008.

#### ARTICLE 8.—CHANGING CORPORATE HEADQUARTERS.

§ 4564. **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 4557.

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. [R. C. 1905, § 4230; 1890, ch. 49; R. C. 1895, § 2911; 1905, ch. 66.]

#### ARTICLE 9.— DISSOLUTION OF CORPORATIONS.

§ 4565. **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. [R. C. 1905, § 4231; Civ. C. 1877, § 418; R. C. 1899, § 2912.]

Where by statute directors become trustees for creditors and stockholders upon dissolution, they may maintain action in other state where corporation could have done so. *Root v. Sweeney*, 12 S. D. 43, 80 N. W. 149.

Acts and proceedings to dissolve. 134 Am. St. Rep. 309.

Effect of dissolution. 12 Am. Dec. 239; 7 Am. St. Rep. 717.

—upon debts and pending actions. 40 Am. Dec. 737.

Effect of proceedings for dissolution of corporation upon its rights of action. 15 L.R.A. 627.

Dissolution as excusing creditor from exercising remedies against corporation as condition of enforcing stockholder's liability on unpaid subscription. 24 L.R.A. (N.S.) 628.

Effect of winding up proceedings on right to rescind subscription for fraud or misrepresentation. 33 L.R.A. 727.

Recovering for services and expenses under a running contract with a corporation ended by its dissolution. 69 L.R.A. 124.

1. Abatement of action by or against corporation in absence of a saving statute by expiration of charter. 33 L.R.A.(N.S.) 446.

2. Right of stockholder to maintain a bill to dissolve and to distribute assets. 91 Am. St. Rep. 33.

Power of courts to decree dissolution. 96 Am. Dec. 756.

3. Right of minority stockholder to restrain voluntary dissolution of corporation by directors or other stockholders. 23 L.R.A.(N.S.) 1177.

§ 4566. 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. [R. C. 1905, § 4232; Civ. C. 1877, § 419; R. C. 1899, § 2913.]

§ 4567. 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.

[R. C. 1905, § 4233; 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.

Disposition of real estate upon the dissolution of a corporation created for benevolent or social purposes. 35 L.R.A.(N.S.) 895.

Liability of directors for corporate debts where they sell the entire corporate property and distribute the proceeds. 26 L.R.A.(N.S.) 267.

As to similar provision in Cal. Civ. Code, § 400, see Havemeyer v. Superior Ct., 84 Cal. 327, 10 L.R.A. 627, 18 Am. St. Rep. 192, 24 Pac. 121; State Invest. & Ins. Co. v. Superior Ct., 101 Cal. 135, 35 Pac. 549.

§ 4568. 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. [R. C. 1905, § 4234; Civ. C. 1877, § 421; R. C. 1899, § 2915.]

§ 4569. How revived. A corporation once dissolved can be revived only by the same power by which it could be created. [R. C. 1905, § 4235; Civ. C. 1877, § 422; R. C. 1899, § 2916.]

ARTICLE 10.—ASSESSMENTS OF STOCK.

§ 4570. 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. [R. C. 1905, § 4236; Civ. C. 1877, § 423; R. C. 1899, § 2917.]

As to similar provision in Cal. Civ. Code, § 331, see *Younglove v. Steinman*, 80 Cal. 375, 22 Pac. 189; *Lankershim Ranch Land & Water Co. v. Herberger*, 82 Cal. 600, 23 Pac. 134; *Arroyo Ditch & Water Co. v. Superior Ct.*, 92 Cal. 47, 27 Am. St. Rep. 91, 28 Pac. 54; *San Joaquin Land & Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349; *San Bernardino Invest. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487; *Market Street R. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *Ventura & O. Valley R. Co. v. Hartman*, 116 Cal. 260, 48 Pac. 65; *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143.

**§ 4571. 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. [R. C. 1905, § 4237; Civ. C. 1877, § 424; R. C. 1899, § 2918.]

Right to make assessment of stock. 76 Am. St. Rep. 126.

Effect of transfer of shares of stock on liability for unpaid subscriptions. 47 L.R.A. 246; 30 L.R.A.(N.S.) 283.

Liability of pledgee of stock as a shareholder. 36 L.R.A. 139; 19 L.R.A.(N.S.) 249.

As to similar provision in Cal. Civ. Code, § 332, see *Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661, 802; *Marysville Electric Light & P. Co. v. Johnson*, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126; *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741; *Shively v. Eureka Tellurium Gold Min. Co.*, 129 Cal. 293, 61 Pac. 939.

**§ 4572. 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 4571. [R. C. 1905, § 4238; Civ. C. 1877, § 425; R. C. 1899, § 2919.]

Right to make successive assessments on stockholders to pay debts. 66 L.R.A. 971.

Assessments on paid-up stock. 45 L.R.A. 648; 22 L.R.A.(N.S.) 1013.

As to similar provision in Cal. Civ. Code, § 333, see *Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661, 802; *Shively v. Eureka Tellurium Gold Min. Co.*, 129 Cal. 293, 61 Pac. 939; *Strouse v. Sylvester*, 6 Cal. Unrep. 798, 66 Pac. 660.

**§ 4573. 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. [R. C. 1905, § 4239; Civ. C. 1877, § 426; R. C. 1899, § 2920.]

As to similar provision in Cal. Civ. Code, § 334, see *Shively v. Eureka Tellurium Gold Min. Co.*, 129 Cal. 293, 61 Pac. 939; *San Bernardino Invest. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487.

**§ 4574. 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.)

[R. C. 1905, § 4240; Civ. C. 1877, § 427; R. C. 1899, § 2921.]

As to similar provision in Cal. Civ. Code, § 335, see *San Joaquin Land & Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349; *Shively v. Eureka Tellurium Gold Min. Co.*, 129 Cal. 293, 61 Pac. 939.

**§ 4575. 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. [R. C. 1905, § 4241; Civ. C. 1877, § 428; R. C. 1899, § 2922.]

As to similar provision in Cal. Civ. Code, § 336, see *Shively v. Eureka Tellurium Gold Min. Co.*, 129 Cal. 293, 61 Pac. 939.

**§ 4576. 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.)

[R. C. 1905, § 4242; Civ. C. 1877, § 429; R. C. 1899, § 2923.]

As to similar provision in Cal. Civ. Code, § 337, see *San Joaquin Land & Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349; *San Bernardino Invest. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487; *Stockton Combined Harvester & Agri. Works v. Houser*, 109 Cal. 1, 41 Pac. 809; *Shively v. Eureka Tellurium Gold Min. Co.*, 129 Cal. 293, 61 Pac. 939.

**§ 4577. 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. [R. C. 1905, § 4243; Civ. C. 1877, § 430; R. C. 1899, § 2924.]

As to similar provision in Cal. Civ. Code, § 338, see *San Joaquin Land & Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 249; *San Bernardino Invest. Co. v. Merrill*, 108 Cal. 293, 61 Pac. 939.

**§ 4578. 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. [R. C. 1905, § 4244; Civ. C. 1877, § 431; R. C. 1899, § 2925.]

As to similar provision in Cal. Civ. Code, § 339, see *San Joaquin Land & Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 249; *San Bernardino Invest. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487.

§ 4579. **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. [R. C. 1905, § 4245; Civ. C. 1877, § 432; R. C. 1899, § 2926.]

§ 4580. **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. [R. C. 1905, § 4246; Civ. C. 1877, § 433; R. C. 1899, § 2927.]

§ 4581. **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. [R. C. 1905, § 4247; Civ. C. 1877, § 434; R. C. 1899, § 2928.]

§ 4582. **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. [R. C. 1905, § 4248; Civ. C. 1877, § 435; R. C. 1899, § 2929.]

§ 4583. **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. [R. C. 1905, § 4249; Civ. C. 1877, § 436; R. C. 1899, § 2930.]

As to similar provision in Cal. Civ. Code, § 344, see *Robinson v. Spaulding Gold & S. Min. Co.*, 72 Cal. 32, 13 Pac. 65; *Market Street R. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

§ 4584. **Time extended by publication.** The dates fixed in any notice of assessment or notice of delinquent 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. [R. C. 1905, § 4250; Civ. C. 1877, § 437; R. C. 1899, § 2931.]

§ 4585. **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. [R. C. 1905, § 4251; Civ. C. 1877, § 438; R. C. 1899, § 2932.]

As to similar provision in Cal. Civ. Code, § 346, see *Burham v. San Francisco Fuse Mfg. Co.*, 76 Cal. 26, 17 Pac. 940; *San Bernardino Invest. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487; *Stockton Combined Harvester & Agri. Works v. Houser*, 109 Cal. 1, 41 Pac. 809.

**§ 4586. 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. [R. C. 1905, § 4252; Civ. C. 1877, § 439; R. C. 1895, § 2933.]

As to similar provision in Cal. Civ. Code, § 347, see *Burham v. San Francisco Fuse Mfg. Co.*, 76 Cal. 26, 17 Pac. 940; *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143.

**§ 4587. 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. [R. C. 1905, § 4253; Civ. C. 1877, § 440; R. C. 1899, § 2934.]

**§ 4588. 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. [R. C. 1905, § 4254; Civ. C. 1877, § 441; R. C. 1899, § 2935.]

As to similar provision in Cal. Civ. Code, § 349, see *San Joaquin Land & Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349; *San Bernardino Invest. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487; *Visalia & T. R. Co. v. Hyde*, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10; *Bank of National City v. Johnston*, 6 Cal. Unrep. 418, 60 Pac. 776.

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

**§ 4589. Franchise salable. 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. [R. C. 1905, § 4255; Civ. C. 1877, § 442; R. C. 1899, § 2936.]

Judicial sale of corporate franchise or property necessary for its enjoyment. 20 L.R.A. 737; 31 L.R.A.(N.S.) 636.

As to similar provision in Cal. Civ. Code, § 388, see *Gregory v. Blanchard*, 98 Cal. 311, 33 Pac. 199.

**§ 4590. Certificate of purchase. Rights of purchaser.** The purchaser at the sale must receive a certificate of purchase of the franchise and be imme-

diately 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. [R. C. 1905, § 4256; Civ. C. 1877, § 443; R. C. 1899, § 2937.]

**§ 4591. 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. [R. C. 1905, § 4257; Civ. C. 1877, § 444; R. C. 1899, § 2938.]

**§ 4592. 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. [R. C. 1905, § 4258; Civ. C. 1877, § 445; R. C. 1899, § 2939.]

**§ 4593. 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. [R. C. 1905, § 4259; Civ. C. 1877, § 446; R. C. 1899, § 2940.]

**§ 4594. 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. [R. C. 1905, § 4260; Civ. C. 1877, § 447; R. C. 1899, § 2941.]

#### ARTICLE 12.—EXAMINATION OF CORPORATIONS, ETC.

**§ 4595. 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. [R. C. 1905, § 4261; Civ. C. 1877, § 448; R. C. 1899, § 2942.]

**§ 4596. 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. [R. C. 1905, § 4262; Civ. C. 1877, § 449; R. C. 1899, § 2943.]

Corporation retains existence for purpose of suit even though its charter has been violated and is subject to cancellation therefor. *Murphy v. Minot Foundry & Mach. Co.*, 24 N. D. 185, 139 N. W. 518.

#### ARTICLE 13.—REGULATING CORPORATION INDEBTEDNESS.

**§ 4597. Reports to state bank examiner by certain corporations.** All corporations engaged in transacting business in this state, which issue, sell or offer for sale, their stocks, securities, notes, obligations, bonds or other evi-

dence of indebtedness by whatever name the same may be designated, shall on demand of the state bank examiner furnish him with a detailed itemized report of their assets, liabilities and business transacted, which reports shall be made to the state examiner in such form as he may prescribe, and shall be made and filed in his office for the information of the public. Such reports shall be verified by the oath of the secretary or chief executive officer of such corporation. [1911, ch. 102, § 1.]

**§ 4598. Examination of financial condition by state examiner.** When requested in good faith by any resident of this state and when good faith and sufficient reasons are given therefor, the state examiner may, if necessary, cause an examination of the financial condition of any such corporation to be made and he shall report the findings thereof to the person applying for such examination. His powers and duties in connection therewith shall be the same as in the examination of banks and the same fees shall be charged and paid therefor as for the examination of banks. His report shall be submitted to and filed with the state banking board. [1911, ch. 102, § 2.]

**§ 4599. When state banking board may take charge. Winding-up action.** The state banking board on being satisfied of the insolvency, mismanagement, fraud or breach of trust of any such corporation or of any violation of any provision of this article by any such corporation, may forthwith take charge of such corporation pending action in the district court to dissolve and wind it up, which action shall be brought by the attorney-general, in the name of the state under the direction of such board. [1911, ch. 102, § 3.]

**§ 4600. Penalty for false report or for hindrance of examiner.** Any officer, agent or employe of any such corporation who makes or subscribes any false report under this article, or who hinders, deceives or obstructs the state examiner or his deputy in the discharge of any lawful duty hereunder, shall on conviction for each offense be punished by fine of not less than fifty dollars, and not more than one thousand dollars, or by imprisonment in the county jail of the county for not more than one year or by both such fine and imprisonment. [1911, ch. 102, § 4.]

False statements in reports required by statute to be made by corporation to public officers as basis of action by individuals at common law for deceit against officers personally. 6 L.R.A.(N.S.) 872.

**§ 4601. Application of this article limited.** The provisions of this article shall not apply to any banking corporation organized and existing under chapter 21 of the Civil Code, Revised Codes of 1905 [chapter 28 herein], or to any building and loan association, organized and existing under chapter 19 of such Civil Code [chapter 26 herein]. [1911, ch. 102, § 5.]

**§ 4602. Further limitation of provisions of this article.** The provisions of this article shall not apply to corporations heretofore or hereafter placed by law under jurisdiction of the banking department of the state. [1911, ch. 102, § 6.]

## CHAPTER 13.

### INCORPORATION OF CO-OPERATIVE ASSOCIATIONS.

**§ 4603. How formed. Purposes. Term of existence.** A co-operative association may be formed for the purpose of engaging in any lawful mercantile, manufacturing, agricultural or other industrial pursuit upon complying with the provisions of this chapter, and the provisions of chapter 11 of the civil code of the state of North Dakota, 1905 [chapter 12 herein], shall be applied to and be observed by persons organized under this chapter, except as herein otherwise provided, and except as to provisions thereof inconsistent with the provisions of this chapter. Its certificate of articles of incorporation shall be filed for record in the office of the secretary of state, for which the secretary of state shall be paid a filing fee of ten dollars, and thereupon it shall become a corporation and such association shall have the right and be subject to all the duties, restrictions and liabilities prescribed in chapter 11 of the

civil code [chapter 12 herein], so far as the same apply or relate to such association. A majority of the incorporators shall be residents of the county of its principal place of business, and the term of existence of any such association without renewal shall not exceed twenty years. [1909, ch. 62, § 1.]

**§ 4604. Purpose must be stated. Cannot loan to stockholders. Penalty.** The purpose for which any association shall be formed must be distinctly and definitely specified in the articles of incorporation, together with its principal place of business, and it must not appropriate its funds to any other purpose, or must it loan any of its money to any stockholder therein, and if any such loan or misappropriation is made the officer who shall make it or who shall consent thereto shall be jointly and severally liable to the extent of such loan or misappropriation and interest and for all debts of the association contracted before repayment of the sum so loaned or misappropriated. [1909, ch. 62, § 2.]

**§ 4605. Officers. Management.** Every such association shall have a president, a secretary and treasurer and not less than three directors, who shall together constitute a board of managers and conduct its business. Such officers shall be chosen annually by the stockholders, and hold their offices until others have been chosen and qualified. The association shall make its own by-laws, not inconsistent with law, and may therein provide for any other officers deemed necessary, and the mode of their selection. It may amend its certificate of incorporation at any general stockholders' meeting, or at any special meeting called for that purpose, upon ten days' notice to the stockholders. [1909, ch. 62, § 3.]

**§ 4606. Capital. Limit of interest. Shares.** The amount of capital stock shall be fixed by the articles of incorporation, which amount and the number of shares may be increased or diminished at a stockholders' meeting specially called for that purpose; but the whole amount of stock shall never exceed fifty thousand dollars. Within thirty days after the adoption of an amendment increasing or diminishing its capital, it shall cause the vote so adopting it, together with a record of the minutes of said meeting, to be filed for record in the office of the secretary of state with its original certificate. No share shall be issued for less than its par value, and no member shall own shares of greater par value than one thousand dollars, or be entitled to more than one vote. It may commence business whenever thirty per cent of the stock has been subscribed for and paid in, but no certificate of shares shall be issued to any person until the full amount thereof has been paid in cash, and no person shall become a shareholder therein except by consent of the managers. [1909, ch. 62, § 4.]

**§ 4607. Liability of officers. Dissolution.** If such board of managers, or the directors or officers having control of such an association, for five consecutive years after its organization shall fail to declare a dividend upon its capital or shares, five or more stockholders, by petition setting forth such facts, may apply to the district court of the county of its principal place of business, for its dissolution. If, upon hearing, the allegations of the petition are found to be true, the court may adjudge a dissolution of the association. [1909, ch. 62, § 5.]

**§ 4608. Dissolution of profits.** The profits of the earnings of such association shall be distributed to those entitled thereto by its by-laws, and in the proportions and at the times therein prescribed, which shall be as often as once in twelve months. [1909, ch. 62, § 6.]

**§ 4609. Annual report to dairy commissioner.** Every creamery association, on or before January first in each year, in addition to the report provided for in chapter 11 of the civil code [chapter 12 herein], shall make a report to the state dairy commissioner, or such officer as may at any time, by law, be given the supervision of dairy products. Such report shall contain the name of the corporation, its principal place of business, the location of its creamery and the number of pounds of butter or other dairy products manufactured by it during the preceding year. [1909, ch. 62, § 7.]

## CHAPTER 14.

## RAILROAD CORPORATIONS.

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## ARTICLE 1.—INCORPORATION AND REGULATION.

§ 4610. **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. [R. C. 1905, § 4263; 1879, ch. 46, § 1; R. C. 1895, § 2944.]

§ 4611. **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. [R. C. 1905, § 4264; 1879, ch. 46, § 3; R. C. 1895, § 2945.]

§ 4612. **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. [R. C. 1905, § 4265; 1879, ch. 46, § 6; R. C. 1899, § 2946.]

§ 4613. **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 4533 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 4622, 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 4610, 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. [R. C. 1905, § 4266; 1897, ch. 46, §§ 9, 10; 1883, ch. 92, § 1; R. C. 1895, § 2947; 1905, ch. 150.]

Right of way (roadway) includes all ground necessary for construction of side tracks and freight and station houses. *C. M. & St. P. R. Co. v. Cass County*, 8 N. D. 18, 76 N. W. 239.

Railway right of way constitutes interest in land under statute of frauds which must be evidenced by grant in writing. *Spawn v. South Dakota C. R. Co.*, 26 S. D. 1, 127 N. W. 648, Ann. Cas. 1912D, 979.

As to similar provision in Cal. Civ. Code, §§ 456, 465, see *Southern P. R. Co. v. Raymond*, 53 Cal. 223; *Weyl v. Sonoma Valley R. Co.*, 69 Cal. 202, 10 Pac. 510; *Arcata v. Arcata & M. River R. Co.*, 92 Cal. 639, 28 Pac. 676; *Southern P. R. Co. v. Southern California R. Co.*, 111 Cal. 221, 43 Pac. 602; *Robinson v. Southern California R. Co.*, 129 Cal. 8, 61 Pac. 947; *Bishop v. McKillican*, 124 Cal. 321, 71 Am. St. Rep. 68, 57 Pac. 76; *Boyd v. Heron*, 125 Cal. 453, 58 Pac. 64; *Southern California Motor-Road Co. v. Union Land & T. Co.*, 12 O. C. A. 215, 29 U. S. App. 110, 64 Fed. 450.

2. As to when sale of land by guardian of minors to corporation for railroad purposes passes unconditional fee title. *Sherman v. Sherman*, 23 S. D. 486, 122 N. W. 439.

Right of reversion on abandonment of road deeded to railroad company. 1 L.R.A. (N.S.) 806.

3. Riparian owner's right to have natural stream flow over his land may be condemned. *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570.

Taking of property by eminent domain for railroad purposes is taking for public use. *Northern P. R. Co. v. Boynton*, 17 N. D. 203, 115 N. W. 679.

Degree of necessity requisite to exercise power of eminent domain. 22 L.R.A. (N.S.) 58.

Necessity of taking particular land by eminent domain as a judicial question. 11 L.R.A. (N.S.) 940.

Power of railroad company to condemn right of way for spur or siding to private establishment. 20 L.R.A. 434; 22 L.R.A. 181; 35 L.R.A. 636.

Uses to which railroad right of way may be devoted as against the owner of the fee. 36 L.R.A. (N.S.) 512.

4. Power of railroad to condemn property to obtain construction material. 40 L.R.A. (N.S.) 793.

5. Right of railroad company to cut off access by owner of upland to navigable water. 40 L.R.A. 604.

Liability of railroad company in constructing its roadway, for removal of lateral support to adjoining property. 21 L.R.A. (N.S.) 318.

Liability of railroad company to abutting owner for damages from change of grade of highway necessary to carry it across tracks. 26 L.R.A. (N.S.) 226.



Right of landowner to damages for obstruction of street or highway by railroad not adjacent to his property. 9 L.R.A.(N.S.) 496.

Liability of railroad for injury by damming back water of stream. 59 L.R.A. 853.

Presumption as to statutory authority to commit nuisance by obstruction of water by railroads. 70 L.R.A. 586.

6. Right of railroad to condemn a right of way over or across the tracks of another company for a spur track to private establishments. 5 L.R.A.(N.S.) 512.

Constitutionality of statute conferring power of eminent domain on private person or corporation other than railroad company for spur or lateral track. 35 L.R.A.(N.S.) 646.

8. Implied power of railroad to engage in or guarantee enterprise other than transportation of goods or passengers. 2 L.R.A.(N.S.) 887; 38 L.R.A.(N.S.) 830.

Right of railroad to contract for the use of its cars for advertising purposes. 24 L.R.A.(N.S.) 1010.

**§ 4614. 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. [R. C. 1905, § 4267; 1893, ch. 99, § 1; R. C. 1895, § 2948.]

**§ 4615. 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. [R. C. 1905, § 4268; 1893, ch. 99, § 2; R. C. 1899, § 2949.]

**§ 4616. How right of way obtained.** Any railway company desiring to secure the benefits of section 4614 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. [R. C. 1905, § 4269; 1893, ch. 99, § 3; R. C. 1895, § 2950.]

**§ 4617. When right of way reverts to state.** If any railway company appropriating any public lands by virtue of section 4614 shall at any time abandon the use thereof for railway purposes for a period of one year the same shall revert to the state. [R. C. 1905, § 4270; 1893, ch. 99, § 4; R. C. 1899, § 2951.]

**§ 4618. 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 4610 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. [R. C. 1905, § 4271; 1879, ch. 46, § 11; R. C. 1895, § 2952.]

**§ 4619. 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. [R. C. 1905, § 4272; 1879, ch. 46, § 12; R. C. 1895, § 2953.]

Right to change railroad location before construction of road. 36 L.R.A. 511.

**§ 4620. Consolidation, leasing and purchase of noncompeting 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 4557, 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 con-

stitute 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. [R. C. 1905, § 4273; 1879, ch. 46, § 13; 1883, ch. 91, § 1; R. C. 1895, § 2954.]

Combinations between railroads to prevent competition. 74 Am. St. Rep. 250.

Restrictions on consolidation of parallel or competing railroads. 45 L.R.A. 271.

Consolidation of railroads and its effect on pre-existing debts and liens. 59 Am. St. Rep. 554; 23 L.R.A. 231.

Liability of one railroad corporation possessing stock control of another for acts and contracts of the latter. 35 L.R.A. (N.S.) 770.

Liability of railroads leasing their property. 48 Am. Rep. 580.

Liability of lessor to persons other than lessees. 58 Am. St. Rep. 147.

— for torts of lessees. 71 Am. Dec. 295.

Liability of lessor of railroad for injuries caused by negligence of another company using road under another contract. 44 L.R.A. 737.

Duty of lessee of railroad as to condition of track. 6 L.R.A. (N.S.) 787.

**§ 4621. 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. [R. C. 1905, § 4274; 1879, ch. 46, § 15; R. C. 1895, § 2955.]

Artificial irrigation ditch as stream of water, water course or canal within meaning of this section. *Taylor v. White River Valley R. Co.*, 27 S. D. 528, 132 N. W. 152.

**§ 4622. 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. [R. C. 1905, § 4275; 1879, ch. 46, § 16; R. C. 1899, § 2956.]

Power to compel railroad to establish or maintain at its own expense overhead or underground crossing, as affected by the fact that the street or highway is opened subsequently to construction of railroad. 28 L.R.A. (N.S.) 298.

Liability for cost of changing grade of street to prevent the crossing of a railroad at grade. 26 L.R.A. 92.

**§ 4623. 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. [R. C. 1905, § 4276; 1879, ch. 46, § 17; R. C. 1899, § 2957.]

Nature of railroad, whether real estate or personal property. 66 L.R.A. 33.

**§ 4624. 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

conveyance of real estate by corporations is 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 instruments 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. And provided, further, that every conveyance or lease, deed of trust or mortgage thus made which covers any real property other than that used by said railroad company as right of way for its railroad, shall likewise be recorded in the office of register of deeds for each and every county wherein such real estate or any part thereof is situated; and provided, further, that such conveyance, lease, deed of trust or mortgage shall not operate as a conveyance of, or as creating any lien upon, any such real estate other than railroad right of way, until such instrument has been duly recorded in the office of the register of deeds of the county in which the same is situated. [1911, ch. 246; R. C. 1905, § 4277; 1879, ch. 46, § 18; R. C. 1899, § 2958.]

Validity of sale of real estate by railroad corporation. 25 L.R.A. 139.

**§ 4625. 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. [R. C. 1905, § 4278; 1883, ch. 93, § 1; R. C. 1895, § 2559.]

**§ 4626. 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. [R. C. 1905, § 4279; 1883, ch. 93, § 2; R. C. 1895, § 2960.]

**§ 4627. 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. [R. C. 1905, § 4280; 1879, ch. 46, § 19; R. C. 1899, § 2961.]

**§ 4628. 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. [R. C. 1905, § 4281; 1879, ch. 46, § 20; R. C. 1899, § 2962.]

**§ 4629. 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. [R. C. 1905, § 4282; 1879, ch. 46, § 21; R. C. 1899, § 2963.]

**§ 4630. 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. [R. C. 1905, § 4283; 1879, ch. 46, § 22; R. C. 1899, § 2964.]

**§ 4631. 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 4630 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. [R. C. 1905, § 4284; Const. § 140; R. C. 1899, § 2965.]

**§ 4632. 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 4610 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. [R. C. 1905, § 4285; 1879, ch. 46, § 27; R. C. 1895, § 2966.]

**§ 4633. 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. [R. C. 1905, § 4286; 1893, ch. 103, § 1; R. C. 1895, § 2967; 1905, ch. 152.]

**§ 4634. 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. [R. C. 1905, § 4287; 1893, ch. 103, § 2; R. C. 1895, § 2968.]

**§ 4635. 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. [R. C. 1905, § 4288; Civ. C. 1877, § 474; R. C. 1899, § 2969.]

Obligation to stop for passengers at the times advertised. 66 Am. Dec. 603.

**§ 4636. 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. [R. C. 1905, § 4289; Civ. C. 1877, § 475; R. C. 1899, § 2970.]

Contract duty of carrier to stop at particular station. 2 L.R.A.(N.S.) 505.

Duty to give regular train service on Sunday. 30 L.R.A.(N.S.) 401.

Liability to passenger for default or delay in running train. 32 L.R.A. 543; 49 L.R.A.(N.S.) 429.

Liability for failure to provide train for crowd. 24 L.R.A. 711.

Right to discontinue receipt of freight at place other than regular station. 38 L.R.A.(N.S.) 932.

Duty of carrier to accept freight originating and terminating within city limits. 33 L.R.A.(N.S.) 443.

Effect of strike on carrier's duty to accept freight. 35 L.R.A. 623; 22 L.R.A.(N.S.) 1200.

Right to refuse to transport dangerous articles. 36 L.R.A. 649.

Duty of carrier to accept liquor for transportation to points where its sale is prohibited or restricted. 40 L.R.A.(N.S.) 798; 45 L.R.A.(N.S.) 120.

**§ 4637. 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. [R. C. 1905, § 4290; Civ. C. 1877, § 476; R. C. 1899, § 2971.]

Contributory negligence of passengers in riding on platforms, etc. 37 Am. Rep. 710; 41 Am. Rep. 347.

Riding on platform of railroad car as negligence. 29 L.R.A.(N.S.) 325.

—where railroad train is crowded. 24 L.R.A. 710.

Negligence in riding on platform or steps of car just before reaching station. 21 L.R.A.(N.S.) 715.

Riding on platform as affecting right to recover for injury through accident to train or car. 17 L.R.A.(N.S.) 158.

Passenger's riding in baggage or express car as contributory negligence. 16 L.R.A. 631.

Power of conductor to waive rule prohibiting passengers from riding in baggage car. 16 L.R.A. 631.

As to similar provision in Cal. Civ. Code, § 484, see *Mitchell v. Southern P. R. Co.*, 87 Cal. 62, 11 L.R.A. 130, 25 Pac. 245, 9 Am. Neg. Cas. 85.

**§ 4638. 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. [R. C. 1905, § 4291; Civ. C. 1877, § 477; R. C. 1899, § 2972.]

What risk is assumed by passengers on freight trains. 19 L.R.A. 310.

Extent of ticket agent's authority as to carriage on freight train. 31 L.R.A.(N.S.) 233.

Liability for injuries to passenger from sudden starting or stopping of freight train. 34 L.R.A.(N.S.) 230.

**§ 4639. 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. [R. C. 1905, § 4292; Civ. C. 1877, § 479; R. C. 1899, § 2973.]

**§ 4640. 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. [R. C. 1905, § 4293; Civ. C. 1877, § 480; R. C. 1899, § 2974.]

Liability for injuries to employes by low bridges. 53 Am. Rep. 699.

**§ 4641. 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. [R. C. 1905, § 4294; Civ. C. 1877, § 481; R. C. 1895, § 2975.]

**§ 4642. 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. [R. C. 1905, § 4295; Civ. C. 1877, § 483; R. C. 1899, § 2976.]

Whistling not required at private crossing, though on section line which might be opened as road. *Reynolds v. Great Northern Ry. Co.*, 69 Fed. 808, 16 C. C. A. 435.

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

Killing stock prima facie evidence of negligence. See Rev. Code Civ. Proc. S. D. 748.

Failure to ring bell or sound whistle does not constitute negligence per se. *Reeves v. Chicago, M. & St. P. R. Co.*, 24 S. D. 84, 123 N. W. 498.

Use of either bell or whistle all the time occupied by train in passing from one public crossing to another a mile distant is permissible. *Lyons v. Chicago, M. & St. P. R. Co.*, 28 S. D. 31, 35 L.R.A.(N.S.) 1219, 132 N. W. 679.

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.

The term "any other road" refers only to public highways, and not to private crossing. *Reynolds v. Great Northern R. Co.*, 69 Fed. 808.

The duty to give signals does not extend to a person driving along a highway parallel to the railroad, who has not lately used and does not intend to use any crossing. *Reynolds v. Great Northern R. Co.*, 69 Fed. 808.

Defense of contributory negligence may be interposed in action brought for violation of section 2223, Revised Codes 1905 [section 3076 herein], for damages resulting from explosion. *Morrison v. Lee*, 22 N. D. 251, 38 L.R.A.(N.S.) 412, 133 N. W. 548, 1 N. C. C. A. 258.

Statutory signals as measure of duty of railroad company. 15 L.R.A. 427.

For whose benefit signals by approaching trains are required by statute at railway crossings. 17 L.R.A. 254.

Failure to give signal as affecting liability for injury to small children on track. 25 L.R.A. 788.

Right of employe to rely on statute requiring signal to be given by train approaching crossing. 40 L.R.A.(N.S.) 1105.

Duty as to signals by locomotive approaching overhead crossings. 1 L.R.A.(N.S.) 307; 22 L.R.A.(N.S.) 915.

Duty to give crossing signals for protection of animals. 46 L.R.A.(N.S.) 881.

Liability for failure to give statutory signals when they would not have prevented the injury. 21 L.R.A. 723.

Violation of rule as to giving of signals as evidence of negligence toward member of public. 8 L.R.A.(N.S.) 1063.

Private action for violation of ordinances requiring warning signals. 5 L.R.A.(N.S.) 240.

Private action for violation of statutory duty to signal approach of crossings. 9 L.R.A.(N.S.) 365.

Failure to give crossing signals as proximate cause of injury by running into side of train. 38 L.R.A.(N.S.) 1153.

As to similar provision in Cal. Civ. Code, § 486, see *Meeks v. Southern P. R. Co.*, 52 Cal. 602; *Strong v. Sacramento & P. R. Co.*, 61 Cal. 326, 11 Am. Neg. Cas. 196; *Orcutt v. Pacific Coast R. Co.*, 85 Cal. 291, 24 Pac. 661, 11 Am. Neg. Cas. 216; *Toomey v. Southern P. R. Co.*, 86 Cal. 374, 10 L.R.A. 139, 24 Pac. 1074; *Hager v. Southern P. Co.*, 98 Cal. 309, 33 Pac. 119.

**§ 4643. 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. 1905, § 4296; R. C. 1895, § 2977; 1903, ch. 148.]

**§ 4644. 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. [R. C. 1905, § 4297; Civ. C. 1877, § 679; R. C. 1895, § 2978.]

Injury to stock by locomotive as prima facie evidence of negligence. *Anderson v. Minneapolis, St. P. & S. Ste. M. R. Co.*, 18 N. D. 462, 123 N. W. 281; *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.*, 16 N. D. 217, 112 N. W. 972.

Presumption of negligence created by fact of killing by cars. *Wright v. Minneapolis, St. P. & S. Ste. M. R. Co.*, 12 N. D. 159, 96 N. W. 324.

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

Contributory negligence, what is. *Wright v. M., St. P. & S. Ste. 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.

It is not error to deny motion for directed verdict where evidence, although undisputed, is such that impartial men might fairly and reasonably differ in conclusions to be drawn from such evidence. *Clair v. Northern P. R. Co.*, 22 N. D. 120, 132 N. W. 776.

Whether presumption arising under statute that railroad company killing cattle on track was negligent, is overcome by company's evidence, is in first instance question of law. *Corbett v. Great Northern R. Co.*, 19 N. D. 457, 125 N. W. 1054.

Presumption of law that killing was caused by defendant's negligence is raised by proof of ownership and killing. *Reinke v. Minneapolis, St. P. & S. Ste. M. R. Co.*, 23 N. D. 182, 135 N. W. 779.

Duty to animals on the track. 49 Am. Dec. 261; 20 Am. St. Rep. 161.

Presumption of negligence from injury to live stock by railway train. 15 L.R.A. 39.

Power of legislature to make the killing of stock prima facie evidence of negligence. 32 L.R.A. (N.S.) 227.

**§ 4645. Crossings over railroads. Penalty for failure to provide.** When any person owns land on both sides of any railway the corporation or individual owning or operating such railway shall, when requested to do so in writing, make and keep in good repair a proper cattle guard and cause-way or other adequate means of crossing such railway at such reasonable place or places as may be designated by the land owner or his agent; provided, that the type of all cattle guards required by law to be constructed in this state shall, before being installed, be approved by the commissioners of rail-

roads. The owner or person in possession of the land through which the railroad passes may recover, of the person or corporation operating such railroad, the sum of twenty-five dollars for every thirty days of default on the part of the person or corporation operating the railroad, after written demand served on an officer, roadmaster or section foreman of the operating company has designated the place for the erection of the cattle guarded crossings of the road crossing requested, and a like penalty for failure to keep such cattle guards, or road crossings, in good repair, after written notice has been served upon the operating company that such repairs are necessary. [1909, ch. 191; R. C. 1905, § 4298; Civ. C. 1877, § 484; R. C. 1899, § 2979.]

**§ 4646. 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. [R. C. 1905, § 4299; 1883, ch. 57, § 1; R. C. 1899, § 2980.]

Inapplicable to lessee of school lands. *Crary v. Chicago, M. & St. P. R. Co.*, 18 S. D. 237, 100 N. W. 18.

Railroad is liable for killing of cow when it has failed to provide cattle guard, where it had right to do so. *Lidel v. South Dakota C. R. Co.*, 25 S. D. 462, 127 N. W. 653.

Railroad corporations need not erect fences unless required by statute. 7 Am. Rep. 47.

Constitutionality of statute requiring fence. 31 L.R.A.(N.S.) 862.

Mandamus to compel company to construct fences. 12 L.R.A. 181.

Measure of care of railroad company to maintain fence once constructed. 11 L.R.A.(N.S.) 228.

Private action for violation of statutory duty to fence right of way. 9 L.R.A.(N.S.) 347.

Duty to keep gates in railroad fence closed. 49 L.R.A. 625.

Liability for injury to stock other than by trains, because of breach of statutory duty to fence. 37 L.R.A.(N.S.) 1181.

Liability of railroad whose failure to maintain fences permits escape of live stock which is killed or injured outside its right of way. 29 L.R.A.(N.S.) 573.

As to similar provision in Cal. Civ. Code, § 485, see *Hynes v. San Francisco & N. P. R. Co.*, 65 Cal. 316, 4 Pac. 28; *Los Angeles, P. & G. R. Co. v. Rumpp*, 104 Cal. 20, 37 Pac. 859; *Baker v. Southern California R. Co.*, 110 Cal. 455, 42 Pac. 975; *Baker v. Southern California R. Co.*, 114 Cal. 501, 46 Pac. 604; *Boyd v. Southern California R. Co.*, 126 Cal. 571, 58 Pac. 1046.

**§ 4647. 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. [R. C. 1905, § 4300; 1883, ch. 57, § 2; R. C. 1899, § 2981.]

Railroad company liable for defective fence although notice to construct was not given. *Wold v. South Dakota C. R. Co.*, 23 S. D. 521, 122 N. W. 583.

**§ 4648. 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. [R. C. 1905, § 4301; 1883, ch. 57, § 3; R. C. 1895, § 2982.]

Railroad company's liability for damages from neglect to repair fence covers damages to stock on track. *Wold v. South Dakota C. R. Co.*, 23 S. D. 521, 122 N. W. 583.

Double damages are provided for regardless of whether owner gave notice. *Bekker v. White River Valley R. Co.*, 28 S. D. 84, 132 N. W. 797.

#### ARTICLE 2.—RAILROAD COMPANIES REPORT WRECKS.

**§ 4649. Duty to report.** It shall be the duty of every railroad company operating a line of railway in this state to report to the railroad commissioners of this state all accidents, wrecks or casualties occurring in the operation of trains on said line or lines of railway within this state, coming within the knowledge of the company, wherein any person is either killed or injured, within reasonable time, not exceeding sixty days, in such form as the railroad commissioners may require. [1907, ch. 205, § 1.]

**§ 4650. Railroad commissioners examine into causes of wrecks. Make report to legislature.** Whenever any such report is made to such railroad commissioners they shall forthwith examine into the causes and circumstances of such wreck, accident or casualty, and it shall thereupon be the duty of said railroad commissioners to order such railroad company to comply with any reasonable requirements prescribed by said railroad commissioners, calculated to prevent the recurrence of any such wreck, accident or casualty, and it shall be the duty of said railroad commissioners to report to the legislature biennially a summarized statement of all wrecks, accidents or casualties that have come to their knowledge by reason of this article, together with a recommendation of such additional legislation as they deem proper for the greater protection of passengers and employes of such railroads. [1907, ch. 205, § 2.]

As to biennial reports to the legislature, see in general sections 95, 97, 98.

**§ 4651. Penalty for violation.** Every person who shall violate any of the provisions of this article shall be guilty of a misdemeanor and shall be punished by a fine of not less than five hundred dollars, nor more than two thousand dollars, or imprisonment in the county jail for not less than thirty days, nor more than one year, or shall suffer both such fine and imprisonment in the discretion of the court. [1907, ch. 205, § 3.]

#### ARTICLE 3.—STOPPING OF PASSENGER TRAINS AT COUNTY SEATS.

**§ 4652. Stop at county seats.** 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 or by which such trains run wherever such person, company or corporation operating such railroad has heretofore established, or shall hereafter establish, a station within one mile of the corporate limits of such county seat, a sufficient length of time to receive and let off passengers with safety; provided, the same shall not apply to any passenger train which does not carry passengers whose trip both begins and terminates within the boundaries of the state of North Dakota. [1911, ch. 253, § 1; 1907, ch. 202; R. C. 1905, § 4302; 1901, ch. 130.]

Power to compel stopping of trains at stations. 17 L.R.A.(N.S.) 821; 29 L.R.A.(N.S.) 159.

Right to require the stopping of interstate and mail trains. 14 L.R.A.(N.S.) 293; 29 L.R.A.(N.S.) 159.

**§ 4653. Penalty.** Every person, company or corporation failing to comply with the provisions of the last section shall be subject to a penalty of five hundred dollars for each and every offense, to be recovered in a civil action in the name of the state, and to be 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. [1911, ch. 253, § 2; 1907, ch. 202; R. C. 1905, § 4302; 1901, ch. 130.]

#### ARTICLE 4.—LIABILITY OF RAILROADS FOR CAUSING FIRES.

§ 4654. **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 escaping or being 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. [1911, ch. 248; R. C. 1905, §§ 4303, 4304; 1893, ch. 102, §§ 1, 2; R. C. 1899, §§ 2983, 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.

Liability for fire when caused by coals or sparks from locomotives. 38 Am. Dec. 70; 78 Am. Dec. 185; 6 Am. Rep. 597.

Liability for burning property stored or piled on railroad right of way by licensees. 1 L.R.A.(N.S.) 533.

Liability for fire set by engines of other company permitted to use road. 10 L.R.A.(N.S.) 1175.

Liability of railroad company for personal injury to person struck by sparks or cinders escaping from locomotive. 18 L.R.A.(N.S.) 241.

Constitutionality of statute imposing absolute liability for damages caused by fire. 25 L.R.A. 161; 35 L.R.A.(N.S.) 1016; 42 Am. St. Rep. 538.

Sufficiency of general allegations of negligence in case of injury to property from fires. 59 L.R.A. 234.

Right to interest on sum allowed as damages from railway fires. 18 L.R.A. 449.

Duty of abutting owner to prevent accumulation of combustible materials near right of way. 12 L.R.A.(N.S.) 624.

Duty of owner of property adjoining a railroad right of way to protect it from fires set out by passing locomotives. 12 L.R.A.(N.S.) 526.

Presumption as to negligence in case of railway fires. 15 L.R.A. 40.

Effect of presumption from fact that fire was set by locomotive to carry question of negligence to jury. 5 L.R.A.(N.S.) 99.

Power of legislature to make injury by fire from locomotives prima facie evidence of negligence. 32 L.R.A.(N.S.) 227.

Admissibility of evidence of other fires. 32 L.R.A.(N.S.) 1146.

Distance within which sparks from a properly equipped engine will set fire as a subject of expert testimony. 22 L.R.A.(N.S.) 1039.

Duty of railroad company to keep cattle guards in condition. 36 L.R.A.(N.S.) 997.

Effect of contributory negligence of owner of stock getting on track through defects in cattle guards. 36 L.R.A.(N.S.) 100.

Constitutionality of statute requiring railroad company to build cattle guards. 31 L.R.A.(N.S.) 861.

Constitutionality of statutes excluding defense of contributory negligence and assumption of risk on failure to build cattle guards. 31 L.R.A.(N.S.) 867.

#### ARTICLE 5.—CATTLE GUARDS AT RAILROAD CROSSINGS.

§ 4655. **Cattle guards, how constructed. Speed of trains at depot grounds.** All railway corporations owning or operating a line of railway within this state shall construct, maintain and keep in repair a suitable fence of posts and barb wire, or posts and boards, on each side of the track so connected with cattle guards at all public road crossings as to prevent cattle, horses and other live stock from getting on the railroad tracks; such fence when of barb wire shall be of five wires securely fastened to posts set not more than twenty feet apart, the top wire not to be less than fifty-four inches high, said wires to be not more than fourteen inches apart; or of five boards securely fastened to posts set not more than eight feet apart, said fence to be not less than fifty-four inches high and the boards not more than one foot apart. Any corporation operating a railroad and failing to fence same against live stock running at large and maintaining proper and sufficient

cattle guards at all points where the right to fence or maintain cattle guards exists shall be liable to the owner of any stock killed or injured by reason of the want of such fence or cattle guard for the full amount of the damages sustained by the owner on account thereof, unless it was occasioned by his grossly negligent act or that of his agent, and to recover the same it shall only be necessary for him to prove the loss of or injury to his property. If such corporation fails or neglects to pay such damages within ninety days after notice in writing that a loss or injury has occurred accompanied by an affidavit thereof served upon an officer or a station or ticket agent employed by said corporation in the county where such loss or injury occurred such owner shall be entitled to recover from the corporation double the amount of damages actually sustained by him, and twenty-five dollars as attorney's fee when it shall be adjudged by a court of competent jurisdiction that the claimant is entitled to the amount claimed. No law of the state or any local or police regulations of any county, township, city or town relating to the restraint of domestic animals, or in relation to the fences of farmers or land owners shall be applicable to railway tracts unless specifically so stated in such law and regulation. Upon depot grounds necessarily used by the public and the corporation the operating of trains at a greater rate of speed than eight miles an hour where no fence is built shall be negligence and shall render such corporation liable for all damages occasioned thereby in the same manner and to the same extent except as to double damages, as in cases where the right to fence exists. [1907, ch. 209.]

#### ARTICLE 6.— MAINTENANCE OF STATION HOUSES.

§ 4656. **When stations to be maintained.** Every railroad corporation in the state of North Dakota shall build a station house and keep a station agent twelve months each year when so ordered by the railroad commissioners at all of its sidings where there is grain and merchandise of any description to be shipped, when the outgoing and incoming freight, and all other receipts at said station amounts to twelve thousand dollars or more in any one year. Provided, that said stations are not less distant than five miles apart upon the same line of railway. [1911, ch. 254; R. C. 1905, § 4305; 1895, ch. 97, § 1; R. C. 1899, § 2985; 1901, ch. 179; 1903, ch. 147.]

Power to compel establishment of railroad stations. 17 L.R.A.(N.S.) 821.

May railroad companies be required to establish or maintain a station that will not pay expenses. 26 L.R.A.(N.S.) 444.

§ 4657. **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. [R. C. 1905, § 4306; 1895, ch. 97, § 2; R. C. 1899, § 2986.]

#### ARTICLE 7.— LIGHTING OF DEPOT PLATFORMS.

§ 4658. **Railroad depot lamps must be provided.** All railroad companies using steam as a motor power and engaged in the business of carrying passengers to and from stations located in this state shall provide for the lighting of each and every depot platform used by passengers in getting on and off from trains. At least one lamp, with a lighting power equal to that of the ordinary street lamp shall be placed at each end of each and every said platform. During the hours of night said lamp or lamps shall be lighted for a period of at least one hour before and thirty minutes after the arrival of each and every train, providing that said train stops at such depot or platform for the purpose of letting passengers on and off. [1907, ch. 210, § 1.]

§ 4659. **Penalty.** In each and every town, village or city where a railroad company violates the provisions of section 4658, such company shall upon conviction thereof be subject to a fine of not less than five dollars nor more

than ten for each and every day during the time such violations continue to be made, said fine to be recovered in civil action by any competent court and it is hereby made the duty of the attorney-general and the various state's attorneys of the counties wherein such violations take place to prosecute the violators of this article. [1907, ch. 210, § 2.]

ARTICLE 8.—SANTARY REGULATIONS FOR RAILROAD STATIONS.

§ 4660. **Closets, where provided.** All railroad companies operating railroads in North Dakota shall provide and maintain at any and all railroad stations in the state where passengers' tickets are sold, within reasonable access of the depot, a water closet, earth closet or privy for the accommodation of railroad employes and the traveling public, or where a sewerage system is maintained within three hundred feet of such station waiting room then and in that case the water closet shall be within the station house. Entirely separate compartments for men and women shall be provided. The water closet, earth closet or privy for males shall also have urinals arranged with conduits of galvanized iron, or other impervious material, draining into a sewer, vault or other suitable place which will prevent the creation of a nuisance. [1913, ch. 232, § 1; 1911, ch. 238.]

§ 4661. **Authority to inspect.** The board of railroad commissioners of the state, or the local health officer, or health commissioner of the township, incorporated village or city in which the depot is located shall have authority to inspect such water closets, earth closets or privies from time to time, and if they are found to be in an unsanitary condition he or they shall notify the proper officials of the railroad company, stating in what respect such water closets, earth closets or privies are unsanitary, and it shall be the duty of the railroad company within a reasonable time to make such alterations or repairs as will remove the unsanitary conditions complained of. [1913, ch. 232, § 2.]

§ 4662. **Waiting rooms, how and when cleaned.** The waiting rooms at the railroad stations in this state shall be scrubbed or washed at least once a week with some standard disinfectant, and such waiting rooms shall at all times be maintained in a comfortable and sanitary condition. [1913, ch. 232, § 3.]

§ 4663. **Penalty.** Any person, firm or corporation failing to comply with the provisions of this act shall upon conviction be punished by a fine of not less than twenty dollars or more than one hundred dollars. [1913, ch. 232, § 5; 1911, ch. 238, § 2.]

ARTICLE 9.—SWEEPING PASSENGER COACHES.

§ 4664. **Dustless sweeping required.** The sweeping of railroad coaches or cars while occupied by passengers, except such sweeping be done with a vacuum cleaner or other similar device, or except when the floor of such car shall previously have been thoroughly moistened with water or oil, or by the use of sufficient sweeping compound to keep down the dust, is hereby prohibited. [1913, ch. 231, § 1.]

§ 4665. **Penalty.** Any person or corporation violating the provisions of this act shall be punishable by a fine not exceeding twenty-five dollars. [1913, ch. 231, § 2.]

ARTICLE 10.—REGULATING NUMBER OF TRAIN MEN.

§ 4666. **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. [R. C. 1905, § 4307; 1895, ch. 94, § 1; R. C. 1899, § 2987.]

Full crew bill. 49 L.R.A.(N.S.) 977.

§ 4667. **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. [R. C. 1905, § 4308; 1895, ch. 94, § 2; R. C. 1899, § 2988.]

#### ARTICLE 11.—HOURS OF SERVICE OF RAILROAD EMPLOYEES.

§ 4668. **Hours limited.** It shall be unlawful for any railroad, railroad corporation or common carrier, engaged in commerce in whole or in part within this state, or any of its officers or agents, to require or permit any employes engaged in or connected with the movement of any train in which commerce is hauled within the state, or to require or permit any employe engaged in or connected with the movement of any train carrying freight or passengers within the state, to remain on duty more than sixteen consecutive hours, except when by casualty, storms, wrecks, washouts, snow blockades or any unavoidable delay arising from like causes he is prevented from reaching his terminal; or to require or permit any such employe who has been on duty sixteen consecutive hours to go on any duty without having at least eight hours' rest. [1907, ch. 207, § 1.]

Construction and application of statute limiting hours of labor. 65 L.R.A. 33.

Constitutionality of statutes limiting hours of labor. 19 L.R.A. 141; 21 L.R.A. 796; 65 L.R.A. 38; 12 L.R.A.(N.S.) 1130; 26 L.R.A.(N.S.) 242; 35 L.R.A.(N.S.) 628; 40 L.R.A. 893.

Statute limiting hours of labor of railroad employes as interference with interstate commerce. 29 L.R.A.(N.S.) 240.

§ 4669. **Penalty.** Any such railroad, railroad corporation, common carrier, or any of its officers or agents, violating any of the provisions of this article shall be deemed guilty of misdemeanor and shall, upon conviction thereof in any district court of the state of competent jurisdiction, be subject to a fine of not less than one hundred dollars nor more than one thousand dollars for each offense; and it shall be the duty of the railroad commissioners to fully investigate all cases of any violation of this article and said railroad commissioners shall forthwith notify the attorney-general of such violation thereof as may come to their knowledge, and it shall be the duty of the attorney-general to prosecute or cause to be prosecuted all violations thereof. [1907, ch. 207, § 2.]

Criminal liability for violation of statute limiting hours of labor. 65 L.R.A. 50.

#### ARTICLE 12.—SIZE AND CONSTRUCTION OF CABOOSE CARS.

§ 4670. **To whom this article shall apply.** The provisions of this article shall apply to any railroad corporation, or any person or persons while engaged as common carriers in the transportation of passengers or property within this state to which the regulative power of this state extends. [1911, ch. 245, § 1.]

§ 4671. **When to take effect, how constructed.** That from and after the first day of June, 1914, it shall be unlawful, except as otherwise provided in this article, for any such common carrier by railroad to use on its lines any caboose car or other car used for like purposes unless such caboose or other car shall be at least twenty-four feet in length exclusive of the platform and equipped with two four-wheeled trucks, and said caboose car or other car shall be of constructive strength equal to that of the thirty-ton capacity freight cars constructed according to M. C. B. standards, and shall

be provided with a door in each end thereof and an outside platform across each end of said car; each platform shall not be less than twenty-four inches in width and shall be equipped with proper guard rails, and with grab irons and steps for safety of the persons getting on and off said car. Said steps shall be equipped with a suitable rod, board or other guard at each end and at the back thereof, properly designed to prevent slipping from said steps. [1911, ch. 245, § 2; 1909, ch. 190, § 1.]

§ 4672. **Repairs, how made.** Whenever any caboose cars now in use by such common carriers as provided by section 4670 shall, after this article goes into effect, be brought into any shop for general repairs, it shall be unlawful to again put the same into service of such common carrier within this state, unless it be equipped as provided in section 4671. [1911, ch. 245, § 3.]

§ 4673. **Extensions, how granted.** That the state railroad commission is hereby authorized to grant to any common carrier aforesaid, upon full hearing and for good cause shown, a reasonable extension of time in which to comply with the provisions of this article; provided, that in no case shall such extension in the aggregate exceed a period of one year from the time herein limited for compliance with this article. [1911, ch. 245, § 4.]

§ 4674. **Penalty.** Any common carrier as provided in section 4670, violating any of the provisions of this article, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars for each offense. [1911, ch. 245, § 5; 1909, ch. 190, § 2.]

#### ARTICLE 13.—LICENSING TICKET AGENTS.

§ 4675. **Agents to obtain state license. Fee.** It shall be the duty of the owners of any railroad or steamboat for 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 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 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 board of railroad commissioners of the state of North Dakota, and at the same time shall pay to said board of railroad commissioners a license fee of five dollars, which fee shall be turned over to the state treasurer monthly, whereupon said board of railroad commissioners shall issue to such agents so presenting said certificate a license under the seal of the board of railroad commissioners 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 board of railroad commissioners 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 the 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. [1913, ch. 237; R. C. 1905, § 4309; 1893, ch. 104, § 1; R. C. 1899, § 2989.]

§ 4676. **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. [R. C. 1905, § 4310; 1893, ch. 104, § 2; R. C. 1899, § 2990.]

Statutes against ticket brokerage or "scalping." 24 L.R.A. 152.

Injunction against dealing in nontransferable railroad tickets. 10 L.R.A.(N.S.) 437.

Constitutionality of anti-scalping legislation. 3 L.R.A.(N.S.) 558; 4 L.R.A.(N.S.) 480.

**§ 4677. Penalty for violation.** Whoever shall violate the provisions of section 4676 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. [R. C. 1905, § 4311; 1893, ch. 104, § 3; R. C. 1899, § 2991.]

**§ 4678. 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. [R. C. 1905, § 4312; 1893, ch. 104, § 4; R. C. 1899, § 2992.]

**§ 4679. 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. [R. C. 1905, § 4313; 1893, ch. 104, § 5; R. C. 1899, § 2993.]

**§ 4680. 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 4679 shall pay to the state of North Dakota a fine not exceeding five hundred dollars for each offense. [R. C. 1905, § 4314; 1893, ch. 104, § 6; R. C. 1899, § 2994.]

**§ 4681. Penalty for fraudulent use of 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. [R. C. 1905, § 4315; 1893, ch. 104, § 7; R. C. 1899, § 2995.]

**§ 4682. 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. [R. C. 1905, § 4316; 1893, ch. 104, § 8; R. C. 1899, § 2996.]

Is pass issued as part of consideration for contract within statute prohibiting free transportation of passengers or discrimination in passenger rates. 23 L.R.A.(N.S.) 217; 31 L.R.A.(N.S.) 657.

#### ARTICLE 14.—MAPS OF RIGHT OF WAY.

**§ 4683. 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. [R. C. 1905, § 4317; 1890, ch. 130, § 1; R. C. 1895, § 2997.]

**§ 4684. 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. [R. C. 1905, § 4318; 1890, ch. 130, § 2; R. C. 1895, § 2998.]

**§ 4685. 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. [R. C. 1905, § 4319; 1890, ch. 130, § 3; R. C. 1899, § 2999.]

#### ARTICLE 15.—CROSSINGS.

**§ 4686. 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. [R. C. 1905, § 4320; 1890, ch. 127, § 1; R. C. 1899, § 3000.]

Defective condition of railroad crossing as affecting traveler's right to recover for injuries sustained in collision with train. 14 L.R.A.(N.S.) 312; 20 L.R.A.(N.S.) 426.

Compensation for construction and maintenance of crossing and safeguards as element of damages for laying out street across railway property. 24 L.R.A.(N.S.) 1232.

**§ 4687. 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. [R. C. 1905, § 4321; 1890, ch. 127, § 2; R. C. 1895, § 3001.]

§ 4688. **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. [R. C. 1905, § 4322; 1890, ch. 127, § 5; R. C. 1895, § 3002.]

#### ARTICLE 16.—SAFETY DEVICES BY RAILROAD COMPANIES.

§ 4689. **Complaint.** Upon written complaint authorized by a majority vote of all the members of the city council being filed with the railroad commissioners of this state by the chief executive officer of any village or city in the state of North Dakota on its behalf, that the crossing of any railroad company, naming it, with any street in said village or city, describing it as dangerous to life and property and giving the reason thereof, said railroad commissioners shall forthwith investigate the same, and to that end shall have at least one (1) public hearing in the village or city making such complaint, at a time to be fixed by said commissioners, and a place to be held upon notice to be given by said railroad commissioners to all parties interested, and shall be held in not less than thirty (30) nor more than sixty (60) days after the date of filing of such complaint. [1911, ch. 239, § 1.]

§ 4690. **Findings, how certified.** Within ten (10) days after such public hearing said commissioners, by a majority vote of the members thereof, shall decide the matter set forth in said complaint, and shall make a report in writing in respect thereto, which shall include the findings of fact which the conclusions of the commissioners are based upon, together with the recommendation of said commissioners as to what kind of safety device, if any, should be installed at said crossing to make the same safe to life and property. Said findings shall be in writing and signed by the members of said commission in favor thereof, and shall be filed with the secretary of said commission and entered for record in his office. If said commission shall find in favor of further protection for said crossing it shall issue an order to the railroad company named in said petition directing said railroad company within sixty (60) days after such order to establish and thereafter maintain at such crossings such gates, flagmen or safety devices as such commission may therein direct, and such as will render such crossing safe to life and property. Service of such order shall be made upon any railroad company in the same manner as a summons in a civil action is served. [1911, ch. 239, § 2.]

Power of municipality to require safety gates at crossing. 3 L.R.A.(N.S.) 141.

Delegation of power to make regulations as to safety gates and flagman. 33 L.R.A.(N.S.) 646.

Violation of police ordinance as to flagman or safety gates as ground for private action. 5 L.R.A.(N.S.) 245.

§ 4691. **Order.** Whenever any such order is made such railroad company may appeal therefrom in the same manner as appeals are allowed to be taken

from orders made by said commission fixing rates of railroad companies, and where no appeal is taken the order of the commission may be enforced by the attorney-general the same as orders relating to the control of railroads. [1911, ch. 239, § 3.]

§ 4692. **Appeal.** In addition to the foregoing, any railroad company failing to comply with the order of said commission if not appealed from as hereinbefore provided, or if appealed from and confirmed on appeal shall be liable to a penalty of fifty dollars (\$50) per day for each and every day that said railroad company does not so conform to said order, to be recovered as damages in a civil action by and for the benefit of the village or city making such complaint. [1911, ch. 239, § 4.]

§ 4693. **Flagman.** Whenever it shall appear that owing to any construction work or repair work, or for any other cause an unusual number of trains are being operated in or through any village or city in this state, the state railroad commissioners shall have the power, upon complaint by any village or city council through its chief executive officer to compel the installation of a flagman or flagmen, as the case may be, without a hearing, and such order shall be complied with within five days; provided, that such railroad companies may remove such flagmen whenever the movement of trains through such village or cities assumes its normal conditions. [1911, ch. 239, § 5.]

#### ARTICLE 17.—HEADLIGHTS ON LOCOMOTIVES.

§ 4694. **Railroads. Employes, who.** The provisions of this article shall apply to any common carrier or carriers, their officers, agents and employes engaged in the transportation of passengers or property by a railroad in the state of North Dakota. The term "railroad" as used in this article shall include all roads in use by common carriers operating a railroad, whether owned or operated under a contract, agreement or lease; and the term "employes" as used in this article, shall be held to mean persons who are engaged in or connected with the movement of any trains. Provided, however, that in passing through or working within the yard limits of any station or terminal a light of lesser candle power may be used. [1913, ch. 233, § 1.]

§ 4695. **Steam locomotives. Headlights.** That from and after the first day of July, 1914, it shall be unlawful for a common carrier, its officers and agents subject to this article, to use any locomotive engine propelled by steam in moving traffic or in the transportation of passengers or property within this state in main line service, between the hours of sunset and sunrise, unless said locomotive engine shall be equipped with a headlight of at least 1,200 candle power of light, when measured without the aid of a reflector. Provided, however, that in passing through or working within the yard limits of any station or terminal a light of lesser candle power may be used. Provided, however, that said common carrier may use its switch engines for switching purposes only, without having provided the same with a headlight as herein required, if said carrier shall so determine. Provided, that this article shall not apply to any engine, the equipment of which shall have failed during the trip, if it is shown that the equipment was in efficient and effective working condition when the trip was begun. [1913, ch. 233, § 2.]

Liability for killing or injuring live stock on railroad track because of lack of proper headlight. 39 L.R.A.(N.S.) §71.

§ 4696. **Penalty.** That any common carrier or carriers violating this article, or any provision thereof, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit to be brought by the attorney-general of the state of North Dakota; and it shall be the duty of such attorney-general to bring suit upon duly verified information being lodged with him that such violations have occurred. [1913, ch. 233, § 3.]

§ 4697. **Cumulative. No repeal.** Nothing in this article contained shall in any manner be construed as repealing, on (or) in any manner altering any

other act or part of acts heretofore adopted by the legislature of this state; but the remedies herein provided shall be cumulative and in addition to all other requirements now existing in relation thereto. [1913, ch. 233, § 4.]

ARTICLE 18.—RAILROADS, CLEARANCE OF OBSTRUCTIONS.

§ 4698. **To whom applicable.** That the provisions of this article shall apply to any railroad corporation or to any person or persons while engaged as common carriers in the transportation by railroad of passengers or property within the state, to which the regulative power of this state extends. [1913, ch. 230, § 1.]

§ 4699. **When to take effect, size of engines, motors and cars, and what exempt.** That on and after the first day of January, 1915, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its lines, any engine, motor or car used in commerce to which this article applies or to which the regulative power of this state extends, which shall exceed a maximum width of ten feet and six inches over all its widest outside dimension, or which shall exceed a maximum height of fourteen feet and two inches, measured from the top of the track rail to the top of the car loaded or empty without extending the clearance as provided for in section 4700 in the same proportion, unless authorized by the railroad commissioners; and the provisions of this section shall not apply to the loaded contents of open flat cars and cars without roofs and foreign cars, wrecking cars, snow plows, pile drivers and caboose cupolas. Provided, however, this shall not apply to rolling stock now in service. [1913, ch. 230, § 2.]

§ 4700. **Clearance required.** That on or after the first day of January, 1915, it shall be unlawful for any such common carrier to erect or maintain on any standard gauge road on its line or on any standard gauge side track used in connection therewith, for use in any traffic mentioned in section 4698, any coal chute, stock pen, pole, mail crane, stand pipe, hog drencher, embankment of earth or natural rock, or any fixed or permanent structure or obstruction upon its line of railroad, or on any side track used in connection therewith at a distance less than eight feet, measured from the center line of track, which said structure or obstruction adjoins on standard gauge roads; nor shall any overhead wires, bridges, viaducts or other obstructions passing over and above its tracks, as aforesaid, be maintained at a less height than twenty-one feet, measured from the top of the track rail; provided, that station freight house platforms which have a vertical height of not more than four feet, measured from the top of the track rail, may be erected and maintained at a less distance from the center of the track which they may adjoin than herein specified. Provided, further, that this article shall not apply to any warehouse, storehouse, elevator or other permanent structure now situated or located upon the right of way of any railroad in this state, which is leased, owned or used by any person or corporation doing business with any railroad, or any railroad terminal or yard now established. And provided, further, that this article shall not apply to loading platforms erected at sidings or stations between terminals now in use. [1913, ch. 230, § 3.]

§ 4701. **Report of obstructions. How made.** That on or before the first day of January, 1914, every common carrier subject to the provisions of this article, shall report to said railroad commission the number of coal chutes, bins, stock chutes, standpipes, hog drenchers, embankments of earth or natural rock or other fixed and permanent structure or obstruction overhead or otherwise upon its line of railroad that do not conform with the minimum clearance line specified in sections 4699 and 4700, giving exact location and kind of such structures and the material used in their construction; also the reason, if any, why such structures, or any of them, should not be made to conform to the clearance established by this article; and the said railroad commission is hereby authorized, after a thorough investigation, to exempt

from the provisions of this article any warehouse, storehouse, permanent structure, elevator, loading or unloading platform, bridge, tunnel, retaining wall of masonry, embankment of earth, natural rock or permanent overhead structure or any obstruction erected or established prior to the passage of this article, that is in closer proximity to the tracks of such carrier than minimum side and top clearance specified by this article. [1913, ch. 230, § 4.]

**§ 4702. Distance between tracks.** That on and after the first day of January, 1915, it shall be unlawful for any such common carrier to construct any track used for the purpose of switching or moving any cars engaged in the movement of traffic within the regulative power of this state, where the center line of such track is at a distance of less than 13 feet from the center line of any other parallel track which it adjoins; provided, that the distance between said tracks specified in this section may be diminished or closed up a necessary distance from track intersections, turnouts and switch points. [1913, ch. 230, § 5.]

**§ 4703. Obstructions to be removed.** It shall be unlawful for any such common carrier to permit the space between such of its tracks as are ordinarily used by yard men and their employes in the discharge of their duties, to become or remain obstructed by any obstacle that will interfere with the work of said employes or subject such employes to unnecessary hazard. Such space between said tracks as aforesaid, and between the rails of said track must be kept in such condition as to permit said employes to pass safely over and between said tracks or to use the same day or night and under all weather conditions, without unnecessary hazard. [1913, ch. 230, § 6.]

**§ 4704. Penalty.** That any common carrier subject to the provisions of this article violating any of the provisions thereof, shall be liable to a penalty of one hundred dollars for each and any such violation; and each day that any locomotive engine or car is operated or used, or structure or obstruction is maintained in violation of this article, shall constitute a separate offense; such penalty to be recovered in a suit or suits to be brought by the state's attorney in the district court having jurisdiction in the locality where such violation shall have been committed, and it shall be the duty of said state's attorney under the direction of the railroad commission to bring such suits upon duly verified information being lodged with him by any person of such violation being committed, and it shall also be the duty of such railroad commission to lodge with such state's attorney information of any such violation as may come to its knowledge. [1913, ch. 230, § 7.]

**§ 4705. Contributory negligence cannot be charged.** That any employe of such common carrier who, while in the performance of his duty and while engaged in any commerce mentioned, subject to the regulative power of this act in section 4698, may be injured or killed by any locomotive, car, structure or obstruction used or retained contrary to the provisions of this article, shall not be deemed to have assumed the risk thereby occasioned or to have been guilty of contributory negligence, although the employe continued in the employ of such common carrier after the unlawful use of such locomotive, car, permanent overhead structure, or obstruction of any kind or character mentioned in this article shall have been brought to his knowledge; and the retention under the exemption authorized in section 4701 shall be at the sole risk of the carrier, and the permission granted in this article to the carrier to construct station or freight house platforms four feet high measured from the top of the track rail and near to the center line of the track or tracks as provided in section 4700, shall be at the sole risk of carrier, as aforesaid in this section. [1913, ch. 230, § 8.]

#### ARTICLE 19.—TRANSFER FACILITIES.

**§ 4706. 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. [R. C. 1905, § 4323; 1901, ch. 195.]

#### ARTICLE 20.—COOPERAGE OF CARS.

§ 4707. **Carriers to furnish lined or coopered cars to grain or flour shippers.** Every railroad corporation or common carrier doing business in this state shall when requested by any shipper of wheat, flax or other grain, flour or flour mill products, furnish to such shipper a box car or box cars properly lined or coopered for receiving and containing the kind of grain flour or flour mill products sought to be shipped and if such railroad, railroad corporation or common carrier shall furnish any car not so lined or coopered to such shipper and shall fail to prepare and put in readiness such car within four hours after notice by such shipper to its agent at point of shipment that such car is not in proper condition such shipper may repair such car at his own expense and recover such sum so expended in a civil action against such railroad corporation or common carrier. [1913, ch. 234.]

#### ARTICLE 21.—TO REGULATE COMMON CARRIERS AND DEFINE THE DUTIES OF THE COMMISSIONERS OF RAILROADS.

§ 4708. **To whom article applies.** The provisions of this article shall apply to the transportation of passengers, property and the transmission of messages between points within this state, and to the receiving, switching, delivering, storing and hauling of such property and receiving and delivering and carrying all messages and of all charges connected therewith, including icing and mileage charges, and shall apply to all railroad corporations, express companies, car companies, freight and freight-line companies and to all associations of persons, whether incorporated or otherwise, that shall do business within this state and to any common carrier within the state that shall do business upon or from any line or railroad within the state and to any common carrier engaged in the transportation of persons or property wholly by rail or partly by rail or water. The term "common carrier" whenever used

in this article shall be construed to include telephone and telegraph companies and associations engaged in the receiving, transmitting and delivering of messages. [1911, ch. 255, § 1; R. C. 1905, § 4324; 1897, ch. 115, § 14; R. C. 1899, § 3011.]

Has no application to interstate commerce. *House v. Chicago & N. W. R. Co.*, 30 S. D. 321, 138 N. W. 809.

**§ 4709. 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 of railroads, except as hereinafter provided. [R. C. 1905, § 4325; 1897, ch. 115, §§ 10, 14; R. C. 1899, §§ 3012, 3013.]

**§ 4710. 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. [R. C. 1905, § 4326; 1897, ch. 115, § 5; R. C. 1899, § 3014.]

Statutory duty of railroad company to furnish cars. 43 L.R.A. 225.

Right of state to require railroad company to equip its road. 13 L.R.A.(N.S.) 320.

State regulations requiring carriers to furnish cars to shippers as interference with interstate commerce. 17 L.R.A.(N.S.) 364; 29 L.R.A.(N.S.) 802; 42 L.R.A.(N.S.) 984.

Mandamus to compel performance of duties by railroad. 37 Am. St. Rep. 321.

**§ 4711. 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. [R. C. 1905, § 4327; 1897, ch. 115, § 6; R. C. 1899, § 3015.]

Recovery back of excessive freight paid. 18 L.R.A.(N.S.) 124.

**§ 4712. Penalty for extortion or unjust discrimination.** Any railroad, railroad corporation or common carrier, which shall violate any of the provisions 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. [R. C. 1905, § 4328; 1897, ch. 115, § 7; R. C. 1899, § 3016.]

§ 4713. **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 noncompliance 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 4748. [R. C. 1905, § 4329; 1897, ch. 115, § 8; R. C. 1899, § 3017.]

§ 4714. **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 accommodations, 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. [R. C. 1905, § 4330; 1897, ch. 115, § 16; R. C. 1899, § 3018.]

Right of carrier as to furnishing equal connecting facilities to different carriers. 12 L.R.A.(N.S.) 513.

Right of carrier to grant exclusive train privilege to baggage or passenger transfer companies. 32 L.R.A.(N.S.) 1181.

Right of railroad to give exclusive or preferential facilities to an express company for express business. 5 L.R.A.(N.S.) 783.

Duty of railroad company to give equal facilities to express companies. 18 L.R.A. 393.

**§ 4715. 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. [1913, ch. 238, § 1; R. C. 1905, § 4331; 1890, ch. 122, § 3; R. C. 1895, § 3019.]

The preamble to this act amending R. C. 1905, § 4331, is as follows: "Whereas, section 2261 of the Revised Codes of North Dakota of 1905 [section 3125 herein] confers upon the commissioners of railroads the right to require railroad companies to construct and maintain a side track for the use of shippers between regular stations, where such stations are ten miles or more apart; and,

"Whereas, the last clause of section 4331 of the Revised Codes of North Dakota of 1905 is in apparent conflict with said section 2261; now, therefore," etc. Section 2 of the act repeals all acts or parts of acts in conflict therewith, "except section 2261 of said Revised Codes" [section 3125 herein].

**§ 4716. Time schedule of trains.** Every corporation, company or person, operating a railroad within this state, shall, immediately after the taking effect of this act [sections 4716, 4717], cause to be placed in a conspicuous place in each passenger depot of such company, located at any station in this state, at which there is a telegraph office, a blackboard of suitable size, upon which such company or person shall cause to be written, at least thirty minutes before the schedule time for the arrival of each passenger train stopping upon such route at such station, the fact whether such train is on schedule time or not, and if late, how much, and the figures on said blackboard shall be changed at intervals of one hour to correspond with the facts until the arrival of such delayed train; provided, also, that any passenger trains not more than fifteen minutes late shall be deemed to be on time as to the operation of this act. [1907, ch. 201, § 1.]

**§ 4717. Penalty for false reports or failure to bulletin trains.** For each violation of the provisions of this act [sections 4716, 4717] in failing to report, or in making a false report, such corporation, company or person, so failing or refusing to comply with the provisions of this act, shall forfeit and pay the sum of twenty-five dollars, together with all taxable costs, to be recovered in a civil action to be prosecuted by the state's attorney of the county in which the neglect or refusal occurs, in the name of the state of North Dakota, which shall be paid over to the county in which such proceedings are had, and shall be a part of the common school fund. [1907, ch. 201, § 2.]

**§ 4718. 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. [R. C. 1905, § 4332; 1897, ch. 115, § 20; R. C. 1899, § 3020.]

**§ 4718a. 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. [R. C. 1905, § 4333; 1897, ch. 115, § 16; R. C. 1899, § 3021.]

This section does not invalidate a contract made by a circus company in consideration of reduced rates to absolve the carrier from liability for damages caused by the carrier's negligence. *Sager v. Northern Pac. R. Co.*, 166 Fed. 526.

Carrier's discrimination against colored persons. 18 L.R.A. 639.

Right of carrier at common law to discriminate between shippers. 18 L.R.A. 105.

Liability of lessor of railroad for discrimination by lessee against shippers. 40 L.R.A.(N.S.) 519.

Carrier's discrimination as to pens and yards for live stock at stations. 44 L.R.A. 296.

Discrimination in furnishing cars to shippers. 8 L.R.A.(N.S.) 112.

Right of carrier to discriminate as to special or unusual service. 12 L.R.A.(N.S.) 506.

Discrimination by requiring prepayment of freight charges. 21 L.R.A.(N.S.) 982.

Carrier's right to make discriminating rate for material to be employed in manufacture of a finished product which will be shipped over its road. 6 L.R.A.(N.S.) 225.

**§ 4719. 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 discrimination, 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 carload lot than is charged, collected or received from the same kind of freight in less than a carload lot. [R. C. 1905, § 4334; 1897, ch. 115, § 15; R. C. 1899, § 3022.]

**§ 4720. 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. [R. C. 1905, § 4335; 1897, ch. 115, § 17; R. C. 1899, § 3023; 1903, ch. 143.]

**§ 4721. 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. [R. C. 1905, § 4336; 1897, ch. 115, § 18; R. C. 1899, § 3024.]

**§ 4722. 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 carload 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 carload lots of freight offered by each bear to the entire number of carload 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. [R. C. 1905, § 4337; 1899, ch. 110, § 7; R. C. 1895, § 3025.]

Discriminating in furnishing cars to shippers. 44 L.R.A. (N.S.) 648.

**§ 4723. 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 commissioners 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. [R. C. 1905, § 4338; 1890, ch. 122, § 7; R. C. 1899, § 3026.]

**§ 4724. 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, rail-

road 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. [R. C. 1905, § 4339; 1897, ch. 115, § 19; R. C. 1899, § 3027.]

**§ 4725. 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. [R. C. 1905, § 4340; 1897, ch. 115, § 19; R. C. 1899, § 3028.]

**§ 4726. 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. [R. C. 1905, § 4341; 1897, ch. 115, § 19; R. C. 1899, § 3029.]

**§ 4727. 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. [R. C. 1905, § 4342; 1897, ch. 115, § 19; R. C. 1899, § 3030.]

§ 4728. **Commissioners to make and revise schedules.** The board of railroad commissioners shall have power to prescribe just and reasonable classifications of freight and to fix and prescribe just and reasonable schedules of charges for the transportation of intra-state freight and intra-state passengers, for sleeping car accommodations, for goods and all matter of every kind carried by express companies within this state, for the transmission of messages by telegraph and telephone companies and for the use of telephone lines within the state. The commissioners shall also have the power to make just and reasonable regulations for the apportionment of all such charges between two or more companies jointly engaged in the transportation of freight, passengers, express matter, telegraph or telephone messages and it shall be the duty of said commissioners to prepare such schedules and classifications; 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 railroads or the transmission of messages by telephone or telegraph 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 the making of the same has been published as required by law, provided, that before finally fixing and deciding what the original maximum rates and classifications shall be, it shall be the duty of the commissioners of railroads to cause notice of such meeting to be given each common carrier affected thereby by mailing a notice thereof addressed to the managing officer thereof at the address given in the last report of such common carrier to the secretary of state, or to such address as may have been given to and filed with said commission, at least thirty days before the date of said hearing, and 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 classifications; and a schedule of rates, fares and classifications 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. [1911, ch. 255, § 2; R. C. 1905, § 4343; 1897, ch. 115, § 29; R. C. 1899, § 3031.]

Reasonableness of rates determined by comparison of gross receipts with cost of doing business. *C. M. & St. P. Ry. Co. v. Tompkins*, 176 U. S. 167, 44 L.ed. 417, 20 Sup. Ct. Rep. 336.

Business of carriers affected with a public interest subjecting them to regulation and control in respect to rates or prices. 6 L.R.A.(N.S.) 834.

Legislative power to regulate rates. 33 L.R.A. 179.

Delegation by legislature of power to fix rates. 18 L.R.A.(N.S.) 713; 32 L.R.A.(N.S.) 649.

Elements entering into determination of reasonableness of railroad rates prescribed by the state for local traffic. 15 L.R.A.(N.S.) 108; 25 L.R.A.(N.S.) 1001.

**§ 4729. 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 4728 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. [R. C. 1905, § 4344; 1897, ch. 115, § 30; R. C. 1899, § 3032.]

**§ 4730. 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. [R. C. 1905, § 4345; 1897, ch. 115, § 31; R. C. 1899, § 3033.]

**§ 4731. 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 4728; 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. [R. C. 1905, § 4346; 1897, ch. 115, § 32; R. C. 1899, § 3034.]

**§ 4732. 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. [R. C. 1905, § 4347; 1897, ch. 115, § 11; R. C. 1899, § 3035.]

Power of state court to pass on interstate rates. 28 L.R.A.(N.S.) 108.

**§ 4733. 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 4732, 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. [R. C. 1905, § 4348; 1897, ch. 115, §§ 12, 13; R. C. 1899, § 3036.]

**§ 4734. 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. [R. C. 1905, § 4349; 1897, ch. 115, § 21; R. C. 1899, § 3037.]

No demand need be made before bringing suit for loss of baggage of passenger while being transported between interstate points. *House v. Chicago & N. W. R. Co.*, 30 S. D. 321, 138 N. W. 809.

**§ 4735. 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. [R. C. 1905, § 4350; 1897, ch. 115, § 22; R. C. 1899, § 3038.]

**§ 4736. 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. [R. C. 1905, § 4351; 1897, ch. 115, § 22; R. C. 1899, § 3039.]

**§ 4737. 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 4742, 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. [R. C. 1905, § 4352; 1897, ch. 115, § 23; R. C. 1899, § 3040.]

**§ 4738. 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. [R. C. 1905, § 4353; 1897, ch. 115, § 24; R. C. 1899, § 3041.]

**§ 4739. Proceedings when subpoenas 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 subpoena, 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. [R. C. 1905, § 4354; 1897, ch. 115, § 24; R. C. 1899, § 3042.]

**§ 4740. 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 com-

plaint, 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. [R. C. 1905, § 4355; 1897, ch. 115, § 25; R. C. 1899, § 3043.]

Railroad commissioners must call upon railroads complained against to satisfy the complaint or answer same. *State ex rel. La Follette v. Chicago, M. & St. P. R. Co.*, 18 S. D. 517, 94 N. W. 406.

**§ 4741. 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 findings 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. [R. C. 1905, § 4356; 1897, ch. 115, § 26; R. C. 1899, § 3044.]

**§ 4742. 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. [R. C. 1905, § 4357; 1897, ch. 115, § 27; R. C. 1899, § 3045.]

**§ 4743. 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. [R. C. 1905, § 4358; 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.

Orders of, not enforced by courts without inquiry. *State v. C. M. & St. P. Ry. Co.*, 11 S. D. 282, 77 N. W. 104.

Railroad commissioners are among those authorized to maintain proceeding to compel obedience by carrier to order of commission. *State ex rel. Railroad Comrs. v. Duluth, W. & P. R. Co.*, 25 S. D. 106, 125 N. W. 565.

**§ 4744. 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. [R. C. 1905, § 4359; 1897, ch. 115, § 28; R. C. 1899, § 3047.]

**§ 4745. 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. [R. C. 1905, § 4360; 1897, ch. 115, § 28; R. C. 1899, § 3048.]

**§ 4746. 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. [R. C. 1905, § 4361; 1897, ch. 115, § 28; R. C. 1899, § 3049.]

**§ 4747. 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. [R. C. 1905, § 4362; 1897, ch. 115, § 33; R. C. 1899, § 3050.]

**§ 4748. 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. [R. C. 1905, § 4363; 1897, ch. 115, §§ 2, 3; R. C. 1899, § 3051.]

**§ 4749. 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. [R. C. 1905, § 4364; 1897, ch. 115, § 4; R. C. 1899, § 3052.]

Right of corporation, corporate officer, or other person having custody of books and papers, to refuse to produce them on the ground that they may tend to incriminate. 47 L.R.A.(N.S.) 1175.

§ 4750. **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 require, 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. [R. C. 1905, § 4365; 1897, ch. 115, § 34; R. C. 1899, § 3053.]

§ 4751. **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. [R. C. 1905, § 4366; 1890, ch. 122, § 18b; R. C. 1899, § 3054.]

§ 4752. **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. [R. C. 1905, § 4367; 1897, ch. 115, § 1; R. C. 1899, § 3055.]

§ 4753. **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 4711, 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 4719 upon conviction



thereof shall be dealt with as hereinafter provided. [R. C. 1905, § 4368; 1897, ch. 115, § 35; R. C. 1899, § 3056.]

**§ 4754. 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. [R. C. 1905, § 4369; 1897, ch. 115, § 36; R. C. 1899, § 3057.]

**§ 4755. 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. [R. C. 1905, § 4370; 1897, ch. 115, § 37; R. C. 1899, § 3058.]

**§ 4756. 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 4757, to be recovered as therein provided. [R. C. 1905, § 4371; 1897, ch. 115, § 38; R. C. 1899, § 3059.]

**§ 4757. 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 4742 shall not apply to either a criminal prosecution or a civil action brought under this article. [R. C. 1905, § 4372; 1897, ch. 115, § 39; R. C. 1899, § 3060.]

**§ 4758. 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 4756 and 4757, it shall be their duty to immediately cause suits to be commenced and prosecuted against any such railroad, railroad corpora-

tion 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. [R. C. 1905, § 4373; 1897, ch. 115, § 40; R. C. 1899, § 3061.]

§ 4759. **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. [R. C. 1905, § 4374; 1897, ch. 115, § 41; R. C. 1899, § 3062.]

§ 4760. **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. [R. C. 1905, § 4375; 1890, ch. 122, § 3d; R. C. 1899, § 3063.]

§ 4761. **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. [R. C. 1905, § 4376; 1890, ch. 122, § 16b; R. C. 1899, § 3064.]

§ 4762. **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 4748, 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. [R. C. 1905, § 4377; 1890, ch. 122, § 17a; R. C. 1899, § 3065.]

§ 4763. **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. [R. C. 1905, § 4378; 1899, ch. 131, § 1; R. C. 1899, § 3066.]

§ 4764. **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. [R. C. 1905, § 4379; 1890, ch. 122, § 18c; R. C. 1899, § 3067.]

**§ 4765. 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 side track 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 car load lots from wagons, sleighs or other vehicles on its side track, 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 side track, elevator, warehouse or depot, without unnecessary delay, proceed to ship the same to the place where the same is consigned. [R. C. 1905, § 4380; 1899, ch. 110, § 5; R. C. 1899, § 3068; 1903, ch. 145.]

**§ 4766. 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 the state to construct from such elevator, warehouse or mill a grade suitable for a side track, to the track of any railroad company and such railroad company shall furnish ties, rails and all necessary connections, and shall lay on such grade a track to connect with the main or side track by switch, when so ordered by the railroad commissioners, and shall charge to and collect from the owner of such elevator, warehouse or mill the actual cost of all material and labor used in the laying of such side track and the owner of such elevator, warehouse or mill shall, upon demand of such railroad company, deposit cash in advance the amount estimated to cover the cost of such labor and material. Such side track and switch shall be the property of the owner of such elevator, warehouse or mill, but shall at all times be under the control and management of and kept in repairs 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 obligation of this section upon such railroad company shall cease and be inoperative as against it until such cost and expense are fully paid. Provided, that the side track described in this section shall not exceed two thousand five hundred feet in length and the switch where connection is made with the side track shall come within the yard limits of the station. [1911, ch. 243; R. C. 1905, § 4381; 1889, ch. 110; § 6; R. C. 1899, § 3069.]

**§ 4767. 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. [R. C. 1905, § 4382; 1890, ch. 128, § 1; R. C. 1899, § 3070.]

Power to compel road to build or maintain side tracks for accommodation of shippers.  
28 L.R.A. (N.S.) 1013.

**§ 4768. Penalty.** Any neglect or refusal to comply with any part of the provisions of the last two sections within fifteen days after being requested in writing by the person operating the elevator, warehouse, mill or coal mine or by the commissioner 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 two sections, to be recovered by the persons 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. [1911, ch. 243; R. C. 1905, § 4383; 1890, ch. 128, § 2; R. C. 1899, § 3071.]

**§ 4769. 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. [R. C. 1905, § 4384; 1889, ch. 110, § 12; R. C. 1899, § 3071a.]

Delay in unloading caused by strike. 35 L.R.A. 630.

**§ 4770. 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. [R. C. 1905, § 4385; 1895, ch. 95, § 1; R. C. 1899, § 3071b.]

**§ 4771. 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. [R. C. 1905, § 4386; 1895, ch. 95, § 2; R. C. 1899, § 3071c.]

**§ 4772. 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. [R. C. 1905, § 4387; 1899, ch. 128; R. C. 1899, § 3071d.]

**§ 4773. 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. [R. C. 1905, § 4388; 1890, ch. 123, § 2; 1892, Spl. H. B. 2, § 2; R. C. 1899, § 3071e.]

**§ 4774. 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. [R. C. 1905, § 4389; 1890, ch. 123, § 5; R. C. 1899, § 3071f.]

**§ 4775. 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. [R. C. 1905, § 4390; 1890, ch. 123, § 6; R. C. 1899, § 3071g.]

**§ 4776. 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. [R. C. 1905, § 4391; 1890, ch. 123, § 3; R. C. 1899, § 3071h.]

**§ 4777. Construct "Y's."** In all cases where any line of railroad shall cross or intersect any other line of railroad at grade in this state, 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, suitable and sufficient transfer facilities, such as waiting rooms, and "Y's," 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 transfer facilities to be borne equally by each of such railroad companies, or in such proportions as they may agree upon, or as may be determined by the board of railroad commissioners on joint hearing. [1911, ch. 242, § 1; R. C. 1905, § 4392; 1899, ch. 130; R. C. 1899, § 3071i.]

**§ 4778. Delivery to connecting line in absence of "Y."** It shall be the duty of all railroad companies to bill all freight over the shortest and cheapest route to its destination, but in the absence of a "Y" or other facilities for transferring to a connecting line over the shortest route, such freight may, at the option of the receiving railroad company, be delivered to the connecting line at some other convenient point, but in such cases the same tariff shall be applied by each railroad as if shipped over the shortest route. [1911, ch. 242, § 2.]

**§ 4779. Construction of transfer facilities ordered by railroad commissioners.** Upon failure of any railroad company to comply with either of the [two] preceding sections, it shall be the duty of the board of railroad commissioners to serve a notice upon the said railroad companies setting a time and place for a joint hearing not less than twenty nor more than thirty days from the date of service of such notice, and if, on such hearing had, the board of railroad commissioners shall deem it necessary and expedient, they shall enter an order directing such railroad companies to at once construct such transfer facilities, including waiting rooms or "Y" tracks, and the board of railroad commissioners is hereby empowered to do any and all acts necessary to the carrying into effect of the provisions of the [two] preceding sections, including power to determine, on joint hearing, after notice to such intersecting railroad companies as above provided for, the question of the necessity for said transfer facilities, also to determine the probable expense and location thereof and all matters relating thereto. Said board may determine the total expense and the just and proper proportion to be borne by each of said intersecting railroads for the erection and maintenance of said transfer facilities, if said railroad companies cannot agree thereon. For such purpose the board of railroad commissioners shall have full authority to view the site, subpoena witnesses, compel attendance and take testimony, all costs and expenses of such proceeding to be paid by such railroad companies against which the proceeding is had.

Provided, that if one intersecting railroad company shall comply with the provisions of this act [sections 4777-4780] and construct one-half of such transfer facilities as determined by the said board of railroad commissioners, the said board shall proceed against the railroad company in default in the same manner as herein provided. Provided, further, that no railroad company shall be compelled to put in such transfer facilities between the first day of December and the first day of April, when it cannot be done without grading. [1911, ch. 242, § 3.]

**§ 4780. Failure of railroad company to comply with order.** In the event of the failure to comply within sixty days after the date of service of said order, the said railroad companies shall be subject to a fine of twenty-five dollars each for each day during which they shall fail to comply with the provisions therein, or in the event of a greater charge than the rate for the short haul, the shipper or consignee may recover the overcharge, together with all cost in a civil action against the railroad companies making such overcharge, and it shall be the duty of the state's attorney in the county where such shipper or consignee may reside, to commence and prosecute or the attorney-general may commence and prosecute all actions necessary for the enforcement of this act [sections 4777-4780] and the recovery of such overcharges, costs or penalties. [1911, ch. 242, § 4.]

Attorney-general and his assistants have right to appear before grand jury and examine witnesses in regard to matters relating to prohibition law. *State ex rel. Miller v. District Ct.*, 19 N. D. 519, 124 N. W. 417, Ann. Cas. 1912D, 935.

**§ 4781. 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 ten miles or fractional part thereof, thirty cents per ton.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For any distance over eighty-five miles and not to exceed ninety miles, fifty-eight cents per ton.

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

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

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

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

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

For any distance over one hundred and fifteen miles and not to exceed one hundred and twenty miles, sixty-seven cents per ton.

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

For any distance over two hundred miles and not to exceed two hundred and ten miles, ninety-seven cents per ton.

For any distance over two hundred and ten miles and not to exceed two hundred and twenty miles, ninety-nine cents per ton.

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

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

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

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

For any distance over two hundred and sixty miles and not to exceed two hundred and seventy miles, one dollar and eleven cents per ton.

For any distance over two hundred and seventy miles and not to exceed two hundred and eighty miles, one dollar and fourteen cents per ton.

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

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

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

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

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

For any distance over three hundred and thirty miles and not to exceed three hundred and forty miles, one dollar and twenty-nine cents per ton.

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

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

For any distance over three hundred and sixty miles and not to exceed three hundred and seventy miles, one dollar and thirty-six cents per ton.

For any distance over three hundred and seventy miles and not to exceed three hundred and eighty miles, one dollar and thirty-nine cents per ton.

For any distance over three hundred and eighty miles and not to exceed three hundred and ninety miles, one dollar and forty-one cents per ton.

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

For any distance over four hundred miles and not to exceed four hundred and ten miles, one dollar and forty-seven cents per ton.

For any distance over four hundred and ten miles and not to exceed four hundred and twenty miles, one dollar and forty-nine cents per ton.

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

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

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

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

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

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

For any distance over four hundred and eighty miles and not to exceed four hundred and ninety miles, one dollar and sixty-six cents per ton.

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

Provided, that the above mentioned rates shall be for carload lots only.

In case any shipment of coal under the provisions of this section must pass over two or more lines of railroad to reach its destination, then an additional charge of two dollars and fifty cents per car for each transfer may be allowed and collected to cover cost of switching, and the total amount of freight and switching charges shall be divided among the several railroads concerned upon such basis as to them may seem just; provided, that if such railroads cannot agree among themselves upon an equitable division thereof, then the board of railroad commissioners shall decide the matter, subject to appeal to the courts. [1907, ch. 51; R. C. 1905, § 4395; 1893, ch. 101, § 1; 1895, ch. 93, § 1; R. C. 1899, § 30711; 1903, ch. 146.]

An amendment of this section vetoed in Laws 1913, ch. 302, p. 464.

Statute not violative of commerce clause of federal constitution, nor of fourteenth amendment of federal constitution, and does not violate state constitution. State ex rel. McCue v. Northern P. R. Co., 19 N. D. 45, 25 L.R.A.(N.S.) 1001, 120 N. W. 869; affirmed in Northern P. R. Co. v. North Dakota ex rel. McCue, 216 U. S. 579, 54 L.ed. 624, 30 Sup. Ct. Rep. 423.

Right of state to regulate local rates of interstate carrier sustained. Minnesota Rate Cases (Simpson v. Shepard), 230 U. S. 352, 57 L.ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

Legislative power to regulate railroad rates. 33 L.R.A. 179; 6 L.R.A.(N.S.) 834.

**§ 4782. 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. [R. C. 1905, § 4396; 1893, ch. 101, § 2; 1895, ch. 93, § 2; R. C. 1899, § 3071m.]

**§ 4783. 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 4781, upon demand of the board of railroad commissioners to commence and prosecute all actions necessary for the enforcement of the provisions of such section. [R. C. 1905, § 4397; 1895, ch. 93, § 3; R. C. 1899, § 3071n.]

Right of attorney-general or other representative of state to maintain action to enforce or prevent violation of statutory regulations affecting rates, etc. 18 L.R.A.(N.S.) 664.

## ARTICLE 22.—RAILROADS TO MAINTAIN TELEPHONE CONNECTIONS.

§ 4784. **Railroads to maintain telephone connection.** Every railroad corporation or common carrier shall provide, furnish and maintain in all of their freight and ticket offices in all towns, cities and villages in this state, where there is a local telephone exchange and where such service is available, reasonable and adequate telephone connections for the use and benefit of its patron. [1911, ch. 252, § 1.]

Duty of railroad company to install telegraph or telephone in its station. 47 L.R.A. (N.S.) 974.

§ 4785. **Penalty.** Any railroad corporation or common carrier violating the provisions of this act shall be fined not less than one hundred dollars nor more than two hundred dollars for each offense, and it shall be the duty of the state's attorney upon orders from the railroad commissioners or upon complaint of any citizen, to commence and prosecute all actions necessary for the enforcement of this article. [1911, ch. 252, § 2.]

## ARTICLE 23.—REMOVING LOADED CARS FROM SIDETRACKS.

§ 4786. **Loaded cars must be removed. Notice required.** Whenever any car shall be loaded with any kind of grain for shipment on any spur or sidetrack of any railroad in this state of North Dakota, it shall be the duty of such railroad or common carrier within forty-eight hours from the time of receiving written notice that said car is ready to be billed for shipment, giving in such notice the name of the consignee, the consignor, the number of the car and the place where the same stands and the place to which car is to be shipped, which notice shall be given to the station agent of the station nearest the place where said car is located on the line of road over which said car is to be shipped, bill said car or cars as provided in said notice and mail to the shipper a shipping bill thereof directed to the post office address given in such notice, and to remove said car or cars from the said sidetrack or spur where the same has been loaded for shipment. [1909, ch. 192, § 1.]

§ 4787. **Penalty.** Every railroad or common carrier who neglects or fails to comply with the provisions of this article shall be liable to the owner of the grain mentioned in section 4786 in the sum of fifty dollars for each twenty-four hours that shall elapse after the time mentioned in this article for billing and removing from said spur or sidetrack, to be collected in a civil action in the name of the owner of such grain. [1909, ch. 192, § 2.]

§ 4788. **Carrier liable for loss.** Should any of the grain mentioned in section 4786 be stolen or destroyed at any time after the giving of the notice in this article provided for, the common carrier to whom such notice shall have been given, shall be liable to the owner of such grain for any loss so occasioned and for any loss caused by fire, to be recovered in a civil action in the name of the owner of such grains. [1909, ch. 192, § 3.]

## ARTICLE 24.—DAILY TRAINS; RECIPROCAL DEMURRAGE.

§ 4789. **Daily local passenger trains. Penalty for failure to run.** It shall be the duty of every railroad corporation operating a line or lines of railroad within this state, except branch lines that may hereafter be constructed, whether such lines are wholly or partly within this state and partly within other states or foreign country, to move over its line or lines of road within this state, each way on every business day of the year, at least one local passenger train to consist of not less than one engine and tender and combination mail, express and baggage car and two passenger coaches, and at least one freight train; provided, however, that if any railroad corporation shall make it appear to the board of railroad commissioners of this state that the business on any line of its road will not justify its operating both the passenger and freight train herein provided for and said board shall so order, such com-

pany may operate one mixed train on such line each way on every business day in the year for such time as said board may direct; provided, further, that such mixed train shall be supplied with not less than one passenger coach and one combination baggage and passenger coach for the accommodation of passengers. For each and every violation of the provisions of this section the railroad company shall be subject to a fine of five hundred dollars. [1907, ch. 200, § 1.]

**§ 4790. Reception of freight. Demurrage for delay in shipment.** It shall be the duty of every railroad corporation operating its road within this state to receive any and all freight offered to it, at any of its stations within this state for transportation to another point within this state, and to deliver to the person offering such freight for transportation a proper receipt therefor showing the time such freight is received, and such railroad corporation shall deliver such freight at its destination by the next schedule train; provided, such freight is offered to such railroad corporation between the hours of eight o'clock a. m. and five o'clock p. m. on any business day, and at least two hours before the time the next local freight train is scheduled to leave such station to the station or point where such freight is to be delivered; provided, further, that any articles of freight weighing one thousand pounds or more each shall be delivered at such station not less than four hours prior to the time that such scheduled train is due to depart; provided, further, that any condition in any contract made a part of any shipping bill, or receipt, which in any way purports to release such railroad corporation from its duty under this act shall be null and void; and provided, further, that any railroad corporation refusing or failing to deliver to such person so offering such freight such receipt when demanded, shall be liable to such person in the sum of one hundred dollars, and any railroad corporation failing or refusing to deliver such freight at its destination as herein provided, shall forfeit ten per cent of the charges for transporting such freight for each twenty-four hours that such freight is delayed; provided, further, that if such freight does not reach its destination for sixty hours after the scheduled time for its arrival, as herein provided, barring accidents and the elements, the consignee may refuse to receive same and such railroad corporation shall be liable to the owner for the value of such freight, together with such damages as the parties may sustain by reason of such delays, same to be recovered in a civil action. Upon payment as above provided the railroad corporation shall become at once the absolute owner of said property. [1907, ch. 200, § 2.]

*Effect of strike on carrier's liability for delay in transportation.* 35 L.R.A. 624.

**§ 4791. Demurrage in case of delay in carload shipments.** Every railroad corporation operating a line or lines of road through or within this state shall furnish suitable cars for car load shipments of freight to any person, persons or corporation, applying therefor to any agent, within this state, of said railroad corporation, and such car or cars shall be placed in a suitable and convenient place for loading within seventy-two hours after application therefor has been made; provided, that no railroad company shall be required to furnish to any person or corporation more than two cars at any one time. Any railroad corporation failing or refusing to furnish such car or cars and failing or refusing to so place such car or cars in a suitable and convenient place for loading within seventy-two hours after such demand, and after the schedule time of its trains will enable it to deliver such car or cars, shall forfeit for each car so ordered to such person, persons or corporation the sum of two dollars for each and every twenty-four hours until such car or cars are so furnished; provided, however, that such person, persons or corporation applying for cars to be used wholly within this state shall, at the time of applying therefor, pay or tender to such railroad corporation not less than twenty per cent of the freight charges for such car according to said railroad corporation's published tariff. [1907, ch. 200, § 3.]

**§ 4792. Demurrage in case of delay in carload shipments within the state.** Whenever any person, persons or corporation shall have loaded any car or cars for transportation wholly within this state, they shall at once deliver same to the railroad corporation by notifying it that said car or cars are ready for shipment and it shall be the duty of such railroad corporation to deliver to such person, persons or corporation a shipping bill, or receipt, for such car or cars, showing the time same was so delivered, and it shall be the duty of said railroad corporation to forward said car by its next scheduled local freight train leaving such station to the station or place to which such car or cars are to be delivered and to deliver same to its destination at the time designated in its schedule of trains for the line or lines over which said train shall pass and said railroad corporation shall forfeit to such shipper ten per cent of the freight on such car or cars for each twenty-four hours such car shall be delayed, as shown by the time same was received and the schedule time of such train or trains; provided, such car or cars were delivered to the railroad company at least three hours before the departure according to the schedule of such train or trains, and if such car or cars are not delivered within sixty hours after the time of arrival of the next scheduled local train after such car or cars are so delivered, barring accidents and the elements, the consignee may refuse to accept same and such railroad corporation shall be liable to the owner for the value of the freight so shipped, together with such damages as the parties may sustain, same to be recovered in a civil action. [1907, ch. 200, § 4.]

**§ 4793. Definition of phrases.** In the construction of this article, the phrase "railroad" shall be construed to include all common carriers, railroads and railways operated by steam, whether used or operated by the corporation owning them or by other corporations or otherwise. The phrase "railroad corporation" shall be construed to mean the corporation which constructs, maintains, uses or operates a railroad operated by steam power, and used for the transportation of persons or property, or leases cars by whatever name known to such railroad for such purposes. [1907, ch. 200, § 5.]

**§ 4794. Costs allowed in action for violation of law.** In any action commenced under this article the plaintiff shall in connection with the usual costs allowed in civil actions, be entitled to the same mileage and witness fees as any witness in the case, and the court shall allow a reasonable amount as an attorney's fee, same to be taxed as costs in this action; provided, however, that nothing in this article shall be construed to stop or hinder any person, persons or corporation from bringing suits against any corporation for any violation of all of the laws of this state, or of the United States, for the government of railroads. [1907, ch. 200, § 6.]

**§ 4795. Provisions of act cumulative.** Nothing in this article contained shall in any manner be construed as repealing or in any manner altering any other act, or part of act, heretofore adopted by the legislature of this state, but the remedies herein provided shall be cumulative to all other remedies now existing. [1907, ch. 200, § 7.]

#### ARTICLE 25.—MAXIMUM TRANSPORTATION RATES.

**[§ 4796. Two and one-half cents a mile and family mileage books.** Every railroad, railroad corporation and common carrier doing business in this state, their officers, agents, representatives, employes, trustees, receivers and lessees shall be limited to a compensation of not to exceed two and one-half cents per mile for distances exceeding six miles, for the transportation of any person with ordinary baggage not exceeding one hundred and fifty pounds in weight; and for children five years of age and less than twelve years of age, one-half of the fare charged for adults; and for children under five years old who are traveling with an adult paying full fare no charge shall be made; provided, that every railroad, railroad corporation and common carrier doing business

in this state shall issue upon request of any person, mileage books in denomination of one thousand miles, limited to not less than one year from date of issue and redeemable within one year after the expiration of such limitation, with baggage and other facilities similar to those accompanying regular trip tickets, at a price of twenty dollars each; that such mileage books shall be good for travel by the purchaser and such adult members of his family as he may designate and whose names are then and there written thereon, but the fare shall always be made that multiple of five nearest reached by multiplying the rate by the distance; provided, further, that the provisions of this act shall not apply to the transportation of passengers within the boundaries of any city by street railway companies. Every officer, agent, conductor, representative or any employe of any railroad, railroad corporation or common carrier who shall aid or abet any such railroad, railroad corporation or common carrier in the violation of this act by selling, charging or collecting for any ticket or transportation over any railroad any greater sum, charge or rate than that above specified shall be deemed personally guilty of a violation of this article and, upon conviction, shall be punished as hereinafter provided. The sum of ten cents may be added to the legal fare when the same is paid on the cars, provided that a reasonable opportunity has been afforded to passengers to purchase tickets at the legal rate of fare before boarding the train.] [1907, ch. 199, § 1.]

Provision as to mileage book held unconstitutional as not giving railroad companies due process of law. *State ex rel. McCue v. Great Northern R. Co.*, 17 N. D. 370, 116 N. W. 89.

Validity of statute requiring issuance of mileage books at reduced rates. 7 L.R.A. (N.S.) 1086.

**§ 4797. Compulsory testimony.** No person and no officer, agent, representative or employe of any railroad, railroad corporation or common carrier shall be excused from testifying or producing books and documents in his possession in relation to any violation of this article on the ground that such testimony, books or documents would tend to convict the person so testifying of a crime; but no person so testifying shall be liable to prosecution or punishment for any offense concerning which he has been required to testify or to produce books or documents. [1907, ch. 199, § 2.]

**§ 4798. Penalty.** Every such railroad, railroad corporation or common carrier violating any of the provisions of this article shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars; and any agent or officer so offending shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars or by imprisonment in the county jail for not less than thirty days or more than ninety days, or by both such fine and imprisonment in the discretion of the court. [1907, ch. 199, § 3.]

#### ARTICLE 26.—PROHIBITING OF FREE PASSES.

**§ 4799. Free passes, franks and special privileges prohibited. Exceptions.** No common carrier subject to the provisions of this article, shall, directly or indirectly, issue or give any free ticket, free pass or free transportation for passengers except to its employes and their families, its officers, bona fide agents, surgeons, physicians and attorneys at law on the pay roll of the common carrier; to ministers of religion, traveling secretaries of railroad, Young Men's Christian Association, inmates of hospitals and charitable, eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals and the necessary agents employed in such transportation; to inmates of national homes or state homes for disabled volunteer soldiers, and of soldiers' and sailors' homes, including those about to enter and those returning home after discharge; to necessary

care-takers of live stock, poultry, milk, fruit and vegetables; to employes on sleeping cars, express cars, and to linemen of telegraph and telephone companies if operated in connection with said common carriers; to railway mail service employes, post office inspectors, custom inspectors and immigration inspectors; to news boys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested; to persons injured in wrecks and physicians and nurses attending such persons.

Provided, further, that the provisions of this article shall not be construed to prohibit or make unlawful the transportation of city policemen, firemen, mail carriers and postmen on the street railways in the cities of this state.

Provided, further, that the provisions of this article shall not be construed to make unlawful the granting of reduced homeseekers' rates or the granting of round trip excursion rates to any class of persons, provided that all persons of that class shall be allowed equal privileges in respect to such homeseekers' or excursion rates, but excursion rates shall not be allowed any persons or representatives of any political party to enable them to attend any political meeting either as delegates or otherwise.

Provided, further, that the provisions of this article shall not be construed to make unlawful the granting of free transportation to persons engaged in the state geological survey, farmers' institute lecturers, and persons rendering service on "good farming special trains."

Provided, further, that the provision shall not be construed to prohibit the interchange of passes for officers, agents and employes of common carriers and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence or other calamitous visitation; and

Provided, further, that this provision shall not be construed to prohibit the privilege of passes or franks or the exchange thereof with each other for the officers, agents, employes and their families, of express companies, and their officers, agents, employes and families of other common carriers subject to the provision of this article;

Provided, further, that the term "employes" as used in this paragraph, shall include furloughed, pensioned and superannuated employes, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier, and the ex-employes traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph, shall include the families of those persons named in this provision, also the families of persons killed and the widows during the widowhood and minor children during minority, of persons who died while in the service of any such common carrier. [1911, ch. 138, § 1.]

Is pass issued as part of consideration for contract within statute prohibiting free transportation of passengers or discrimination in passenger rates? 23 L.R.A.(N.S.) 217; 31 L.R.A.(N.S.) 657.

**§ 4800. Penalty.** Any common carrier violating any of the provisions of this article 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 more than five hundred (\$500.00) dollars for each offense; and any person other than the persons excepted in this article who uses any such free ticket, free pass or free transportation, shall be subject to a like penalty. [1911, ch. 138, § 2.]

#### ARTICLE 27.—TRANSPORTATION OF LIVE STOCK.

[§ 4801. **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.] [R. C. 1905, § 4398; 1903, ch. 144, § 1.]

This and the following section were held unconstitutional as an unreasonable exercise of the police power. *Downey v. Northern P. R. Co.*, 19 N. D. 621, 26 L.R.A.(N.S.) 1017, 125 N. W. 475.

Constitutionality of statute fixing minimum rate of speed at which carrier may transport special kinds of freight. 26 L.R.A.(N.S.) 1018.

Liability for injuries to animals during transportation. 67 Am. Dec. 208; 12 Am. Rep. 500.

**[§ 4802. 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 4801, 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.] [R. C. 1905, § 4399; 1903, ch. 144, § 2.]

#### ARTICLE 28.—PERSONAL INJURY.

**§ 4803. 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. [R. C. 1905, § 4400; 1903, ch. 131.]

Applicable only to employes engaged in operating railroads. *Beal v. Northern P. R. Co.*, 15 N. D. 318, 108 N. W. 33, 11 A. & E. Ann. Cas. 321.

This action does not invalidate a contract made by a circus company to absolve the carrier from all liability for damages to its property or persons travelling with the circus by reason of the negligence of the carrier. *Sager v. Northern Pac. R. Co.*, 166 Fed. 526.

#### ARTICLE 29.—FELLOW SERVANT AND CONTRIBUTORY NEGLIGENCE ACT.

It is to be observed that this article is not limited to railroad or other corporations.

**§ 4804. Liability of common carriers.** Every common carrier shall be liable to any of its employes, or in case of the death of an employe, to his personal representative, for the benefit of his widow, children or next of kin, for all damages which may result from the negligence of any of its officers, agents or employes, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works. [1907, ch. 203, § 1.]

Liability of railroad to trainmen injured by overhead structure. 47 L.R.A.(N.S.) 483.

Liability of railroad to watchman or flagman for injuries caused by passing trains. 48 L.R.A.(N.S.) 150.

Injury to railroad employe by torpedoes on track. 16 L.R.A.(N.S.) 1084.

What constitutes a defect in the "ways" of a railroad company within meaning of employers' liability acts. 19 L.R.A.(N.S.) 738.



Duty and liability under federal and state railway safety appliance acts. 20 L.R.A. (N.S.) 473; 41 L.R.A. (N.S.) 49.

Assumption by train employe of risks due to defects in tracks or roadbed. 28 L.R.A. (N.S.) 1255.

—of risk of unblocked switches. 48 L.R.A. 72; 16 L.R.A. (N.S.) 717.

Who may raise question that employers' liability law involves unconstitutional discrimination. 32 L.R.A. (N.S.) 958.

Master's liability for vice-principal's negligence in manipulating switch, injuring servant. 54 L.R.A. 129.

Duty to keep switch closed as a delegable duty. 17 L.R.A. (N.S.) 542.

Master's liability for negligence of coservant in respect to defective switches. 54 L.R.A. 170.

Abrogation of defense of fellow-servant doctrine by federal employers' liability act. 47 L.R.A. (N.S.) 60.

Validity of statute abrogating fellow-servant rule. 12 L.R.A. (N.S.) 1040; 47 L.R.A. (N.S.) 84.

Is a street or interurban railway affected by abrogation of fellow-servant rule as to "railroads." 17 L.R.A. (N.S.) 117.

Applicability to private railroad, of enactment abrogating fellow-servant rule as to "railroads." 15 L.R.A. (N.S.) 479; 45 L.R.A. (N.S.) 841.

What constitutes operation of railroad under statutes abrogating fellow-servant rule for railroads. 1 L.R.A. (N.S.) 696.

What is a railroad hazard within statutes abolishing or restricting fellow-servant rule as to railroad employes. 18 L.R.A. (N.S.) 478; 22 L.R.A. (N.S.) 969.

State statute modifying fellow-servant rule as an interference with interstate commerce. 15 L.R.A. (N.S.) 134.

Employes and employments within the purview of statutes abrogating the fellow-servant rule. 47 L.R.A. (N.S.) 113.

Right of servant to rely on promise of master to discharge incompetent or careless fellow servant. 47 L.R.A. (N.S.) 1220.

**§ 4805. Contributory negligence no bar to recovery, when.** In all actions hereinafter brought against any common carrier to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. All questions of negligence and contributory negligence shall be for the jury. [1907, ch. 203, § 2.]

Contributory negligence in entering or remaining in employment. 49 L.R.A. 33.

Negligence of employe in stepping between moving cars. 41 L.R.A. (N.S.) 32.

Walking in front of moving car to prepare coupling. 10 L.R.A. (N.S.) 881.

Venturing with hand car on track over which other train has the right of way. 1 L.R.A. (N.S.) 1014.

Contributory negligence of watchman or flagman injured by passing trains. 48 L.R.A. (N.S.) 152.

Contributory negligence of trainman injured by overhead structure. 47 L.R.A. (N.S.) 494.

Negligence in going, without previous notice, under or between cars liable to be moved at any time. 46 L.R.A. (N.S.) 877.

Duty of employe engaged in repairing or cleaning track to look out for his own safety. 6 L.R.A. (N.S.) 646.

Contributory negligence in failing to remember dangerous conditions. 41 L.R.A. (N.S.) 79.

Employe's right to rely on statute requiring signal to be given by train approaching crossing. 40 L.R.A. (N.S.) 1105.

Availability of defense of contributory negligence under safety appliance acts. 20 L.R.A. (N.S.) 483; 41 L.R.A. (N.S.) 57.

Abrogation of defense of contributory negligence by federal employers' liability act. 47 L.R.A. (N.S.) 61; 48 L.R.A. (N.S.) 987.

**§ 4806. Contracts to avoid liability void.** No contract of employment, insurance, relief benefit or indemnity for injury or death entered into by or on behalf of any employe, nor the acceptance of any such insurance, relief benefit or indemnity by the person entitled thereto shall constitute a bar or defense to any action brought to recover damages for personal injuries to or death of such employe; provided, however, that upon the trial of said action against any common carrier, the defendant may set off therein any sum it has con-

tributed toward any such insurance, relief benefit or indemnity that may have been made to the injured employe, or in case of his death, to his personal representative. [1907, ch. 203, § 3.]

Validity of contract exonerating master in advance from liability for negligent injuries to servant. 7 L.R.A.(N.S.) 537.

Contract requiring servant to elect between acceptance of benefits out of a relief fund and a prosecution of his claim in an action for damages. 11 L.R.A.(N.S.) 182; 48 L.R.A.(N.S.) 440.

Constitutionality of statute forbidding the avoidance of liability to employe, or reduction of his damages, by relief or indemnity contract. 33 L.R.A.(N.S.) 706; 38 L.R.A.(N.S.) 867.

Effect of federal employers' liability act on validity of contracts exempting master from liability. 47 L.R.A.(N.S.) 50.

**§ 4807. Time of action limited.** No action shall be maintained under this article unless commenced within one year from the time the cause of action accrued. [1907, ch. 203, § 4.]

#### ARTICLE 30.— MISCELLANEOUS.

**§ 4808. 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. [R. C. 1905, § 4401; 1899, ch. 127, §§ 1, 2; R. C. 1899, § 3072a.]

Liability for injury to person wrongfully on train by collusion with train employe. 5 L.R.A.(N.S.) 1025; 37 L.R.A.(N.S.) 419.

**§ 4809. Penalty.** Any person violating any of the provisions of section 4808 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. [R. C. 1905, § 4402; 1899, ch. 127, § 3; R. C. 1899, § 3072a.]

**§ 4810. 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. [R. C. 1905, § 4403; 1899, ch. 127, §§ 4, 5, 6; R. C. 1899, § 3072b.]

**§ 4811. 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. [R. C. 1905, § 4404; 1899, ch. 127, § 7; R. C. 1899, § 3072c.]

## CHAPTER 15.

## URBAN ELECTRIC RAILWAYS.

§ 4812. **Granted right of condemnation.** Urban electric railways are hereby specifically granted and given the same rights, privileges and powers granted and given to steam railways in this state, including the right of organization and of condemnation of real property for right of way; provided, that when they shall exercise the right of eminent domain they shall become subject to the laws, rules and regulations governing other public corporations having the right of eminent domain; provided, further, that no person, firm or corporation shall hereafter construct any electric railway on any street of any city that is now or hereafter may be incorporated under the general laws of this state, without first securing and filing in the office of the city auditor of such city the consent in writing of the owners of at least one-half of the property abutting on both sides of such street for the full length of such proposed construction. [1911, ch. 241; 1907, ch. 212.]

## CHAPTER 16.

## RAILROAD AND TELEPHONE COMPANIES TO FILE INFORMATION.

§ 4813. **Railroad and telephone companies shall file maps and information.** That each railroad company and each telephone company located and doing business in this state, file in the office of the county auditor of each county a map showing:

First. The exact location of such companies' lines, and showing on which side of section and other lines, its property is located in each assessment district and school district in each county.

Second. A description of any other property owned by said companies in each assessment district and school district in each county.

Third. Telephone companies to show separately the number of miles of poles and of each kind of wire and the number of telephone instruments in each assessment district and school district. [1911, ch. 249, § 1.]

§ 4814. **County map, auditor to send.** The county auditor of each county in the state shall, each year, on or before the first day of March, mail to each railroad or telephone company, doing business in his county, an accurate map of the county, showing the boundaries of each assessment district and school district. [1911, ch. 249, § 2.]

§ 4815. **Information to be filed.** Every railroad company and every telephone company shall on or before the fifteenth day of February, in each year, file in the office of the county auditor, of each county in the state, in which said companies' lines are located, the name of its company, the principal place of doing business, the names of its president, secretary and treasurer, together with their post office address. [1911, ch. 249, § 3.]

§ 4816. **County auditor to report to state auditor.** The county auditor of each county shall, on or before the first day of June, in each year, report to the state auditor, the names of all such companies so filing reports and their officers and such other information as may be required by the state auditor. [1911, ch. 249, § 4.]

§ 4817. **Company shall report to state auditor.** Each of said companies shall on or before July first and at any other time, in each year, report to the state auditor, such information in regard to its mileage and other property owned in the state, as such state auditor or the state board of equalization shall require. [1911, ch. 249, § 5.]

§ 4818. **Maps when filed.** Every such company located or doing business in the state at the date of the approval of this act [chapter], shall immediately on

receipt of the maps referred to in section 4814, furnish complete and full information required by this act [chapter]. In subsequent years said companies need only file maps showing any changes that have been made since the report of the previous year. [1911, ch. 249, § 6.]

**§ 4819. Duties of companies organized.** All railroad and telephone companies, locating in and commencing and doing business in this state, after the passage of this act [chapter], must file reports with the county auditor, state auditor and state board of equalization as required of companies now located and doing business in the state. [1911, ch. 249, § 7.]

**§ 4820. Duty of county and state officers.** In case the said companies or any of them fail to make the reports herein provided for, the county auditor, state auditor or state board of equalization are hereby authorized, and it is hereby made the duty of said officers and board to procure such information, and report the expense in detail of procuring said information, to the state's attorney of his county or the attorney-general of the state, whose duty it shall be to collect same by civil action as provided in section 4821. [1911, ch. 249, § 8.]

**§ 4821. Penalty.** Every railroad or telephone company which neglects or fails to comply with the provisions of this act [chapter] shall be liable to fine of not more than five hundred dollars, or less than fifty dollars and shall also be liable for the expense incurred by said officers or board in procuring the information in any other manner than provided herein, to be collected in a civil action in the name of the state. [1911, ch. 249, § 9.]

## CHAPTER 17.

### WAGON ROAD CORPORATIONS.

**§ 4822. 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. [R. C. 1905, § 4405; Civ. C. 1877, § 486; R. C. 1899, § 3073.]

Construction and maintenance for over fifteen years of a toll road by private corporation is prima facie evidence of ownership. *Lawrence County v. Toll Road Co.*, 11 S. D. 74, 75 N. W. 817.

As to similar provision in Cal. Civ. Code, § 512, see *Blood v. Woods*, 95 Cal. 78, 30 Pac. 129.

**§ 4823. 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. [R. C. 1905, § 4406; Civ. C. 1877, § 487; R. C. 1899, § 3074.]

**§ 4824. 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. [R. C. 1905, § 4407; Civ. C. 1877, § 488; R. C. 1899, § 3075.]

Rights and duties of toll-bridge proprietors. 58 L.R.A. 155; 30 L.R.A.(NS.) 360.

Right to take toll on road within a city. 15 L.R.A. 651.

As to similar provision in Cal. Civ. Code, § 514, see *Stony Hill Turnp. Road Co. v. Placer County*, 88 Cal. 632, 26 Pac. 513.

**§ 4825. 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. [R. C. 1905, § 4408; Civ. C. 1877, § 489; R. C. 1899, § 3076.]

**§ 4826. 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. [R. C. 1905, § 4409; Civ. C. 1877, § 490; R. C. 1899, § 3077.]

**§ 4827. 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. [R. C. 1905, § 4410; Civ. C. 1877, § 491; R. C. 1899, § 3078.]

**§ 4828. 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. [R. C. 1905, § 4411; Civ. C. 1877, § 492; R. C. 1899, § 3079.]

As to similar provision in Cal. Civ. Code, § 518, see *Brown v. Rice*, 51 Cal. 489.

**§ 4829. 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. [R. C. 1905, § 4412; Civ. C. 1877, § 493; R. C. 1899, § 3080.]

**§ 4830. 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. [R. C. 1905, § 4413; Civ. C. 1877, § 494; R. C. 1899, § 3081.]

**§ 4831. 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 4824. When the repayment of the costs of construction is com-

pleted, 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. [R. C. 1905, § 4414; Civ. C. 1877, § 495; R. C. 1899, § 3082.]

**§ 4832. 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. [R. C. 1905, § 4415; Civ. C. 1877, § 496; R. C. 1899, § 3083.]

As to similar provision in Cal. Civ. Code, § 522, see *Welsh v. Plumas County*, 80 Cal. 338, 22 Pac. 254.

**§ 4833. 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. [R. C. 1905, § 4416; Civ. C. 1877, § 497; R. C. 1899, § 3084.]

As to similar provision in Cal. Civ. Code, § 523, see *People ex rel. El Dorado County v. Davidson*, 79 Cal. 166, 21 Pac. 538.

## CHAPTER 18.

### INSURANCE CORPORATIONS.

- ARTICLE 1. GENERAL PROVISIONS, § 4834.**
2. PROVISIONS COMMON TO ALL DOMESTIC INSURANCE COMPANIES, §§ 4835-4845.
  3. DOMESTIC LIFE INSURANCE COMPANIES TO DEPOSIT SECURITIES WITH INSURANCE COMMISSIONER, §§ 4846-4852.
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  10. PROVISIONS PECULIAR TO DOMESTIC STOCK INSURANCE COMPANIES, §§ 4863-4869.
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  18. PROVISIONS COMMON TO ALL INSURANCE COMPANIES, §§ 4914-4930.
  19. REPORTS OF LIFE INSURANCE COMPANIES, § 4931.
  20. COUNTY MUTUAL COMPANIES, §§ 4932-4950.
  21. LIVE STOCK, §§ 4951-4956.
  22. CHATTEL MORTGAGES IN APPLICATIONS, §§ 4957, 4958.
  23. LICENSING INSURANCE AGENTS, §§ 4959, 4960.
  24. RESIDENT AGENTS FOR TRANSACTION OF FIRE INSURANCE BUSINESS, §§ 4961-4964.

## ARTICLE 1.—GENERAL PROVISIONS.

§ 4834. **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. 1905, § 4417; R. C. 1899, § 3085.]

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

§ 4835. **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. 1905, § 4418; R. C. 1895, § 3086.]

§ 4836. **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. [R. C. 1905, § 4419; 1895, ch. 69, § 1; 1891, ch. 73, § 1; R. C. 1895, § 3087.]

§ 4837. **Articles. Contents.** The articles of incorporation shall set forth in addition to what is required to be set forth in section 4505 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. [R. C. 1905, § 4420; 1885, ch. 69, § 4; R. C. 1895, § 3038.]

§ 4838. **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. [R. C. 1905, § 4421; 1885, ch. 69, § 4; R. C. 1895, § 3089.]

§ 4839. **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. [R. C. 1905, § 4422; 1885, ch. 69, § 11; R. C. 1895, § 3090.]

Taking of applications in mutual insurance company is necessary step in formation, and is required to be done before issuance of a certificate to commence business. *Montgomery v. Harker*, 9 N. D. 527, 84 N. W. 369.

**§ 4840. Reinsurance.** Any domestic insurance company shall have power to effect reinsurance of any risks taken by it. [R. C. 1905, § 4423; 1885, ch. 69, § 2; 1889, ch. 69, § 1; R. C. 1895, § 3091.]

Liability of reinsurer. 44 L.R.A. (N.S.) 317.

**§ 4841. 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. [R. C. 1905, § 4424; 1885, ch. 69, § 5; R. C. 1895, § 3092.]

**§ 4842. 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. [R. C. 1905, § 4425; 1885, ch. 69, § 10; 1889, ch. 69, § 3; R. C. 1895, § 3093.]

**§ 4843. 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 reinvest 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. [R. C. 1905, § 4426; 1885, ch. 69, § 9; 1889, ch. 69, § 2; R. C. 1895, § 3094; 1905, ch. 122.]

§ 4844. **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. [R. C. 1905, § 4427; 1885, ch. 69, § 13; R. C. 1895, § 3095.]

§ 4845. **Penalty for violation of section 4426.** Any director or officer making or authorizing an investment or loan in violation of section 4843 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 4914. [R. C. 1905, § 4428; R. C. 1895, § 3096.]

ARTICLE 3.—DOMESTIC LIFE INSURANCE COMPANIES TO DEPOSIT SECURITIES  
WITH INSURANCE COMMISSIONER.

§ 4846. **Annual statement.** The president or vice-president and secretary or actuary or a majority of the directors of each company organized under the laws of this state shall annually, by the first Monday in February, prepare under oath and file in the office of the commissioner of insurance a statement of its affairs for the year terminating on the thirty-first day of December, preceding, showing:

1. The name of the company and where located.
2. The names of its officers.
3. The amount of capital, if a stock company.
4. The amount of capital paid in, if a stock company.
5. The value of real estate owned by the company.
6. The amount of cash on hand.
7. The amount of cash deposited in banks, giving the name of the bank or banks.
8. The amount of cash in the hands of agents and in the course of transmission.
9. The amount of bonds of the United States, and all other bonds and securities, giving names and amounts with the par and market value of each kind.
10. The amount of loans secured by first mortgage on real estate and where such real estate is situated.
11. The amount of all other bonds, loans, how secured, and the rate of interest.
12. The amount of premium notes and their value on policies in force, if a mutual company.

13. The amount of notes given for unpaid stock, and their value in detail, if a stock company.
14. The amount of assessments unpaid on stock or premium notes.
15. The amount of interest due and unpaid.
16. The amount of all other securities.
17. The amount of losses due and unpaid.
18. The amount of losses adjusted but not due.
19. The amount of losses unadjusted.
20. The amount of claims for losses resisted.
21. The amount of money borrowed and evidences thereof.
22. The amount of dividends unpaid on stock.
23. The amount of dividends unpaid on policies.
24. The amount required to safely reinsure all outstanding risks.
25. The amount of other claims against the company.
26. The amount of net cash premiums received.
27. The amount of notes received for premiums.
28. The amount of interest received from all sources.
29. The amount of moneys received from all other sources.
30. The amount paid for losses.
31. The amount of dividends paid to policyholders, and the amount to stockholders, if a stock company.
32. The amount of commissions and salaries paid to agents.
33. The amount paid to officers for salaries and other compensation.
34. Amount paid for taxes.
35. The amount of all other payments and expenditures.
36. The greatest amount insured on any one life.
37. The amount deposited in other states or territories as security for policyholders therein, stating the amount in each state or territory.
38. The amount of premiums received in this state during the year.
39. The amount paid for losses in this state during the year.
40. The whole number of policies issued during the year, with the amount of insurance effected thereby, the total amount of risk.
41. All other items of information necessary to enable the commissioner of insurance to correctly estimate the cash value of policies or to judge of the correctness of the valuation thereof. [1909, ch. 150, § 1.]

**§ 4847. Commissioner ascertains value of policies. Securities to be deposited.** As soon as practicable after the filing of such statement the insurance commissioner shall ascertain the net cash value of every policy in force upon the basis of the American table of mortality and four and one-half per cent interest, or actuaries combined experience table of mortality and four per cent interest, in all companies organized under the laws of this state. The company may make such valuation and make and file the same with such annual statement, and it shall be received by the insurance commissioner upon satisfactory proof of its correctness. The net cash value of all policies in force in any such company being ascertained, the insurance commissioner shall notify it of the amount, and within thirty days thereafter, the officers thereof shall deposit with the insurance commissioner the amount of the ascertained value in the securities specified in chapter 156 of the session laws of 1907 [sections 4861, 4862 herein]; provided, however, that no stock company organized under the laws of this state shall be required to make a deposit of such securities in an amount exceeding one hundred thousand dollars; and when securities in that amount shall have been deposited then such insurance company may, and the insurance commissioner shall accept, in lieu of further deposit, a detailed, verified statement setting forth a list of the items of security held by such insurance company with sufficient particularity; and such securities so specified in such list, although retained by such insurance company, shall be kept separate and distinct from its other securities and

shall be held as a deposit for the policyholders of said company under the provisions of this section. The insurance commissioner may at any time make a personal examination of the books, papers, securities and business of any such life insurance company or authorize any other suitable person to make the same, and he or the person so authorized may examine under oath any officer or agent of the company, or others, relative to its business and management. If upon such examination the insurance commissioner is of the opinion that the company is insolvent, or that its condition is such as to render a further continuance of its business hazardous, then the insurance commissioner may require such insurance company to forthwith deposit in its office all of such securities so listed and specified in said list, and not deposited; provided, however, that nothing therein contained shall be construed as preventing or prohibiting any domestic life insurance company from depositing such securities in an amount to exceed the cash value of its policies. [1909, ch. 150, § 2.]

**§ 4848. Certificate of authority.** On receipt of such deposit and statement and such detailed list of securities provided for in the preceding section, all of which shall be renewed annually, by the first Monday in February, the insurance commissioner shall issue a certificate to the effect that such insurance company does business under the compulsory reserve deposit law of the state of North Dakota, and maintains in accordance with section two of said law, in the office of the insurance commissioner of the state of North Dakota, a deposit of an amount in excess of the net cash value of all outstanding policies in stipulated and highclass securities, deposited for the protection of the policyholders of said company, which certificate shall expire on the thirty-first day of March of the ensuing year. Such certificate shall be renewed annually upon a renewal of the deposit or statement provided for under the preceding sections, and upon compliance with the conditions above required. The insurance commissioner shall receive the sum of five dollars for issuing such certificate; provided, that a copy of such certificate may be attached to any policy of insurance hereafter or heretofore issued by any life insurance company organized under the laws of this state, upon its compliance with the provisions of this article. [1909, ch. 150, § 3.]

**§ 4849. On default securities vest in policyholders.** The securities of a defaulting or insolvent company or a company against which proceedings are pending for dissolution, on deposit shall vest in the state for the benefit of the policies on which such deposit is made or were made, and the proceeds of the same shall, by order of the court upon final hearing be divided among the holders thereof in the proportion of the last annual valuation of the same, or at any time be applied to the purchase of reinsurance for their benefit. [1909, ch. 150, § 4.]

**§ 4850. Securities may be exchanged.** Companies shall have the right at any time to change the securities on deposit by substituting a like amount of the character required in the first instance. If the annual valuation of the policies in force shows them to be less than the amount of the security deposited, then the company may withdraw such excess, but twenty-five thousand dollars must always remain on deposit. [1909, ch. 150, § 5.]

**§ 4851. Dividends on securities property of company.** Companies having on deposit with the insurance commissioner bonds or other securities may collect the dividends or interest thereon, delivering to their authorized agents the coupons or other evidence of interest as the same become due, but if any company fails to deposit additional securities when and as called for by the insurance commissioner, or pending any proceedings to close up or enjoin it, the insurance commissioner shall collect such dividends or interest and add the same to such securities. [1909, ch. 150, § 6.]

**§ 4852. Exception to article.** None of the provisions of this article shall apply to fraternal beneficiary associations. [1909, ch. 150, § 7.]

## ARTICLE 4.—MISREPRESENTATIONS BY INSURANCE COMPANIES.

§ 4853. **Prohibited.** No life insurance company doing business in this state and no officer, director or agent thereof, shall issue or circulate, or cause or permit to be issued or circulated, any estimate, illustration, circular or statement of any sort misrepresenting the terms of any policy issued by it or the benefits or advantages promised thereby, or the dividends or shares of surplus to be received thereon, or shall use any name or title of any policy or class of policies misrepresenting the true nature thereof. [1907, ch. 147, § 1.]

§ 4854. **Penalty.** Any officer, agent, solicitor or any representative of any life insurance company violating the provisions of this article, shall be deemed guilty of a misdemeanor. Any life insurance company found guilty of a violation of the provisions of this article by the commissioner of insurance upon a hearing, after fifteen days' notice, shall be subject to a penalty to be by such commissioner of insurance imposed, of not to exceed five hundred dollars, in default of the payment of which he is authorized to revoke the license of such company; and provided, that upon a second conviction upon a similar hearing the commissioner of insurance shall revoke the license of such company to transact business in the state. [1907, ch. 147, § 2.]

## ARTICLE 5.—DISCRIMINATION BY LIFE INSURANCE COMPANIES.

§ 4855. **Prohibited.** No life insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between insureds (the insured) of the same class and equal expectation of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms or conditions of the contracts it makes, nor shall any such company or agent thereof make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon, nor shall any such company or any officer, agent, solicitor or representative thereof, pay, allow or give, or offer to pay, allow or give, directly or indirectly as inducement to insurance, any rebate of premium payable on their policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any paid employment or contract for services of any kind or any valuable consideration or inducement whatever not specified in the policy contract of insurance, or give, sell or purchase, or offer to give, sell or purchase as inducement to insurance or connection therewith any stocks, bonds or other securities of any insurance company or other corporation, association or partnership, or any dividends or profits to accrue thereon or anything of value whatsoever not specified in the policy. [1907, ch. 148, § 1.]

Power of legislature to regulate life insurance rates. 37 L.R.A. (N.S.) 778.

§ 4856. **Penalty.** Any officer, agent, solicitor or any representative of any life insurance company violating the provisions of this article shall be deemed guilty of a misdemeanor. Any life insurance company found guilty of a violation of the provisions of this article by the commissioner of insurance upon a hearing, after fifteen days' notice, shall be subject to a penalty to be by such commissioner of insurance imposed, of not to exceed five hundred dollars, in default of the payment of which he is authorized to revoke the license of such company; and provided, that upon a second conviction upon a similar hearing the commissioner of insurance shall revoke the license of such company to transact business in the state. [1907, ch. 148, § 2.]

## ARTICLE 6.—DISBURSEMENTS BY LIFE INSURANCE COMPANIES.

§ 4857. **Voucher required.** No domestic life insurance company shall make any disbursements of one hundred dollars or more unless the same be evidenced by a voucher signed by or in behalf of the person, firm or corpora-

tion receiving the money and correctly describing the consideration for the payment. If the expenditure be for both services and disbursements the voucher shall set forth the services rendered and an itemized statement of the disbursements made. If the expenditure be in connection with any matter pending before any legislative or public body, or before any department or officer of any state or government, the voucher shall correctly describe, in addition, the nature of the matter and of the interest of such company therein. When such voucher cannot be obtained the expenditure shall be evidenced by an affidavit describing the character and object of the expenditure and stating the reason for not obtaining such voucher. [1907, ch. 149.]

**ARTICLE 7.— DIVERSION OF FUNDS FOR POLITICAL PURPOSES BY LIFE INSURANCE COMPANIES.**

**§ 4858. Unlawful to aid political parties. Penalty.** No insurance company or association, including fraternal beneficiary associations, doing business in this state, shall, directly or indirectly, pay or use or offer, consent or agree to pay or use any money or property for or in aid of any political party, committee or organization, or for or in aid of any corporation, joint stock or other associations, organized or maintained for political purposes, or for or in aid of any candidate for political office, or for nomination for such office, or for any political purpose whatsoever, or for the reimbursement or indemnification of any person for money or property so used. Any officer, director, stockholder, attorney or agent of any corporation or association which violates any of the provisions of this article, who participates in, aids, abets or advises or consents to any such violation, and any person who solicits or knowingly receives any money or property in violation of this article, shall be guilty of a misdemeanor and be punished by imprisonment for not more than one year and a fine of not more than one thousand dollars, and any officer aiding or abetting in any contribution made in violation of this article, shall be liable to the company or association for the amount so contributed. No person shall be excused from attending and testifying or producing any books, papers or other documents before any court or magistrate, upon any investigation, proceeding or trial for a violation of any of the provisions of this article, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate or degrade him; but no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be used against him upon any criminal investigation or proceeding. [1907, ch. 152.]

The title of the act constituting the foregoing section reads as follows: "An act regulating life insurance companies and prohibiting the diversion of funds for political purposes."

**ARTICLE 8.— SALARIES OF OFFICERS AND AGENTS OF LIFE INSURANCE COMPANIES.**

**§ 4859. Expenses of officers, how regulated.** No domestic life insurance company shall pay any salary, compensation or emolument to any officer, trustee or director thereof, nor any salary, compensation or emolument amounting in any one year to more than five thousand dollars to any one person, firm or corporation unless such payment be first authorized by a vote of the board of directors of such life insurance company. No such life insurance company shall make any agreement with any of its officers, trustees or salaried employes whereby it agrees that for services rendered or to be rendered he shall receive any salary, compensation or emolument that will extend beyond a period of twelve months from the date of such agreement; and no officer, director or trustee, who is paid a salary for his services of more than one hundred dollars per month, shall receive any other compensa-

tion or emolument; provided, that the limitation as to time contained herein shall not be construed as preventing a life insurance company from entering into contracts with its agents for the payment of renewal commissions. No such company shall grant any pension to any officer, director or trustee thereof or to any member of his family after his death. [1907, ch. 154, § 1.]

**§ 4860. Salary restricted.** No life insurance company which pays as a salary or as compensation for services more than fifty thousand dollars per annum to any one person shall be licensed to transact business in this state. [1907, ch. 154, § 2.]

ARTICLE 9.—INVESTMENT OF FUNDS OF LIFE INSURANCE COMPANIES.

**§ 4861. Investment of funds restricted.** No domestic life insurance company, whether incorporated by special act or under a general law, shall, after the first day of January, 1908, invest in or loan upon any shares of stock of any corporation, other than a municipal corporation; nor, excepting government, state or municipal securities, shall it invest in, or loan upon, any bonds or obligations not secured by adequate collateral security, and when more than one-third of the total value of the collateral security shall consist of shares of stock it shall be deemed inadequate. Every such company possessed of stocks or securities prohibited by this act shall dispose of the same within five years, unless such time is extended by the commissioner of insurance. No investment or loan, except policy loans, shall be made by any such life insurance company unless the same shall first have been authorized by the board of directors or by a committee thereof charged with the duty of supervising such investment or loan. No such company shall subscribe to or participate in any underwriting of the purchase or sale of securities or property; or enter into any transaction for such purchase or sale on account of said company jointly with any other person, firm or corporation; nor shall any such company enter into any agreement to withhold from sale any of its property, but the disposition of its property shall be at all times within the control of its board of directors. Any such company, in addition to other investments allowed by law, may invest any of its funds and accumulations in the bonds of the United States or of this state or of any county, city, town or village or duly organized school district therein, or of any municipality or civil division of any state, and may loan upon improved unincumbered real property in any state fifty per centum of the value of such property, or invest in the mortgage bonds of any dividend paying railway or street railway company duly incorporated and organized under the authority of this state or any other state, and it may also make loans on the security of promissory notes amply secured by pledge of any bonds in which such insurance companies are hereby authorized to invest their funds, and may also make loans upon the security of its own policies, but no loan on any policy shall exceed the reserve value thereof. [1907, ch. 156, § 1.]

**§ 4862. Holding of real property limited.** Every such life insurance company may acquire, hold and convey real property only for the following purposes and in the following manner:

First. Such as shall be requisite for the convenient accommodation in the transaction of its business.

Second. Such as shall have been mortgaged to it in good faith by way of security for loans previously contracted or for moneys due.

Third. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as shall have been purchased at sales on judgments, decrees or mortgages obtained or made for such debts.

All such property specified in subdivisions two, three and four of this section which shall not be necessary for its accommodation in the convenient transaction of its business, shall be sold and disposed of within two years after

the company shall have acquired title to the same, or within two years after same shall have ceased to be necessary for the accommodation of its business; and it shall not hold such property for a longer period unless it shall procure a certificate from the commissioner of insurance that its interests will suffer materially by the forced sale thereof, in which event the time for the sale may be extended to such time as the commissioner shall direct in such certificate. [1907, ch. 156, § 2.]

**ARTICLE 10.— PROVISIONS PECULIAR TO DOMESTIC STOCK INSURANCE COMPANIES.**

**§ 4863. 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; provided, that the commissioner of insurance may for good cause shown extend the time of payment of such residue for the further period of not to exceed one year. 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 one hundred thousand dollars in available cash assets, over and above all liabilities for losses reported, expenses, taxes and reinsurance of all outstanding risks. [1911, ch. 160; 1909, ch. 147; R. C. 1905, § 4429; 1885, ch. 69, § 6; R. C. 1895, § 3097.]

**§ 4864. 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 4837, 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. [R. C. 1905, § 4430; 1885, ch. 69, § 8; R. C. 1895, § 3098.]

**§ 4865. 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 4844, he shall notify the company that its capital is legally subject to be made good in the mode provided by section 4866. 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 4925. [R. C. 1905, § 4431; R. C. 1895, § 3099.]

**§ 4866. 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 cancelled 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. 1905, § 4432; R. C. 1895, § 3100.]

**§ 4867. 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 com-

missioner 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. [R. C. 1905, § 4433; 1885, ch. 69, § 36; R. C. 1895, § 3101.]

§ 4868. **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. 1905, § 4434; R. C. 1895, § 3102.]

§ 4869. **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. [R. C. 1905, § 4435; 1885, ch. 69, § 32; 1889, ch. 69, § 7; R. C. 1895, § 3103.]

ARTICLE 11.— PROVISIONS PECULIAR TO DOMESTIC MUTUAL INSURANCE COMPANIES.

§ 4870. **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. [R. C. 1905, § 4436; 1885, ch. 69, § 41; R. C. 1899, § 3104.]

As to taking applications for \$200,000 of insurance before issuance of policy in mutual societies. *Montgomery v. Whitbeck*, 12 N. D. 385, 96 N. W. 327.

§ 4871. **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. 1905, § 4437; R. C. 1895, § 3105.]

§ 4872. **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. 1905, § 4438; R. C. 1895, § 3106.]

§ 4873. **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. 1905, § 4439; R. C. 1895, § 3107.]

**§ 4874. Premium. Contingent liability stated on policy.** Mutual insurance companies shall charge and collect upon their policies the full mutual premium in cash or notes, and may by 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; provided, further, that in case said premium be not so paid in cash or unconditional notes within sixty days from the date of issue, the policy shall become and be absolutely void and to remain void during the nonpayment of such premium, and upon payment of the premium as above provided, such policy shall reattach; provided, there has been no loss while the policy was void. The total amount of the liability of a policy holder shall be clearly and legibly stated upon the back of each policy. [1907, ch. 143; R. C. 1905, § 4440; R. C. 1895, § 3108.]

As to validity of insurance contract made with company which violated the statute. *Walker v. Rein*, 14 N. D. 608, 106 N. W. 405.

As to requirement that amount of accepted cash premium should be written in policy of insurance. *Montgomery v. Whitbeck*, 12 N. D. 385, 96 N. W. 327.

**§ 4875. 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. 1905, § 4441; R. C. 1895, § 3109.]

**§ 4876. Temporary capital may be retired.** A mutual life insurance company may be organized with, and an existing mutual life insurance company may establish a temporary capital of not less than one hundred thousand dollars, which shall be invested in the same manner as is provided for the investment of its other funds. Out of the net surplus of the company the holders of the temporary capital stock may receive a dividend of not more than eight per cent per annum, which may be cumulative. Such capital stock shall not be a liability of the company except that it shall be retired as soon as, but not before the surplus of the company remaining after its retirement shall not be less than the temporary capital so established. At the time for the retirement of such capital stock the holders shall be entitled to receive from the company the par value thereof and any dividends thereon due and unpaid, and thereupon the stock shall be surrendered and cancelled, and the right to vote thereon shall cease. [1907, ch. 144.]

**§ 4877. 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. 1905, § 4442; R. C. 1895, § 3110.]

Liability of members of mutual insurance company. 32 L.R.A. 481.

Jurisdiction of equity to enforce liability of member of mutual insurance company. 40 L.R.A.(N.S.) 781.

**§ 4878. 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 4844. 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. 1905, § 4443; R. C. 1895, § 311.]

**§ 4879. 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. 1905, § 4444; R. C. 1895, § 3112.]

**§ 4880. 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 cancelled, 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 cancelled, 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 cancelled 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. 1905, § 4445; R. C. 1895, § 3113.]

**§ 4881. 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. 1905, § 4446; R. C. 1895, § 3114.]

ARTICLE 12.—SURPLUS OF LIFE INSURANCE COMPANY.

§ 4882. **Surplus apportioned annually.** Every life insurance company doing business in this state conducted on the mutual plan or in which policy holders are entitled to share in the profits or in which policy holders of life insurance heretofore issued, under the conditions of which the distribution of surplus is deferred to a fixed or specified time and contingent upon the policy being in force and the insured living at that time annually ascertain the amount of surplus to which all such policies as a separate class are entitled, and shall apportion to such policies as a class the amount of surplus so ascertained and carry the amount of such apportioned surplus, plus the actual interest earnings and accretions of such fund, as a distinct and separate liability to such class of policies on and for which the same was accumulated, and no company or any of its officers shall be permitted to use any part of such apportioned surplus fund for any purpose whatsoever other than for the express purpose for which the same was accumulated. [1909, ch. 145, § 1.]

Laws 1907, ch. 142, § 1, reads as follows: "Section 1. Surplus apportioned annually. Every life insurance company doing business in this state conducted on the mutual plan or in which the policy holders are entitled to share in the profits or surplus, shall make an annual apportionment and accounting of divisible surplus to each policy holder beginning not later than the end of the third policy year on all participating policies hereafter issued; and each such policy holder shall be entitled to and be credited with or paid, in the manner hereinafter provided, such a portion of the entire divisible surplus as has been contributed thereto by his policy."

§ 4883. **Exception.** The preceding section shall not apply to industrial policies. [1909, ch. 145, § 2.]

§ 4884. **Contingency reserve.** Any life insurance company doing business in this state may accumulate and maintain in addition to the capital and surplus contributed by its stockholders, and in addition to an amount equal to the net values of its policies, computed according to the laws of the jurisdiction under which it is organized, a contingency reserve not exceeding the following respective percentages of said net values, to wit: When said net values are less than one hundred thousand dollars, twenty per centum thereof or the sum of ten thousand dollars, whichever is the greater; when said net values are greater than one hundred thousand dollars, the percentage thereof measuring the contingency reserve shall decrease one-half of one per centum for each one hundred thousand dollars of said net values up to one million dollars; one-half of one per centum for each additional one million dollars up to ten million dollars; one-half of one per centum for each additional two million five hundred thousand dollars up to twenty million dollars; one-half of one per centum for each additional five million dollars up to fifty million dollars; one-half of one per centum for each additional twenty-five million dollars up to seventy-five million dollars; and if said net values equal or exceed the last mentioned amount the contingency reserve shall not exceed five per centum thereof; provided, that as the net values of said policies increase and the maximum percentage measuring the contingency reserve decreases such corporation may maintain the contingency reserve already accumulated hereunder, although for the time being it may exceed the maximum percentage herein prescribed, but may not add to the contingency reserve when the addition will bring it beyond the maximum percentage; provided, further, that

for cause shown the commissioner of insurance may at any time from time to time permit any corporation to accumulate and maintain a contingency reserve in excess of the limit above mentioned for a prescribed period, not exceeding one year under any one permission, by filing in his office a decision stating his reasons therefor and causing the same to be published in his next annual report. This section shall not apply to any company doing exclusively a nonparticipating business. [1907, ch. 142, § 2.]

§ 4885. **Rights of policy holder.** Every policy holder shall on all participating policies hereafter issued be permitted annually to select the manner and method of the application of the surplus to be annually apportioned to his policy from among those set forth in the policy. All apportioned surplus not actually paid over to the insured, or applied in the reduction of current or future premiums or in the purchase of paid-up insurance or pure endowment additions, shall be credited to the assured and carried as an actual liability and be paid at the maturity of the policy. [1907, ch. 142, § 3.]

§ 4886. **Automatic insurance.** In event of default in payment of any premium due on any policy, provided not less than three full years' premiums shall have been paid, there shall be secured to the insured without action on his part, either paid-up or extended insurance as specified in the policy, the net value of which shall be at least equal to the entire net reserve held by the company on such policy less two and one-half per centum of the amount insured by the policy and dividend additions, if any, and less any outstanding indebtedness to the company on the policy at time of default. There shall be secured to the insured the right to surrender the policy to the company at its home office within one month after date of default for the cash value otherwise available for the purchase of the paid-up or extended insurance as aforesaid. [1907, ch. 142, § 4.]

§ 4887. **Contra agreement forbidden.** No agreement between the company and the policy holder or applicant for insurance shall be held to waive any of the provisions of this article. [1907, ch. 142, § 5.]

#### ARTICLE 13.—CONSOLIDATION AND REINSURANCE OF DOMESTIC INSURANCE COMPANIES.

§ 4888. **Consolidation forbidden.** No company organized under the laws of this state to do business of life, accident or health insurance, either on the stock, mutual, stipulated premium, assessment or fraternal plan, shall consolidate with any other company, or reinsure its risks, or any part thereof with any other company, or assume or reinsure the whole of or any portion of the risks of any other company, except as hereinafter provided, but nothing herein contained shall prevent any such company, organized on the stock or mutual plan, from reinsuring a fractional part of any risk. [1907, ch. 150, § 1.]

Right of corporations to consolidate. 52 L.R.A. 369.

§ 4889. **Petition for consolidation.** When any such company shall propose to consolidate with any other company, or to enter into any contract of reinsurance, it shall present its petition to the insurance commissioner of this state, setting forth the terms and conditions of such proposed consolidation or reinsurance, and asking for the approval or of any modification thereof, which the commission hereinafter provided for may approve. [1907, ch. 150, § 2.]

§ 4890. **Duty of insurance commissioner.** The insurance commissioner thereupon shall issue an order of notice requiring notice to be given by mail to each policyholder of such company, of the pending of such petition, and the time and place at which hearing thereon will be held, and shall publish the said order of notice and said petition in five newspapers for at least two weeks before the time appointed for the hearing upon said petition, and in one daily newspaper published at the capital of the state. [1907, ch. 150, § 3.]

§ 4891. **Commission.** The governor or, in the event of his inability to act, some competent person resident of the state to be appointed by him, the attorney-general and the insurance commissioner of this state, shall constitute a commission to hear and determine upon said petition. At the time and place fixed in said notice or at such time and place as shall be fixed by adjournment, the said commission shall proceed with the hearing and may make or order such examination into the affairs and condition of such company as it may deem proper. The insurance commissioner shall have the power to summon and compel the attendance and testimony of witnesses and production of books and papers before said commission. Any policyholder or stockholder of the company or companies so petitioning may appear before said commission and be heard in reference to said consolidation or reinsurance. Said commission if satisfied that the interests of the policyholders of such company or companies are properly protected, and that no reasonable objection exists thereto, may approve and authorize the proposed consolidation or reinsurance or may modify or change the terms and conditions thereof as may seem best for the interests of the policyholders, and said commission may make such order with reference to the distribution and disposition of the surplus assets of any such company thereafter remaining as shall be just and equitable to the policyholders. Such consolidation or reinsurance shall only be approved by the consent of all the members of such commission, and it shall be the duty of said commission to guard the interests of the policyholders of any such company or companies proposing to consolidate or reinsurance. [1907, ch. 150, § 4.]

§ 4892. **Expenses paid.** All actual expenses and costs incident to proceedings under the provisions of this article shall be paid by the company or companies bringing said petition, and an itemized statement of the expenses and costs shall be filed with the insurance commissioner with a certified copy of the decision of the commission. No officer of any such company or companies, nor members of said commission, or employe of the state, shall receive any compensation, gratuity or otherwise, directly or indirectly, for in any manner aiding, promoting or assisting in such consolidation or reinsurance. [1907, ch. 150, § 5.]

§ 4893. **Penalty for violation.** Any officer, director or stockholder of any such company or companies, or any member of such commission or employe of the state, violating or consenting to the violation of the provisions of this article shall be punished by a fine not less than five thousand dollars or imprisonment in the county jail for not less than one year, or both such fine and imprisonment in the discretion of the court. [1907, ch. 150, § 6.]

#### ARTICLE 14.—PROVISIONS PECULIAR TO MUTUAL HAIL INSURANCE COMPANIES.

§ 4894. **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. [R. C. 1905, § 4447; 1903, ch. 109, §§ 1, 2.]

§ 4895. **Penalty.** Any person who violates any of the provisions of section 4894 or who procures or induces another to do so is guilty of a misdemeanor. [R. C. 1905, § 4448; 1903, ch. 109, § 3.]

§ 4896. **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; provided, that domestic mutual hail insurance companies in lieu of said deposit shall be required to file a bond in the office of the commissioner of insurance in the sum of twenty-five thousand dollars, conditional for the carrying out of its contracts and obligations incurred by its policies; said bond to be satisfactory as to form and surety to the insurance commissioner. [1907, ch. 153; R. C. 1905, § 4449; 1903, ch. 114, § 1.]

Foreign mutual insurance companies are authorized to engage in hail insurance business. *State ex rel. State Farmers Mut. Hail Ins. Co. v. Cooper*, 18 N. D. 583, 120 N. W. 878.

§ 4897. **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. [R. C. 1905, § 4450; 1903, ch. 114, § 2.]

§ 4898. **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. [R. C. 1905, § 4451; 1903, ch. 114, § 3.]

§ 4899. **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. [R. C. 1905, § 4452; 1903, ch. 114, § 4.]

§ 4900. **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. [R. C. 1905, § 4453; 1903, ch. 114, § 5.]

§ 4901. **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. [R. C. 1905, § 4454; 1903, ch. 114, § 6.]

ARTICLE 15.—TIME WHEN HAIL INSURANCE POLICIES TAKE EFFECT.

§ 4902. **Twenty-four hours after application taken.** Every insurance company engaged in the business of insuring against loss by hail in this state, shall be bound, and the insurance shall take effect from and after twenty-four hours from the day and hour the application for such insurance has been taken by the authorized local agent of said company, and if the company shall decline to write the insurance upon receipt of the application, it shall forthwith notify the applicant and agent who took the application, by telegram, and in that event, the insurance shall not become effective. Provided, that nothing in this article shall prevent the company from issuing a policy on such application and putting the insurance in force prior to the expiration of said twenty-four hours. [1913, ch. 177, § 1.]

§ 4903. **Hail insurance department excepted.** No provision herein, however, shall apply to the state hail insurance department.

ARTICLE 16.—PROVISIONS PECULIAR TO FIDELITY INSURANCE COMPANIES.

§ 4904. **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. 1905, § 4455; R. C. 1895, § 3115; 1903, ch. 113, § 1.]

Certificate of corporation's authority to execute surety bond need not be annexed to undertaking. *Germantown Trust Co. v. Whitney*, 19 S. D. 108, 102 N. W. 304.

§ 4905. **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. [R. C. 1905, § 4456; 1897, ch. 135, § 1; R. C. 1899, § 3115b; 1903, ch. 113, § 2.]

Board of railroad commissioners may examine into sufficiency of bonds given by grain elevator operator and may for such purpose summon any witness before them that they please. *State ex rel. Dakota Trust Co. v. Stutsman*, 24 N. D. 68, 139 N. W. 83.

**§ 4906. 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. [R. C. 1905, § 4457; 1897, ch. 36; R. C. 1899, § 3115a; 1903, ch. 113, § 3.]

**§ 4907. 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 exceeding 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 outstanding in this state. Service upon such attorney shall be deemed sufficient service upon the corporation. [R. C. 1905, § 4458; 1897, ch. 135, § 2; R. C. 1899, § 3115c; 1903, ch. 113, § 4.]

**§ 4908. 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 31 of the civil code and section 4929, 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 5207, 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 4920, 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. [R. C. 1905, § 4459; 1897, ch. 135, § 3; R. C. 1899, § 3115d; 1903, ch. 113, § 5.]

Board of railroad commissioners may examine into sufficiency of bonds given by grain elevator operator and may for such purpose summon any witness before them that they please. *State ex rel. Dakota Trust Co. v. Stutsman*, 24 N. D. 68, 139 N. W. 83.

**§ 4909. 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. [R. C. 1905, § 4460; 1903, ch. 113, § 6.]

**§ 4910. 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 afore-

said 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. [R. C. 1905, § 4461; 1897, ch. 135, § 4; R. C. 1899, § 3115e; 1903, ch. 113, § 7.]

§ 4911. **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. [R. C. 1905, § 4462; 1903, ch. 113, § 8.]

§ 4912. **Responsibility of fidelity insurance companies.** Any corporation organized under the laws of this state, or of any state or country, to transact the business of fidelity insurance and corporate suretyship, and authorized to do business in this state, which makes contracts of insurance guaranteeing the fidelity of persons holding positions of trust in public office, shall be held responsible to any person for any loss or damage which he may suffer by reason of any fraud or misrepresentation practiced upon him by such public official under the guise of or by virtue of his office. [1913, ch. 193.]

ARTICLE 17.—PROVISIONS PECULIAR TO FOREIGN INSURANCE COMPANIES.

§ 4913. **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 4863 and, if a mutual company, that its assets are not less than is required by section 4870, 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 insur-

ance, 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. 1905, § 4463; R. C. 1895, § 3116.]

Failure of foreign corporation to comply with law as to doing business in state justifies direction of verdict against it in suit for breach of contract. *Chealey v. Soo Lignite Coal Co.*, 19 N. D. 18, 121 N. W. 73.

Restrictions on business of foreign insurance company. 24 L.R.A. 298.

Effect on insurance of noncompliance with statutory requirements as to recovery on the policy. 20 L.R.A. 405.

#### ARTICLE 18.—PROVISIONS COMMON TO ALL INSURANCE COMPANIES.

§ 4914. **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. [R. C. 1905, § 4464; 1885, ch. 69, § 7; R. C. 1895, § 3117.]

Board of railroad commissioners may inquire into general business conduct and reliability of sureties on bonds given by grain elevator operator. *State ex rel. Dakota Trust Co. v. Stutsman*, 24 N. D. 68, 139 N. W. 83.

§ 4915. **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 day of March 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. It shall be the duty of the insurance commissioner upon the date of the receipt of any such statement to stamp thereon the date of the receipt of such statement in his office, and the insurance commissioner is hereby prohibited from receiving such statement from any company after the day which is herein designated for the filing of such statement, unless the same be accompanied by the penalty by law provided for each day's delinquency in filing such statement. 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, provided, however, that the statements of state, county and town mutual insurance companies need only be published once in a newspaper selected at their annual meeting in the county wherein such company does business. 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 such filing of the annual statement. Such publication 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. [1911, ch. 159; 1899, ch. 102; R. C. 1899, § 3119.]

**§ 4916. 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. [R. C. 1905, § 4467; 1885, ch. 69, § 17; R. C. 1895, § 3120.]

See also section 4931.

**§ 4917. 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. [R. C. 1905, § 4468; 1885, ch. 69, § 19; R. C. 1895, § 3121.]

**§ 4918. 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. [R. C. 1905, § 4469; 1885, ch. 69, § 27; R. C. 1895, § 3122.]

**§ 4919. 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. [R. C. 1905, § 4470; 1891, ch. 73, § 15; R. C. 1895, § 3123.]

**§ 4920. 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. [R. C. 1905, § 4471; 1885, ch. 69, § 25; R. C. 1895, § 3124.]

Granting or revoking of certificate to transact business within commissioner's discretion. *State v. Carey*, 2 N. D. 36, 49 N. W. 164.

Soliciting applications necessary in formation of mutual insurance company not a violation. *Montgomery v. Harker*, 9 N. D. 527, 84 N. W. 369.

Crime for agent to act without procuring certificate of authority. *State v. Hogan*, 8 N. D. 301, 78 N. W. 1051, 73 Am. St. Rep. 759, 45 L.R.A. 166.

**§ 4921. 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. 1905, § 4472; R. C. 1895, § 3125.]

**§ 4922. 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. [R. C. 1905, § 4473; 1885, ch. 69, § 28; R. C. 1895, § 3126.]

**§ 4923. 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. [R. C. 1905, § 4474; 1891, ch. 73, § 12; R. C. 1895, § 3127.]

**§ 4924. 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. [R. C. 1905, § 4475; 1897, ch. 94; R. C. 1899, § 3127a.]

Association incorporated principally to secure for each member payment of certain sum to his beneficiary at death is taxable as a life insurance company. *Masonic Association v. Taylor*, 2 S. D. 324, 50 N. W. 93.

Ancient Order of United Workmen is exempt from state tax. *Ancient Order, U. W. v. Shober*, 16 S. D. 513, 94 N. W. 405.

Imposes "occupation tax" and not an "ordinary tax" within constitution relating to taxation. *Queen City F. Ins. Co. v. Basford*, 27 S. D. 164, 130 N. W. 44.  
State tax on insurance premiums. 57 L.R.A. 69.

**§ 4925. 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. 1905, § 4476; R. C. 1895, § 3128; 1905, ch. 124.]

**§ 4926. 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. [R. C. 1905, § 4477; 1890, ch. 76, §§ 1, 2; R. C. 1895, § 3129.]

**§ 4927. 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. 1905, § 4478; R. C. 1895, § 3130.]

§ 4928. **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. 1905, § 4479; R. C. 1895, § 3131.]

§ 4929. **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. [R. C. 1905, § 4480; 1885, ch. 69, § 39; R. C. 1895, § 3132.]

§ 4930. **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. [R. C. 1905, § 4481; 1891, ch. 73, § 20; R. C. 1895, § 3133.]

Restrictions on business of foreign insurance companies. 24 L.R.A. 298.

Effect on insurance by foreign company of noncompliance with statutory requirements. 20 L.R.A. 405.

Right of burglary and theft insurance companies to do business in foreign states. 46 L.R.A. (N.S.) 563.

#### ARTICLE 19.—REPORTS OF LIFE INSURANCE COMPANIES.

§ 4931. **Annual report, contains what.** In addition to any other matter which may be required by law or pursuant to law by the commissioner of insurance to be stated therein, every annual report of every life insurance company doing business in this state, shall contain an accurate, concise and complete statement of the following matters, to wit:

1. All the real property held by the company, the dates of acquisition, the names of the vendors, the actual cost, the value at which it is carried on the company's books, the market value, the amounts expended during the year for repairs and improvements, the gross and net income from each parcel, and if any portion thereof be occupied by the company the rental value thereof, a statement of any certificate issued by the commissioner extending the time for the disposition thereof, and all purchases and sales made since the last annual statement, with particulars as to dates, names of vendors and vendees and the consideration.

2. The amount of existing loans upon the security of real property, stating the amount loaned upon property in each state and foreign country.

3. The moneys loaned by the company to any person other than loans upon the security of real property above mentioned and other than loans upon policies the actual borrowers thereof, the maturity and rate of interest of such loans, the securities held therefor, and all substitutions of securities in con-



nection therewith, and the same particulars with reference to any loans made or discharged since the last annual statement.

4. All other property owned by the company or in which it has any interest (including all securities, whether or not recognized by the law as proper investments), the dates of acquisition, from whom acquired, the actual cost, the value at which the property is carried upon the books, the market value, the interest or dividends received thereon during the year; also all purchases and sales of property other than real estate made since the last annual statement with particulars as to dates, names of purchasers and sellers, and the consideration; and also the income received and outlays made in connection with all such property.

5. All commissions paid to any persons in connection with loans or purchases or sales of any property, and a statement of all payments for legal expenses, giving particulars as to dates, amounts and names and addresses of payees.

6. All money expended in connection with any matter pending before any legislative body or any officer or department of government, giving particulars as to dates, amounts, names and addresses of payees, the measure or proceeding in connection with which the payment was made, and the interest of the company therein.

7. The names of officers and directors of the company, the proceedings at the last annual election, giving the names of candidates and the number of votes cast for each, and whether in person, by proxy or by mail.

8. The salary, compensation and emoluments received by officers or directors and where the same amount to more than five thousand dollars, that received by any person, firm or corporation, with particulars as to dates, amounts, payees and the authority by which the payment was made; also all salaries paid to any representative either at the home office, or at any branch office, or agency, for agency supervision.

9. The largest balances carried in each bank or trust company during each month of the year.

10. All death claims resisted or compromised during the year with particulars as to sums insured, sums paid and reasons assigned for resisting or compromising the same in each case.

11. A complete statement of the profits and losses upon the business transacted during the year and the sources of such gains and losses, and a statement showing separately the margins upon premiums for the first year of insurance and the actual expenses chargeable to the procurement of new business incurred since the last annual statement. A foreign company, issuing both participating and nonparticipating policies shall make a separate statement of profits and losses, margins and expenses, as aforesaid, with reference to each of said kinds of business, and also showing the manner in which any general outlays of the company have been apportioned to each of such kinds of business.

12. A statement separately showing the amount of the gains of the company for the year attributable to policies written after December thirty-first, nineteen hundred and . . . and the precise method by which the calculation has been made.

13. The rates of annual dividends declared during the year for all plans of insurance and all durations for ages at entry, twenty-five, thirty-five, forty-five and fifty-five, and the precise method by which such dividends have been calculated.

14. A statement showing the rates of dividends declared upon deferred dividend policies completing their dividend periods for all plans of insurance and the precise methods by which said dividends have been calculated.

15. A statement showing any and all amounts set apart or provisionally ascertained or calculated or held awaiting apportionment upon policies with deferred dividend periods longer than one year for all plans of insurance and

all durations and for ages of entry as aforesaid, together with the precise statements of the methods of calculation by which the same have been provisionally or otherwise determined.

16. A statement of any and all reserve or surplus funds held by the company and for what purpose they are claimed respectively to be held. [1907, ch. 141.]

See also section 4916.

#### ARTICLE 20.—COUNTY MUTUAL COMPANIES.

§ 4932. **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. [R. C. 1905, § 4482; 1887, ch. 67, § 1; 1890, ch. 77, § 1; R. C. 1895, § 3134; 1905, ch. 121.]

§ 4933. **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 three years and until their successors are elected and qualified. At the first election after this section takes effect the directors shall divide themselves as nearly as possible into three equal groups, the members of the first group to hold office for one year, of the second for two years and of the third for three years, and thereafter each director shall hold office for three years as provided herein. [1911, ch. 163; R. C. 1905, § 4483; 1887, ch. 67, § 2; R. C. 1895, § 3125.]

§ 4934. **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. [R. C. 1905, § 4484; 1887, ch. 67, § 5; R. C. 1895, § 3136.]

§ 4935. **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. [R. C. 1905, § 4485; 1887, ch. 67, § 6; R. C. 1899, § 3137; 1901, ch. 109.]

**§ 4936. 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 4939 and notice of loss or damage by hail shall be the same as is prescribed in said section. [R. C. 1905, § 4486; 1887, ch. 67, § 7; R. C. 1899, § 3138.]

**§ 4937. 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 hundred 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. [R. C. 1905, § 4487; 1887, ch. 67, § 8; R. C. 1899, § 3139; 1901, ch. 55.]

**§ 4938. 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, [R. C. 1905, § 4488; 1887, ch. 67, § 9; R. C. 1895, § 3140.]

**§ 4939. 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. [R. C. 1905, § 4489; 1887, ch. 67, § 10; R. C. 1895, § 3141.]

Failure of insurance company to appoint arbitrator to adjust loss, etc., as waiver of provisions of statute. *Norris v. Equitable Fire Asso.*, 19 S. D. 114, 102 N. W. 306.

Waiver of condition requiring determination of amount of loss by arbitration. *Schouweiler v. Mut. Ins. Co.*, 11 S. D. 401, 78 N. W. 356.

§ 4940. **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. [R. C. 1905, § 4490; 1887, ch. 67, § 11; R. C. 1895, § 3142; 1901, ch. 109.]

§ 4941. **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. [R. C. 1905, § 4491; 1887, ch. 67, § 12; R. C. 1899, § 3143.]

§ 4942. **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. [R. C. 1905, § 4492; 1887, ch. 67, § 13; R. C. 1895, § 3144.]

§ 4943. **Authority to borrow money.** That the board of directors of any county mutual fire insurance company is hereby authorized and empowered to borrow money if necessary on behalf of the company to pay losses occurring prior to the month of October in any year. [1911, ch. 161.]

§ 4944. **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 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 stack or bin, 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 unless such property is detached and situated on land not surveyed or platted into lots. [1913, ch. 188; R. C. 1905, § 4493; 1887, ch. 67, § 14; R. C. 1895, § 3145.]

§ 4945. **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 Friday in June of each year, and every member shall have one vote.

but no person shall vote by proxy at such election. Provided, that to constitute a quorum for the transaction of business there must be at least twenty members present, including officers and directors; provided, that in any company organized under 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. [1913, ch. 190; 1911, ch. 162; 1909, ch. 146; R. C. 1905, § 4494; 1887, ch. 67, § 15; R. C. 1895, § 3146; 1903, ch. 110.]

**§ 4946. 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. [R. C. 1905, § 4495; 1887, ch. 67, § 17; R. C. 1895, § 3147.]

**§ 4947. 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. [R. C. 1905, § 4496; 1887, ch. 67, § 18; R. C. 1895, § 3148.]

**§ 4948. Term of existence.** No company formed under this article shall continue for a longer term than thirty years. [R. C. 1905, § 4497; 1887, ch. 67, § 20; R. C. 1899, § 3149.]

**§ 4949. 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 4915. [R. C. 1905, § 4498; R. C. 1895, § 3150.]

**§ 4950. 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. 1905, § 4499; R. C. 1895, § 3151.]

#### ARTICLE 21.—LIVE STOCK.

**§ 4951. 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. [R. C. 1905, § 4500; 1905, ch. 123, § 1.]

**§ 4952. 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. [R. C. 1905, § 4501; 1905, ch. 123, § 2.]

**§ 4953. 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. [R. C. 1905, § 4502; 1905, ch. 123, § 3.]

§ 4954. **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. [R. C. 1905, § 4503; 1905, ch. 123, § 4.]

§ 4955. **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. [R. C. 1905, § 4504; 1905, ch. 123, § 5.]

§ 4956. **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. [R. C. 1905, § 4505; 1905, ch. 123, § 6.]

#### ARTICLE 22.—CHattel MORTGAGES IN APPLICATIONS.

§ 4957. **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. [R. C. 1905, § 4506; 1887, ch. 19, § 1; R. C. 1899, § 3132.]

§ 4958. **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. [R. C. 1905, § 4507; 1887, ch. 19, § 2; R. C. 1895, § 3153.]

#### ARTICLE 23.—LICENSING INSURANCE AGENTS.

§ 4959. **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. [R. C. 1905, § 4508; 1903, ch. 112, § 1.]

§ 4960. **Must have license. Penalty for noncompliance.** No officer or broker, agent or subagent 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 affecting 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 violat-

ing 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. [R. C. 1905, § 4509; 1903, ch. 112, § 2.]

Effect of insurance agent's failure to procure license. 1 L.R.A.(N.S.) 1159.

ARTICLE 24.— RESIDENT AGENTS FOR TRANSACTION OF FIRE INSURANCE BUSINESS.

**§ 4961. Foreign agents.** 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. [R. C. 1905, § 4510; 1901, ch. 100, § 1.]

**§ 4962. 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. [R. C. 1905, § 4511; 1901, ch. 100, § 2.]

**§ 4963. 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 4961, 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 4961, and shall subject it to the penalties prescribed and imposed in section 4964. [R. C. 1905, § 4512; 1901, ch. 100, § 3.]

**§ 4964. 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. [R. C. 1905, § 4513; 1901, ch. 100, § 4.]

## CHAPTER 19.

### ACCIDENT AND SICKNESS INSURANCE CORPORATIONS, ASSOCIATIONS AND SOCIETIES.

**§ 4965. Number requisite to organization.** Any number of persons, not less than five, a majority of whom are citizens of this state, may associate themselves together as a corporation, association or society for the purpose of transacting the business of accident or sickness, or accident and sickness insurance upon the assessment plan. [1907, ch. 157, § 1.]

**§ 4966. Compliance required.** Every corporation, association or society organized under this article shall, before commencing business, comply with the provisions of this article. [1907, ch. 157, § 2.]

**§ 4967. Articles, state what.** The articles of incorporation of such organizations shall state the name or title by which the corporation, association or society shall be known in law, the location of its principal office (which office must be located in this state) with its plan of doing business clearly and fully defined, the number of its directors, trustees or managers, and shall be submitted to the insurance commissioner and attorney-general, and if said articles of incorporation are found to comply with the provisions of this article they shall approve the same. When said articles of incorporation are thus approved they shall be recorded in the office of the recorder of deeds in the county where such organization is located, and of the secretary of state, and a notice published as provided for under the general incorporation laws of the state of North Dakota; provided, that corporations, associations and societies heretofore incorporated and doing business in this state shall not be required to reincorporate. But any corporation, association or society may become a corporation under this act and avail itself of the provisions herein by filing with the insurance commissioner a certificate signed by the president and secretary of such corporation, association or society, setting forth the facts as to its incorporation, and that it desires to avail itself of the provisions of this article and will be controlled thereby and transact its business thereunder; provided, this article shall not relieve any corporation, association or society now doing business in this state from the fulfillment of any contract heretofore entered into with its members under its policies or certificates of membership, nor shall any member be relieved thereby from his or her part of the contract. [1907, ch. 157, § 3.]

**§ 4968. Name forbidden.** No corporation, association or society organized under this article shall take any name or title in use by any other corporation, association or society, or so closely resembling such name as to deceive the public as to its identity. [1907, ch. 157, § 4.]



**§ 4969. Application contains what.** Each corporation, association or society organized under this article shall, before issuing any policy or certificate of membership, if said corporation, association or society has not membership sufficient to pay the full amount of the certificate or policy on an assessment, cause the application for insurance to have printed in red ink in a conspicuous manner along the margin of said application the words "It is understood and agreed that the amount to be paid, when the certificate or policy issued upon this application becomes a claim, shall be dependent upon the amount collected for an assessment made to meet such claim," and they must have actual applications upon at least two hundred and fifty persons for accident indemnity, or accident and sick benefits in such corporation, association or society as the case may be, and shall file with the insurance commissioner satisfactory proof that the president, secretary and treasurer of said association or society will faithfully discharge their duties as such officers and fully comply with this article in the organization and carrying on the business of such corporation, association or society. A list of said applications giving the name, age and residence of the applicant, together with the annual dues and the proposed assessments thereon shall be filed with the insurance commissioner, with a sworn statement of such officers and that such parties have deposited with them one advance assessment on the insurance applied for, and a certificate of a solvent bank that such funds are deposited therein to be turned over to the treasurer of the corporation, association or society after certificate of authority is issued by the insurance commissioner as provided herein. [1907, ch. 157, § 5.]

**§ 4970. Agent must have certificate of authority.** No person shall act within this state as agent in receiving or procuring applications for accident insurance or accident and sick benefit insurance for any corporation, association or society organized under this act (except for the purpose of taking applications for organization), unless this corporation, association or society for which he is acting has received a certificate from the insurance commissioner as provided in this act, authorizing said corporation, association or society to transact business in this state, nor as general or traveling agent or solicitor, until he shall have received from the insurance commissioner a certificate in substance the same as that provided for in section 4976. [1907, ch. 157, § 6.]

**§ 4971. By-laws.** The by-laws of such corporation, association or society shall state the object or objects for which the money to be collected is intended. [1907, ch. 157, § 7.]

**§ 4972. Age of members.** No corporation, association or society organized or operating under this article shall issue any certificate of membership or policy of insurance to any person under the age of fifteen years, nor over the age of sixty-five years. Any member of any corporation, association or society holding a policy or certificate of membership, naming a beneficiary, operating under this article shall have the right at any time with the consent of such corporation, association or society to designate a new and different beneficiary without requiring the consent of such beneficiary. [1907, ch. 157, § 8.]

**§ 4973. Annual report.** The business year of such corporation, association or society organized or operating under this act shall close on the thirty-first day of December of each year, and such corporation, association or society shall, within sixty days thereafter, prepare under oath of its president and secretary, and file in the office of the insurance commissioner a detailed statement of its assets, liabilities, receipts from assessments and all other sources, expenditures, salaries of officers, number of contributing members, losses paid for indemnity and benefits, the amount paid on each death loss and answer such other interrogatories as the insurance commissioner (who shall furnish blanks for the purpose) may require, in order to ascertain its true financial condition, and shall pay upon filing each annual statement the sum of ten

dollars. The insurance commissioner shall publish said annual statement in detail in his annual report and for the purpose of verifying such statement the insurance commissioner may make, or cause to be made, an examination of the affairs of any corporation, association or society doing business under this article at the expense of the corporation, association or society, which expense shall not exceed the necessary hotel and traveling expenses of the auditor or clerk. If the insurance commissioner appoints some person not employed in his office to make the examination he shall in addition to actual expenses, be allowed not to exceed five dollars per day for the time actually employed. If the said insurance commissioner shall deem it necessary for the security of the funds of the association, he may require the official bonds of the officers to be increased to an amount not to exceed double the sum for which they are accountable, and he may require supplemental reports from any such corporation, association or society at such time and in such form as he may direct. [1907, ch. 157, § 9.]

**§ 4974. Reserve fund.** Any North Dakota corporation, association or society organized and doing business under this article may create and maintain and disburse a reserve or surplus fund, and may invest such funds in interest bearing securities. [1907, ch. 157, § 10.]

**§ 4975. Duty of insurance commissioner.** When any North Dakota corporation, association or society operating under this article shall fail to make its annual statement to the insurance commissioner on or before the first day of March, or is conducting its business fraudulently and not in compliance with this article, then it shall be the duty of the insurance commissioner to promptly communicate the facts to the attorney-general who shall at once commence action in the district court of the county in which said organization is located, or before any judge thereof, citing the officers to appear before said court or judge, and if upon a hearing of said cause it is found to be for the best interests of the holders of certificates of membership or policies in said corporation, association or society, said court or judge shall have the power to remove any officer or officers of said corporation, association or society and appoint others in their place until the next annual election. If it is found to be for the best interest of said certificate or policy holder that the affairs of said corporation, association or society be wound up, said court or judge shall so direct, and for that purpose may appoint a receiver, who shall regard all proper claims for benefits under said certificates as preferred claims. No action or proceeding shall be instituted with a view of the appointment of a receiver or closing up of the business of any such corporation, association or society by any other person, or in any other manner except as herein provided. [1907, ch. 157, § 11.]

**§ 4976. Company's certificate of authority.** On compliance with this article by any corporation, association or society the insurance commissioner shall issue a certificate that it has fully complied with the provisions of this article, and is authorized to transact business for a period of one year from April first of the year of its issue. [1907, ch. 157, § 12.]

**§ 4977. Voting proxy.** At any regularly constituted meeting of the policy holders or certificate holders of any corporation, association or society doing business under this article, each policy holder or certificate holder shall be entitled to at least one vote, and any such person may in writing authorize any other person entitled to vote at such meeting to vote for him. [1907, ch. 157, § 13.]

**§ 4978. Limit time of suit.** Any corporation, association or society organized or operating under this article may limit the time within which suit may be brought against it on any claim based upon its policies or certificates of membership, and after the expiration of the time thus limited shall not be liable thereon; provided, such limitation shall be incorporated in and form a part of the contract between the company, association or society, and the

assured or its members; and provided, further, that such limitation shall not be limited to a period of less than one year from the time such right of action accrues. [1907, ch. 157, § 14.]

**§ 4979. Reciprocal penalties.** Whenever the existing or future laws of any other state of the United States, territory or province of any other country, or the rules and regulations of the insurance department of any such state, territory or province shall require of corporations, associations or societies organized and doing business under this act, any payment of taxes, fines, penalties, certificates of authority, licenses, fees or require any other duties, examinations or acts other than are by the laws of this state required of such mutual corporation, association or society organized under the laws of such other state, territory or province, then the insurance commissioner shall immediately require from every such insurance corporation, association or society of such other state, territory or province transacting or seeking to transact business in this state, the like payment of all licenses, fees, taxes, fines or penalties, and the like doing of all acts which by the laws or the rules of the insurance department of such other state, territory or province, require in excess of the licenses, fees, taxes, statements, fines, penalties, acts, examinations or duties required by the laws of this state of the mutual companies of such other states, transacting business in this state. [1907, ch. 157, § 15.]

**§ 4980. Foreign corporations, licensed when.** When any corporation, association or society not organized in this state and doing business of accident or sickness, or accident and sickness insurance shall comply with the requirements of this article applicable to it and shall satisfy the insurance commissioner that it is in a solvent condition and able to meet its obligations at maturity, he shall issue to such foreign corporation, association or society a certificate stating that such corporation, association or society has complied with the laws of this state and authorizing said corporation, association or society to do and transact such business in this state subject to the provisions of this article. [1907, ch. 157, § 16.]

## CHAPTER 20.

### MINING AND MANUFACTURING CORPORATIONS, ETC.

**§ 4981. How formed. Term of existence.** Corporations for mining, manufacturing and other industrial pursuits may be formed as provided in chapter 12; 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. [R. C. 1905, § 4514; Civ. C. 1877, § 511; R. C. 1899, § 3154.]

**§ 4982. 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. [R. C. 1905, § 4515; Civ. C. 1877, § 512; R. C. 1895, § 3155.]

**§ 4983. Accounts. Publicity. Statement.** Regular books of accounts of all the business of such corporation must be kept, which with the vouchers shall at all reasonable times be open for the inspection of any of the stockholders, and any stockholder in making such inspection shall be privileged to take with him an expert accountant to aid him in making the inspection, 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. [1907, ch. 55; R. C. 1905, § 4516; Civ. C. 1877, § 513; R. C. 1899, § 3156.]

**§ 4984. 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. [R. C. 1905, § 4517; Civ. C. 1877, § 514; R. C. 1899, § 3157.]

Recovery against stockholders. *Busby v. Riley*, 6 S. D. 401, 61 N. W. 164.

Who are laborers, servants or employes under statute making stockholders individually liable. 18 L.R.A. 308.

**§ 4985. 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. [R. C. 1905, § 4518; Civ. C. 1877, § 515; R. C. 1899, § 3158.]

**§ 4986. 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. [R. C. 1905, § 4519; Civ. C. 1877, § 516; R. C. 1895, § 3159.]

**§ 4987. 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. [R. C. 1905, § 4520; Civ. C. 1877, § 517; R. C. 1899, § 3160.]

§ 4988. 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. [R. C. 1905, § 4521; Civ. C. 1877, § 518; R. C. 1899, § 3161.]

CHAPTER 21.

STATEMENTS BY MINING CORPORATIONS.

§ 4989. Mining corporations to file statement before offering stock for sale. No shares or certificates of stock in any mining corporation established under the laws of this state, or any state, territory, province, country or government, shall be sold or offered for sale within this state by such corporation, or by any person, firm, association or corporation acting as agent, representative, attorney or broker for such corporation, until such corporation shall have filed in the office of the secretary of state a statement under oath, showing the financial condition of such corporation, the location of the mine or mines, owned by such corporation, with plans of the same; the amount of work done thereon; the amount of cash expended for improvements thereon and the condition of the plant and machinery connected therewith. Such statements shall be signed by the president, secretary and treasurer of such corporation and shall be verified by the oath of each of such officers to the effect that the same is in all respects true. [1909, ch. 169, § 1.]

§ 4990. Form of statement. Fee for filing. The statement provided for in section 4989 shall be in substantially the following form:

STATEMENT of the

....., a corporation organized under the laws of the state, territory or province of ..... and operating ..... mines located in or near the town of or mining district of ....., county of ....., state of .....

I.

- 1. Amount of authorized capital stock .....
2. Amount of capital stock issued.....
3. Amount of capital stock held by corporation.....
4. Amount of capital stock issued in payment of property.....
5. Amount of capital stock sold for cash.....
6. Amount of cash received in payment for stock.....
7. Value and description of property received in payment for stock.....
8. Amount of debts or liabilities in
(a) Bonds (stating rate of interest, and time at which bonds fall due .....
(b) Other indebtedness .....
9. Amount of cash on hand.....
10. Amount of credits and estimated value thereof:
(a) Notes .....
(b) Bills receivable .....
(c) Accounts receivable .....
11. Present value of property of corporation.....
12. Number and amount of dividends declared.....
13. Rate of last dividend, and date when same was declared and paid.....

II.

- 1. Location of property owned (to be accompanied by plans of the same) .....

2. Amount of work done on the property, showing extent of development  
 .....  
 3. Amount of cash expended for improvements on said properties.....  
 .....  
 4. Description of plant and machinery, and their present condition.....  
 .....  
 Dated at ..... this ..... day of ..... 190..  
 .....President.  
 .....Secretary.  
 .....Treasurer.

State of ..... }  
 County of ..... }ss.:

On this ..... day of ....., 190., personally appeared  
 ..... president, ..... secretary and .....  
 treasurer of the ..... and who being by me duly sworn  
 did each for himself depose and say that the foregoing statement by them  
 signed is in all respects correct, true and accurate.

.....  
 Notary Public.

A fee of twenty-five dollars for filing such statement shall be paid to the  
 secretary of state by such corporation, at the time such statement is pre-  
 sented for filing. [1909, ch. 169, § 2.]

**§ 4991. Secretary of state to keep docket open to public inspection.** It  
 shall be the duty of the secretary of state to provide and keep in his office  
 and open to public inspection a docket with appropriate blanks and indices,  
 and to forthwith and as soon as the statement provided for in section 4989 is  
 filed in his office, enter therein the name of the corporation filing the same,  
 together with a copy of the statement. [1909, ch. 109, § 3.]

**§ 4992. Punishment for violation of preceding sections.** Any person who  
 sells or offers for sale within this state any shares or certificates of stock in any  
 mining corporation which has not filed a statement in accordance with the  
 provisions of sections 4989 and 4990 of this act, is guilty of a misdemeanor.  
 [1909, ch. 169, § 4.]

**§ 4993. Punishment for violation of preceding sections by corporations.**  
 Any corporation or officer or agent thereof, or any broker, selling or offering  
 for sale shares or certificates of stock in any mining corporation which has not  
 filed the statement in accordance with the provisions of sections 4989 and 4990  
 of this act is guilty of a misdemeanor, and in addition thereto shall forfeit to  
 the people of the state the sum of one thousand dollars for each and every  
 offense, to be recovered in an action to be brought by the attorney-general.  
 The secretary of state shall report to the attorney-general at least once in  
 three months the names of all agents, corporations or brokers who to his  
 knowledge are engaged in the sale of shares or certificates of stock in mining  
 corporations which have failed to comply with the provisions of this chapter.  
 The moneys forfeited by this section, when recovered, shall be paid into the  
 state treasury, except, that where the fact of the violation of this chapter is  
 brought to the knowledge of the attorney-general by a person other than a  
 person holding a public office within this state, one-half of the moneys re-  
 covered for a violation of this chapter shall be paid to such person so fur-  
 nishing the information and knowledge of such violation to the attorney-  
 general as aforesaid. [1909, ch. 169, § 5.]

**§ 4994. Making false statement.** Any officer of a mining corporation who,  
 in making the statement prescribed by section 4990, willfully makes any state-  
 ment which he knows to be false, is guilty of a misdemeanor. [1909, ch. 169,  
 § 6.]

## CHAPTER 22.

## BRIDGE CORPORATIONS.

§ 4995. **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 4505 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. [R. C. 1905, § 4522; Civ. C. 1877, § 528; R. C. 1899, § 3162.]

§ 4996. **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. [R. C. 1905, § 4523; Civ. C. 1877, § 529; R. C. 1899, § 3163.]

§ 4997. **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. [R. C. 1905, § 4524; Civ. C. 1877, § 530; R. C. 1899, § 3164.]

§ 4998. **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. [R. C. 1905, § 4525; Civ. C. 1877, § 531; R. C. 1899, § 3165.]

Rights and duties of toll-bridge proprietors. 58 L.R.A. 155; 30 L.R.A.(N.S.) 360.

§ 4999. **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. [R. C. 1905, § 4526; Civ. C. 1877, § 532; R. C. 1899, § 3166.]

Conditions to right to take tolls. 58 L.R.A. 163; 30 L.R.A.(N.S.) 363.

Vehicles subject to tolls. 30 L.R.A.(N.S.) 363.

§ 5000. **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. [R. C. 1905, § 4527; Civ. C. 1877, § 533; R. C. 1899, § 3167.]

§ 5001. **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. [R. C. 1905, § 4528; Civ. C. 1877, § 534; R. C. 1899, § 3168.]

§ 5002. **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. [R. C. 1905, § 4529; Civ. C. 1877, § 535; R. C. 1899, § 3169.]

§ 5003. **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. [R. C. 1905, § 4530; Civ. C. 1877, § 536; R. C. 1899, § 3170.]

§ 5004. **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. [R. C. 1905, § 4531; Civ. C. 1877, § 537; R. C. 1899, § 3171.]



## CHAPTER 23.

## RELIGIOUS, EDUCATIONAL AND BENEVOLENT CORPORATIONS.

- ARTICLE 1. GENERAL PROVISIONS, §§ 5005-5012.**
2. PROVISIONS RELATING TO EDUCATIONAL CORPORATIONS, §§ 5013-5016.
  3. FRATERNAL CORPORATIONS, §§ 5017-5024.
  4. STATUS AND ORGANIZATION OF FRATERNAL CORPORATIONS, §§ 5025-5042.
  5. FRATERNAL BENEFICIARY ASSOCIATIONS, §§ 5043-5058.
  6. FRATERNAL BENEFIT SOCIETIES, §§ 5059-5090.
  7. CEMETERY CORPORATIONS, §§ 5091-5099.
  8. HOMES FOR ORPHANS, §§ 5100-5108.
  9. DEPENDENT CHILDREN, §§ 5109, 5110.

## ARTICLE 1.—GENERAL PROVISIONS.

**§ 5005. How formed.** A corporation for religious, educational, benevolent, charitable or scientific purposes may be formed in the manner provided in chapter 12. [R. C. 1905, § 4532; Civ. C. 1877, § 538; 1891, ch. 48, § 2; R. C. 1895, § 3172.]

**§ 5006. 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. [R. C. 1905, § 4533; Civ. C. 1877, § 541; R. C. 1899, § 3173.]

**§ 5007. 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. [R. C. 1905, § 4534; Civ. C. 1877, § 542; 1881, ch. 28, § 1; R. C. 1895, § 3174.]

**§ 5008. 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 7 of this chapter. [R. C. 1905, § 4535; 1901, ch. 50.]

**§ 5009. By-laws.** Such corporations may in their by-laws in addition to the provisions of section 4535 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. [R. C. 1905, § 4536; Civ. C. 1877, § 543; R. C. 1895, § 3175.]

**§ 5010. 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. [R. C. 1905, § 4537; Civ. C. 1877, § 544; R. C. 1899, § 3176.]

**§ 5011. 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. [R. C. 1905, § 4538; Civ. C. 1877, § 545; R. C. 1899, § 3177.]

§ 5012. **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. 1905, § 4539; R. C. 1899, § 3178.]

#### ARTICLE 2.—PROVISIONS RELATING TO EDUCATIONAL CORPORATIONS.

§ 5013. **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. [R. C. 1905, § 4540; Civ. C. 1877, § 549; R. C. 1899, § 3179.]

§ 5014. **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. [R. C. 1905, § 4541; Civ. C. 1877, § 550; R. C. 1895, § 3180.]

§ 5015. **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. [R. C. 1905, § 4542; Civ. C. 1877, § 551; R. C. 1899, § 3181.]

§ 5016. **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. [R. C. 1905, § 4543; Civ. C. 1877, § 552; R. C. 1899, § 3182.]

#### ARTICLE 3.—FRATERNAL CORPORATIONS.

§ 5017. **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. [R. C. 1905, § 4544; 1890, ch. 72, § 1; R. C. 1899, § 3183; 1901, ch. 91.]

As to fraternal benefit societies, see sections 5059-5090.

**§ 5018. 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. [R. C. 1905, § 4545; 1890, ch. 72, § 2; 1901, ch. 91.]

**§ 5019. 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. [R. C. 1905, § 4546; 1890, ch. 72, § 3; R. C. 1899, § 3185.]

**§ 5020. 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. [R. C. 1905, § 4547; 1890, ch. 72, § 4; R. C. 1899, § 3186.]

**§ 5021. Term of existence.** The duration of corporations organized under this article may be perpetual if it is so stated in the articles of incorporation. [R. C. 1905, § 4548; 1890, ch. 72, § 5; R. C. 1899, § 3187.]

**§ 5022. 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 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 this 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. [R. C. 1905, § 4549; 1890, ch. 72, § 6; R. C. 1899, § 3188.]

**§ 5023. 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. [R. C. 1905, § 4550; 1890, ch. 72, § 7; R. C. 1899, § 3189.]

**§ 5024. 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. [R. C. 1905, § 4551; 1890, ch. 72, § 8; 1891, ch. 49, § 1; R. C. 1899, § 3190.]

#### ARTICLE 4.—STATUS AND ORGANIZATION OF FRATERNAL CORPORATIONS.

**§ 5025. Fraternities and associations.** Associations known as lodges, chapters, posts, encampments, councils, commanderies, 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. [R. C. 1905, § 4552; 1901, ch. 89, § 1.]

Conclusiveness of decision of tribunals of fraternal societies. 49 L.R.A. 353.

**§ 5026. 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. [R. C. 1905, § 4553; 1901, ch. 89, § 2.]

Incorporated club whose articles provide that members shall not be liable for corporate debts, is owner of liquor sold by club. *State v. Mudie*, 22 S. D. 41, 115 N. W. 107.

**§ 5027. 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. [R. C. 1905, § 4554; 1891, ch. 89, § 3.]

**§ 5028. Failure to comply. Penalty.** Any such association failing to comply with either section 5026 or 5027 shall forfeit to the state the sum of five dollars to be collected by suit. [R. C. 1905, § 4555; 1901, ch. 89, § 4.]

**§ 5029. 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. [R. C. 1905, § 4556; 1901, ch. 89, § 5.]

**§ 5030. 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. [R. C. 1905, § 4557; 1901, ch. 89, § 6.]

**§ 5031. 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. [R. C. 1905, § 4558; 1901, ch. 89, § 7.]

**§ 5032. 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. [R. C. 1905, § 4559; 1901, ch. 89, § 8.]

**§ 5033. Membership.** The membership of any such association shall be

fixed and determined, each one according to its laws, rules, customs and usages. [R. C. 1905, § 4560; 1901, ch. 89, § 9.]

**§ 5034. 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. [R. C. 1905, § 4561; 1901, ch. 89, § 10.]

**§ 5035. 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. [R. C. 1905, § 4562; 1901, ch. 89, § 11.]

**§ 5036. 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. [R. C. 1905, § 4563; 1901, ch. 89, § 12.]

**§ 5037. 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. [R. C. 1905, § 4564; 1901, ch. 89, § 13.]

**§ 5038. 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. [R. C. 1905, § 4565; 1901, ch. 89, § 14.]

**§ 5039. 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. [R. C. 1905, § 4566; 1901, ch. 89, § 15.]

**§ 5040. 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 person, 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. [R. C. 1905, § 4567; 1901, ch. 89, § 16.]

**§ 5041. Service of process, how made.** Service of process against such associations 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. [R. C. 1905, § 4568; 1901, ch. 89, § 17.]

**§ 5042.** 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. [R. C. 1905, § 4569; 1901, ch. 89, § 18.]

#### ARTICLE 5.—FRATERNAL BENEFICIARY ASSOCIATIONS.

This article is perhaps superseded in part by the provisions in article 6, sections 5059-5090. See section 5061a and the last paragraph in section 5088.

**§ 5043. 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. [R. C. 1905, § 4570; 1901, ch. 90, § 1.]

Who is a "dependent" within statute or rules defining beneficiaries of mutual benefit societies. 2 L.R.A.(N.S.) 653; 36 L.R.A.(N.S.) 208; 37 L.R.A.(N.S.) 1191.

**§ 5044. How to proceed.** All such associations coming within the description, as set forth in section 5043, 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. [R. C. 1905, § 4571; 1901, ch. 90, § 2.]

**§ 5045. How to do business in this state.** Any such association coming within the description, as set forth in section 5043, 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. [R. C. 1905, § 4572; 1901, ch. 90, § 3.]

**§ 5046. 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. [R. C. 1905, § 4573; 1901, ch. 90, § 4.]

**§ 5047. 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. [R. C. 1905, § 4574; 1901, ch. 90, § 5.]

§ 5048. **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. [R. C. 1905, § 4575; 1901, ch. 90, § 6.]

**§ 5049. 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. [R. C. 1905, § 4576; 1901, ch. 90, § 7.]

**§ 5050. 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. [R. C. 1905, § 4577; 1901, ch. 90, § 8.]

**§ 5051. 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. [R. C. 1905, § 4578; 1901, ch. 90, § 9.]

**§ 5052. 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. [R. C. 1905, § 4579; 1891, ch. 90, § 10.]

**§ 5053. 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. [R. C. 1905, § 4580; 1901, ch. 90, § 11.]

**§ 5054. 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
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

FRATERNAL CONGRESS MORTALITY TABLE — Continued.

Age.	No. Living.	No. Dying.	Probability of Dying.
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

[R. C. 1905, § 4581; 1901, ch. 90, § 12.]

§ 5055. **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. [R. C. 1905, § 4582; 1901, ch. 90, § 13.]

§ 5056. **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. [R. C. 1905, § 4583; 1901, ch. 90, § 14.]

§ 5057. **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. [R. C. 1905, § 4584; 1901, ch. 90, § 15.]

§ 5058. **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. [R. C. 1905, § 4585; 1901, ch. 90, § 16.]

#### ARTICLE 6.—FRATERNAL BENEFIT SOCIETIES.

§ 5059. **Fraternal benefit societies defined.** Any corporation, society, order or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provisions for the payment of death benefits in accordance with section 5062, is hereby declared to be a fraternal benefit society. [1913, ch. 191,

See the note under the title of article 5 immediately preceding section 5043.

§ 5060. **Lodge system defined.** Any society having a supreme governing or legislative body, and subordinate lodges or branches by whatever name known, into which members shall be elected, initiated and admitted in accordance with its constitution, laws, rules, regulations and prescribed ritualistic ceremonies, which subordinate lodges or branches shall be required by the laws of such society to hold regular or stated meetings at least once in each month, shall be deemed to be operating on the lodge system. [1913, ch. 191, § 2.]

§ 5061. **Representative form of government defined.** Any such society shall be deemed to have a representative form of government when it shall provide in its constitution and laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws; provided, that the elective members shall constitute a majority in number and have not less than two-thirds of the votes, nor less than the votes required to amend its constitution and laws, and provided further, that the meetings of the supreme or governing

body, and the election of officers, representatives or delegates shall be held as often as once in four years. The members, officers, representatives or delegates of a fraternal benefit society shall not vote by proxy. [1913, ch. 191, § 3.]

§ 5061a. **Exemptions.** Except as herein provided, such societies shall be governed by this article, and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereafter shall apply to them unless they be expressly designated therein. [1913, ch. 191, § 4.]

§ 5062. **Benefits.** Subsection 1. Every society transacting business under this article shall provide for the payment of death benefits, and may provide for the payment of benefits in case of temporary or permanent physical disability, either as the result of disease, accident, or old age; provided, the period of life at which the payment of benefits or disability on account of old age shall commence, shall not be under seventy years; and may provide for monuments or tombstones to the memory of its deceased members, and for the payment of funeral benefits. Such society shall have the power to give a member, when permanently disabled or on attaining the age of seventy, all, or such portion of the face value of his certificate as the laws of the society may provide; provided, that nothing in this act contained shall be so construed as to prevent the issuing of benefit for a term of years less than the whole of life, which are payable upon the death or disability of the member occurring within the term for which the benefit certificate may be issued. Such society shall, upon written application of the member, have the power to accept a part of the periodical contributions in cash, and charge the remainder, not exceeding one-half of the periodical contribution, against the certificate with interest payable or compounded annually at a rate not lower than four per cent per annum; provided, that this privilege shall not be granted except to societies which have readjusted or may hereafter readjust their rates of contributions, and to contracts affected by such readjustment.

Subsection 2. Any society which shall show by the annual valuation hereinafter provided for that it is accumulating and maintaining the reserve not lower than the usual reserve computed by the American experience table and four per cent interest, may grant to its members extended and paid up protection, or such withdrawal equities as its constitution and laws may provide; provided, that such grants shall in no case exceed in value the portion of the reserve to the credit of such members to whom they are made. [1913, ch. 191, § 5.]

§ 5063. **Beneficiaries.** The payment of death benefits shall be confirmed (confined) to wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member; provided, that if after the issuance of the original certificate the member shall become dependent upon an incorporated charitable institution, he shall have the privilege with the consent of the society to make such institution his beneficiary. Within the above restrictions, each member shall have the right to designate his beneficiary, and from time to time have the same changed in accordance with the laws, rules and regulations of the society, and no beneficiary shall have or obtain any vested interest in the said benefit until the same has become due and payable upon the death of the said member; provided, that any society may, by its laws, limit the scope or beneficiaries within the above classes. [1913, ch. 191, § 6.]

Who is a "dependent" within statute or rules defining beneficiaries of mutual benefit societies. 2 L.R.A.(N.S.) 653; 36 L.R.A.(N.S.) 208; 37 L.R.A.(N.S.) 1191.

§ 5064. **Qualifications of membership.** Any society may admit to beneficial membership any person not less than sixteen and not more than sixty years of age, who has been examined by a legally qualified physician, and whose examination has been supervised and approved in accordance with the laws of

the society; provided, that any beneficiary member of such society who shall apply for a certificate providing for disability benefits, need not be required to pass an additional medical examination therefor. Nothing herein contained shall prevent such society from accepting general or social members. [1913, ch. 191, § 7.]

§ 5065. **Certificate.** Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation, or, if a voluntary association, the articles of association, the constitution and laws of the society and the applications for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member, and copies of the same certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions or amendments to said charter or articles of incorporation, or articles of association, if a voluntary association, constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate shall bind the member and his beneficiaries and shall govern and control the agreement in all respects the same as though such changes, additions or amendments had been made prior to and were in force at the time of the application for membership. [1913, ch. 191, § 8.]

§ 5066. **Funds.** Subsection 1. Any society may create, maintain, invest, disburse and apply an emergency, surplus or other similar fund in accordance with its laws. Unless otherwise provided in the contract, such funds shall be held, invested and disbursed for the use and benefit of the society, and no member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the surrender of any part thereof, except as provided in subsection 2 of section 5062. The funds from which benefits shall be paid and the funds from which the expenses of the society shall be defrayed, shall be derived from periodical or other payments by the members of the society and accretions of said funds; provided, that no society domestic or foreign, shall hereafter be incorporated or admitted to transact business in this state which does not provide for stated periodical contributions sufficient to provide for meeting the mortuary obligations contracted, when valued upon the basis of the national fraternal congress table of mortality as adopted by the national fraternity congress, August 23, 1899, or any higher standard with interest assumption not more than four per cent per annum, nor write or accept members for temporary or permanent disability benefits except upon tables based upon reliable experience, with an interest assumption not higher than four per cent per annum. [1913, ch. 191, § 9.]

Subsection 2. Deferred payments or installments of claims shall be considered as fixed liabilities on the happening of the contingency upon which such payments or installments are thereafter to be paid. Such liability shall be the present value of such future payments of installments upon the rate of interest and mortality assumed by the society for valuation, and every society shall maintain a fund sufficient to meet such liabilities regardless of proposed future collections to meet any such liabilities.

§ 5067. **Investments.** Every society shall invest its funds only in securities permitted by the laws of this state for the investment of the assets of life insurance companies; provided, that any foreign society permitted or seeking to do business in this state, which invests its funds in accordance with the laws of the state in which it is incorporated, shall be held to meet the requirements of this article for the investment of funds. [1913, ch. 191, § 10.]

§ 5068. **Distribution of funds.** Every provision of the laws of the society for the payment by members of such society, in whatever form made, shall distinctly state the purpose of the same and the proportion thereof which

may be used for expenses, and no part of the money collected for mortuary or disability purposes, or the net accretions of either or any of said funds shall be used for expenses. [1913, ch. 191, § 11.]

Distribution of assets of insolvent insurance company. 38 L.R.A. 97.

**§ 5069. Organization.** Seven or more persons, citizens of the United States, and a majority of whom are citizens of this state, who desire to form a fraternal benefit society, as defined by this article, may make and sign (giving their addresses) and acknowledge before some officer competent to take acknowledgment of deeds, articles of incorporation, in which shall be stated:

1st. The proposed corporate name of the society, which shall not so closely resemble the name of any society or insurance company already transacting business in this state as to mislead the public or to lead to confusion;

2nd. The purpose for which it is formed — which shall not include more liberal powers than are granted by this article, provided that any lawful, social, intellectual, educational, charitable, benevolent, moral or religious advantages may be set forth among the purposes of the society — and the mode in which its corporate powers are to be exercised;

3rd. The names, residences and official titles of all the officers, trustees, directors or other persons who are to have and exercise the general control and management of the affairs and funds of the society for the first year, or until the ensuing election, at which all such officers shall be elected by the supreme legislative or governing body, which election shall be held not later than one year from the date of the issuance of the permanent certificate.

Such articles of incorporation and duly certified copies of the constitution and laws, rules and regulations, and copies of all proposed form of benefit certificates, applications therefor and circulars to be issued by such society, and a bond in the sum of five thousand dollars, with sureties approved by the commissioner of insurance, conditioned upon the return of the advance payments, as provided in this section, to applicants, if the organization is not completed within one year, shall be filed with the commissioner of insurance, who may require such further information as he deems necessary, and if the purposes of the society conform to the requirements of this article, and all provisions of law have been complied with the commissioner of insurance shall so certify and retain and record (or file) the articles of incorporation, and furnish the incorporators a preliminary certificate authorizing said society to solicit members as hereinafter provided.

Upon receipt of said certificate from the commissioner of insurance said society may solicit members for the purpose of completing its organization and shall collect from each applicant the amount of not less than one regular monthly payment, in accordance with its table of rates as provided by its constitution and laws, and shall issue to each such applicant a receipt for the amount so collected. But no such society shall incur any liability other than for such advanced payments, nor issue any benefit certificate nor pay or allow, or offer or promise to pay or allow to any person any death or disability benefit until actual bona fide applications for death benefit certificates have been secured upon at least five hundred lives for at least one thousand dollars each, and all such applicants for death benefits shall have been regularly examined by legally qualified practicing physicians, and certificates of such examinations have been duly filed and approved by the chief medical examiner of such society; nor until there shall be established ten subordinate lodges or branches, into which said five hundred applicants have been initiated; nor until there has been submitted to the commissioner of insurance, under oath of the president and secretary, or corresponding officers of such society, a list of such applicants, giving their names, addresses, date examined, date approved, date initiated, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, rate of stated periodical contributions, which shall be



sufficient to provide for meeting the mortuary obligation, contracted, when valued for death benefits upon the basis of the national fraternal congress table of mortality, as adopted by the national fraternal congress August 23, 1899, or any higher standard at the option of the society, and for disability benefits by tables based upon reliable experience and for combined death and permanent total disability benefits by tables based upon reliable experience, with an interest assumption not higher than four per cent per annum; nor until it shall be shown to the commissioner of insurance by the sworn statement of the treasurer, or corresponding officer of such society that at least five hundred applicants have each paid in cash at least one regular monthly payment, as herein provided per one thousand dollars of indemnity to be affected, which payments in the aggregate shall amount to at least twenty-five hundred dollars; all of which shall be credited to the mortuary or disability fund on account of such applicants, and no part of which may be used for expenses.

Said advanced payments shall, during the period of organization, be held in trust, and, if the organization is not completed within one year, as hereinafter provided, returned to said applicants.

The commissioner of insurance may make such examination and require such further information as he deems advisable, and, upon presentation of satisfactory evidence that the society has complied with all the provisions of law, he shall issue to such society a certificate to that effect. Such certificate shall be prima facie evidence of the existence of such society at the date of such certificate. The commissioner of insurance shall cause a record of such certificate to be made and certified copy of such record may be given in evidence with like effect as the original certificate.

No preliminary certificate granted under the provisions of this section shall be valid after one year from its date, or after such further period, not exceeding one year, as may be authorized by the commissioner of insurance upon cause shown; unless the five hundred applicants herein required have been secured, and the organization has been completed, as herein provided, and the articles of incorporation and all proceedings thereunder shall become null and void in one year from the date of said preliminary certificate, or at the expiration of said extended period, unless such society shall have completed its organization and commenced business as herein provided. When any domestic society shall have discontinued business for the period of one year, or has less than four hundred members, its charter shall become null and void.

Every such society shall have the power to make a constitution and by-laws for the government of the society, the admission of its members, the management of its affairs, and the fixing and readjusting of the rates of contribution of its members from time to time; and it shall have the power to change, alter, add to, or amend such constitution and by-laws, and shall have such other powers as are necessary and incidental to carrying into effect the objects and purposes of the society. [1913, ch. 191, § 12.]

**§ 5070. Powers retained. Reincorporation. Amendments.** Any society now engaged in transacting business in this state may exercise, after the passage of this article, all of the rights conferred thereby, and all of the rights, powers and privileges not exercised or possessed by it under its charter or articles of incorporation not inconsistent with this article, if incorporated; or if it be a voluntary association it may incorporate hereunder. But no society already organized shall be required to reincorporate hereunder, and any such society may amend its articles of incorporation from time to time in the manner provided therein, or in its constitution and laws, and all such amendments shall be filed with the commissioner of insurance and shall become operative upon such filing unless a later time be provided in such amendments, or in its articles of incorporation, constitution or laws. [1913, ch. 191, § 13.]

**§ 5071. Mergers and transfers.** No domestic societies shall merge with or accept the transfer of the membership or funds of any other society unless such merger or transfer is evidenced by a contract in writing, setting out in full the terms and conditions of such merger or transfer, and filed with the commissioner of insurance of this state together with a sworn statement of the financial condition of each of said societies by its president and secretary, or corresponding officers, and a certificate of such officers, duly verified under oath of said officers of each of the contracting societies that such merger or transfer has been approved by a vote of two-thirds of the members of the supreme legislative or governing body of each of said societies. Upon the submission of said contract, financial statements and certificates, the commissioner of insurance shall examine the same, and if he shall find such financial statements to be correct and the said contract to be in conformity with the provisions of this section, and that such merger or transfer is just and equitable to the members of each of said societies he shall approve said merger or transfer, issue his certificate to that effect, and thereupon the said contract of merger or transfer shall be of full force and effect.

In case such contract is not approved the facts of its submission and its contents shall not be disclosed by the commissioner of insurance. [1913, ch. 191, § 14.]

**§ 5072. Annual license.** Societies which are now authorized to transact business in this state may continue such business until the first day of April next succeeding the passage of this article, and the authority of such societies may thereafter be renewed annually, but in all cases to terminate on the first day of the succeeding April; provided, however, the license shall continue in full force and effect until the new license be issued or specifically refused. For each such license or renewal the society shall pay the commissioner of insurance ..... dollars. A duly certified copy or duplicate of such license shall be prima facie evidence that the licensee is a fraternal benefit society within the meaning of this article. [1913, ch. 191, § 15.]

**§ 5073. Admission of foreign society.** No foreign society now transacting business, organized prior to the passage of this article, which is not now authorized to transact business in this state, shall transact any business herein without a license from the commissioner of insurance. Any such society shall be entitled to a license to transact business within this state upon filing with the commissioner a duly certified copy of its charter or articles of association, a copy of its constitution and laws, certified by its secretary or corresponding officer; a power of attorney to the commissioner of insurance as hereinafter provided; a statement of its business under oath of its president and secretary, or corresponding officers, in the form required by the commissioner, duly verified by an examination made by the supervising insurance official of its home state or other state satisfactory to the commissioner of insurance of this state; a certificate from the proper official in its home state, province, or country, that the society is legally organized; a copy of its contract, which must show that benefits are provided for by periodical, or other payments by persons holding similar contracts; and upon furnishing the commissioner such other information as he may deem necessary to a proper exhibit of its business and plan of working, and upon showing that its assets are invested in accordance with the laws of the state, territory, district, province or country where it is organized, he shall issue a license to such society to do business in this state until the first day of the succeeding April, and such license shall, upon compliance with the provisions of this article, be renewed annually but in all cases to terminate on the first day of the succeeding April; provided, however, that license shall continue in full force and effect until the new license be issued or specifically refused. Any foreign society desiring admission to this state shall have

the qualifications required of domestic societies organized under this article and have its assets invested as required by the laws of the state, territory, district, country or province where it is organized. For each such license or renewal the society shall pay the commissioner ..... dollars. When the commissioner refuses to license any society, or revokes its authority to do business in this state he shall reduce his ruling, order or decision to writing and file the same in his office, and shall furnish a copy thereof, together with a statement of his reasons, to the officers of the society, upon request, and the action of the commissioner shall be reviewable by proper proceedings in any court of competent jurisdiction within the state; provided, however, that nothing contained in this or the preceding section shall be taken or construed as preventing any such society from continuing in good faith all contracts made in this state during the time such society was legally authorized to transact business herein. [1913, ch. 191, § 16.]

**§ 5074. Power of attorney and service of process.** Every society, whether domestic or foreign, now transacting business in this state, shall, within thirty days after the passage of this article, and every said society hereafter applying for admission shall, before being licensed, appoint in writing the commissioner of insurance and his successors in office to be its true and lawful attorney, upon whom all legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon the society, and that the authority shall continue in force so long as any liability remains outstanding in this state.

Copies of such appointment, 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 shall only be made upon such attorney, must be made in duplicate upon the commissioner of insurance, or, in his absence, upon the person in charge of his office, and shall be deemed sufficient service upon such society; provided, however, that no such service shall be valid or binding against any such society when it is required thereunder to file its answer, pleading or defense, in less than thirty days from the date of mailing the copy of such service to such society. When legal process against any such society is served upon said commissioner of insurance he shall forthwith forward by registered mail one of the duplicate copies prepaid and directed to its secretary or corresponding officer. Legal process shall not be served upon any such society except in the manner provided herein. [1913, ch. 191, § 17.]

**§ 5075. Place of meeting, location of office.** Any domestic society may provide that the meetings of its legislative or governing body may be held in any state, district, province or territory wherein such society has subordinate branches, and all business transacted at such meetings shall be as valid in all respects as if such meetings were held in this state; but its principal office shall be located in this state. [1913, ch. 191, § 18.]

**§ 5076. No personal liability.** Officers and members of the supreme, grand, or any subordinate body of any such incorporated society shall not be individually liable for the payment of any disability or death benefit provided for in the laws and agreements of such society, but the same shall be payable only out of the funds of such society and in the manner provided by its laws. [1913, ch. 191, § 19.]

Liability of members of mutual insurance company. 32 L.R.A. 481.

Jurisdiction of equity to enforce liability of member of mutual insurance company. 40 L.R.A. (N.S.) 781.

**§ 5077. Waiver of the provisions of the laws.** The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same

shall be binding on the society and each and every member thereof and on all beneficiaries of members. [1913, ch. 191, § 20.]

**§ 5078. Benefit not attachable.** No money or other benefit, charity or relief or aid to be paid, provided or rendered by any such society shall be liable to attachment, garnishment or other process, or be seized, taken, appropriated or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary, or any other person who may have a right thereunder, either before or after payment. [1913, ch. 191, § 21.]

**§ 5079. Constitution and laws. Amendment.** Every society transacting business under this article shall file with the commissioner of insurance a duly certified copy of all amendments of or additions to its constitution and laws within ninety days after the enactment of the same. Printed copies of the constitution and laws as amended, changed or added to, certified by the secretary or corresponding officer of the society shall be prima facie evidence of the legal adoption thereof. [1913, ch. 191, § 22.]

**§ 5080. Annual reports.** Every society transacting business in this state shall annually, on or before the first day of March, file with the commissioner of insurance, in such form as he may require, a statement under oath of its president and secretary, or corresponding officers, of its condition and standing on the thirty-first day of December next preceding, and of its transactions for the year ending on that date, and also shall furnish such other information as the commissioner of insurance may deem necessary to a proper exhibit of its business and plan of working. The commissioner may at other times require any further statement he may deem necessary to be made relating to such society.

In addition to the annual report herein required each society shall annually report to the commissioner a valuation of its certificates in force on December thirty-first, last preceding; including those issued within the year for which the report is filed, in cases where the contributions for the first year in whole or in part are used for current mortality and expenses; provided, the first report of valuation shall be made as of December thirty-first, 1912. Such report of valuation shall show, as contingent liabilities, the present midyear value of the promised benefits provided in the constitution and laws of such society under certificates then subject to valuation; and, as contingent assets, the present midyear values of the future net contributions provided in the constitution and laws as the same are in practice actually collected. At the option of any society, in lieu of the above, the valuation may show the net value of the certificates subject to valuation hereinbefore provided, and said net value, when computed in case of monthly contributions, may be the means of the terminal values for the end of the preceding and of the current insurance years.

Such valuation shall be certified by a competent accountant or actuary, or, at the request and expense of the society, verified by the actuary of the department of insurance of the home state of the society, and shall be filed with the commissioner of insurance within ninety days after the submission of the last preceding annual report. The legal minimum standard of valuation for all certificates, except for disability benefits, shall be the national fraternal congress table of mortality as adopted by the national fraternal congress August twenty-third, 1899, or, at the option of the society, any higher table; or at its option it may use a table based upon the society's own experience of at least twenty years and covering not less than one hundred thousand lives with interest assumption not more than four per cent per annum. Each such valuation report shall set forth clearly and fully the mortality and interest bases and the method of valuation. Any society providing for disability benefits shall keep the net contributions for such benefits in a fund separate and apart from all other benefit and expense funds

and the valuation of all other business of the society; provided, that where a combined contribution table is used by a society for both death and permanent total disability benefits the valuation shall be according to tables of reliable experience, and in such case a separation of the funds shall not be required.

The valuation herein provided for shall not be considered or regarded as a test of the financial solvency of the society, but each society shall be held to be legally solvent so long as the funds in its possession are equal to or in excess of its matured liabilities.

Beginning with the year 1914 a report of such valuation and an explanation of the facts concerning the condition of the society thereby disclosed shall be printed and mailed to each beneficiary member of the society not later than June first of each year; or, in lieu thereof, such report of valuation and showing of the society's condition as thereby disclosed may be published in the society's official paper and the issue containing the same mailed to each beneficiary member of the society. The laws of such society shall provide that if the stated periodical contributions of the members are insufficient to pay all matured death and disability claims in full, and to provide for the creation and maintenance of the funds required by its laws, additional, increased or extra rates of contribution shall be collected from the members to meet such deficiency; and such laws may provide that, upon the written application or consent of the member, his certificate may be charged with its proportion of any deficiency disclosed by valuation, with interest not exceeding five per centum per annum. [1913, ch. 191, § 23.]

**§ 5081. Provisions to insure future security.** If the valuation of the certificates, as hereinbefore provided, on December thirty-first, 1917, shall show that the present value of future net contributions, together with the admitted assets, is less than the present value of the promised benefits and accrued liabilities such society shall thereafter maintain said financial condition at each succeeding triennial valuation in respect of the degree of deficiency, as shown in the valuation as of December thirty-first, 1917. If at any succeeding triennial valuation such society does not show at least the same condition the commissioner shall direct that it thereafter comply with the requirements herein specified. If the next succeeding triennial valuation after the receipt of such notice shall show that the society has failed to maintain the condition required herein the commissioner may, in the absence of good cause shown for such failure, institute proceedings for the dissolution of such society, in accordance with the provisions of section 5083 or in the case of a foreign society, its license may be cancelled in the manner provided in this article.

Any such society, shown by any triennial valuation, subsequent to December thirty-first, 1917, not to have maintained the condition herein required, shall within two years thereafter make such improvement as to show a percentage of deficiency not greater than as of December thirty-first, 1917, or thereafter, as to all new members admitted, be subject, so far as stated rates of contributions are concerned, to the provisions of section 5069, applicable in the organization of new societies; provided, that the net mortality or beneficial contributions and funds of such new members shall be kept separate and apart from the other funds of the society. If such required improvement is not shown by the succeeding triennial valuation then the said new members may be placed in a separate class, and their certificates valued as an independent society in respect of contributions and funds. [1913, ch. 191, § 23a.]

**§ 5082. Alternative provisions.** In lieu of the requirements of sections 5080 and 5081 any society accepting in its laws the provisions of this section may value its certificates on a basis herein designated "accumulation basis" by crediting each member with the net amount contributed for each year with

interest at approximately the net rate earned and by charging him with his share of the losses for each year, herein designated "cost of insurance," and carrying the balance, if any, to his credit. The charge for the cost of insurance may be according to the actual experience of the society applied to a table of mortality recognized by the law of this state, and shall take into consideration the amount at risk during each year, which shall be the amount payable at death less the credit to the member. Except as specifically provided in its articles or laws or contracts no charge shall be carried forward from the first valuation hereunder against any member for any past share of losses exceeding the contributions and credit. If, after the first valuation, any member's share of losses for any year exceeds his credit including the contribution for the year the contribution shall be increased to cover his share of the losses. Any such excess share of losses chargeable to any member may be paid out of a fund or contributions especially created or required for such purpose.

Any member may transfer to any place adopted by the society with net rates on which tabular reserves are maintained and on such transfer shall be entitled to make such application of his credit as provided in the laws of the society.

Certificate issued, rerated or readjusted on a basis providing for adequate rate with adequate reserves to mature such certificates upon assumption for mortality and interest recognized by the law of this state shall be valued on such basis, herein designated the "tabular basis;" provided, that if on the first valuation under this section a deficiency in reserve shall be shown for any such certificate the same shall be valued on the accumulation basis.

Whenever in any society having members upon the tabular basis and upon the accumulation basis the total of all costs of insurance provided for any year shall be insufficient to meet the actual death and disability losses for the year the deficiency shall be met for the year from the available funds after setting aside all credits in the reserve; or from increased contributions, or by an increase in the number of assessments applied to the society as a whole, or to classes of members as may be specified in its laws. Savings from a lower amount of death losses may be returned in like manner as may be specified in its laws.

If the laws of the society so provide the assets representing the reserves of any separate class of members may be carried separately for such class as if an independent society, and the required reserve accumulation of such class so set apart shall not thereafter be mingled with the assets of other classes of the society.

A table showing the credits to individual members for each age and year of entry and showing opposite each credit the tabular reserve required on the whole life or other plan of insurance specified in the contract, according to assumptions for mortality and interest recognized by the law of this state and adopted by the society, shall be filed by the society with each annual report, and also be furnished to each member before July first of each year.

In lieu of the aforesaid statement there may be furnished to each member within the same time a statement giving the credit for such member, and giving the tabular reserve and level rate required for a transfer carrying out the plan of insurance specified in the contract. No table or statement need be made or furnished where the reserves are maintained on the tabular basis.

For this purpose individual bookkeeping accounts for each member shall not be required, and all calculations may be made by actuarial methods.

Nothing herein contained shall prevent the maintenance of such surplus over and above the credits on the accumulation basis and the reserves on the tabular basis pursuant to its law; nor be construed as giving to the individual member any right or claim to any such reserve or credit other than in manner as expressed in the contract and its law; nor as making any such reserve

or credits a liability in determining the legal solvency of the society. [1913, ch. 191, § 23b.]

**§ 5083. Examination of domestic societies.** The commissioner of insurance, or any person he may appoint, shall have the power of visitation and examination into the affairs of any domestic society. He may employ assistants for the purpose of such examination, and, he, or any person he may appoint, shall have free access to all the books, papers and documents that relate to the business of the society, and may summon and qualify as witness under oath and examine its officers, agents and employes, or other persons in relation to the affairs, transactions and condition of the society. The expense of such examination shall be paid by the society examined upon statement furnished by the commissioner of insurance, and the examination shall be made at least once in three years.

Whenever, after examination, the commissioner of insurance is satisfied that any domestic society has failed to comply with any provisions of this article, or is exceeding its powers, or is not carrying out its contracts in good faith, or is transacting business fraudulently; or whenever any domestic society, after the existence of one year or more, shall have a membership of less than 400 (or shall determine to discontinue business) the commissioner of insurance may present the facts relating thereto to the attorney-general, who shall, if he deem the circumstances warrant, commence an action in quo warranto in a court of competent jurisdiction, and such court shall thereupon notify the officers of such society of a hearing, and if it shall then appear that such society should be closed, said society shall be enjoined from carrying on any further business and some person shall be appointed receiver of such society, and shall proceed at once to take possession of the books, papers, moneys and other assets of the society, and shall forthwith, under the direction of the court, proceed to close the affairs of the society and to distribute its funds to those entitled thereto.

No such proceedings shall be commenced by the attorney-general against any such society until after notice has been duly served on the chief executive officers of the society and a reasonable opportunity given to it on a date to be named in said notice to show cause why such proceedings should not be commenced. [1913, ch. 191, § 24.]

**§ 5084. Application for receiver, etc.** No application for injunction against or proceedings for the dissolution of or the appointment of a receiver for any such domestic society or branch thereof shall be entertained by any court in this state unless the same is made by the attorney-general. [1913, ch. 191, § 25.]

**§ 5085. Examination of foreign societies.** The commissioner of insurance, or any person whom he may appoint, may examine any foreign society transacting or applying for admission to transact business in this state. The said commissioner may employ assistants, and he, or any person he may appoint, shall have free access to all the books, papers and documents that relate to the business of the society and may summon and qualify as witness under oath and examine its officers, agents and employes and other persons in relation to the affairs, transactions and conditions of the society. He may, in his discretion, accept in lieu of such examination the examination of the insurance department of the state, territory, district, province or country where such society is organized. The actual expenses of examiners making any such examination shall be paid by the society upon statement furnished by the commissioner of insurance.

If any such society, or its officers, refuse to submit to such examination, or to comply with the provisions of the section relative thereto, the authority of such society to write new business in this state shall be suspended or license refused until satisfactory evidence is furnished the commissioner relating to the condition and affairs of the society, and during such sus-

pension the society shall not write new business in this state. [1913, ch. 191, § 26.]

§ 5086. **No adverse publications.** Pending, during or after an examination or investigation of any such society, either domestic or foreign, the commissioner of insurance shall make public no financial statement, report or finding, nor shall he permit to become public any financial statement, report or finding affecting the status, standing or rights of any such society until a copy thereof shall have been served upon such society at its home office, nor until such society shall have been afforded a reasonable opportunity to answer any such financial statement, report or finding, and to make such showing in connection therewith as it may desire. [1913, ch. 191, § 27.]

§ 5087. **Revocation of license.** When the commissioner of insurance, on investigation, is satisfied that any foreign society transacting business under this article has exceeded its powers, or has failed to comply with any provisions of this article, or is conducting business fraudulently, or is not carrying out its contracts in good faith, he shall notify the society of his findings, and state in writing the grounds of his dissatisfaction, and after reasonable notice require said society, on a date named, to show cause why its license should not be revoked. If on the date named in said notice such objections have not been removed to the satisfaction of the said commissioner of insurance, or the society does not present good and sufficient reasons why its authority to transact business in this state should not at that time be revoked, he may revoke the authority of the society to continue business in this state. All decisions and findings of the commissioner made under the provisions of this section may be reviewed by the proper proceedings in any court of competent jurisdiction, as provided in section 5073. [1913, ch. 191, § 28.]

§ 5088. **Exemption of certain societies.** Nothing contained in this article shall be construed to affect or apply to grand or subordinate lodges of Masons, Odd Fellows or Knights of Pythias (exclusive of the Insurance Department of the Supreme Lodge Knights of Pythias), and the Junior Order of the United American Mechanics (exclusive of the Beneficiary Degree of Insurance branch of the National Council Junior Order United American Mechanics), or societies which limit their membership to any one hazardous occupation, nor to similar societies which do not issue insurance certificates, nor to an association of local lodges of a society now doing business in this state, which provides death benefits not exceeding five hundred dollars to any one person or disability benefits not exceeding three hundred dollars in any one year to any one person, or both, nor to any contracts of reinsurance business on such plan in this state, nor to domestic societies which limit their membership to the employes of a particular city or town, designated firm, business house or corporation, nor to domestic lodges, orders or associations of a purely religious, charitable and benevolent description, which do not provide for a death benefit of more than one hundred dollars, or for disability benefits of more than one hundred and fifty dollars to any one person in any one year. The commissioner of insurance may require from any such society such information as will enable him to determine whether such society is exempt from the provisions of this article.

Any fraternal benefit society, heretofore organized and incorporated and operating within the definition set forth in sections 5059, 5060 and 5061 of this article, providing for benefits in case of death or disability resulting solely from accidents, but which does not obligate itself to pay death or sick benefits, may be licensed under the provisions of this article, and shall have all the privileges and shall be subject to all the provisions and regulations of this act, except that the provisions of this article requiring medical examinations, valuations of benefit certificates, and that the certificate shall



specify the amount of benefits, shall not apply to such society. [1913, ch. 191, § 29.]

**§ 5089. Taxation.** Every fraternal benefit society organized or licensed under this article is hereby declared to be a charitable and benevolent institution, and all of its funds shall be exempt from all and every state, county, district, municipal and school tax, other than taxes on real estate and office equipment. [1913, ch. 191, § 30.]

Fraternal benefit society as a benevolent or charitable association within exemption statutes. 7 L.R.A. (N.S.) 380.

**§ 5090. Penalties.** Any person, officer, member or examining physician of any society authorized to do business under this article 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 money from or benefit in any society transacting business under this article, 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 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 society 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 state, 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.

Any person who shall solicit membership for, or in any manner assist in procuring membership in any fraternal benefit society not licensed to do business in this state, or who shall solicit membership for, or in any manner assist in procuring membership in any such society not authorized, as herein provided, to do business, as herein defined in this state, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty or more than two hundred dollars.

Any society, or any officer, agent or employe thereof neglecting or refusing to comply with, or violating any of the provisions of this article, the penalty for which neglect, refusal or violation is not specified in this section, shall be fined not exceeding two hundred dollars upon conviction thereof. [1913, ch. 191, § 31.]

#### ARTICLE 7.—CEMETERY CORPORATIONS.

**§ 5091. 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. [R. C. 1905, § 4586; Civ. C. 1877, § 553; R. C. 1899, § 3191.]

**§ 5092. 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. Any plat may be vacated by such corporation at any time before the sale of any lots therein by a majority vote of the directors of such corporation, and when so vacated a written instrument declaring the same to be vacated, ex-

cuted and acknowledged, as such plats are executed and acknowledged, shall be recorded in the office of the register of deeds where such plat is recorded; and in case any lot or lots have been sold in such plat and reconveyed by the owners thereof to such corporation, such plat may be vacated as hereinbefore provided; and such corporation may by a majority vote of its directors vacate any avenue or avenues, walk or walks, in its cemetery upon the written petition of all owners of lots abutting upon such avenue, avenues, walk or walks, and when any avenue, avenues, walk or walks are so vacated such avenue, avenues, walk or walks shall revert to and become the property of the owners of lots abutting thereon from either side to the center thereof; and such corporation shall file, in the office where the plat of such cemetery is filed, a plat of such portion of said cemetery showing such change, and acknowledged as such plats are required to be acknowledged. The register of deeds in whose office the plats aforesaid are recorded shall write in plain, legible letters across the plat or that part of a plat so vacated the word "vacated," and shall make a reference on the same to the volume and page in which such instrument of vacation is recorded. [1907, ch. 44; R. C. 1905, § 4587; Civ. C. 1877, § 554; R. C. 1899, § 3192.]

**§ 5093. 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; and such corporation may receive by gift, devise, bequest or otherwise, moneys or real or personal property or the income or avails of such moneys or property in trust, in perpetuity, for the perpetual and permanent improvement, maintenance, ornamentation, repair, care and preservation of any burial lot or grave, vault or tomb in any cemetery owned or controlled by such corporation, upon such terms and in such manner as may be provided by the terms of such gift, devise, bequest or other conveyance of such moneys or property in trust, and assented to by such corporation, and subject to the rules and regulations of such corporation; and every such cemetery corporation owning or controlling any such cemetery may make contracts with the owner, legal representatives of such owner of any lot, grave, vault or tomb in such cemetery for the perpetual and permanent improvement, maintenance, ornamentation, care, preservation and repair of any such lot, grave, vault or tomb in such cemetery owned or controlled by such corporation. [1913, ch. 108; R. C. 1905, § 4588; Civ. C. 1877, § 555; R. C. 1899, § 3193.]

**§ 5094. 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. [R. C. 1905, § 4589; Civ. C. 1877, § 556; R. C. 1899, § 3194.]

**§ 5095. 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. [R. C. 1905, § 4590; Civ. C. 1877, § 557; R. C. 1899, § 3195.]

**§ 5096. 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. [R. C. 1905, § 4591; Civ. C. 1877, § 558; R. C. 1899, § 3196.]

§ 5097. **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. [R. C. 1905, § 4592; Civ. C. 1877, § 559; R. C. 1899, § 3197.]

§ 5098. **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. [R. C. 1905, § 4593; Civ. C. 1877, § 560; R. C. 1899, § 3198.]

Rights of persons who have buried relatives in cemeteries. 75 Am. St. Rep. 427.  
Character of estate or property of owner in burial lot. 67 L.R.A. 118.

§ 5099. **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. [R. C. 1905, § 4594; Civ. C. 1877, § 561; R. C. 1899, § 3199.]

#### ARTICLE 8.— HOMES FOR ORPHANS.

§ 5100. **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. [R. C. 1905, § 4595; 1897, ch. 87, § 1; R. C. 1899, § 3199a.]

§ 5101. **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. [R. C. 1905, § 4596; 1897, ch. 87, § 2; 1899, ch. 98, § 2; R. C. 1899, § 3199b.]

**§ 5102. 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. [R. C. 1905, § 4597; 1897, ch. 87, § 3; R. C. 1899, § 3199c.]

**§ 5103. 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. [R. C. 1905, § 4598; 1897, ch. 87, § 4; R. C. 1899, § 3199d.]

**§ 5104. 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. [R. C. 1905, § 4599; 1897, ch. 87, § 5; 1899, ch. 98, § 5; R. C. 1899, § 3199e.]

Law establishing children's home society may be constitutional. *State v. Children's Home Society*, 10 N. D. 493, 88 N. W. 273.

Though time for appeal from order granting an association the custody of plaintiff's children had expired, court had jurisdiction to consider his petition to have them restored to him. *McFall v. Simmons*, 12 S. D. 562, 81 N. W. 898.

Court in proceedings hereunder has no authority to call jury, and continuance to allow jury trial is without legal authority. *State ex rel. Kronchnabel v. Taylor*, 30 S. D. 304, 138 N. W. 372.

**§ 5105. Citations issued in certain cases.** Whenever a petition such as is provided for in section 5104, 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. [R. C. 1905, § 4600; 1899, ch. 87, §§ 6, 7; R. C. 1899, § 3199f.]

**§ 5106. 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 9205. [R. C. 1905, § 4601; 1903, ch. 39.]

**§ 5107. Foreign societies must give bond.** 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 five hundred dollars, with the treasurer of the county, where such child or children may 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 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 prohibit 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; and provided, further, that this act [section] shall not be so construed as to prevent the free interchange of dependent children without bond, between such associations or societies organized under the laws of other states and associations or societies organized under the laws of North Dakota for the purpose of caring for dependent children by placing them in family homes by adoption or otherwise; and such associations or societies organized for such purposes within the state of North Dakota may become the legal guardians of such dependent children assigned or released to them by similar legally authorized associations or societies in other states. [1911, ch. 80; R. C. 1905, § 4602; 1903, ch. 79, § 1.]

**§ 5108. Bonds approved by county commissioners. Penalty.** Such bonds shall cover all children placed in any given county of North Dakota by said associations 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 or children in violation of this article, shall be deemed guilty of a misdemeanor. [1911, ch. 80; R. C. 1905, § 4603; 1903, ch. 79, §§ 2, 3.]

#### ARTICLE 9.—DEPENDENT CHILDREN.

**§ 5109. Cared for at public expense. Duty of county commissioners.** Any minor child under the age of sixteen years who shall by reason of the failure of either or both of its parents or its custodians to support such child becomes dependent upon public charity, or who may be deserted by its parent or

parents or custodians without arrangements for its proper care, shall be deemed abandoned, and may be cared for at public expense by the overseers of the poor, or assigned by the county commissioners as overseers of the poor, and with the written consent of the county judge under the seal of his office, to any reputable organization incorporated under the laws of North Dakota for the purpose of placing such children in family homes for adoption or otherwise; provided, that in such cases the consent of either parent or custodian shall not be necessary. The commissioners may in their discretion allow and pay to such incorporated organization a reasonable amount to cover the expense of such assignment. [1907, ch. 91, § 1.]

**§ 5110. Child deemed abandoned, when.** Any minor child under the age of sixteen years who shall have been left for board with any reputable organization incorporated under the laws of North Dakota for the care and placing of children, and whose board shall not have been paid for a period of three months without a reasonable excuse, and the residence of whose legal custodians shall not be known to such organization or its officers, shall be deemed abandoned, and may upon assignment by the county commissioners as overseers of the poor, with the written consent of the county judge under the seal of his office, be placed by such organization in a family home for adoption or upon contract as may seem to be for the best welfare of the child, without the consent of either parent, and as provided for in sections 5100-5105. [1907, ch. 91, § 2.]

## CHAPTER 24.

### AGRICULTURAL FAIR CORPORATIONS.

**§ 5111. 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 department of the public thereon, which may be requisite or proper. [R. C. 1905, § 4604; 1903, ch. 7, § 1.]

Liability of persons giving exhibitions for acts of independent contractor. 66 L.R.A. 152.

Liability of one conducting fair or exposition for injury to patron through negligence of concessionary. 14 L.R.A.(N.S.) 284; 32 L.R.A.(N.S.) 717.

Liability of one maintaining place of amusement for the safety of patrons. 1 L.R.A.(N.S.) 427; 3 L.R.A.(N.S.) 1132; 19 L.R.A.(N.S.) 772; 32 L.R.A.(N.S.) 713; 42 L.R.A.(N.S.) 1071.

**§ 5112. 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. [R. C. 1905, § 4605; 1903, ch. 7, § 2.]

**§ 5113. Liability of stockholders.** The liability of stockholders shall not be other or greater than that provided in section 4554 of this code. [R. C. 1905, § 4606; 1903, ch. 7, § 3.]

**§ 5114. 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. [R. C. 1905, § 4607; Civ. C. 1877, § 562; R. C. 1899, § 3200.]

**§ 5115. Debts limited.** Such corporation must not contract any debt or liabilities in excess of the amount of money in the treasury at the time of contract or not exceeding two thousand five hundred dollars, reasonably ex-

pected to be paid into the treasury from the receipts from a fair or exposition immediately to be held thereafter, except for the purchase of real property or the making of permanent improvements on the real property owned by such corporation, for which it may create a debt not exceeding ten thousand dollars, secured by mortgage on the real property of the corporation. The directors who vote therefor are personally liable for any debt contracted or incurred in violation of this section. [1907, ch. 126, § 1; R. C. 1905, § 4608; Civ. C. 1877, § 564; R. C. 1899, § 3201.]

§ 5116. **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 concessions, 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 and the creation of a sinking fund not exceeding five thousand dollars and for carrying on the business of such corporation; 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. [1907, ch. 126, § 2; R. C. 1905, § 4609; Civ. C. 1877, § 505; 1879, ch. 8, § 1; R. C. 1899, § 3202.]

## CHAPTER 25.

### STATE POULTRY ASSOCIATION.

§ 5117. **Appropriation.** There is hereby appropriated out of the funds of the state treasury not otherwise appropriated, the sum of three hundred dollars annually, to be expended by the North Dakota poultry association in payment of premiums and special awards in connection with its annual exhibits. [1907, ch. 184, § 1.]

§ 5118. **Annual exhibition.** For the purpose of promoting, improving and increasing the poultry industry, an annual exhibition shall be held subject to the conditions hereinafter named. [1907, ch. 184, § 2.]

§ 5119. **Conditions to be complied with.** The present North Dakota poultry association, organized under the general laws of this state in relation to corporations, is hereby created as the North Dakota state poultry association; provided, however, that the state shall never become liable for any of the debts or liabilities of said association. The association shall adopt and file with the secretary of state an irrevocable by-law consenting, and providing that its board of directors shall consist of ten persons; that the commissioner of agriculture and labor shall ex-officio constitute one member of said board of directors. [1907, ch. 184, § 3.]

§ 5120. **Appointment and duties of executive committee.** The board of directors of such institution shall appoint an executive committee which shall keep an accurate account of the expenditures of all moneys appropriated to it by the state and all other receipts and expenditures and shall collect all information in their power in relation to the poultry industry in the state, and report the same, together with a statement of their doings, to the governor on or prior to the first day of January each year following the holding of the annual exhibition, and by the governor laid before the legislative assembly. All moneys hereby appropriated shall be paid over to the treasurer of the association on the order of the president, attested by the secretary. [1907, ch. 184, § 4.]



## CHAPTER 26.

## BUILDING AND LOAN ASSOCIATIONS.

§ 5121. **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 one to twelve, inclusive, of chapter twelve of this code shall be applicable to such corporation; provided that the term of corporate existence of any such association may be renewed for a term of years, not exceeding the period limited by law, at any regular directors' meeting of such corporation by a two-thirds vote of the directors of said corporation, and the certificate of the chairman and secretary of such directors' meeting, evidencing such vote and renewal and filed with the secretary of state shall be effectual to accomplish such renewal, and shall be recorded by the secretary of state in the book of corporations, and thereupon the terms of the existence of such corporation shall be renewed for the term provided by said vote and certificate. Such corporation may do business outside of the 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 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; provided, however, that for the purpose of this act any foreign corporation which issues certificates or contracts to citizens of this state whereby it agrees that in consideration of certain stipulated monthly payments to said corporation it will either buy or build a home, or loan money upon real estate, shall be considered and held to be foreign building and loan associations. [1913, ch. 107; 1907, ch. 56; R. C. 1905, § 4610; 1899, ch. 31; R. C. 1899, § 3203.]

History, objects and powers of building and loan associations and membership and its rights and obligations. 69 Am. Dec. 158.

Validity and effect of statute requiring deposit of securities by building and loan association as a prerequisite to the right to transact business. 9 L.R.A.(N.S.) 461.

§ 5122. **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. [R. C. 1905, § 4611; 1885, ch. 34, § 2; 1887, ch. 34, § 1; 1889, ch. 40, § 11; R. C. 1895, § 3204.]

Withdrawing member must pay fines and penalties prescribed by by-laws. *Beach v. Loan Asso.*, 10 S. D. 549, 74 N. W. 889.

Cannot adopt by-law for forfeiture of shares for nonpayment of dues and fines, without sale of the shares. *Mueller v. Madison Loan Co.*, 11 S. D. 43, 75 N. W. 277.

Nature and validity of fines in building and loan associations. 35 L.R.A. 215.

Withdrawals from building and loan associations. 35 L.R.A. 289.

Power of associations to borrow money to pay withdrawing member. 20 L.R.A. (N.S.) 393.

**§ 5123. 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. [R. C. 1905, § 4612; 1885, ch. 34, § 4; 1887, ch. 34, § 3; 1899, ch. 32, § 1; R. C. 1899, § 3205.]

Minimum premium at which money can be loaned may be fixed. *Co-operative Loan Asso. v. Fawick*, 11 S. D. 589, 79 N. W. 847.

Fixed premiums or fixed minimum of premiums in building and loan associations. 35 L.R.A. 244.

**§ 5124. 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. 1905, § 4613; R. C. 1895, § 3206.]

Right to apply payments made on stock in a building and loan association upon a mortgage given for a loan by the same member. 29 L.R.A. 120.

Provision in mortgage for payment of fines to building and loan associations. 35 L.R.A. 220.

**§ 5125. 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. [R. C. 1905, § 4614; 1885, ch. 34, § 5; 1887, ch. 34, § 4; R. C. 1895, § 3207.]

Failure to pay monthly as agreed may render entire principal, with interest, due. *Yankton B. & L. Asso. v. Dowling*, 10 S. D. 540, 74 N. W. 438.

Loan to member; application of payments. *U. S. Loan Co. v. Shain*, 8 N. D. 136, 77 N. W. 1006; *Hale v. Cairns*, 8 N. D. 145, 77 N. W. 1010, 44 L.R.A. 261; 73 Am. St. Rep. 746; *Clark v. Olson*, 9 N. D. 364, 83 N. W. 519; *Hale v. Gullick*, 13 S. D. 637, 84 N. W. 196.

**§ 5126. 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. [R. C. 1905, § 4615; 1885, ch. 34, § 6; R. C. 1895, § 3208.]

Payment of bonus agreed upon not usury. *Yankton B. & L. Asso. v. Dowling*, 10 S. D. 540, 74 N. W. 438; *Vermont L. & T. Co. v. Whithed*, 2 N. D. 82, 49 N. W. 318.

**§ 5127. 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. [R. C. 1905, § 4616; 1899, ch. 32, § 2; R. C. 1899, § 3209.]

**§ 5128. 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. [R. C. 1905, § 4617; 1889, ch. 40, § 4; R. C. 1899, § 3210.]

**§ 5129. 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. [R. C. 1905, § 4618; 1889, ch. 40, § 5; R. C. 1895, § 3211.]

**§ 5130. 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. [R. C. 1905, § 4619; 1889, ch. 40, § 7; R. C. 1895, § 3212.]

**§ 5131. Power to borrow.** Such corporation shall have power to borrow money under such restrictions and regulations as its by-laws may provide. [R. C. 1905, § 4620; 1889, ch. 40, § 8; R. C. 1895, § 3213.]

Power of building and loan association to borrow money to pay withdrawing members. 20 L.R.A. (N.S.) 393.

**§ 5132. 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. [R. C. 1905, § 4621; 1889, ch. 40, § 9; R. C. 1895, § 3214.]

**§ 5133. 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. [R. C. 1905, § 4622; 1885, ch. 34, § 18; R. C. 1895, § 3215.]

Withdrawals from building and loan association while a solvent going concern. 49 L.R.A. (N.S.) 1129.

Withdrawals as affected by insolvency or winding up of business. 49 L.R.A. (N.S.) 1142.

**§ 5134. 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. 1905, § 4623; R. C. 1895, § 3216.]

**§ 5135. 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. 1905, § 4624; R. C. 1895, § 3217.]

**§ 5136. 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. 1905, § 4625; R. C. 1895, § 3218; 1901, ch. 46; 1905, ch. 59.]

**§ 5137. 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. [R. C. 1905, § 4626; 1899, ch. 33; R. C. 1899, § 3219.]

Effect of insolvency of building and loan association upon the rights and liabilities of members. 61 Am. St. Rep. 24.

When may receivers for building and loan association be appointed. 72 Am. St. Rep. 47.

**§ 5138. 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 5238 and 5240.
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 persons 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. 1905, § 4627; R. C. 1895, § 3220.]

**§ 5139. 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. 1905, § 4628; R. C. 1895, § 3221.]

**§ 5140. 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. 1905, § 4629; R. C. 1895, § 3222.]

**§ 5141. 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. 1905, § 4630; R. C. 1895, § 3223.]

§ 5142. **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. 1905, § 4631; R. C. 1895, § 3224.]

§ 5143. **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. 1905, § 4632; R. C. 1895, § 3225.]

## CHAPTER 27.

### RIGHT OF WAY FOR TELEPHONE AND ELECTRIC LINES.

§ 5144. **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. [R. C. 1905, § 4633; 1899, ch. 156; R. C. 1899, § 3225a; 1903, ch. 196.]

City authorized to grant telephone company right to erect, maintain and operate telephone system in streets. *Kirby v. Citizens' Teleph. Co.*, 17 S. D. 362, 97 N. W. 3, 2 A. & E. Ann. Cas. 152.

Necessity of consent of local authorities to construction of telephone line in city. *Missouri R. Teleph. Co. v. Mitchell*, 22 S. D. 191, 116 N. W. 67.

City was authorized to require as condition to grant of telephone franchise that company pay annually to city 10 per cent of its gross receipts above sum specified. *Mitchell v. Dakota Central Teleph. Co.*, 25 S. D. 409, 127 N. W. 582.

Telephone companies are not empowered to create public nuisances, or interfere with use of highways by improper erection of poles and wires. *Snee v. Clear Lake Teleph. Co.*, 24 S. D. 361, 123 N. W. 729.

Telegraph and telephone poles and wires as additional servitude on the public streets and highways. 49 Am. Rep. 14; 54 Am. Rep. 290; 106 Am. St. Rep. 260.

Privilege of using street for telegraph line as a contract within provision against impairing obligation. 50 L.R.A. 146.

Right to require telegraph or telephone wires to be placed underground. 31 L.R.A. 806; 14 L.R.A.(N.S.) 654.

**§ 5145. 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. [R. C. 1905, § 4634; 1905, ch. 153.]

Street railroads as additional servitude in streets. 28 Am. St. Rep. 235; 47 Am. St. Rep. 272.

Privilege of using street for street railway as a contract within provision against impairing obligation. 50 L.R.A. 143.

Liability of municipality in damages for repeal, or interference with enjoyment, of street franchise. 36 L.R.A.(N.S.) 861.

Municipal power to impose conditions when giving consent to street railway. 36 L.R.A. 33.

Power of municipality to prevent laying an additional street car track under a franchise originally granting the right to lay double tracks. 36 L.R.A.(N.S.) 850.

Estoppel of town or municipality to object to street railway in street by acquiescence or consent to its construction or use. 7 L.R.A.(N.S.) 1187.

## CHAPTER 28.

### BANKING CORPORATIONS.

**§ 5146. Creation of banking department. State banking board.** (1) There is hereby created a department of banking which shall have charge of the execution of all laws relating to state banks, savings banks, trust companies, building and loan associations, mutual investment corporations, mutual savings corporations and other financial corporations heretofore or hereafter organized or doing business under the laws of the state of North Dakota, and engaged wholly or in part in the receiving of deposits or the selling of their certificates of indebtedness or other obligations to the public. Such department shall be designated as the "department of banking," and it shall be under the management and control of the state banking board and a chief officer to be known as the state examiner.

(2) The state banking board shall consist of the governor, the secretary of state and the attorney-general; and ex-officio the president and secretary of the corporation known as the North Dakota bankers' association, so long as said corporation shall maintain its corporate capacity. None of the members of said board shall receive any compensation for their services other than that now provided by law and the two members last named shall be entitled to attend all meetings of said board and to participate in its deliberations but shall not vote in the deciding of questions coming before it. The governor shall be the chairman of said board and the attorney-general shall be ex-officio the attorney for the board, and the state examiner shall be its secretary. A majority of the first three members shall constitute a quorum. Said board shall hold regular meetings on the first Wednesdays of January, April, July and October of each year, at the office of the department in the state capitol at Bismarck, and special meetings at the call of the governor.

(3) The said board shall have, and there is hereby vested in it, the power



to make such rules and regulations 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 said board at each regular meeting and at any special meeting called for that purpose, to examine all reports made by said corporations relating to their condition, and all reports of regular and special examinations made by the state examiner and deputy examiners from his department and filed with said board during the preceding quarter or such period as shall have elapsed since the last meeting of said board, and to approve or disapprove the same, and to make and enforce such orders as, in its judgment, may be necessary or proper to protect the public and particularly the depositors or creditors of said institutions. Said board and the state examiner and deputy examiners shall have the power to subpoena witnesses, administer oaths, and generally to do and perform any and all acts and things necessary to the complete performance of the duties herein imposed, and to enforce all of the provisions of this article, and for the purpose of enabling them to perform all the duties imposed upon them, the provisions of section 8200 shall be held as applicable to their proceedings. Any and all orders made by said board shall be immediately operative and remain in full force until modified, amended or annulled by such board, or by a court of competent jurisdiction, in an action to be commenced by the party against whom such order may have been issued. Said board shall keep a full and complete record of all its proceedings and of all orders made by it, and the records of the state banking board, and of the state examiner, and of any and all reports made by or filed with the board or the state examiner shall, under proper restrictions, during regular business hours, be open to inspection and examination by stockholders, depositors, creditors and sureties on any bonds of any of the said corporations or on the bonds of any officer or employe thereof. The said board is hereby vested with the power and authority to appoint by its own order, receivers for insolvent corporations as defined in this article, and such receivers shall have the same power and authority, and their acts the same validity as if appointed under and by the direction of a district court, but nothing herein contained shall be construed so as to take away from the courts the power to appoint receivers of such institutions at any stage of the proceedings and thus terminate the receivership ordered by the board.

(4) The state examiner shall, under the direction and subject to the orders of the state banking board, exercise a constant supervision, either personal or through the deputy examiners hereinafter provided for, over the business and affairs of all the financial corporations placed by this act within the jurisdiction of the state banking board and shall, personally or through the deputy examiners herein provided for, visit at least twice each year, all of said corporations, inspecting and verifying the assets and liabilities of each, and so far investigate the character and value of the assets of each such corporation as to ascertain with reasonable certainty that the values are correctly carried on its books. He shall further investigate the methods of operation and conduct of said corporations and their systems of accounting, to ascertain whether such methods are in accordance with the law and sound banking usage and principles, and report the findings, conclusions and recommendations upon such examinations to the banking board and put into force and effect such orders and directions as it may make in reference thereto.

(5) The state examiner shall be ex-officio secretary of the state banking board, and he shall keep all proper records and files pertaining to the duties and work of his office and the proceedings of the board and shall report to the board annually, touching on all his official acts and those of his deputy examiners, giving abstracts of statistics and of the conditions of the various

institutions to which his duties relate, and making such recommendations and suggestions as he may deem proper, which report shall be printed and bound in a satisfactory and substantial manner and distributed among all of the state banks and other corporations within his jurisdiction. The state banking board shall make biennial reports the same as other state officers and boards, in which there shall be included with a full report of its proceedings, a summary or abstract of the reports of the state examiner.

(6) The state examiner may, subject to the approval of the state banking board, appoint and at pleasure remove, not more than ten (10) deputy examiners and one stenographer and such other employes as may in the judgment of the state banking board, be necessary for the proper discharge of the business of his department. Each deputy examiner shall give bond to the state in the sum of ten thousand dollars to be approved and filed in the same manner as the bond of the state examiner. The state examiner shall select and designate one of said deputy examiners to be the office deputy and to act during the absence or disability of the state examiner, and in such cases the deputy examiner so authorized shall have charge of the office and administer its affairs. Six of the said deputy examiners so appointed shall have had at least three years' active experience in bank work within this state and shall furnish such evidence of qualification as expert accountants and general fitness for the duties as may be demanded by the banking board.

(7) For the purpose of the better administration of his department the state examiner shall, immediately after the taking effect of this act, proceed to divide the state into six districts which shall have as nearly as may be, banks and other financial institutions of an equal number, and arranged with reference to convenience and economy in travel and shall at once designate the district in which each of his six deputy examiners shall make examinations, and such deputy examiners shall confine their work, as near as may be, to the examination of corporations located within their respective districts, except that any such deputy examiners may be temporarily transferred to other districts, or more than one deputy examiner may be assigned temporarily to any district when the proper performance of the work therein would indicate the necessity for so doing. No deputy examiner shall have any interest directly or indirectly in any corporation within the jurisdiction of the banking department, nor in any corporation engaged wholly or in part in the writing or issuing of bonds of or for any such corporation or of the officers or employes of any such corporations.

(8) Each deputy examiner herein provided for shall be under the direct orders and instructions of the state examiner and shall make report to him in such form as he or the banking board may prescribe during or immediately after the completion of the examination of each financial institution examined by him, with such recommendations and suggestions as he may deem advisable.

(9) The salary of each deputy examiner shall be two thousand dollars per annum and in addition thereto he shall be paid his actual and necessary travelling expenses when engaged in the discharge of his duties; the salary of the stenographer shall be twelve hundred dollars per annum and the salaries of other clerks or assistants herein provided for, shall be fixed by the state banking board. [1911, ch. 55, § 1; R. C. 1905, § 4635; 1905, ch. 165, § 1.]

See section 5204.

As to biennial reports by the state banking board. See sections 95, 97, 98, 633.

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.

**§ 5146a. Appropriation.** There is hereby annually appropriated from any moneys in the state treasury not otherwise appropriated, the sum of twenty-nine thousand dollars or so much thereof as may be necessary for the pay-

ment of the salaries and expenses of the persons to be appointed under the provisions of this act. [1911, ch. 55, § 5.]

The words "this act" as here used mean sections 5146, 5149, 5155, 5179.

**§ 5146b. Repeal.** All acts and parts of acts inconsistent with or repugnant to this act are hereby repealed; provided, however, that this act shall not affect any offense committed, any right acquired, or any obligation imposed by or under any law in force up to the date of the taking effect of this act. But all such offenses, rights and liabilities shall remain and be prosecuted, maintained or defended under the law existing at the time such offense was committed or such right or liability accrued. [1911, ch. 55, § 6.]

As to the words "this act," see note to section 5146a.

**§ 5147. 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. [R. C. 1905, § 4636; 1890, ch. 23, § 1; 1893, ch. 27, § 1; R. C. 1899, § 3226; 1905, ch. 165, § 2.]

Banking corporation organized before legislative authority so to do, is corporation de facto on receiving deposits after such authority is given, although not filing required certificate. *Mason v. Stevens*, 16 S. D. 320, 92 N. W. 424.

Power to prohibit or regulate banking business by individuals. 15 L.R.A. 477; 5 L.R.A. (N.S.) 874; 25 L.R.A. (N.S.) 1217.

**§ 5148. 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. [R. C. 1905, § 4637; 1890, ch. 23, § 2; 1893, ch. 27, § 2; R. C. 1895, § 3227; 1905, ch. 165, § 3.]

**§ 5149. 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 banks 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 banking board and issue a certificate of authority to the corporation, which certificate of authority shall be transmitted to and held by the state examiner until an examination is made and the certificate of the state examiner or a deputy examiner procured, to the effect that the capital stock has been paid in full, and that all conditions of the law have been strictly complied with. [1911, ch. 55, § 2; R. C. 1905, § 4638; 1890, ch. 23, § 3; 1893, ch. 27, § 3; R. C. 1899, § 3228; 1905, ch. 165, § 4.]

**§ 5150. 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 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 in any amount exceeding twenty-five per cent of total loans and discounts, and then only upon first mortgages which shall not exceed forty per cent of the actual cash value of the property mortgaged, 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. [1913, ch. 51; R. C. 1905, § 4639; 1899, ch. 28, § 1; R. C. 1899, § 3229; 1905, ch. 165, § 5.]

§. President of state bank must be stockholder thereof. *McCarty v. Kepreta*, 24 N. D. 395, 48 L.R.A.(N.S.) 65, 139 N. W. 1012.

Liability of bank on negotiable paper executed by officer or agent. 21 L.R.A.(N.S.) 1079.

Implied power of cashier of bank to sell or lease property. 31 L.R.A.(N.S.) 737.

Power of bank officer to bind bank by agreement that liability of party to commercial paper shall not be enforced. 28 L.R.A.(N.S.) 501.

7. Right of bank to engage in business to save debt. 27 L.R.A.(N.S.) 243.

Liability of directors to bank for acts in excess of their powers. 55 L.R.A. 758.

—for default or negligence of cashier. 4 L.R.A.(N.S.) 597.

—in case of bad loans or investments. 55 L.R.A. 762; 39 L.R.A.(N.S.) 173.

**§ 5151. Limiting the powers of its investment in banking house furniture, fixtures, including the lot or parcels of land on which banking house is located.** It shall be unlawful for any corporation having banking powers and a capital stock of twenty thousand dollars or more, to invest over thirty per cent of such stock and unimpaired surplus in banking house furniture and fixtures, including the lot, piece or parcel of land on which such banking house is located; provided, that similar corporations with a capital stock of ten thousand dollars and less than fifty thousand dollars may invest forty

per cent of its stock and unimpaired surplus, and those with fifteen thousand dollars and less than twenty thousand dollars stock may invest thirty-five per cent of its capital stock and unimpaired surplus in such banking house furniture, fixtures and lot, piece or parcel of land on which such banking house is located. [1913, ch. 52, § 1; 1911, ch. 54, § 1; R. C. 1905, § 4640; 1899, ch. 28, § 2; R. C. 1899, § 3230; 1905, ch. 165, § 6.]

§ 5152. **Powers as to other real estate.** It shall have the power to purchase, hold and convey such other real estate as shall be mortgaged to it in good faith by way of security for loans, or for debts previously contracted.

Such as may or shall be mortgaged to it in good faith in satisfaction of debts previously contracted in the course of its dealings.

Such as it shall purchase at sales under judgments, decrees or mortgages held by the corporation, or shall purchase to secure debts due it; but no banking corporation shall hold the possession of any real estate under mortgage, or title and possession of any real estate purchased to secure indebtedness, for a longer period than five years from the date of acquiring title thereto. And all real estate heretofore and hereafter conveyed by any such banking corporation, shall be deemed to have been acquired, held and disposed of in conformity with the provisions of this chapter. [1913, ch. 52, § 2; 1911, ch. 54, § 2; R. C. 1905, § 4640; 1899, ch. 28, § 2; R. C. 1899, § 3230; 1905, ch. 165, § 6.]

Authorizes bank to receive real property deeds as security for past indebtedness. *Merchants State Bank v. Tufts*, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760.

§ 5153. **Penalty.** Any banking corporation violating the provisions of this act [sections 5151-5154] shall be subject to a fine of not more than five hundred dollars and cancellation of its organization certificate. [1913, ch. 52, § 3; 1911, ch. 54, § 3.]

§ 5154. **Duty of state examiner.** It shall be the duty of the state examiner to enforce the provisions of this act. [1913, ch. 52, § 4; 1911, ch. 54, § 4.]

§ 5155. **Capital stock.** Hereafter no association shall be organized under this chapter in cities, towns or villages containing less than one thousand inhabitants with a capital stock of less than ten thousand dollars; in cities, towns or villages containing over one thousand inhabitants and less than two thousand inhabitants, with a capital stock of less than twenty thousand dollars; in cities, towns or villages of over two thousand, and not exceeding three thousand inhabitants, with a capital of 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 of less than forty thousand dollars; and in cities, towns or villages of over five thousand inhabitants, with a capital of less than fifty thousand dollars. All of the capital stock of every association shall be paid in before it shall be authorized to commence business, and evidence of such payment of capital stock either in actual money or a deposit in a previously approved correspondent bank must be furnished to the state examiner or deputy examiner before the certificate of authority may be delivered. 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; no such association having been organized to transact business in any 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 its 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 banking board 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 and the proper amendment of the article of incorporation, the board 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. The corporate existence of any bank or corporation heretofore organized with a capital of less than ten thousand dollars shall not be renewed unless such corporation seeking to renew its existence shall increase its capital to the amount required by this act for the organization of a new banking corporation in the city, town or village where such bank is located at the time of such renewal. When any association whose capital is less than ten thousand dollars, applies for a renewal of its corporate existence, it shall, before being permitted to continue its corporate existence, furnish satisfactory evidence through the state banking board that its articles of association have been properly amended and the full amount of the increased capital has been actually paid in cash; provided, that such association in renewing its existence, may, with the consent and approval of the state banking board, convert its then accumulated surplus and undivided profits into capital, to be apportioned amongst the shareholders entitled thereto, or their assigns. [1911, ch. 55, § 3; R. C. 1905, § 4641; 1897, ch. 31; R. C. 1899, § 3231; 1901, ch. 29; 1905, ch. 165, § 7.]

**§ 5156. 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. [R. C. 1905, § 4642; 1890, ch. 23, § 7; 1893, ch. 27, § 7; R. C. 1899, § 3232; 1905, ch. 165, § 8.]

See section 5204.

**§ 5157. Banks have official number.** It is hereby provided that all banks existing and hereafter organized under the laws of this state shall be numbered and shall receive from the secretary of state an official number, and it shall be the duty of the secretary of state to notify each bank of its official number and also file a list of same with the state bank examiner. [1909, ch. 43.]

**§ 5158. 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. [R. C. 1905, § 4643; 1890, ch. 23, § 8; 1893, ch. 27, § 8; R. C. 1899, § 3233; 1905, ch. 165, § 9.]

See section 5204.

**§ 5159. 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 advertisement 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. [R. C. 1905, § 4644; 1890, ch. 23, § 9; 1893, ch. 27, § 9; R. C. 1899, § 3234; 1905, ch. 165, § 10.]

See section 5204.

**§ 5160. 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 dividend, 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. [R. C. 1905, § 4645; 1890, ch. 23, § 10; 1893, ch. 27, § 10; R. C. 1899, § 3235; 1905, ch. 165, § 11.]

See section 5204.

**§ 5161. 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. [R. C. 1905, § 4646; 1890, ch. 23, § 11; 1893, ch. 27, § 11; R. C. 1899, § 3236; 1905, ch. 165, § 12.]

See section 5204.

**§ 5162. 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. [R. C. 1905, § 4647; 1890, ch. 23, § 12; 1893, ch. 27, § 12; R. C. 1899, § 3237; 1905, ch. 165, § 13.]

See section 5204.

§ 5163. **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. [R. C. 1905, § 4648; 1890, ch. 23, § 13; 1893, ch. 27, § 13; R. C. 1899, § 3238; 1905, ch. 165, § 14.]

§ 5164. **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 any 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. [R. C. 1905, § 4649; 1890, ch. 23, § 14; 1893, ch. 27, § 14; R. C. 1899, § 3239; 1905, ch. 165, § 15.]

§ 5165. **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. [R. C. 1905, § 4650; 1890, ch. 23, § 15; 1893, ch. 27, § 15; R. C. 1899, § 3240; 1905, ch. 165, § 16.]

§ 5166. **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. [R. C. 1905, § 4651; 1890, ch. 23, § 16; 1893, ch. 27, § 16; R. C. 1899, § 3241; 1905, ch. 165, § 17.]

See section 5204.

§ 5167. **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. [R. C. 1905, § 4652; 1897, ch. 31; R. C. 1899, § 3242; 1905, ch. 165, § 18.]

See section 5204.

§ 5168. **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. [R. C. 1905, § 4653; 1890, ch. 23, § 18; 1893, ch. 27, § 18; R. C. 1899, § 3243; 1905, ch. 165, § 19.]

See section 5204.

Individual liability of stockholder of insolvent bank. *Union Nat. Bank v. Halley*, 19 S. D. 474, 104 N. W. 213.

**§ 5169. 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 cancelled and deducted from the capital stock of said association. [R. C. 1905, § 4654; 1890, ch. 23, § 19; 1893, ch. 27, § 19; R. C. 1899, § 3244; 1905, ch. 165, § 20.]

See section 5204.

**§ 5170. 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. [R. C. 1905, § 4655; 1890, ch. 23, § 20; 1893, ch. 27, § 20; R. C. 1899, § 3245; 1905, ch. 165, § 21.]

**§ 5171. 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. [R. C. 1905, § 4656; 1890, ch. 23, § 21; 1893, ch. 27, § 21; R. C. 1899, § 3246; 1905, ch. 165, § 22.]

See section 5204.

**§ 5172. Limit of loan to one concern.** The total liability to any association of any person, corporation, company or firm, including in the liabilities of the firm the liabilities of the several members 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 and surplus 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 possession 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. [1909, ch. 45; R. C. 1905, § 4657; 1890, ch. 23, § 22; 1893, ch. 27, § 22; R. C. 1899, § 3247; 1905, ch. 165, § 23.]

**§ 5173. 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 recorded shall be paid into the state treasury. [R. C. 1905, § 4658; 1890, ch. 23, § 23; 1893, ch. 27, § 23; R. C. 1899, § 3248; 1905, ch. 165, § 24.]

See section 5204.

**§ 5174. 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. [R. C. 1905, § 4659; 1890, ch. 23, § 24; 1893, ch. 27, § 24; R. C. 1899, § 3249; 1905, ch. 165, § 25.]

See section 5204.

**§ 5175. 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. [R. C. 1905, § 4660; 1890, ch. 23, § 25; 1893, ch. 27, § 25; R. C. 1899, § 3250; 1905, ch. 165, § 26.]

See section 5204.

Insolvent bank became trustee ex maleficio of money received for draft issued by it when officer knew there was no funds to meet draft. *Widman v. Kellogg*, 22 N. D. 396, 39 L.R.A.(N.S.) 563, 133 N. W. 1020.

Receiving deposit in bank when insolvent as a fraud. 34 L.R.A. 533.

**§ 5176. 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. [R. C. 1905, § 4661; 1890, ch. 23, § 26; 1893, ch. 27, § 26; R. C. 1899, § 3251; 1905, ch. 165, § 27.]

See section 5204.

Liability of directors to depositors for negligence and false statements of solvency. 8 Am. St. Rep. 605.

Liability of officers for failure to close insolvent bank. 3 L.R.A.(N.S.) 438.

Criminal liability for receiving deposit in bank knowing of its insolvency. 31 L.R.A. 124.

When is a bank insolvent within statute making it an offense to receive further deposits. 20 L.R.A.(N.S.) 444.

**§ 5177. 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. [R. C. 1905, § 4662; 1890, ch. 23, § 27; 1893, ch. 27, § 27; R. C. 1895, § 3252; 1905, ch. 165, § 28.]

§ 5178. **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 annulling the existence of said association. [R. C. 1905, § 4663; 1890, ch. 23, § 28; 1893, ch. 27, § 28; R. C. 1899, § 3253; 1905, ch. 165, § 29.]

See section 5204.

§ 5179. **Fees for examination.** Every corporation contemplated to be by this act placed under the jurisdiction and control of the state banking board, and made subject to the examination of the state examiner and his deputy examiners, shall if a new corporation, prior to receiving its certificate of authority to commence business, and in all cases within ten days after each examination, pay into the state treasury the following fees or sums, to wit: Those having a paid-up capital stock of less than twenty thousand dollars, fifteen dollars; those having a capital of twenty thousand dollars and less than thirty thousand dollars, twenty dollars; those having a capital of thirty thousand dollars and less than forty thousand dollars, twenty-five dollars; those having a capital of forty thousand dollars and less than fifty thousand dollars, thirty dollars; those having a capital of fifty thousand dollars and less than sixty thousand dollars, thirty-five dollars; those having a capital of sixty thousand dollars and less than seventy-five thousand dollars, forty dollars; those having a capital of seventy-five thousand and not over one hundred thousand dollars, fifty dollars; those having a capital of over one hundred thousand dollars and less than two hundred thousand dollars, one hundred dollars; those having a capital of over two hundred thousand dollars, one hundred twenty-five dollars.

Building and loan associations, mutual improvement corporations, mutual investment corporations and other corporations of a mutual character, having no capital stock or a nominal capital stock, shall pay a semi-annual fee of twenty-five dollars for the first one hundred thousand dollars of assets, and five dollars for each additional one hundred thousand dollars or major fraction thereof of assets.

The treasurer shall report such payments to the banking board, and if any such corporation shall be delinquent more than twenty days in making such payments, the board may make an order suspending its functions until such payment is made, and such order shall be rescinded only upon payment of the amount due and a penalty of five dollars additional for the delay. [1911, ch. 55, § 4; R. C. 1905, § 4664; 1897, ch. 31; R. C. 1899, § 3254; 1901, ch. 94; 1905, ch. 165, § 30.]

See section 5204.

§ 5180. **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 directors' record and then filed with the state banking board. [R. C. 1905, § 4665; 1897, ch. 31; R. C. 1899, § 3255; 1905, ch. 165, § 31.]

See section 5204.

§ 5181. **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. [R. C. 1905, § 4666; 1897, ch. 31; R. C. 1899, § 3256; 1905, ch. 165, § 32.]

See section 5204.

§ 5182. **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. 1905, § 4667; R. C. 1895, § 3257; 1905, ch. 165, § 83.]

See section 5204.

§ 5183. **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. [R. C. 1905, § 4668; 1897, ch. 31; R. C. 1899, § 3258; 1905, ch. 165, § 34.]

See section 5204.

When title to money deposited with or collected by bank does not vest in bank and the right to recover on insolvency. 86 Am. St. Rep. 775.

§ 5184. **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. [R. C. 1905, § 4669; 1905, ch. 165, § 35.]

See section 5204.

§ 5185. **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. [R. C. 1905, § 4670; 1905, ch. 165, § 36.]

See section 5204.

§ 5186. **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. [R. C. 1905, § 4671; 1905, ch. 165, § 37.]

See section 5204.

**§ 5187. 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. [R. C. 1905, § 4672; 1905, ch. 165, § 38.]

See section 5204.

**§ 5188. 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. [R. C. 1905, § 4673; 1905, ch. 165, § 39.]

See section 5204.

**§ 5189. 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. [R. C. 1905, § 4674; 1905, ch. 165, § 40.]

See section 5204.

**§ 5190. 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. [R. C. 1905, § 4675; 1905, ch. 165, § 41.]

See section 5204.

**§ 5191. 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 first, 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. [R. C. 1905, § 4676; 1905, ch. 165, § 42.]

## CHAPTER 29.

## LOANS FROM BANKING ASSOCIATIONS.

**§ 5192. Certain persons not to borrow. Exceptions conditioned.** That no officer or employe of any banking association in this state nor the public examiner, his deputies or any employe of such public examiner's department, shall be permitted to borrow any of the funds of the banking association upon his own note or obligation, whether secured or unsecured, without first obtaining the approval of a majority of the board of directors of said banking association or from a committee selected by a majority of the board of directors, the names of the committee so selected from the directors of said banking association to be recorded in the minutes of the association. All loans approved and obtained under authority of this act shall be made a part of the records of said banking association; provided, further, that if the directors of any incorporated banking association shall knowingly permit any of the officers, directors or employes of such banking association, or the public examiner, his deputies or any employe of the state public examiner's department to borrow any funds from such banking association in excess of that authorized by law or in a dishonest manner or in a manner incurring great risk or loss to such banking association, every director who is directly or indirectly responsible by his acts for any loss to such banking association shall be held liable in his personal and individual capacity for all damage which the corporation or any other person shall have sustained in consequence thereof. [1911, ch. 53.]

## CHAPTER 30.

## SAVINGS BANKS.

**§ 5193. Organization.** Any number of persons, not less than five, at least three of whom must be residents of this state, may associate themselves together for the purpose of organizing and operating a savings bank, by complying with the provisions of sections 4636, 4637 and 4638 of the Revised Codes and thereupon shall be vested with the powers provided for in sections 4639 and 4640 of the Revised Codes, subject to such limitations as are in this article provided. [1911, ch. 56, § 1.]

"Sections 4636, 4637 and 4638 of the Revised Codes" mentioned in this section are, respectively, sections 5147, 5148 and 5149 herein. Section 4639 as amended is section 5150 herein. Section 4640 was expressly repealed in Laws 1911, ch. 54, § 5 and again in Laws 1913, ch. 52, § 5, and sections 5151, 5152 herein are manifest substitutes for the repealed section.

**§ 5194. Capital stock.** The capital of every such savings bank shall be divided into shares of the par value of one hundred dollars (\$100) each, and shall not be less than twenty-five thousand dollars (\$25,000) in cities, towns or villages having a population of less than five thousand, nor less than fifty thousand dollars (\$50,000) in cities having a population of five thousand or more, and the capital stock of every association incorporated hereunder, shall be paid up in full before such corporation shall be authorized to commence business. [1911, ch. 56, § 2.]

**§ 5195. Management. Officers. Meetings.** The business and property of savings banks incorporated hereunder shall be managed by a board of directors, not less than five, nor more than nine, the majority of whom shall be residents of this state, all of whom shall be share-holders, and no person shall be eligible as director of any savings bank, nor can he qualify to serve as such unless he owns in his own right not less than ten (10) shares of the

capital stock in such bank. Each director before acting as such, shall take an oath that he will diligently, faithfully and impartially perform the duties imposed upon him by law, that he will not violate or willingly permit to be violated any of its provisions; that he is the owner in his own right of ten (10) shares of the capital stock of such savings bank, and that the same is not hypothecated as security to any loan or debt, which oath shall be filed with and preserved in the office of the public examiner. The directors at their first meeting and as often thereafter as the by-laws require, shall elect from their number a president, whose term shall be indeterminate but at the pleasure of a majority of the board of directors, and one or more vice-presidents, a treasurer, and a secretary of the board of directors for the ensuing year, and shall have authority to appoint a cashier and assistants to other officers and employes as may be required, and which appointees shall hold their office during the pleasure of the board of directors, and shall give such security for the faithful performance of their duties as may be required of them by the by-laws. [1911, ch. 56, § 3.]

§ 5196. **Deposits.** Savings banks organized hereunder may receive on deposit money equal to twenty times the aggregate amount of its paid up capital and surplus, and no greater amount of deposits shall be received without a corresponding increase in the aggregate paid up capital and surplus. Deposits so received shall be paid to the order of such depositor or his representative, with such interest and under such regulations as the board of directors from time to time prescribe, not inconsistent with the provisions of this chapter, which rules and regulations shall be printed in a pass book furnished the depositor, and also conspicuously exposed in the business office of the bank in some place accessible and visible to all and no alterations which may at any time be made in such rules and regulations affecting the rights of depositors acquired previously thereto in respect to the deposits or interest thereon shall be operative until sixty days after the posting of such alteration; provided, however, that in order to prevent loss to the depositor, by enforced sale of securities before their real value, it shall be lawful for the directors in their discretion, to require notice of one week before the withdrawal of any part of any savings deposits of more than ten dollars (\$10) and not exceeding one hundred dollars (\$100); of two weeks before the withdrawal of any part of any deposit of more than one hundred dollars (\$100) and not exceeding five hundred dollars (\$500); of three weeks before the withdrawal of any part of any deposit of more than five hundred dollars (\$500) and not exceeding one thousand dollars (\$1,000); of thirty days before the withdrawal of any part of any deposit of more than one thousand dollars (\$1,000) and not exceeding two thousand dollars (\$2,000); of sixty days before the withdrawal of any part of any deposit of more than two thousand dollars (\$2,000) and not exceeding three thousand dollars (\$3,000), and in case where the deposit has been made on certificate for a definite time and the depositor fails to withdraw the same within thirty days after such definite time, then notice for withdrawal may be required as prescribed above; and provided, further, that the directors of such savings bank may, and by the written consent of, and shall, at the direction of the state banking board, make any changes deemed necessary in regard to the notices heretofore required to be given by the depositor for the withdrawal of their deposits, by extending the time that notice shall be given by any depositor for the withdrawal of all deposits, to any period of time not exceeding six months; and provided, further, that the directors may limit the aggregate amount that any depositor may deposit to such sum as they deem it expedient to receive, and may in their discretion refuse to receive any deposit, and may also, at any time, return all or any part of any deposit and the accrued interest thereon to any depositor without notice. [1911, ch. 56, § 4.]



**§ 5197. Limit of interest.** All accounts, upon which no deposits or drafts have been made for the period of six years in succession, and the whereabouts of the depositor be not known to any officer of the savings bank, shall be so far closed that neither the sum deposited nor the interest which shall have accrued thereon shall be entitled to any interest after the expiration of six years from the date of the last deposit or draft. This provision, however, shall not apply to endowments nor to trust estates nor to other cases where special provision is made therefor at the time of the deposit thereof. [1911, ch. 56, § 5.]

**§ 5198. Investment of fund.** A savings bank incorporated hereunder shall invest its capital, its deposits, its surplus and its profits only as follows:

First. In bonds of the United States.

Second. In bonds or evidences of debt in this state or in the bonds of other states in the union.

Third. In bonds or warrants of any county in this state, or in the bonds or warrants of any city in this state, or any special improvement district therein, or in the bonds or warrants of any village, township, school district or drainage district in this state, issued pursuant to the authority of law, but not exceeding thirty per cent of the assets of such savings bank shall be invested in such bonds or warrants.

Fourth. In notes or bonds secured by mortgage or deed of trust upon unincumbered real estate in this state, which real estate shall be worth, exclusive of all improvements at least twice the amount loaned thereon, but, in addition thereto, there may be loaned thirty per cent of an appraised value of any buildings on said real estate provided fire insurance policies are maintained and deposited as collateral to such mortgage.

Fifth. In the mortgage bonds of any railroad corporation, incorporated under the laws of any of the United States, provided that during each of the ten fiscal years of such railroad corporation next preceding the date of such investment:

1. Such railroad corporation shall have paid the matured principal and interest of all its mortgage indebtedness.

2. Such railroad shall have paid in dividends in cash to its stockholders, an amount of at least four per cent per annum upon all its outstanding stock of every class.

Sixth. To the extent of sixty per cent of the total demand deposits, in promissory notes due not more than one year from the date of loan, but no such loan shall be made unless the obligation evidencing the same bears the signature or indorsement of at least two persons whose net worth, as shown by sworn statement, is more than ten times the amount of the loan, provided, that where there are pledged securities such as such corporation is by this chapter authorized to invest its funds, there may be loaned an amount not to exceed eighty per cent of the value of such securities, and provided, further, that no such loan shall be made to a person in excess of five per cent of the total demand deposits, and in no event more than fifteen per cent of the capital stock and surplus. [1911, ch. 56, § 6.]

**§ 5199. Dividends.** No dividend shall be declared or paid to any stockholder save out of the undivided profits on hand after paying or setting apart a sum sufficient for the payment of:

First. All expense for operating the bank.

Second. All interest due and accrued to depositors according to the rate fixed therefor in the by-laws.

Third. The taxes for the current year.

Fourth. Ten per cent of the net profits to the surplus fund until such fund amounts to thirty per cent of the paid-in capital stock. [1911, ch. 56, § 7.]

**§ 5200. Deposits by executors, minors, etc.** Deposits made by a person as executor, administrator or guardian, or in any other official position, shall be

payable to him as such official, or if personally made by a minor, shall be paid to him, although he have no guardian, or if he has a guardian, it shall not be necessary to obtain his consent to such payment, but a check, receipt of acquittance, signed by such minor therefor shall be valid and binding. If made by any corporation, association or society, payment shall be made to any person authorized by its board of directors or trustees to receive the same. [1911. ch. 56, § 8.]

**§ 5201. Reserve.** Each savings bank shall at all times have on hand in available funds an amount which shall equal: (1) Twenty per cent of its total deposits subject to check, or on demand, (2) eight per cent of its total deposits on time certificate, and (3) five per cent of its total savings deposits subject to notice as herein authorized, three-fifths of these amounts may consist of balances due the savings bank from such solvent state or national banks or trust companies as shall have been approved by the state banking board, but 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 savings bank shall carry as cash or cash items any paper or other matter except legitimate bank exchange, which shall be cleared on the same or next successive business day. Whenever the available funds within the meaning of this section shall be below the percentage of its deposits stated therein, such savings bank shall not increase its liabilities by taking any new loans or 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 said banking board shall notify any bank whose reserve shall be below the amount required, to make good such reserve, and if such savings bank 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 (\$100) nor more than five hundred dollars (\$500), which penalty shall be collected in the same manner as other penalties described in this chapter. [1911, ch. 56, § 9.]

**§ 5202. Savings deposits, who may take. Penalty.** Every corporation organized under the provisions of this chapter shall use the words "savings bank" as a part of its corporate name, and it shall not be the same name as that of any other bank heretofore or hereafter incorporated in this state, and no corporation not organized under the provisions of this chapter shall use the word "savings" as a part of its title, and no corporation, except national banking corporations, state banks and annuity, safe deposit and trust companies organized under the laws of this state, shall receive savings deposits without first complying with and organizing under the provisions of this chapter. Any person violating the provisions of this section shall be guilty of a misdemeanor. [1911, ch. 56, § 10.]

**§ 5203. Loans to directors and officers.** No savings bank shall make any loan to any of its directors or officers except on security as required herein, and in addition thereto a resolution of the board of directors passed and spread on the records of the corporation. [1911, ch. 56, § 11.]

**§ 5204. Other provisions applicable.** Except as herein otherwise provided, the following sections of the civil code [R. C. 1950] are hereby made applicable to savings banks under this article, to wit:

Sections 4635 [am'd, 5146 herein], 4642 [5156 herein], 4643 [5158 herein], 4644 [5159 herein], 4645 [5160 herein], 4646 [5161 herein], 4647 [5162 herein], 4651 [5166 herein], 4652 [5167 herein], 4653 [5168 herein], 4654 [5169 herein], 4656 [5171 herein], 4658 [5173 herein], 4659 [5174 herein], 4660 [5175 herein], 4661 [5176 herein], 4663 [5178 herein], 4664 [am'd, 5179 herein], 4665 [5180 herein], 4666 [5181 herein], 4667 [5182 herein], 4668 [5183 herein], 4669 [5184 herein], 4670 [5185 herein], 4671 [5186 herein], 4672 [5187 herein], 4673 [5188 herein], 4674 [5189 herein] and 4675 [5190 herein]. [1911, ch. 56, § 12.]

CHAPTER 31.

ORGANIZATION AND MANAGEMENT OF ANNUITY, SAFE DEPOSIT AND TRUST COMPANIES.

§ 5205. **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 12 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. [R. C. 1905, § 4677; 1897, ch. 143, §§ 1, 2; R. C. 1899, § 3258a.]

§ 5206. **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. [R. C. 1905, § 4678; 1897, ch. 143, §§ 3, 4; R. C. 1899, § 3258b.]

§ 5207. **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. [R. C. 1905, § 4679; 1897, ch. 142, § 5; R. C. 1899, § 3258c; 1903, ch. 202.]

This section is R. C. 1905, § 4679. The reference to "section 4668," here given in brackets merely for the purpose of calling attention to it, is undoubtedly erroneous. The error was committed by compilers in R. C. 1899, § 3258c, repeated by the legislature in the amendment of that section in Laws 1903, ch. 202, and again by compilers in R. C. 1905, § 4679. The original reference in Laws 1897, ch. 142, § 5, was to "section 4 of this act," which constitutes all of section 5206 herein except the first sentence of the latter. The reference in section 5707 should therefore be "section 5206."

Board of railroad commissioners may inquire into general business conduct and reliability of sureties on bonds given by grain elevator operator. *State ex rel. Dakota Trust Co. v. Stutsman*, 24 N. D. 68, 139 N. W. 83.

**§ 5208. 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 commencement 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. [R. C. 1905, § 4680; 1897, ch. 143, § 6; R. C. 1899, § 3258d.]

**§ 5209. 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 5207 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. [R. C. 1905, § 4681; 1897, ch. 143, § 7; R. C. 1899, § 3258e.]

**§ 5210. Corporate powers.** Every corporation organized under the provisions of this chapter, and qualified as provided by section 5207, 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 antenuptial 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 31, 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 appointment 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 represent 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 5207 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. [R. C. 1905, § 4682; 1897, ch. 143, § 8; R. C. 1899, § 3258f; 1903, ch. 195, § 1.]

Foreign corporation is incompetent to receive letters of administration upon estate of deceased person. *Grunow v. Simonitsch*, 21 N. D. 277, 130 N. W. 835.

Legal powers and privileges of surety and trust companies. 48 L.R.A. 587.

8. Board of railroad commissioners may inquire into general business conduct and reliability of sureties on bonds given by grain elevator operator. *State ex rel. Dakota Trust Co. v. Stutsman*, 24 N. D. 68, 139 N. W. 83.

Character of and rules governing contracts by corporations engaged for profit in business of guaranteeing fidelity or contracts of other persons. 33 L.R.A.(N.S.) 513.

**§ 5211. 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. [R. C. 1905, § 4683; 1897, ch. 143, § 8; R. C. 1899, § 3258g.]

**§ 5212. 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. [R. C. 1905, § 4684; 1897, ch. 143, § 8; R. C. 1899, § 3258h.]

§ 5213. **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 5206, which shall hereafter be appointed to execute 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. [R. C. 1905, § 4685; 1897, ch. 143, § 8; R. C. 1899, § 3258i.]

§ 5214. **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. [R. C. 1905, § 4686; 1897, ch. 143, § 8; R. C. 1899, § 3258j.]

§ 5215. **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. [R. C. 1905, § 4687; 1897, ch. 143, § 8; R. C. 1899, § 3258k.]

§ 5216. **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 5206, 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. [R. C. 1905, § 4688; 1897, ch. 143, § 9; R. C. 1899, § 3258l.]

**§ 5217. 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. [R. C. 1905, § 4689; 1897, ch. 143, § 10; R. C. 1899, § 3258m; 1903, ch. 195, § 2.]

**§ 5218. 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. [R. C. 1905, § 4690; 1897, ch. 143, § 11; R. C. 1899, § 3258n.]

**§ 5219. 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 regularly 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 5206, in an amount sufficient to comply with said order. [R. C. 1905, § 4691; 1897, ch. 143, § 13; R. C. 1899, § 3258o.]

§ 5220. **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. [R. C. 1905, § 4692; 1897, ch. 143, §§ 12, 14; R. C. 1899, § 3258p; 1903, ch. 195, § 3.]

## CHAPTER 32.

### SUPERVISION OF INVESTMENT COMPANIES.

§ 5221. **Domestic and foreign investment companies defined.** Every corporation, every copartnership or company and every association (other than state and national banks, savings banks, trust companies, real estate mortgage companies dealing exclusively in real estate mortgage notes, and corporations not organized for profit), organized or which shall be organized in this state, whether incorporated or unincorporated, which shall sell or negotiate for the sale of any stocks or investment bonds or investment certificates of any corporation, foreign or domestic, other than bonds of the United States, the state of North Dakota, or of some municipality of the state of North Dakota, to any person or persons in the state of North Dakota, other than those specifically exempted herein, shall be known for the purpose of this chapter as a domestic investment company. Every such investment company organized in any other state, territory or government, or organized under the laws of any other state, territory or government, shall be known for the purpose of this chapter as a foreign investment company. [1913, ch. 109, § 1.]

§ 5222. **What documents to be filed with secretary of state.** Before offering or attempting to sell any stocks or investment bonds or investment certificates

of any kind or character other than those specifically exempted in section 5221 to any person or persons, or transacting any business whatever in this state, excepting that of preparing the documents hereinafter required, every such investment company, domestic or foreign, shall file in the office of the state examiner of this state, in addition to those required by law to be filed by corporations and associations in the office of the secretary of state, together with a filing fee of fifteen dollars, the following documents, to wit: a statement showing in full detail the plan upon which it proposes to transact business; a copy of all contracts, bonds and other instruments which it proposes to make with or sell to its contributors or customers; a statement which shall show the name and location of the investment company, and an itemized account of its actual financial condition, and the amount of its property and liabilities, and such other information touching its affairs as said state examiner may require. If such investment company shall be a copartnership or an unincorporated association, it shall also file with the state examiner a copy of its articles of copartnership or association, and all other papers pertaining to its organization; and if it be a corporation organized under the laws of North Dakota it shall also file with the state examiner a copy of its articles of incorporation, constitution and by-laws, and all other papers pertaining to its organization. If it shall be an investment company organized under the laws of any other state, territory or government, incorporated or unincorporated, it shall also file with the said state examiner a copy of the laws of such state, territory or government under which it exists or is incorporated, and also a copy of its charter, articles of incorporation, constitution and by-laws and all amendments thereof which have been made and all other papers pertaining to its organization. [1913, ch. 109, § 2.]

§ 5223. **Verification and certification of documents filed.** All of the above described papers shall be verified by the oath of a member of a copartnership or company, if it be a copartnership or company, or by the oath of a duly authorized officer, if it be an incorporated or unincorporated association. All such papers, however, as are recorded or are on file in any public office shall be further certified to by the officer of whose records or archives they form a part as being correct copies of such records or archives. [1913, ch. 109, § 3.]

§ 5224. **Filing of written consent to service of process on secretary of state.** Every foreign investment company shall also file its written consent, irrevocable, that actions may be commenced against it, in the proper court of any county in this state in which a cause of action may arise, or in which the plaintiff may reside, by the service of process on the secretary of state, and stipulating and agreeing that such service of process on the secretary of state shall be taken and held, in all courts, to be as valid and binding as if due service had been made on the company itself, according to the laws of this or any other state, and such instrument shall be authenticated by the seal of said foreign investment company and by the signatures of all the members of the copartnership or company, or by the signatures of the president and secretary of the incorporated or unincorporated association, if it be an incorporated or unincorporated association, and shall be accompanied by a duly certified copy of the order or resolution of the board of directors, trustees or managers of the corporation authorizing the said secretary and president to execute the same. [1913, ch. 109, § 4.]

§ 5225. **Examination by state examiner. Favorable statement; unfavorable finding.** It shall be the duty of the state examiner to examine the statements and documents so filed, and if said state examiner shall deem it advisable he shall make or have made a detailed examination of such investment company's affairs, which examination shall be at the expense of such investment company, as hereinafter provided; and if he finds that such investment company is solvent, that its articles of incorporation or association, its constitution and

by-laws, its proposed plan of business and proposed contract, contain and provide for a fair, just and equitable plan for the transaction of business, and in his judgment promises a fair return on the stocks, bonds and other securities by it offered for sale, the state examiner shall issue to such investment company a statement reciting that such company has complied with the provisions of this act, that detailed information in regard to the company and its securities is on file in the state examiner's office for public inspection and information, that such investment company is permitted to do business in this state, and such statement shall also recite in bold type that the state examiner in no wise recommends the securities to be offered for sale by such security company. But if said state examiner finds that such articles of incorporation or association, charter, constitution and by-laws, plan of business or proposed contract contain any provision that is unfair, unjust, inequitable or oppressive to any class of contributors or customers, or if he decides from his examination of its affairs that said investment company is not solvent or does not intend to do a fair and honest business, or in his judgment does not promise a fair return on the stocks, bonds or other securities by it offered for sale, then he shall notify such investment company in writing of his findings, and it shall be unlawful for such company to do any further business in this state until it shall so change its constitution and by-laws, articles of incorporation or association, its proposed plan of business and proposed contract and its general financial condition in such manner as to satisfy the state examiner that it is solvent, and its articles of incorporation or association, its constitution and by-laws, its proposed plan of business and proposed contracts, provide for a fair, just and equitable plan for the transaction of business, and does, in his judgment, promise a fair return on the stocks, bonds and other securities by it offered for sale; provided, that all expenses paid or incurred and all fees or charges received or collected for any examination made under the provisions of this section of this chapter shall be reported in detail by the state examiner and a full report and record made thereof in detail. [1913, ch. 109, § 5.]

**§ 5226. Conditions precedent to transacting business.** It shall not be lawful for any investment company, either as principal or agent, to transact any business in form or character similar to that set forth in section 5221, except as is provided in section 5222, until it shall have filed the papers and documents above provided for. No amendment of the charter, articles of incorporation, constitution and by-laws of any such investment company shall become operative until a copy of the same has been filed with the state examiner as provided in regard to the original filing of charters, articles of incorporation, constitution and by-laws, nor shall it be lawful for any such investment company to transact business on any other plan than that set forth in the statement required to be filed by section 5222, or to make any contracts other than that shown in the copy of the proposed contract required to be filed by section 5222, until a written statement showing in full detail the proposed new plan of transacting business and a copy of the proposed new contract shall have been filed with the state examiner, in like manner as provided in regard to the original plan of business and proposed contract, and the consent of the state examiner obtained as to making such proposed new plan of business and proposed new contract. [1913, ch. 109, § 6.]

**§ 5227. Registration of agents.** Any investment company may appoint one or more agents, but no such agent shall do any business for said investment company in this state until he shall first register with the state examiner as agent for such investment company, and for each such registration there shall be paid to the state examiner the sum of two dollars. Such registration shall entitle such agent to represent said investment company as its agent until the first day of March following, unless said authority is sooner revoked by the state examiner, and such authority shall be subject to revocation at any time

by the state examiner for cause appearing to him sufficient. [1913, ch. 109, § 7.]

**§ 5228. Appeal from examiner's refusal to grant statement.** An appeal may be taken from the decision of the state examiner refusing to grant the statement provided for in this act to the district court of any county in the state of North Dakota.

Such appeal may be taken by filing with the clerk of said court a certified transcript of all papers on file in the office of the state examiner relating to such application and decision, within thirty days after the rendition of such decision, and serving notice of such appeal upon said examiner and filing a bond in the sum of two hundred and fifty dollars with said clerk, conditioned for payment of all costs in case said appeal is dismissed and decision of the examiner sustained, said bond to be approved by the clerk of said court as provided for approval of bonds in arrest and bail proceedings. The judge shall hear said appeal not less than ten nor more than thirty days after the filing of said appeal with the clerk, the day of hearing to be fixed by the court. The case shall be tried in all respects as a court case without a jury, and costs shall be allowed and taxed as costs are now taxed in said courts in civil actions, and upon like notice. [1913, ch. 109, § 8.]

**§ 5229. Company to file annual or special report.** Every investment company, domestic or foreign, shall file at the close of business on December thirty-first of each year, and at such other times as required by the state examiner, a statement verified by the oath of the copartnership or company, if it be a copartnership or company, or by the oath of a duly authorized officer, if it be an incorporated or unincorporated association, setting forth in such form as may be prescribed by the said state examiner, its financial condition and the amount of its assets and liabilities, and furnishing such other information concerning its affairs as said state examiner may require. Each regular statement of December thirty-first shall be accompanied by a filing fee of two dollars and fifty cents. Any investment company failing to file its report at the close of business December thirty-first of each year or within ten days of that date, or failing to file any other or special report herein required within thirty days after receipt of request or requisition therefor, shall forfeit its right to do business in this state, and shall be subject to such further penalties as hereinafter provided for violation of this chapter. [1913, ch. 109, § 9.]

**§ 5230. Accounts of investment companies, how kept.** The general accounts of every investment company, domestic or foreign, doing business in this state, shall be kept in double entry, and such company, its copartners or managing officers, shall at least once in each month make a trial balance of such accounts which shall be recorded in a book provided for that purpose; such trial balance and all other books and accounts of such company shall at all times during business hours, except on Sundays and legal holidays, be open to the inspection of stockholders and investors in said company or investors in the stocks, investment bonds or investment certificates by it offered for sale and to the state examiner and his deputies. [1913, ch. 109, § 10.]

**§ 5231. General supervision by state examiner. Fee for examination.** The state examiner shall have general supervision and control, as provided by this chapter, over any and all investment companies, domestic or foreign, doing business in this state, and all such investment companies shall be subject to examination by the state examiner or his duly authorized deputies at any time the state examiner may deem it advisable and in the same manner as is now provided for the examination of state banks. The rights, powers and privileges of the state examiner in connection with such examinations shall be the same as is now provided with reference to the examination of state

banks; and such investment company shall pay a fee for each of such examinations, not to exceed fifteen dollars for each day or fraction thereof, plus the actual traveling and hotel expenses of said state examiner or deputy that he is absent from the capitol building for the purpose of making such examination, and the failure or refusal of any investment company to pay such fee upon demand of the state examiner, or deputy, shall work a forfeiture of its right to do business in this state. [1913, ch. 109, § 11.]

**§ 5232. Impairment of assets; receivership.** Whenever it shall appear to the state examiner that the assets of any investment company doing business in this state are impaired to the extent that the assets do not equal its liabilities, or that it is conducting its business in an unsafe, inequitable or unauthorized manner, or is jeopardizing the interests of its stockholders or investors in stocks, investment bonds or investment certificates by it offered for sale, or whenever any investment company shall fail or refuse to file any papers, statements or documents required by this chapter, without giving satisfactory reasons therefor, said state examiner shall at once communicate such facts to the attorney-general, who shall thereupon apply to any district court, or a judge thereof, for the appointment of a receiver to take charge of and wind up the business of such investment company; and if such fact or facts be made to appear, it shall be sufficient evidence to authorize the appointment of a receiver and the making of such order and decrees in such cases as equity may require. [1913, ch. 109, § 12.]

**§ 5233. Penalty for false statement or entry.** Any person who shall knowingly or willfully subscribe to or make or cause to be made any false statements or false entry in any book of such investment company, or exhibit any false paper with the intention of deceiving any person authorized to examine into the affairs of such investment company, or shall make or publish any false statement of the financial condition of such investment company, or the stocks, investment bonds or investment certificates by it offered for sale, shall be deemed guilty of a felony, and upon conviction thereof shall be fined not less than two hundred dollars nor more than ten thousand dollars, or shall be imprisoned for not less than one year nor more than ten years in the state penitentiary, or by both such fine and imprisonment. [1913, ch. 109, § 13.]

**§ 5234. Penalty for doing business in violation hereof.** Any person or persons, agent or agents, who shall sell or attempt to sell the stock, investment bonds or investment certificates of any investment company, domestic or foreign, or the stock, investment bonds or investment certificates by it offered for sale, who have not complied with the provisions of this chapter; or any investment company, domestic or foreign, which shall do any business, or offer or attempt to do any business, except as provided in section 5222, which shall not have complied with the provisions of this chapter; or any agent or agents who shall do or attempt to do any business for any investment company, domestic or foreign, in this state, which agent is not at the time duly registered and has fully complied with the provisions of this chapter, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined for each offense not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail for not more than ninety days. [1913, ch. 109, § 14.]

**§ 5235. Fees and expenses of state examiner.** All fees herein provided for shall be collected by the state examiner and by him shall be turned into the state treasury, and shall be kept in a special fund for the payment of the actual and necessary expenses herein provided. All money actually and necessarily paid out by the state examiner for traveling or incidental expenses on duties performed under this chapter shall be audited as other claims against the state and paid out of the special fund herein created. [1913, ch. 109, § 15.]

## CHAPTER 33.

## EXISTING CORPORATIONS ELECTING TO CONTINUE UNDER THIS CHAPTER.

§ 5236. **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. [R. C. 1905, § 4693; Civ. C. 1877, § 566; R. C. 1899, § 3259.]

§ 5237. **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. [R. C. 1905, § 4694; 1879, ch. 10, § 4; R. C. 1895, § 3260.]

Acts of unincorporated association are acts of its members. Winona Lumber Co. v. Church, 6 S. D. 498, 62 N. W. 107.

## CHAPTER 34.

## CONDITIONS PRECEDENT TO DOING BUSINESS BY CORPORATIONS.

ARTICLE 1. FOREIGN CORPORATIONS, §§ 5238-5242.

2. DOMESTIC CORPORATIONS, §§ 5243, 5244.

## ARTICLE 1.— FOREIGN CORPORATIONS.

§ 5238. **Foreign corporations can do business in this state, when.** No foreign corporation, association or joint stock company, except an insurance company shall sell or otherwise dispose of its capital stock or 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, articles of incorporation and by-laws, 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. [1911, ch.

137, § 1; R. C. 1905, § 4695; Civ. C. 1877, § 567; R. C. 1895, § 3261; 1905, ch. 68.]

Contracts of foreign corporations before compliance with statute, not void. Question can only be raised by state. *Wasburn Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544; *U. S. Loan Co. v. Shain*, 8 N. D. 136, 77 N. W. 1006; *Nat. Cash Register Co. v. Wilson*, 9 N. D. 112, 81 N. W. 285; *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706; *American Button Hole Co. v. Moore*, 2 D. 280, 8 N. W. 131; *Fuller & Johnson Mfg. Co. v. Foster*, 4 D. 329, 30 N. W. 166; *Red River Lumber Co. v. Children of Israel*, 7 N. D. 46, 73 N. W. 203.

Cannot avail of its failure to file copy of articles. *Foster v. Lumber Co.*, 5 S. D. 57, 58 N. W. 9, 49 Am. St. Rep. 859, 23 L.R.A. 490.

Right to do business cannot be questioned or determined collaterally. *Wright v. Lee*, 4 S. D. 237, 55 N. W. 931.

Attachment levied at suit of nonresident corporation which has not complied with law since amendment in 1895 will be dissolved on motion. *Bradley v. Armstrong*, 9 S. D. 267, 68 N. W. 733.

Vested right to continue action commenced before amendment of 1895, regardless of whether or not it has complied with statute. *Root v. Sweeney*, 12 S. D. 43, 80 N. W. 149.

Assignee of foreign corporation is barred from asserting cause of action or defense which domestic corporation cannot assert. *Walker v. Rein*, 14 N. D. 608, 106 N. W. 405.

Foreign corporation cannot sue in courts of state until it complies with its laws. *Bishop & B. Co. v. Schleuning*, 20 S. D. 71, 104 N. W. 854; *American Copying Co. v. Eureka Bazaar*, 20 S. D. 526, 9 L.R.A.(N.S.) 1176, 108 N. W. 15.

Foreign corporation engaged in transacting interstate business may sue on contract without complying with statute. *Sucker State Drill Co. v. Wirtz*, 17 N. D. 313, 18 L.R.A.(N.S.) 134, 115 N. W. 844.

Inapplicable to foreign corporation transacting interstate business because of expiration of agency. *Rex Buggy Co. v. Dinneen*, 23 S. D. 474, 122 N. W. 433.

Not unconstitutional as interfering with interstate commerce. *Iowa Falls Mfg. Co. v. Farrar*, 19 S. D. 632, 104 N. W. 449.

Single business transaction does not constitute "doing business." State use of *Hart-Parr Co. v. Robb-Lawrence Co.*, 15 N. D. 55, 106 N. W. 406.

Failure of foreign corporations to comply with law as to doing business in state justifies direction of verdict against it, in suit for breach of contract. *Chesley v. Soo Lignite Coal Co.*, 19 N. D. 18, 121 N. W. 73.

Foreign corporation may acquire title to real property within state without having complied with law relating to such corporations. *Reed v. Todd*, 25 S. D. 421, 127 N. W. 527.

Secretary of state is not judicial officer and judicial power cannot be vested in him. *State ex rel. Standard Oil Co. v. Blaisdell*, 22 N. D. 66, 132 N. W. 769.

Application of statute of limitations to foreign corporations. 52 Am. Dec. 256.

Who may take advantage of statute rendering foreign corporation incapable of taking title to real estate. 33 L.R.A.(N.S.) 355.

Right of foreign corporation to do business in state. 70 L.R.A. 519.

Power of the states to discriminate against foreign corporation. 95 Am. Dec. 536.

Recognition or exclusion of foreign corporation as interference with interstate commerce. 24 L.R.A. 311.

Right of foreign corporations to sue. 70 L.R.A. 514.

Liability of foreign corporation which has complied with conditions of doing business in state to attachment as nonresident. 31 L.R.A.(N.S.) 278.

Garnishment of debt due from foreign corporation in state where it is engaged in business. 67 L.R.A. 214.

Place of payment of debt due from a foreign corporation as affecting jurisdiction to garnish the same. 3 L.R.A.(N.S.) 608; 20 L.R.A.(N.S.) 264.

Sale of single cargo by foreign corporation as doing business. 2 L.R.A.(N.S.) 127.

Single or isolated transaction by foreign corporation as "doing business" within the state. 10 L.R.A.(N.S.) 693.

Soliciting trade as doing business within the state. 9 L.R.A.(N.S.) 1214; 23 L.R.A.(N.S.) 834.

Sale by foreign corporation of goods stored in state as intrastate business. 18 L.R.A.(N.S.) 134.

Establishing agency to handle a corporation's product within the state as doing business therein. 18 L.R.A.(N.S.) 142.

Effect of agreement by foreign corporation to install article within the state to bring it within statute regulating foreign corporations. 14 L.R.A.(N.S.) 674.

Effect of location of insured property within the state to prevent an action by a foreign insurance company upon a contract made in another state. 9 L.R.A.(N.S.) 417.

**§ 5239. Record.** Such charter or articles of incorporation shall be recorded in a book to be kept by the secretary of state for that purpose. [R. C. 1905, § 4696; Civ. C. 1877, § 568; R. C. 1899, § 3262.]



**§ 5240. 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. [R. C. 1905, § 4697; Civ. C. 1877, § 560; 1885, ch. 36, § 1; R. C. 1895, § 3263.]

Attachment may be issued against foreign corporation, although it has not appointed agent on whom service of process may be made. *Finch v. Armstrong*, 9 S. D. 255, 68 N. W. 740.

Attachment levied by foreign corporation which has not appointed agent, will be dissolved. *Bradley, Metcalf & Co. v. Armstrong*, 9 S. D. 267, 68 N. W. 733.

"Assign" as used in statute does not include indorsee of note. *Nat. Bank of Commerce v. Pick*, 13 N. D. 74, 99 N. W. 63.

Compliance with laws of this state before making contract prerequisite to suit thereon by foreign corporation. *American Copying Co. v. Eureka Bazaar*, 20 S. D. 526, 9 L.R.A.(N.S.) 1176, 108 N. W. 15.

Single business transaction does not constitute "doing business." *State use of Hart-Parr Co. v. Robb-Lawrence Co.*, 15 N. D. 55, 106 N. W. 406.

Inapplicable to foreign corporation transacting interstate commerce business because of expiration of agency. *Rex Buggy Co. v. Dinneen*, 23 S. D. 474, 122 N. W. 433.

Not unconstitutional as interfering with interstate commerce. *Iowa Falls Mfg. Co. v. Farrar*, 19 S. D. 632, 104 N. W. 449.

Foreign corporation engaged in transacting interstate business may sue on contract without complying with statute. *Sucker State Drill Co. v. Wirtz*, 17 N. D. 313, 18 L.R.A.(N.S.) 134, 115 N. W. 844.

Compelling designation of person upon whom process may be served as a condition of right to do business. 1 L.R.A.(N.S.) 558.

**§ 5241. Liability of officers, etc., for failure to comply.** Any failure to comply with the provisions of the last three sections and with section 4913 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. Each and every officer and agent of such corporation shall further be deemed guilty of a misdemeanor. [1911, ch. 137, § 2; R. C. 1905, § 4698; 1890, ch. 193, § 1; R. C. 1895, § 3264.]

Officers and stockholders of foreign corporation are liable on implied contracts of corporation to return everything received under express contract which has been rescinded by party making claim, because of breach by corporation. *Chesley v. Soo Lignite Coal Co.*, 19 N. D. 18, 121 N. W. 73.

**§ 5242. 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 4913, if an insurance company, or with the provisions of section 5238 and 5240, 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. 1905, § 4699; R. C. 1895, § 3265.]

Not unconstitutional as interfering with interstate commerce. *Iowa Falls Mfg. Co. v. Farrar*, 19 S. D. 632, 104 N. W. 449.

Single business transaction does not constitute "doing business." State use of *Hart-Parr Co. v. Robb-Lawrence Co.*, 15 N. D. 55, 106 N. W. 406.

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.

Foreign corporation may acquire title to real property within state without having complied with law relating to such corporations. *Reed v. Todd*, 25 S. D. 421, 127 N. W. 527.

Assignee of foreign corporation could recover price of goods sold on written orders which were accepted and filled in foreign state although these sections were not complied with. *Coffin v. Smith*, 26 S. D. 536, 128 N. W. 805.

Does not invalidate contract made by foreign corporation which has failed to comply with statute, but is reasonable condition upon which right to use of courts depend. *Sioux Remedy Co. v. Cope*, 28 S. D. 397, 133 N. W. 683.

Compliance with laws of this state before making contract prerequisite to suit thereon by foreign corporation. *American Copying Co. v. Eureka Bazaar*, 20 S. D. 526, 9 L.R.A.(N.S.) 1176, 108 N. W. 15.

Foreign corporation engaged in transacting interstate business may sue on contract without complying with statute. *Sucker State Drill Co. v. Wirtz*, 17 N. D. 313, 18 L.R.A.(N.S.) 134, 115 N. W. 844.

Inapplicable to foreign corporation transacting interstate business because of expiration of agency. *Rex Buggy Co. v. Dinneen*, 23 S. D. 474, 122 N. W. 433.

Right of foreign corporation to set up noncompliance with conditions of doing business in order to defeat recovery against it. 25 L.R.A. 569.

Right of foreign corporation which has not complied with local laws to defend action. 17 L.R.A.(N.S.) 1117.

Effect upon right of foreign corporation to maintain suit, of compliance with local law after suit is instituted. 14 L.R.A.(N.S.) 561; 23 L.R.A.(N.S.) 492.

Enforceability of subscription to stock of foreign corporation that has not complied with local laws. 29 L.R.A.(N.S.) 92.

Lack of authority of foreign corporation to do business within a state as affecting embezzlement by agent. 27 L.R.A.(N.S.) 415.

Validity of contracts made by foreign corporations which have not complied with statutory conditions of the right to do business in a state. 24 L.R.A. 315.

Validity of contracts of foreign corporations before getting permission to do business. 1 L.R.A.(N.S.) 1041.

Statutory provision for penalty as affecting validity or enforceability of contract made by foreign corporation without complying with conditions of doing business. 4 L.R.A.(N.S.) 688; 40 L.R.A.(N.S.) 857.

Right to cancellation of contract made with foreign corporation because it has not complied with the laws entitling it to do business within the state. 21 L.R.A.(N.S.) 707.

Enforceability in federal court, or court of another state, of a contract made by a foreign corporation which had not complied with the conditions of doing business within the state. 26 L.R.A.(N.S.) 999.

Recovery back of money paid under a contract to a foreign corporation which has not complied with the conditions of doing business in the state. 38 L.R.A.(N.S.) 210.

Effect on insurance of noncompliance with statutory requirements. 20 L.R.A. 405.

## ARTICLE 2.—DOMESTIC CORPORATIONS.

§ 5243. **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 trans-

action 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. [R. C. 1905, § 4700; 1897, ch. 73, § 1; R. C. 1899, § 3265a.]

Migration of corporation as ground for forfeiting corporate charter. 24 L.R.A. 462.

§ 5244. **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. [R. C. 1905, § 4701; 1897, ch. 73, § 2; R. C. 1899, § 3265b.]

## CHAPTER 35.

### NATURE OF PROPERTY.

§ 5245. **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. [R. C. 1905, § 4702; Civ. C. 1877, § 159; R. C. 1899, § 3266.]

Term "use and possess" is broader than either the term "title" or "possession."

Fleming v. Sherwood, 24 N. D. 144, 42 L.R.A.(N.S.) 945, 139 N. W. 101.

As to similar provision in Cal. Civ. Code, § 654, see Fudickar v. East Riverside Irrig. Dist., 109 Cal. 29, 41 Pac. 1024; Re Stanford, 126 Cal. 112, 45 L.R.A. 768, 58 Pac. 462; Higgins v. San Diego, 131 Cal. 294, 63 Pac. 470.

§ 5246. **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. [R. C. 1905, § 4703; Civ. C. 1877, § 160; 1891, ch. 101, § 1; R. C. 1899, § 3267.]

Court will enjoin fraudulent appropriation and use of trade-mark. Simmons Hwd. Co. v. Wiabel, 1 S. D. 488, 47 N. W. 814, 36 Am. St. Rep. 755, 11 L.R.A. 267.

Sale of good will not a contract in restraint of trade. Mapes v. Metcalf, 10 N. D. 601, 88 N. W. 713.

§ 5247. **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. [R. C. 1905, § 4704; Civ. C. 1877, § 161; R. C. 1899, § 3268.]

Property rights in bees. 40 L.R.A. 687.

Liability for injury done by animals *feræ naturæ*. 11 L.R.A.(N.S.) 748; 16 L.R.A.(N.S.) 445.

Master's liability to servant for personal injury by wild animal. 23 L.R.A.(N.S.) 1071.

As to similar provision in Cal. Civ. Code, § 656, see Kellogg v. King, 114 Cal. 378,

55 Am. St. Rep. 74, 46 Pac. 166; *Garcia v. Gunn*, 119 Cal. 315, 51 Pac. 684; *Ex parte Kenneke*, 136 Cal. 527, 89 Am. St. Rep. 177, 69 Pac. 261.

§ 5248. **Property classified.** Property is either:

1. Real or immovable; or,
2. Personal or movable. [R. C. 1905, § 4705; Civ. C. 1877, § 162; R. C. 1899, § 3269.]

As to similar provision in Cal. Civ. Code, § 657, see *Jeffers v. Easton E. & Co.*, 113 Cal. 345, 45 Pac. 680.

§ 5249. **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. [R. C. 1905, § 4706; Civ. C. 1877, § 163; R. C. 1899, § 3270.]

Classification of growing fruit as real property. 16 L.R.A. 103.

Oil and gas lease as real property. 42 L.R.A.(N.S.) 472.

Whether railroad is real estate or personalty. 66 L.R.A. 33.

Nature of interest of vendor or vendee in a land contract as real or personal property. 57 L.R.A. 643.

§ 5250. **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. [R. C. 1905, § 4707; Civ. C. 1877, § 164; R. C. 1899, § 3271.]

In defining "land" exclude growing grain and only include such things as are annexed to the earth by roots, such as are deemed fructus naturales. *Bjornson v. Rostad*, 30 S. D. 40, 137 N. W. 567.

§ 5251. **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. [R. C. 1905, § 4708; Civ. C. 1877, § 165; R. C. 1899, § 3272.]

Tenant has no right to remove fixtures after surrender of lease. *Sweet v. Myers*, 3 S. D. 324, 53 N. W. 187.

Buildings may be sold separate from the land. *Myrick v. Bill*, 3 D. 284, 17 N. W. 268.

House on mining claim of another is property of owner of land in absence of contract to contrary. *Milison v. Mutual Cash Guaranty F. Ins. Co.*, 24 S. D. 285, 140 Am. St. Rep. 788, 123 N. W. 839.

What are fixtures. 14 Am. Dec. 303; 17 Am. Dec. 686; 24 Am. Dec. 726.

—within meaning of bulk sale law. 34 L.R.A.(N.S.) 218.

—cold storage plant as. 30 L.R.A.(N.S.) 576.

—engine, when placed upon land by owner of realty. 8 L.R.A.(N.S.) 376.

—gas fixtures. 29 Am. Rep. 403; 37 Am. Rep. 472.

—gas pipes and other appliances. 34 Am. Rep. 354; 37 Am. Rep. 472.

—gas stoves. 17 L.R.A.(N.S.) 699.

—heating apparatus. 1 B. R. C. 972.

—machinery. 11 Am. Rep. 314; 42 Am. Rep. 447.

—manure. 14 Am. Dec. 397.

—mirrors. 37 Am. Rep. 472.

—show cases, shelving, etc. 43 L.R.A.(N.S.) 675.

—storm doors and windows and screens. 30 L.R.A.(N.S.) 1189.

—window fronts. 41 L.R.A.(N.S.) 1022.

Are things placed on land with the intention of annexing them fixtures, where they are never actually attached. 69 L.R.A. 892; 15 L.R.A.(N.S.) 727.

Character of building placed by consent on another's land as real or personal property, in the absence of an agreement as to its character. 14 L.R.A.(N.S.) 439.

When and against whom may fixtures retain character of personal property. 84 Am. St. Rep. 877.

Effect of agreement to prevent fixtures from becoming part of realty. 19 L.R.A. 441.

Effect of chattel mortgage on fixtures as against subsequent purchaser or incumbrancer. 15 L.R.A. 61.

Rights of seller of chattel, retaining title thereto or a lien thereon, as against existing mortgagees of the realty to which it is affixed by the owner. 37 L.R.A.(N.S.) 119; 1 B. R. C. 664.

Right of third person to remove fixtures as breach of covenant in a deed of real property. 35 L.R.A.(N.S.) 976.

Ejectment as proper remedy to recover fixtures. 18 L.R.A. 787.

Effect upon rights of owner of a building, or of an interest in or a lien thereon, of its wrongful removal and attachment to the land of a third person without the former's consent. 14 L.R.A.(N.S.) 435.

As to similar provision in Cal. Civ. Code, § 660, see *Miller v. Waddingham*, 91 Cal. 377, 13 L.R.A. 680, 27 Pac. 750.

**§ 5252. 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. [R. C. 1905, § 4709; Civ. C. 1877, § 166; R. C. 1899, § 3273.]

What are appurtenances. 13 Am. Dec. 657; 40 Am. Rep. 381; 81 Am. St. Rep. 764.  
—fixtures as. 15 L.R.A. 653.

—ponds as. 58 L.R.A. 489.

What articles will pass as appurtenances on sale of personal property. 8 L.R.A.(N.S.) 793.

Appurtenant easements. 14 L.R.A. 300; 20 L.R.A. 635.

Corporeal appurtenances to realty. 15 L.R.A. 652.

Right of way on shore as appurtenant to fishery right. 4 L.R.A.(N.S.) 879.

Way appurtenant to close from which it is separated by intervening lands. 2 L.R.A.(N.S.) 983.

American law as to easements of light, air and prospect. 22 L.R.A. 536; 8 L.R.A.(N.S.) 350.

Does lease carry right to light and air from adjoining premises of landlord. 13 L.R.A.(N.S.) 333.

Way of necessity where other possible modes of access exist. 17 L.R.A.(N.S.) 1019; 32 L.R.A.(N.S.) 1075.

Does the fact that the sale of part of a tract is involuntary prevent the implication of a way by necessity over the remainder. 12 L.R.A.(N.S.) 482.

Implication from necessity of easement other than right of way. 8 L.R.A.(N.S.) 328.

Implied grant of easement in partition deed. 3 L.R.A.(N.S.) 1082.

Grant of easement by implication. 23 Am. Rep. 446; 122 Am. St. Rep. 206.

Easement by severance of tract of land with apparent benefit existing. 26 L.R.A.(N.S.) 316.

Effect of division of tract with visible servitude in favor of one parcel upon another. 6 L.R.A.(N.S.) 410.

As to similar provision in Cal. Civ. Code, § 662, see *Dixon v. Schermier*, 110 Cal. 582, 42 Pac. 1091; *Peterson v. Machado*, 5 Cal. Unrep. 273, 43 Pac. 611.

**§ 5253. Personal property defined.** Every kind of property that is not real is personal. [R. C. 1905, § 4710; Civ. C. 1877, § 167; R. C. 1899, § 3274.]

Choses in action are personal property. *Sykes v. Hannawalt*, 5 N. D. 335, 65 N. W. 682.

Railroad as personal property. 66 L.R.A. 33.

Oil and gas lease as. 42 L.R.A.(N.S.) 472.

Injury from abandonment of highway as. 26 L.R.A. 665.

Classification of growing fruit as. 16 L.R.A. 103.

As to similar provision in Cal. Civ. Code, § 663, see *Raventas v. Green*, 57 Cal. 254.

## CHAPTER 36.

### OWNERSHIP.

- ARTICLE 1. OWNERS, §§ 5254-5256.  
2. INTERESTS IN PROPERTY, §§ 5257-5281.  
3. CONDITIONS OF OWNERSHIP, §§ 5282-5286.  
4. RESTRAINTS UPON ALIENATION, §§ 5287-5289.  
5. ACCUMULATIONS, §§ 5290-5294.  
6. RIGHTS OF OWNERS, §§ 5295, 5296.  
7. TERMINATION OF OWNERSHIP, §§ 5297-5300.

#### ARTICLE 1.—OWNERS.

**§ 5254. 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. [R. C. 1905, § 4711; Civ. C. 1877, § 168; R. C. 1899, § 3275.]

Legal title to all property in the state originally in some person, United States or state, legal title vesting legal estate in holder. State ex rel. Dillman v. Weide, 23 S. D. 109, 135 N. W. 696.

§ 5255. **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. [R. C. 1905, § 4712; Civ. C. 1877, § 169; R. C. 1899, § 3276.]

State and federal ownership of waters. 50 L.R.A. 737.

Right as between state and federal government to improve navigability of stream. 67 L.R.A. 824.

§ 5256. **Who may convey.** Any person, whether citizen or alien, may take, hold and dispose of property, real or personal, within this state. [R. C. 1905, § 4713; Civ. C. 1877, § 170; R. C. 1899, § 3277.]

Alien may acquire a title to mining property. Gorman v. Alexander, 2 S. D. 557, 51 N. W. 346.

As to similar provision in Cal. Civ. Code, § 671, see Re. Billings, 65 Cal. 593, 4 Pac. 639.

#### ARTICLE 2.—INTERESTS IN PROPERTY.

§ 5257. **Ownership classified.** The ownership of property is either:

1. Absolute; or,
2. Qualified. [R. C. 1905, § 4714; Civ. C. 1877, § 171; R. C. 1899, § 3278.]  
As to similar provision in Cal. Civ. Code, § 678, see *Le Breton v. Cook*, 107 Cal. 410, 40 Pac. 552; *Spreckels v. Spreckels*, 116 Cal. 339, 36 L.R.A. 497, 58 Am. St. Rep. 170, 48 Pac. 228.

§ 5258. **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. [R. C. 1905, § 4715; Civ. C. 1877, § 172; R. C. 1899, § 3279.]

As to similar provision in Cal. Civ. Code, § 679, see *Works v. Merritt*, 105 Cal. 467, 38 Pac. 1109; *Bank of Ukiah v. Moore*, 106 Cal. 673, 39 Pac. 1071; *Rodgers v. Bachman*, 109 Cal. 552, 42 Pac. 448; *Re Burdick*, 112 Cal. 387, 44 Pac. 734; *Spreckels v. Spreckels*, 116 Cal. 339, 36 L.R.A. 497, 58 Am. St. Rep. 170, 48 Pac. 228.

§ 5259. **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. [R. C. 1905, § 4716; Civ. C. 1877, § 173; R. C. 1899, § 3280.]

Recital in deed to city that it is "understood that said premises are deeded for city hall purposes only" does not qualify ownership. *Huron v. Wilcox*, 17 S. D. 625, 106 Am. St. Rep. 788, 98 N. W. 88.

As to similar provision in Cal. Civ. Code, § 680, see *Le Breton v. Cook*, 107 Cal. 410, 40 Pac. 552; *Re Burdick*, 112 Cal. 387, 44 Pac. 734; *Spreckels v. Spreckels*, 116 Cal. 339, 36 L.R.A. 497, 58 Am. St. Rep. 170, 48 Pac. 228; *Blackburn v. Webb*, 133 Cal. 420, 65 Pac. 952.

§ 5260. **Sole ownership.** The ownership of property by a single person is designated as a sole or several ownership. [R. C. 1905, § 4717; Civ. C. 1877, § 174; R. C. 1899, § 3281.]

§ 5261. **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. [R. C. 1905, § 4718; Civ. C. 1877, § 175; R. C. 1899, § 3282.]

As to similar provision in Cal. Civ. Code, § 682, see *Re Burdick*, 112 Cal. 387, 44 Pac. 734; *Spreckels v. Spreckels*, 116 Cal. 339, 36 L.R.A. 497, 58 Am. St. Rep. 170, 48 Pac. 228.

**§ 5262. 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. [R. C. 1905, § 4719; Civ. C. 1877, § 176; R. C. 1899, § 3283.]

As to similar provision in Cal. Civ. Code, § 683, see *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, 78 Am. St. Rep. 35, 59 Pac. 330.

**§ 5263. Partnership.** A partnership interest is one owned by several persons in partnership for partnership purposes. [R. C. 1905, § 4720; Civ. C. 1877, § 177; R. C. 1899, § 3284.]

As to similar provision in Cal. Civ. Code, § 684, see *Smith v. Cooley*, 65 Cal. 46, 2 Pac. 880; *People v. Greening*, 102 Cal. 384, 36 Pac. 665.

**§ 5264. Common tenancy.** An interest in common is one owned by several persons not in joint ownership or partnership. [R. C. 1905, § 4721; Civ. C. 1877, § 178; R. C. 1899, § 3285.]

As to similar provision in Cal. Civ. Code, § 685, see *Re Hittell*, 141 Cal. 432, 76 Pac. 53.

**§ 5265. 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 5262. [R. C. 1905, § 4722; Civ. C. 1877, § 179; R. C. 1899, § 3286.]

As to similar provision in Cal. Civ. Code, § 686, see *Re Hittell*, 141 Cal. 432, 75 Pac. 53.

**§ 5266. 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. [R. C. 1905, § 4723; Civ. C. 1877, § 180; R. C. 1899, § 3287.]

As to similar provision in Cal. Civ. Code, § 688, see *Le Breton v. Cook*, 107 Cal. 410, 40 Pac. 552.

**§ 5267. Present.** A present interest entitles the owner to the immediate possession of the property. [R. C. 1905, § 4724; Civ. C. 1877, § 181; R. C. 1899, § 3288.]

As to similar provision in Cal. Civ. Code, § 689, see *Le Breton v. Cook*, 107 Cal. 410, 40 Pac. 552.

**§ 5268. Future.** A future interest entitles the owner to the possession of the property only at a future period. [R. C. 1905, § 4725; Civ. C. 1877, § 182; R. C. 1899, § 3289.]

Person vested with title to land through will of his father, though land is subject to life interest of mother, is owner of real property subject to lien of judgment. *John Leslie Paper Co. v. Wheeler*, 23 N. D. 477, 42 L.R.A.(N.S.) 292, 137 N. W. 412.

As to similar provision in Cal. Civ. Code, § 690, see *Goldtree v. Thompson*, 79 Cal. 613, 22 Pac. 50; *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049; *Le Breton v. Cook*, 107 Cal. 410, 40 Pac. 552; *Dunn v. Schell*, 122 Cal. 626, 55 Pac. 595; *Blackburn v. Webb*, 133 Cal. 420, 65 Pac. 952.

**§ 5269. Perpetual.** A perpetual interest has a duration equal to that of the property. [R. C. 1905, § 4726; Civ. C. 1877, § 183; R. C. 1899, § 3290.]

**§ 5270. Limited.** A limited interest has a duration less than that of the property. [R. C. 1905, § 4727; Civ. C. 1877, § 184; R. C. 1899, § 3291.]

**§ 5271. Future estates classified.** A future interest is either:

1. Vested; or,
2. Contingent. [R. C. 1905, § 4728; Civ. C. 1877, § 185; R. C. 1899, § 3292.]

**§ 5272. 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. [R. C. 1905, § 4729; Civ. C. 1877, § 186; R. C. 1899, § 3293.]

Purchaser at sale under attachment acquires no title as against deed delivered before levy but recorded after attachment. *Leonard v. Fleming*, 13 N. D. 629, 102 N. W. 308.

Person vested with title to land through will of his father, though land is subject to life estate of mother, is owner of real property subject to lien of judgment. *John Leslie Paper Co. v. Wheeler*, 23 N. D. 477, 42 L.R.A.(N.S.) 292, 137 N. W. 412.

As to similar provision in Cal. Civ. Code, § 694, see *Williams v. Williams*, 73 Cal. 99, 14 Pac. 394; *Dunn v. Schell*, 122 Cal. 626, 55 Pac. 595; *Re Fair*, 132 Cal. 523, 84 Am.

St. Rep. 70, 60 Pac. 442, 64 Pac. 1000; *Blackburn v. Webb*, 133 Cal. 420, 65 Pac. 952; *Re Sanford*, 136 Cal. 97, 68 Pac. 494.

§ 5273. **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. [R. C. 1905, § 4730; Civ. C. 1877, § 187; R. C. 1899, § 3294.]

Purchaser at sale under attachment acquires no title as against deed delivered before levy but recorded after attachment. *Leonard v. Fleming*, 13 N. D. 629, 102 N. W. 308.

As to similar provision in Cal. Civ. Code, § 695, see *Jewell v. Pierce*, 120 Cal. 79, 52 Pac. 132.

§ 5274. **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. [R. C. 1905, § 4731; Civ. C. 1877, § 188; R. C. 1899, § 3295.]

§ 5275. **Not void.** A future interest is not void merely because of the improbability of the contingency on which it is limited to take effect. [R. C. 1905, § 4732; Civ. C. 1877, § 189; R. C. 1899, § 3296.]

§ 5276. **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. [R. C. 1905, § 4733; Civ. C. 1877, § 190; R. C. 1899, § 3297.]

§ 5277. **Future estates pass.** Future interests pass by succession, will and transfer in the same manner as present interests. [R. C. 1905, § 4734; Civ. C. 1877, § 191; R. C. 1899, § 3298.]

As to similar provision in Cal. Civ. Code, § 699, see *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049; *Le Breton v. Cook*, 107 Cal. 410, 40 Pac. 552; *Re Walkerly*, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772; *Dunn v. Schell*, 122 Cal. 626, 55 Pac. 595; *Blackburn v. Webb*, 133 Cal. 420, 65 Pac. 952.

§ 5278. **Possibilities.** A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind. [R. C. 1905, § 4735; Civ. C. 1877, § 192; R. C. 1899, § 3299.]

Release by heir in lifetime of ancestor of his interest in estate of ancestor is operative. *Re Thompson*, 26 S. D. 576, 128 N. W. 1127, Ann. Cas. 1913B, 446.

As to similar provision in Cal. Civ. Code, § 700, see *Re Burdick*, 112 Cal. 387, 44 Pac. 734; *Supreme Council, A. L. H. v. Gehrenbeck*, 124 Cal. 43, 56 Pac. 640; *Re Wickersham*, 138 Cal. 355, 70 Pac. 1076; *Re Ryder*, 141 Cal. 366, 74 Pac. 993.

§ 5279. **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 38 of this code. [R. C. 1905, § 4736; Civ. C. 1877, § 193; R. C. 1899, § 3300.]

§ 5280. **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. [R. C. 1905, § 4737; Civ. C. 1877, § 194; R. C. 1899, § 3301.]

§ 5281. **Future interests limited.** No future interest in property is recognized by the law, except such as is defined in this code. [R. C. 1905, § 4738; Civ. C. 1877, § 195; R. C. 1899, § 3302.]

#### ARTICLE 3.—CONDITIONS OF OWNERSHIP.

§ 5282. **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. [R. C. 1905, § 4739; Civ. C. 1877, § 196; R. C. 1899, § 3303.]

As to similar provision in Cal. Civ. Code, § 707, see *Nichols v. Emery*, 109 Cal. 323, 50 Am. St. Rep. 43, 41 Pac. 1089.

§ 5283. **Classified.** Conditions are precedent or subsequent. The former fix the beginning, the latter the ending of the right. [R. C. 1905, § 4740; Civ. C. 1877, § 197; R. C. 1899, § 3304.]

Effect on a condition subsequent of a succeeding law or act of God preventing its performance. 21 L.R.A. 58.

Necessity of entry or formal declaration of forfeiture as a condition of maintaining action other than for damages, based on breach of condition subsequent in conveyance of freehold. 14 L.R.A.(N.S.) 1188; 23 L.R.A.(N.S.) 938.



Character and effect of provision in deed to railroad for construction of road within a specified time. 32 L.R.A.(N.S.) 117.

Condition in deed that land is to be used for a specified charitable or quasi public purpose. 19 L.R.A. 262.

Effect of specifying condition in use of real estate in devise to religious society. 11 L.R.A.(N.S.) 509.

Breach of condition in devise of real estate to religious society for specified use. 11 L.R.A.(N.S.) 525.

Execution of contract on condition that others shall sign. 45 L.R.A. 321.

Reverter of land dedicated or conveyed for purposes of courthouse upon removal of courthouse, or failure to use land for courthouse purposes. 35 L.R.A.(N.S.) 603.

Right of entry on condition broken. 60 L.R.A. 750.

Does grantor's right to rescind for breach of condition as to support descend to his heirs or representatives. 23 L.R.A.(N.S.) 232.

Suit for damages as waiver of right to forfeit deed for breach of condition. 5 L.R.A.(N.S.) 603.

**§ 5284. 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 performance of an act not wrong of itself, but otherwise unlawful the instrument takes effect and the condition is void. [R. C. 1905, § 4741; Civ. C. 1877, § 198; R. C. 1899, § 3305.]

As to similar provision in Cal. Civ. Code, § 709, see *Hoag v. Howard*, 55 Cal. 564.

**§ 5285. 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. [R. C. 1905, § 4742; Civ. C. 1877, § 199; R. C. 1899, § 3306.]

Validity of condition in restraint of marriage. 2 L.R.A.(N.S.) 545.

Devises or bequests conditioned upon divorce or separation or limited upon its continuance. 49 L.R.A.(N.S.) 637.

Provision in restraint of marriage in a deed or will as a condition or a limitation. 49 L.R.A.(N.S.) 615.

Validity of provision in restraint of marriage as affected by fact that the gift to which it relates is to a daughter or other female relative. 49 L.R.A.(N.S.) 606.

Validity of condition in restraint of marriage as affected by fact that a breach entails only a partial forfeiture. 49 L.R.A.(N.S.) 627.

Meaning of words "unmarried," and "without having been married," in will. 15 L.R.A. 292.

Effect of testamentary provision restricting widow to enjoyment during widowhood, upon quantum of estate taken by her. 28 L.R.A.(N.S.) 1093.

Equitable relief against forfeiture of estate under condition against marriage. 63 L.R.A. 858.

Contracts in restraint of marriage. 49 L.R.A.(N.S.) 633.

**§ 5286. Restraints on alienation.** Conditions restraining alienation, when repugnant to the interest created, are void. [R. C. 1905, § 4743; Civ. C. 1877, § 200; R. C. 1899, § 3307.]

Validity of limitation upon power of alienation imposed upon devise of equitable estate to married woman. 28 L.R.A.(N.S.) 426.

#### ARTICLE 4.—RESTRAINTS UPON ALIENATION.

**§ 5287. 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 5315. [R. C. 1905, § 4744; Civ. C. 1877, § 201; R. C. 1899, § 3308.]

Power of alienation not suspended for longer than continuance of lives in being at testator's death. *Penfield v. Tower*, 1 N. D. 216, 46 N. W. 413.

Statute has no application where executor is vested with absolute and unconditional power to sell and convert land into money and devote fund to charitable use mentioned in will. *Hagen v. Sacrison*, 19 N. D. 160, 26 L.R.A.(N.S.) 724, 123 N. W. 518.

Effect on prior takers of failure of gift because it violates the rule against perpetuities. 20 L.R.A. 509.

Devises of life estates to unborn children of living persons, as contravening the rule against perpetuities. 6 L.R.A.(N.S.) 330.

Limitation of estate upon probate of will as a violation of the rule against perpetuities. 10 L.R.A.(N.S.) 564.

Contract for indefinite option, or indefinite renewal of option, as perpetuity. 9 L.R.A.(N.S.) 913.

Allowing period for conversion of property as violation of rule against perpetuities or suspension of power of alienation. 26 L.R.A.(N.S.) 724.

Allowing specified period for election to take under devise or bequest as a violation of the rule against perpetuities, or the suspension of the power of alienation. 26 L.R.A.(N.S.) 825.

Validity of devise over upon indefinite cessation of lineal descendants of first taker. 3 L.R.A.(N.S.) 1143.

Validity of restraints on the alienation of a fee simple during a limited time. 3 L.R.A.(N.S.) 668.

Effect of rule against perpetuities on enforcement of general bequest for charity or religion. 14 L.R.A.(N.S.) 66.

Restrictions on alienation in devise of real estate to religious society for specified uses. 11 L.R.A.(N.S.) 523.

Validity of limitation of power of alienation imposed upon grant or devise of equitable estate to married woman. 28 L.R.A.(N.S.) 426.

As to similar provision in Cal. Civ. Code, § 715, see *Hinckley's Estate*, 58 Cal. 457; *Whitney v. Dodge*, 105 Cal. 192, 38 Pac. 636.

**§ 5288. 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. [R. C. 1905, § 4745; Civ. C. 1877, § 202; R. C. 1899, § 3309.]

Effect on prior takers of the failure of a gift because it violates the rule against perpetuities. 20 L.R.A. 509.

Remainder void for remoteness; effect on particular estate. 3 L.R.A.(N.S.) 639.

Effect of decree of distribution following a testamentary disposition of property void under the rule against perpetuities or as unlawfully suspending the power of alienation. 15 L.R.A.(N.S.) 900.

As to similar provision in Cal. Civ. Code, § 716, see *Goldtree v. Thompson*, 79 Cal. 613, 22 Pac. 50; *Sacramento Bank v. Alcorn*, 121 Cal. 379, 53 Pac. 813; *Re Steele*, 124 Cal. 533, 57 Pac. 664; *Blakeman v. Miller*, 136 Cal. 138, 89 Am. St. Rep. 120, 68 Pac. 587.

**§ 5289. Leases limited.** No lease or grant of agricultural land for a longer period than ten years, in which shall be reserved 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. [R. C. 1905, § 4746; Civ. C. 1877, § 203; R. C. 1899, § 3310; 1903, ch. 151.]

"Rent" means profit arising out of land and payable periodically. *Wegner v. Lubenow*, 12 N. D. 95, 95 N. W. 442.

As to similar provision in Cal. Civ. Code, § 717, see *Mann v. Mann*, 141 Cal. 326, 74 Pac. 995.

#### ARTICLE 5.—ACCUMULATIONS.

**§ 5290. 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. [R. C. 1905, § 4747; Civ. C. 1877, § 204; R. C. 1899, § 3311.]

As to similar provision in Cal. Civ. Code, § 722, see *Hinckley's Estate*, 58 Cal. 457.

**§ 5291. Illegal accumulation.** All directions for the accumulation of the income of property, except such as are allowed by this chapter are void. [R. C. 1905, § 4748; Civ. C. 1877, § 205; R. C. 1899, § 3312.]

Effect of direction for accumulation upon validity of charitable gift. 2 B. R. C. 880.

As to similar provision in Cal. Civ. Code, § 723, see *Hinckley's Estate*, 58 Cal. 457; *Re Sanford*, 136 Cal. 97, 68 Pac. 494.

**§ 5292. 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. [R. C. 1905, § 4749; Civ. C. 1877, § 206; R. C. 1899, § 3313.]

As to similar provision in Cal. Civ. Code, § 724, see *Hinckley's Estate*, 58 Cal. 457; *Goldtree v. Thompson*, 79 Cal. 613, 22 Pac. 50.

**§ 5293. 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 during 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. [R. C. 1905, § 4750; Civ. C. 1877, § 207; R. C. 1899, § 3314.]

As to similar provision in Cal. Civ. Code, § 725, see *Hinckley's Estate*, 58 Cal. 457.

**§ 5294. 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. [R. C. 1905, § 4751; Civ. C. 1877, § 208; R. C. 1899, § 3315.]

#### ARTICLE 6.—RIGHTS OF OWNERS.

**§ 5295. Owner owns product and accessions.** The owner of a thing owns also all of its products and accessions. [R. C. 1905, § 4752; Civ. C. 1877, § 209; R. C. 1899, § 3316.]

Word "accession" used in section applies to things added to realty, and not to crops raised by adverse possessor and severed from land. *Golden Valley Land & Cattle Co. v. Johnstone*, 21 N. D. 101, 128 N. W. 691, Ann. Cas. 1913B, 631.

Title by accession to crops, fruit and timber wrongfully severed. 32 L.R.A. 422.

Title to increase of animals as between mortgagee of dam and other claimants. 17 L.R.A. 82.

Necessity that increase of animals be in gestation at time of execution of mortgage in order to be covered thereby. 17 L.R.A.(N.S.) 203.

Does chattel mortgage on domestic animals cover their increase when not mentioned therein. 14 L.R.A.(N.S.) 431.

Rights and remedies of owner of standing timber which has been manufactured into lumber after expiration of time stipulated for removal. 29 L.R.A.(N.S.) 552.

**§ 5296. 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. [R. C. 1905, § 4753; Civ. C. 1877, § 210; R. C. 1899, § 3317.]

#### ARTICLE 7.—TERMINATION OF OWNERSHIP.

**§ 5297. 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. [R. C. 1905, § 4754; Civ. C. 1877, § 211; R. C. 1899, § 3318.]

Does contingency of death without issue, children, etc., import their survival of the first taker. 37 L.R.A.(N.S.) 164.

To what time contingency of death of a legatee or devisee without child or issue on which a gift is conditioned is referable. 25 L.R.A.(N.S.) 1045.

**§ 5298. 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. [R. C. 1905, § 4755; Civ. C. 1877, § 212; R. C. 1899, § 3319.]

**§ 5299. 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. [R. C. 1905, § 4756; Civ. C. 1877, § 213; R. C. 1899, § 3320.]

**§ 5300. 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. [R. C. 1905, § 4757; Civ. C. 1877, § 214; R. C. 1899, § 3321.]

## CHAPTER 37.

### GENERAL DEFINITIONS.

**§ 5301. 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. [R. C. 1905, § 4758; Civ. C. 1877, § 215; R. C. 1899, § 3322.]

**§ 5302. 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. [R. C. 1905, § 4759; Civ. C. 1877, § 216; R. C. 1899, § 3323.]

## CHAPTER 38.

### REAL OR IMMOVABLE PROPERTY.

- ARTICLE 1. GENERAL PROVISIONS, § 5303.  
 2. ESTATES IN GENERAL, §§ 5304-5324.  
 3. TERMINATION OF ESTATES, §§ 5325-5329.  
 4. SERVITUDES, §§ 5330-5340.

#### ARTICLE 1.—GENERAL PROVISIONS.

**§ 5303. 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. [R. C. 1905, § 4760; Civ. C. 1877, § 217; R. C. 1899, § 3324.]

As to inheritance by illegitimate child. *Moen v. Moen*, 16 S. D. 210, 92 N. W. 13.

As to similar provision in Cal. Civ. Code, § 763, see *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049.

#### ARTICLE 2.—ESTATES IN GENERAL.

**§ 5304. 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. [R. C. 1905, § 4761; Civ. C. 1877, § 218; R. C. 1899, § 3325.]

**§ 5305. 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. [R. C. 1905, § 4762; Civ. C. 1877, § 219; R. C. 1899, § 3326.]

Character of estate created by grant of property to one so long as he shall desire to live upon it or devote it to a particular use. 21 L.R.A.(N.S.) 575.

Right of one to whom estate is devised for life, with power to consume, to convey a good title. 13 L.R.A.(N.S.) 458.

Power of disposition bestowed on devisee as indicative of quantum of estate intended to be devised. 18 L.R.A.(N.S.) 463.

Effect of bequest for life of chattels consumable in the use. 16 L.R.A.(N.S.) 483.

**§ 5306. 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. [R. C. 1905, § 4763; Civ. C. 1877, § 220; R. C. 1899, § 3327.]

Estates tail, creation, nature and destruction of. 7 Am. St. Rep. 428.

**§ 5307. 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. [R. C. 1905, § 4764; Civ. C. 1877, § 221; R. C. 1899, § 3328.]

**§ 5308. 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. [R. C. 1905, § 4765; Civ. C. 1877, § 222; R. C. 1899, § 3329.]

Equitable estate vested in purchaser under simple contract for purchase of land is inheritable and is a freehold estate. State ex rel. Dillman v. Weide, 29 S. D. 109, 135 N. W. 696.

**§ 5309. Same.** An estate during the life of a third person, whether limited to heirs or otherwise, is a freehold. [R. C. 1905, § 4766; Civ. C. 1877, § 223; R. C. 1899, § 3330.]

Estate during the life of a third person is a freehold, alienable and inheritable. State ex rel. Dillman v. Weide, 29 S. D. 109, 135 N. W. 696.

Devise absolutely; effect of subsequent gift over. 5 L.R.A.(N.S.) 323.

**§ 5310. 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. [R. C. 1905, § 4767; Civ. C. 1877, § 224; R. C. 1899, § 3331.]

**§ 5311. 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. [R. C. 1905, § 4768; Civ. C. 1877, § 225; R. C. 1899, § 3332.]

**§ 5312. 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. [R. C. 1905, § 4769; Civ. C. 1877, § 226; R. C. 1899, § 3333.]

Person vested with title to land through will of his father, though land is subject to life estate of mother, is owner of real property subject to lien of judgment. John Leslie Paper Co. v. Wheeler, 23 N. D. 477, 42 L.R.A.(N.S.) 292, 137 N. W. 412.

Power to create remainder after life estate with absolute power of disposal. 6 L.R.A.(N.S.) 1186; 39 L.R.A.(N.S.) 805.

**§ 5313. 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. [R. C. 1905, § 4770; Civ. C. 1877, § 227; R. C. 1899, § 3334.]

**§ 5314. 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 5287. [R. C. 1905, § 4771; Civ. C. 1877, § 228; R. C. 1899, § 3335.]

As to similar provision in Cal. Civ. Code, § 771, see *Hinckley's Estate*, 58 Cal. 457; *Re Walkerly*, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772.

**§ 5315. 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. [R. C. 1905, § 4772; Civ. C. 1877, § 229; R. C. 1899, § 3336.]

As to similar provision in Cal. Civ. Code, § 772, see *Hinckley's Estate*, 58 Cal. 457; *Crew v. Pratt*, 119 Cal. 139, 51 Pac. 38.

**§ 5316. Creation of future freehold estates, etc.** Subject to the rules of this chapter and of chapters 35, 36 and 37 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. [R. C. 1905, § 4773; Civ. C. 1877, § 230; R. C. 1899, § 3337.]

As to similar provision in Cal. Civ. Code, § 773, see *Blakeman v. Miller*, 136 Cal. 138, 89 Am. St. Rep. 120, 68 Pac. 587.

**§ 5317. 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. [R. C. 1905, § 4774; Civ. C. 1877, § 231; R. C. 1899, § 3338.]

**§ 5318. 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 of years unless it is for the whole residue of such term. [R. C. 1905, § 4775; Civ. C. 1877, § 232; R. C. 1899, § 3339.]

**§ 5319. 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. [R. C. 1905, § 4776; Civ. C. 1877, § 233; R. C. 1899, § 3340.]

As to similar provision in Cal. Civ. Code, § 776, see *Blakeman v. Miller*, 136 Cal. 138, 89 Am. St. Rep. 120, 68 Pac. 587.

**§ 5320. 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. [R. C. 1905, § 4777; Civ. C. 1877, § 234; R. C. 1899, § 3341.]

**§ 5321. 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. [R. C. 1905, § 4778; Civ. C. 1877, § 235; R. C. 1899, § 3342.]

**§ 5322. 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. [R. C. 1905, § 4779; Civ. C. 1877, § 236; R. C. 1899, § 3343.]

Full treatment of rule in *Shelley's Case*. 29 L.R.A.(N.S.) 963.

Effect upon rule in *Shelley's Case*, of express prohibition against conveyance or incumbrance of property by life tenant. 7 L.R.A.(N.S.) 1109.

Extent to which rule in *Shelley's Case* controls in the United States. 30 Am. Dec. 415.

Effect of videlicet following word "heirs" in a grant or devise of real property to restrict estate given to the first taker. 33 L.R.A.(N.S.) 191.

Construction of word "heirs" to mean children. 1 L.R.A.(N.S.) 319.

As to similar provision in Cal. Civ. Code, § 779, see *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049.

§ 5323. **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. [R. C. 1905, § 4780; Civ. C. 1877, § 237; R. C. 1899, § 3344.]

§ 5324. **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. [R. C. 1905, § 4781; Civ. C. 1877, § 238; R. C. 1899, § 3345.]

As to similar provision in Cal. Civ. Code, § 781, see *Re Fair*, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000.

#### ARTICLE 3.—TERMINATION OF ESTATES.

§ 5325. **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. [R. C. 1905, § 4782; Civ. C. 1877, § 239; R. C. 1899, § 3346.]

§ 5326. **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. [R. C. 1905, § 4783; Civ. C. 1877, § 240; R. C. 1899, § 3347.]

§ 5327. **Subsequent action.** After the notice prescribed by sections 5325 and 5326 has been served in the manner therein directed and the period specified by such notice has expired, but not before, the landlord may re-enter or proceed according to law to recover possession. [R. C. 1905, § 4784; Civ. C. 1877, § 241; R. C. 1899, § 3348.]

§ 5328. **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 5326. [R. C. 1905, § 4785; Civ. C. 1877, § 242; R. C. 1899, § 3349.]

Eviction on three days' notice for nonpayment of rent; no re-entry clause necessary in lease. *Dakota Hot Springs Co. v. Young*, 9 S. D. 577, 70 N. W. 842.

As to similar provision in Cal. Civ. Code, § 791, see *Earl Orchard Co. v. Fava*, 138 Cal. 76, 70 Pac. 1073.

§ 5329. **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 5328. [R. C. 1905, § 4786; Civ. C. 1877, § 243; R. C. 1899, § 3350.]

#### ARTICLE 4.—SERVITUDES.

§ 5330. **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. [R. C. 1905, § 4787; Civ. C. 1877, § 244; R. C. 1899, § 3351.]

As to right to acquire land for park purposes by common-law dedication. *Cole v. Minnesota Loan & T. Co.*, 17 N. D. 409, 117 N. W. 354, 17 A. & E. Ann. Cas. 304.

Grant of easement by implication. 23 Am. Rep. 446; 40 Am. Rep. 537; 122 Am. St. Rep. 206.

Implied grant of by severance and sale of property. 34 Am. St. Rep. 708; 26 L.R.A.(N.S.) 316.

Restrictive covenants as to use of property as easement. 37 L.R.A.(N.S.) 36.

When easements by necessity exist. 36 Am. Rep. 415.

As to similar provision in Cal. Civ. Code, § 801, see *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *McDaniel v. Cummings*, 83 Cal. 515, 8 L.R.A. 575, 23 Pac. 795; *Dorris v. Sullivan*, 90 Cal. 279, 27 Pac. 216; *Painter v. Pasadena Land & Water Co.*, 91 Cal. 74, 27 Pac. 539; *Kennedy v. Burnap*, 120 Cal. 488, 40 L.R.A. 476, 52 Pac. 843; *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36, 68 Pac. 308.

3. Right of way on shore as appurtenant to fishery right. 4 L.R.A.(N.S.) 879.

4. Ways of necessity. 13 Am. Dec. 746; 35 Am. Dec. 464; 85 Am. Dec. 675.

Ways and the rights and remedies of the parties entitled thereto. 88 Am. Dec. 279; 100 Am. Dec. 115; 50 Am. Rep. 64; 95 Am. St. Rep. 318.

Way of necessity where other possible modes of access exist. 17 L.R.A.(N.S.) 1019; 32 L.R.A.(N.S.) 1075.

Way appurtenant to close from which it is separated by intervening lands. 2 L.R.A.(N.S.) 983.

Does the fact that the sale of part of a tract is involuntary prevent the implication of a way by necessity over the remainder. 12 L.R.A.(N.S.) 482.

Effect of bounding grant on private way to carry title thereto. 24 L.R.A.(N.S.) 539.

Right of grantee to claim an easement, implied covenant or estoppel, as against the grantor, by a call in the deed for a street or alley in which the grantor owns the fee. 14 L.R.A.(N.S.) 878.

Right of purchaser of property according to plat to easements in streets or ways indicated thereon other than those on which his property abuts. 28 L.R.A.(N.S.) 1024.

Bounding land on alley as covenant that alley exists, where grantor does not own the fee thereof. 10 L.R.A.(N.S.) 964.

5. 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. Thorp*, 17 S. D. 13, 94 N. W. 402.

8. Ancient lights. 46 Am. Dec. 583.

Easement of light and air. 7 Am. Dec. 49; 32 Am. Dec. 412.

—of light and air from public streets. 41 Am. St. Rep. 323.

American law as to easements of light, air and prospect. 22 L.R.A. 536; 8 L.R.A.(N.S.) 350.

Does lease carry right to light and air from adjoining premises of landlord. 13 L.R.A.(N.S.) 333.

10. Right to flood another's land is easement acquisition of which by prescription requires continuous enjoyment for period of statute of limitations governing actions to recover land. *Shearer v. Hutterische Bruder Geineinde*, 26 S. D. 509, 134 N. W. 63.

11. Servitude of easement to receive the flow of water. 32 Am. Dec. 123.

12. Conveyance by two parties of land for party wall each to the other is an easement. *Scottish-American Mortg. Co. v. Russell*, 20 S. D. 42, 104 N. W. 607.

Right to lateral support. 33 Am. St. Rep. 446.

—presumption of grant of right of. 29 Am. Rep. 399.

—prescriptive right to. 7 Am. Dec. 62.

Nature of right to lateral and subjacent support. 68 L.R.A. 683.



§ 5331. **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. [R. C. 1905, § 4788; Civ. C. 1877, § 245; R. C. 1899, § 3352.]

Easement in ditch acquired by landowner's continued acquiescence without objection. *Scott v. Toomey*, 8 S. D. 639, 67 N. W. 838.

Acquisition of easement by adverse possession by. 11 Am. Dec. 663.

Void parol conveyance of easement as foundation for easement by prescription. 13 L.R.A.(N.S.) 991.

Burden of showing that use upon which an easement by prescription is claimed was permissive, and not under claim of right. 8 L.R.A.(N.S.) 149.

Implied easement by exhibiting unfiled plat to intending purchaser. 35 L.R.A.(N.S.) 938.

Prescriptive right by use of underground water pipes. 2 L.R.A.(N.S.) 976.

Prescriptive right to lateral support of buildings. 20 L.R.A. 730.

Acquisition by prescription of party-wall easement in common division wall. 18 L.R.A.(N.S.) 131.

As to similar provision in Cal. Civ. Code, § 802, see *Dixon v. Schermeier*, 110 Cal. 582, 42 Pac. 1091.

1. Prescriptive right to fish. 60 L.R.A. 496.

3. Interest of owner in burial lot as easement. 67 L.R.A. 119.

Prescription or adverse possession of grave or burial lot. 40 L.R.A.(N.S.) 752.

5. Acquisition of prescriptive right of way across railroad tracks. 35 L.R.A.(N.S.) 190.

Effect of protest by owner to prevent acquisition of right of way by prescription. 25 L.R.A.(N.S.) 174.

Right of way on shore by custom or prescription. 4 L.R.A.(N.S.) 880.

Grant of right of way on shore. 4 L.R.A.(N.S.) 881.

Validity of contract by public-service corporation for exclusive right of way across private property. 36 L.R.A.(N.S.) 456.

Right of way for irrigation ditch; right of fee owner to cross. 3 L.R.A.(N.S.) 1148.

Leaving bars or gates for convenience of neighbor when fencing land, as affecting the acquisition of easement of way by prescription. 35 L.R.A.(N.S.) 941.

§ 5332. **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. [R. C. 1905, § 4789; Civ. C. 1877, § 246; R. C. 1899, § 3353.]

§ 5333. **Who can create servitude.** A servitude can be created only by one who has a vested estate in the servient tenement. [R. C. 1905, § 4790; Civ. C. 1877, § 247; R. C. 1899, § 3354.]

Creation and conveyance of easements appurtenant. 136 Am. St. Rep. 680.

Cotenant's power to create. 21 Am. St. Rep. 593.

Power of husband to create easements in homestead without wife's consent. 27 L.R.A.(N.S.) 963.

§ 5334. **Who cannot hold.** A servitude thereon cannot be held by the owner of the servient tenement. [R. C. 1905, § 4791; Civ. C. 1877, § 248; R. C. 1899, § 3355.]

§ 5335. **Extent of.** The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired. [R. C. 1905, § 4792; Civ. C. 1877, § 249; R. C. 1899, § 3356.]

Extent of indefinite easement as affected by the extent to which it has been used. 5 L.R.A.(N.S.) 851.

Rights conferred by grant of unrestricted easement as limited to a reasonable use. 15 L.R.A.(N.S.) 292.

Duration of easements appurtenant. 20 L.R.A. 635.

Continuance of easement on the severance of a heritage. 57 Am. Dec. 759.

When easement is revocable. 43 Am. Rep. 195.

As to similar provision in Cal. Civ. Code, § 806, see *Allen v. San Jose Land & Water Co.*, 92 Cal. 138, 15 L.R.A. 93, 28 Pac. 215.

**§ 5336. 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. [R. C. 1905, § 4793; Civ. C. 1877, § 250; R. C. 1899, § 3357.]

**§ 5337. 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. [R. C. 1905, § 4794; Civ. C. 1877, § 251; R. C. 1899, § 3358.]

**§ 5338. 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. [R. C. 1905, § 4795; Civ. C. 1877, § 252; R. C. 1899, § 3359.]

Right of property owner to compensation for interference with light or air by railroad structure on company's own property. 20 L.R.A.(N.S.) 1061.

Abutter's right to compensation for interference with easement of light, air and access by railroad in street 36 L.R.A.(N.S.) 736, 778.

Injunction against interference with view from street. 5 L.R.A.(N.S.) 486.

Mandatory injunction for removal of obstruction to light. 20 L.R.A. 161.

What constitutes a "taking" of easements of light, air and prospect. 18 L.R.A. 166.

**§ 5339. 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. [R. C. 1905, § 4796; Civ. C. 1877, § 253; R. C. 1899, § 3360.]

Ejectment by original owner of land dedicated to public against permanent incumbrancer inconsistent with dedication. N. P. Ry. Co. v. Lake, 10 N. D. 541, 88 N. W. 461.

Ejectment for public easement. 11 L.R.A.(N.S.) 123.

Right of owner of right of way over another's land to compensation when the land is taken for a public highway. 2 L.R.A.(N.S.) 598.

**§ 5340. 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. [R. C. 1905, § 4797; Civ. C. 1877, § 254; R. C. 1899, § 3361.]

Abandonment of highway by nonuser. 26 L.R.A. 449.

Will failure to maintain easement raise a presumption of its abandonment. 2 L.R.A.(N.S.) 832.

As to similar provision in Cal. Civ. Code, § 811, see Smith v. Worn, 93 Cal. 206, 28 Pac. 944; Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453; Los Angeles v. Pomeroy, 125 Cal. 420, 58 Pac. 69.

1. Effect upon easement of unity of seisin of dominant and servient estates. 1 B. R. C. 477.

2. Dedication of land as affecting easement. 31 L.R.A.(N.S.) 1028.

Extinguishment of easement for private way by its incorporation into a public way. 21 L.R.A.(N.S.) 1002.

Effect of destruction of building to terminate adjoining owner's easement of support. 19 L.R.A.(N.S.) 883.

Right of abutting owner to continue enjoyment of pathway across highway. 12 L.R.A.(N.S.) 918.

3. Abandonment of private way by nonuser or improvements inconsistent with its use. 22 L.R.A.(N.S.) 880; 42 L.R.A.(N.S.) 741.

4. Extinguishment of easement by statute of limitations. 14 Am. St. Rep. 278.

Inclosure of right of way as adverse possession. 1 L.R.A.(N.S.) 565.

## CHAPTER 39.

## RIGHTS OF OWNERS.

- ARTICLE 1. INCIDENTS OF OWNERSHIP, §§ 5341-5350.  
 2. BOUNDARIES, §§ 5351-5356.  
 3. OBLIGATIONS OF OWNERS, §§ 5357, 5358.

## ARTICLE 1.—INCIDENTS OF OWNERSHIP.

§ 5341. **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. [R. C. 1905, § 4798; Civ. C. 1877, § 255; R. C. 1899, § 3362.]

Underground water not in a defined stream, not "running water." Deadwood Cent. R. Co. v. Barker, 14 S. D. 558, 86 N. W. 619.

Riparian owner may use reasonable quantity of water for irrigation purposes. Lone Tree Ditch Co. v. Ditch Co., 15 S. D. 519, 91 N. W. 352.

Water coming to surface in a spring belongs to landowner. Metcalf v. Nelson, 8 S. D. 87, 65 N. W. 911, 59 Am. St. Rep. 746.

Right of homesteader to use of water flowing overland superior to that of mining claim afterward located. Sturr v. Beck, 6 D. 71, 50 N. W. 486, 133 U. S. 541, 33 Led. 761, 10 S. Ct. R. 350.

Riparian owner's right to have stream flow over land is such property as may be condemned for railroad purposes. Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570.

Riparian rights of pre-emptor of public land attach at time of settlement, and not at date of final proof. Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 519, 91 N. W. 352; Sturr v. Beck, 133 U. S. 541, 33 L.ed. 761, 10 S. Ct. R. 350.

Riparian owner was entitled as against lower riparian owner to divert water on land of upper owners with their consent, so long as quantity of water taken does not exceed amount defendants are entitled to use. Redwater Land & Canal Co. v. Reed, 26 S. D. 466, 128 N. W. 702.

Property in water. 7 Am. Dec. 531.

Rights in subterranean waters. 19 L.R.A. 92; 64 Am. Dec. 727; 99 Am. St. Rep. 66.

Constitutionality of statutes to prevent waste of subterranean water. 23 L.R.A.(N.S.) 436.

Character of water flowing underground in a defined but unknown channel. 2 B. R. C. 991.

Percolating waters, what are. 67 Am. St. Rep. 663.

—correlative rights in. 64 L.R.A. 236; 17 L.R.A.(N.S.) 650; 23 L.R.A.(N.S.) 331; 25 L.R.A.(N.S.) 465; 37 L.R.A.(N.S.) 193; 64 Am. Dec. 727; 99 Am. St. Rep. 66.

—right to drain or interrupt flow of. 9 Am. Rep. 284.

—liability for interference with. 28 Am. Rep. 101.

—remedy for diversion of. 6 L.R.A.(N.S.) 1099.

—mandatory injunction as to diversion or obstruction. 20 L.R.A. 164.

—pollution of. 48 Am. Rep. 194.

Right to water of new spring. 30 L.R.A.(N.S.) 1158.

Right of flowage and liability for injuring property thereby. 57 Am. Dec. 684.

Correlative rights of upper and lower proprietors as to flow of water. 41 L.R.A. 743.

Right of one land owner to accelerate or diminish flow of water to or from the lands of another. 85 Am. St. Rep. 707.

Riparian proprietor's right to use and detain water and to the natural flow of the stream. 79 Am. Dec. 638.

Right as to flow of surface water. 16 Am. St. Rep. 710; 21 L.R.A. 593.

What is surface water. 25 L.R.A. 527.

Rights and liabilities of owners of dams. 57 Am. Dec. 684.

Liability for damming back water of stream. 59 L.R.A. 817.

§ 5341a. **Water course defined.** A water course entitled to the protection of the law is constituted, if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and a defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes

and reaches a plainly defined channel of a permanent character. [1907, ch. 271.]

What waters are navigable. 42 L.R.A. 305.

**§ 5342. 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. [R. C. 1905, § 4799; Civ. C. 1877, § 256; R. C. 1899, § 3363.]

Rights and remedies of life tenants. 14 Am. St. Rep. 630.

Duty of life tenant to remainderman and reversioners. 137 Am. St. Rep. 651.

Allowance to life tenant for improvements. 81 Am. St. Rep. 183; 13 L.R.A.(N.S.) 514.

Duty of life tenant to keep property in repair. 33 L.R.A.(N.S.) 669.

Must life tenant or remainderman bear the cost of a public improvement. 10 L.R.A.(N.S.) 342.

**§ 5343. 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. [R. C. 1905, § 4800; Civ. C. 1877, § 257; R. C. 1899, § 3364.]

Timber rights of life tenant. 37 L.R.A.(N.S.) 763.

Mineral rights of life tenant. 36 L.R.A.(N.S.) 1100.

Right to emblements. 69 Am. Dec. 511.

Right to estovers. 64 Am. Dec. 367.

Manure made on the farm belongs to the realty. 28 Am. Rep. 39.

As to similar provision in Cal. Civ. Code, § 819, see *Marshall v. Luiz*, 115 Cal. 622, 47 Pac. 597.

**§ 5344. 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. [R. C. 1905, § 4801; Civ. C. 1877, § 258; R. C. 1899, § 3365.]

**§ 5345. 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 deviser might have had. [R. C. 1905, § 4802; Civ. C. 1877, § 259; R. C. 1899, § 3366.]

Grantee of land is entitled to recover money due under contract made between his grantor and cropper who was in possession of land. *Martin v. Royer*, 19 N. D. 504, 125 N. W. 1027.

**§ 5346. 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. [R. C. 1905, § 4803; Civ. C. 1877, § 260; R. C. 1899, § 3367.]

Covenants run with the land. *N. P. Ry. Co. v. McClure*, 9 N. D. 73, 81 N. W. 52.

Remedies against assignees and sublessees. 15 Am. Dec. 543.

**§ 5347. 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. [R. C. 1905, § 4804; Civ. C. 1877, § 261; R. C. 1899, § 3368.]

**§ 5348. Life lease rent.** Rent due upon a lease for life may be recovered in the same manner as upon a lease for years. [R. C. 1905, § 4805; Civ. C. 1877, § 262; R. C. 1899, § 3369.]

**§ 5349. After death.** Rent dependent on the life of a person may be recovered after as well as before his death. [R. C. 1905, § 4806; Civ. C. 1877, § 263; R. C. 1899, § 3370.]

**§ 5350. 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. [R. C. 1905, § 4807; Civ. C. 1877, § 264; R. C. 1899, § 3371.]

Landowner may sue for damages to realty, though in possession of tenant. *Arneson v. Spawn*, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783.

Which is real party in interest by whom action affecting rights of landlord and tenant must be brought. 64 L.R.A. 611.

Right of landlord to maintain trespass *quare clausum fregit*. 30 L.R.A.(N.S.) 248.

Right of owner to recover damages to property from nuisance not of a permanent character, while in possession of tenant. 3 L.R.A.(N.S.) 1060.

Right of remaindermen to maintain ejectment. 18 L.R.A. 790.

Rights of remaindermen on condemnation of property. 21 L.R.A. 212.

Right to partition among remaindermen pending life estate. 28 L.R.A.(N.S.) 125.

#### ARTICLE 2.—BOUNDARIES.

**§ 5351. 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. [R. C. 1905, § 4808; Civ. C. 1877, § 265; R. C. 1899, § 3372.]

The owner of property abutting on street dedicated by plat may recover for injury to trees planted by him. *Lovejoy v. Campbell*, 16 S. D. 231, 92 N. W. 24.

**§ 5352. 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. [R. C. 1905, § 4809; Civ. C. 1877, § 266; R. C. 1899, § 3373.]

Owner of land bordering on nonnavigable lake takes to center. *Olson v. Huntamer*, 6 S. D. 364, 61 N. W. 479.

Grant of border land as including river bed. *Tossini v. Donahue*, 22 S. D. 277, 117 N. W. 148.

Where land abuts on stream, shore line is boundary and not meander line. *Heald v. Yumisko*, 7 N. D. 422, 75 N. W. 807.

Waters and watercourses as boundaries. 10 Am. Dec. 385; 30 Am. Dec. 286; 27 Am. St. Rep. 56.

Running side lines of water lots. 23 Am. Dec. 536.

Effect of bounding grant on river or tide water. 42 L.R.A. 502.

Effect of deed to carry title to water's edge, where a street or highway intervenes. 13 L.R.A.(N.S.) 551.

Government grant bounded by nontidal river as carrying title to land thereunder. 24 L.R.A.(N.S.) 1240.

**§ 5353. 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. [R. C. 1905, § 4810; Civ. C. 1877, § 267; R. C. 1899, § 3374.]

The owner of property abutting on street dedicated by plat, may recover for injury to trees planted by him. *Lovejoy v. Campbell*, 16 S. D. 231, 92 N. W. 24.

Rights of abutting owner in street are distinct and separate from easement in public generally. *Edmison v. Lowry*, 3 S. D. 77, 52 N. W. 583, 44 Am. St. Rep. 774, 17 L.R.A. 275.

Abutting lot owner owning fee in street may construct and use therein an area subject to public easement. *Dell Rapids Merchant Co. v. City of Dell Rapids*, 11 S. D. 116, 75 N. W. 898, 74 Am. St. Rep. 783.

Conveyance of property fronting on highway is presumed to carry title to center thereof, unless the fee is expressly reserved. *Sweatman v. Bathrick*, 17 S. D. 138, 95 N. W. 422.

Abutting lot owner may enjoin use of street for telephone poles. *Donovan v. Allert*, 11 N. D. 289, 58 L.R.A. 775, 95 Am. St. Rep. 720, 91 N. W. 441.

Ownership of fee is in enjoining land owner. *Meek v. Meade County*, 12 S. D. 162, 80 N. W. 182; *Edmison v. Lowry*, 3 S. D. 77, 52 N. W. 583, 44 Am. St. Rep. 774, 17 L.R.A. 275; *Dell Rapids Mer. Co. v. City of Dell Rapids*, 11 S. D. 116, 75 N. W. 898, 74 Am. St. Rep. 783; *Donovan v. Allert*, 11 N. D. 289, 58 L.R.A. 775, 95 Am. St. Rep. 720, 91 N. W. 441.

Effect of bounding grant on private way to carry title thereto. 24 L.R.A.(N.S.) 539.

Bounding land on street or alley as covenant that the street or alley exists, where grantor does not own the fee thereof. 10 L.R.A.(N.S.) 964.

Conveyance of parcel abutting on abandoned street as carrying grantor's title to fee of former street. 32 L.R.A.(N.S.) 778.

When streets or highways are included within boundaries. 54 Am. Dec. 797.

Construction of "beginning at the side of a road." 39 Am. Rep. 305.

Preventive remedy of nonconsenting abutting property owner where use of highway for street railway is authorized by public. 28 L.R.A.(N.S.) 1082.

What use of a street or highway constitutes an additional burden. 17 L.R.A. 474.

Telegraph and telephone poles and wires in street as additional burden on easement. 17 L.R.A. 480; 24 L.R.A. 721.

Telephone or telegraph as additional servitude on highway. 3 L.R.A.(N.S.) 323; 7 L.R.A.(N.S.) 87.

Electric power or light line in street or highway as an additional burden. 36 L.R.A.(N.S.) 185.

Railroad in street as additional burden. 36 L.R.A.(N.S.) 698.

Street railway as additional burden. 17 L.R.A. 477; 36 L.R.A.(N.S.) 709.

Interurban trolley road as additional burden. 4 L.R.A.(N.S.) 202; 40 L.R.A.(N.S.) 254.

As to similar provision in Cal. Civ. Code, § 831, see *Weyl v. Sonoma Valley R. Co.*, 69 Cal. 202, 10 Pac. 510.

**§ 5354. 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. [R. C. 1905, § 4811; Civ. C. 1877, § 268; R. C. 1899, § 3375.]

Verbal notice before excavation may be sufficient. *Novotny v. Danforth*, 9 S. D. 301, 68 N. W. 749.

Notice of intention to excavate does not relieve from liability for negligence. *Ulrick v. Dak. L. & T. Co.*, 2 S. D. 285, 49 N. W. 1054.

Right to remove lateral support by dredging water bed. 64 L.R.A. 275.

Condemnation or grant of land for railroad right of way as carrying right to lateral and subjacent support. 32 L.R.A.(N.S.) 155.

Liability of railroad company in constructing its roadway, for removal of lateral support to adjoining property. 21 L.R.A.(N.S.) 318.

Liability for removal of lateral support for land in natural state. 68 L.R.A. 673.

Liability for injuries to buildings on adjoining land by negligent removal of lateral support of the soil. 6 L.R.A.(N.S.) 243.

Right to lateral support as against public by adverse possession of highway or city street. 18 L.R.A. 150.

Liability of municipal corporation for injury to lateral support in making street improvements. 12 L.R.A.(N.S.) 696.

Duty of abutting owner to preserve lateral support to highway. 20 L.R.A.(N.S.) 287.

Liability of employer for injury to lateral support by independent contractor. 65 L.R.A. 849; 66 L.R.A. 148.

Right to lateral support from adjacent land. 66 Am. Dec. 646; 29 Am. Rep. 339; 33 Am. St. Rep. 446.

Prescriptive right of adjoining land owners to lateral support. 7 Am. Dec. 62.

As to similar provision in Cal. Civ. Code, § 832, see *Aston v. Nolan*, 63 Cal. 269; *Dunton v. Niles*, 95 Cal. 494, 30 Pac. 762; *Sullivan v. Zeiner*, 98 Cal. 346, 20 L.R.A. 730, 33 Pac. 209; *Conboy v. Dickinson*, 92 Cal. 600, 28 Pac. 809.

**§ 5355. 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. [R. C. 1905, § 4812; Civ. C. 1877, § 269; R. C. 1899, § 3376.]

Rights of adjoining proprietors to trees growing on or near boundary. 82 Am. Dec. 330.

Property rights in trees on a boundary line. 21 L.R.A. 729.

Trees near boundary as a nuisance. 2 B. R. C. 901.

Removal of trees near boundary as a nuisance. 21 L.R.A. 730.

**§ 5356. Same on line.** Trees whose trunks stand partly on the land of two or more coterminous owners belong to them in common. [R. C. 1905, § 4813; Civ. C. 1877, § 270; R. C. 1899, § 3377.]

### ARTICLE 3.— OBLIGATIONS OF OWNERS.

**§ 5357. 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. [R. C. 1905, § 4814; Civ. C. 1877, § 271; R. C. 1899, § 3378.]

Applicable to surviving husband holding homestead as such. *Wells v. Sweeney*, 16 S. D. 489, 102 Am. St. Rep. 813, 94 N. W. 394.

Measure of damages for allowing land to become infested with weeds. 12 L.R.A.(N.S.) 88.

Right of life tenant who pays off liens or incumbrances as against remainderman. 29 L.R.A.(N.S.) 153.

Right of life tenant, or person claiming under him, to recover for improvements. 13 L.R.A.(N.S.) 514.

Duty of life tenant to keep property in repair. 33 L.R.A.(N.S.) 669.

Duty of life tenant to pay taxes. 32 L.R.A. 744; 114 Am. St. Rep. 448.

Effect of tax sale on land held by life tenant. 32 L.R.A. 805.

Effect on estates in reversion or remainder of tax sale during life estate. 33 L.R.A. 688.

Life tenant's right to timber for payment of taxes. 37 L.R.A.(N.S.) 767.

Must life tenant or remainderman bear the cost of a public improvement. 10 L.R.A.(N.S.) 342.

**§ 5358. 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. [R. C. 1905, § 4815; Civ. C. 1877, § 272; R. C. 1899, § 3379.]

As to similar provision in Cal. Civ. Code, § 841, see *Gonzales v. Wasson*, 51 Cal. 295; *Meade v. Watson*, 87 Cal. 591, 8 Pac. 311; *Bliss v. Sneath*, 103 Cal. 43, 36 Pac. 1029; *Bliss v. Sneath*, 119 Cal. 526, 51 Pac. 848.

1. Suits to ascertain and declare boundaries. 119 Am. St. Rep. 66.

Construction of survey and establishing lost corners. 22 Am. St. Rep. 34.

Rules governing inconsistent or uncertain description of boundaries. 30 Am. Dec. 734.

General rule for the location of boundaries. 129 Am. St. Rep. 990.

Limitations of actions founded on mistakes in boundaries. 62 Am. Dec. 527.

Location of boundaries by acquiescence or agreement. 69 Am. Dec. 711; 27 Am. Rep. 239.

Conclusiveness of established boundaries. 110 Am. St. Rep. 677.

Equity jurisdiction in case of confusion of boundaries. 15 Am. Dec. 745.

Construction of boundaries. 22 Am. St. Rep. 34; 30 Am. St. Rep. 453.

Possession taken and held beyond boundaries through mistake or ignorance. 24 Am. St. Rep. 388.

Proof of boundaries by declarations and other hearsay testimony. 36 Am. Rep. 749; 60 Am. Rep. 589; 15 Am. Dec. 628; 94 Am. St. Rep. 678.

Settlement of disputed boundaries by an express or implied agreement. 27 Am. Dec. 121.

Effect of compromise agreement locating division line at place known not to be the true boundary. 10 L.R.A.(N.S.) 610.

Judgment against plaintiff in action involving boundary as establishing boundary claimed by defendant. 38 L.R.A.(N.S.) 1020.

Effect of taking possession on disputed boundaries. 3 L.R.A.(N.S.) 805.

Injunctive relief to compel or prevent erection, maintenance or removal of boundary fences in settlement of disputed boundary lines. 7 L.R.A.(N.S.) 57.

2. Partition fences; liability for injuries arising from defects in. 54 Am. St. Rep. 513.  
Lack of division fence as affecting liability for damages by trespassing cattle. 22 L.R.A. 60.

Extent of liability for permitting another's live stock to escape from pasture by failure to keep proper division fence. 20 L.R.A. 479.

Injunction to compel or prevent erection, maintenance or removal of fences. 7 L.R.A.(N.S.) 55.

Covenants to build fences; whether run with the land. 56 Am. Rep. 161.

## CHAPTER 40.

### USES AND TRUSTS.

**§ 5359. What are.** Uses and trusts in relation to real property are those only which are specified in this chapter. [R. C. 1905, § 4816; Civ. C. 1877, § 273; R. C. 1899, § 3380.]

Sections 5359 to 5362 construed in *Smith v. Security Loan & Trust Co.*, 8 N. D. 451, 79 N. W. 981.

As to similar provision in Cal. Civ. Code, § 847, see *Hinckley's Estate*, 58 Cal. 457; *Re Fair*, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000; *McCurdy v. Otto*, 140 Cal. 48, 73 Pac. 748.

**§ 5360. 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. [R. C. 1905, § 4817; Civ. C. 1877, § 275; R. C. 1899, § 3381.]

Beneficial owner of land may sue to quiet title. *Dalrymple v. Trust Co.*, 9 N. D. 306, 83 N. W. 245.

Legal estate, when vests in beneficiaries under the statute of uses. 78 Am. Dec. 406.

**§ 5361. 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. [R. C. 1905, § 4818; Civ. C. 1877, § 276; R. C. 1899, § 3382.]

**§ 5362. 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. [R. C. 1905, § 4819; Civ. C. 1877, § 277; R. C. 1899, § 3383.]

Right to compel trustee of dry trust to convey to beneficiary. 38 L.R.A.(N.S.) 198.

Right of one whose interest is merely contingent, to maintain suit to establish or enforce a trust. 7 L.R.A.(N.S.) 999.

**§ 5363. 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. [R. C. 1905, § 4820; Civ. C. 1877, § 278; R. C. 1899, § 3384.]

**§ 5364. Requisites of trusts.** No trust in relation to real property is valid unless created or declared:

1. To sell real property and apply or dispose of the proceeds in accordance thereto authorized in writing.

2. By the instrument under which the trustee claims the estate affected; or,

3. By operation of law. [R. C. 1905, § 4821; Civ. C. 1877, § 279; R. C. 1899, § 3385.]



The statutes under this title are not qualified by S. D. Rev. Civ. Code, §§ 1612 et seq. (Sections 6276 et seq. herein.) *Murphey v. Cook*, 11 S. D. 47, 75 N. W. 387.

Enforceability of promise by beneficiary to pay proceeds of life insurance policy to third person. 40 L.R.A.(N.S.) 632.

When deposits in savings banks create trusts. 31 Am. Rep. 453.

As to similar provision in Cal. Civ. Code, § 852, see *Hinckley's Estate*, 58 Cal. 457; *Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659; *Mallagh v. Mallagh*, 2 Cal. Unrep. 837, 16 Pac. 535; *Brisson v. Brisson*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; *Barr v. O'Donnell*, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 429; *Roach v. Caraffa*, 85 Cal. 436, 25 Pac. 22; *Garnsey v. Gothard*, 90 Cal. 603, 27 Pac. 516; *Re Groome*, 94 Cal. 69, 29 Pac. 487; *Baker v. Baker*, 3 Cal. Unrep. 597, 31 Pac. 355; *Hayne v. Hermann*, 97 Cal. 259, 32 Pac. 171; *Lynch v. Rooney*, 112 Cal. 279, 44 Pac. 565; *Wittfield v. Forster*, 124 Cal. 418, 57 Pac. 219; *Sheehan v. Sullivan*, 126 Cal. 189, 58 Pac. 543; *Barker v. Hurley*, 132 Cal. 21, 63 Pac. 1071; *Faylor v. Faylor*, 136 Cal. 92, 68 Pac. 482; *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428.

1. Declaration of trust cannot be enforced unless in writing. *Reagan v. McKibben*, 11 S. D. 270, 76 N. W. 943.

Express trust cannot be created by parol. *Cardiff v. Marquis*, 17 N. D. 110, 114 N. W. 1088.

Trust deed; construction; title conveyed. *Smith v. Trust Co.*, 8 N. D. 451, 79 N. W. 981; *Dalrymple v. Trust Co.*, 9 N. D. 306, 83 N. W. 245.

As to validity of agreement relating to trust in real property. *Berry v. Evendon*, 14 N. D. 1, 103 N. W. 748.

Creation of trust in land by parol. 115 Am. St. Rep. 774.

Creation of trusts by writings payable to or in favor of "trustee." 82 Am. St. Rep. 513.

May statute of frauds be satisfied by a declaration of trust signed by the trustee alone. 38 L.R.A.(N.S.) 646.

Parol agreement to take title to real property, sell the same and account for the proceeds, as affected by statute of frauds. 20 L.R.A.(N.S.) 298.

Statute of frauds as affecting legal remedy for breach of contract to purchase land for and in the name of another. 5 L.R.A.(N.S.) 123.

**§ 5365. 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. [R. C. 1905, § 4822; Civ. C. 1877, § 280; R. C. 1899, § 3386.]

Trust must be established by substantial proof that title was to be taken in trust. *Graham v. Selbie*, 8 S. D. 604, 67 N. W. 831.

Such deed operates to vest entire estate in beneficiary. *Dalrymple v. Trust Co.*, 9 N. D. 306, 83 N. W. 245; *Smith v. Trust Co.*, 8 N. D. 451, 79 N. W. 981.

As to trust relation of parties on conveyance of land to one and payment by another. *Fleischer v. Fleischer*, 11 N. D. 221, 91 N. W. 51.

One who advances money to pay for part of interest purchased in mining claim is entitled to pro rata portion of interest. *Sing You v. Wong Free Lee*, 16 S. D. 383, 92 N. W. 1073.

It is immaterial when consideration for transfer of property to another is paid. *Hickson v. Culbert*, 19 S. D. 207, 102 N. W. 774.

Equity will apply property, paid for by debtor but deeded to another, to payment of debtor's obligations. *Watt v. Morrow*, 19 S. D. 317, 103 N. W. 45.

Contemporaneous facts are admissible to show resulting trust. *Sutton v. Whetstone*, 21 S. D. 341, 112 N. W. 850.

It will be presumed that person who purchased land paid for same and if deeded to third person that such first mentioned person was equitable owner. *J. F. Anderson Lumber Co. v. Spears*, 25 S. D. 624, 127 N. W. 643.

Deed vests title, both legal and equitable, in beneficiary. *Smith v. Security Loan & Trust Co.*, 8 N. D. 451, 79 N. W. 981.

Definition of resulting trust and when created. 51 Am. Dec. 751.

When resulting trust arises in favor of a husband or wife who pays the purchase price and takes title in the name of the other spouse. 127 Am. St. Rep. 252.

Resulting trust in partnership lands. 27 L.R.A. 468, 37 L.R.A.(N.S.) 899.

Resulting trust in favor of one who purchases stock exchange seat in name of another. 4 L.R.A.(N.S.) 435.

Effect of investment by husband in his own name of wife's separate property in real estate, to create trust in her favor. 6 L.R.A.(N.S.) 381; 26 L.R.A.(N.S.) 161.

Effect of statute of limitations on the trust relationship arising from the taking of title in the husband's name, to lands inherited by or purchased with the money of the wife. 12 L.R.A.(N.S.) 493.

Evidence contradicting recital of payment in the consideration clause of deeds, whether admissible to prove trusts in favor of grantors. 90 Am. Dec. 270.

As to similar provision in Cal. Civ. Code, § 853, see *Tryon v. Huntoon*, 67 Cal. 325, 7 Pac. 741; *Roach v. Caraffa*, 85 Cal. 436, 25 Pac. 22; *South San Bernardino Land &*

Improv. Co. v. San Bernardino Nat. Bank, 127 Cal. 245, 59 Pac. 699; Faylor v. Faylor, 136 Cal. 92, 68 Pac. 482; Los Angeles & B. Oil & Development Co. v. Occidental Oil Co. 144 Cal. 528, 78 Pac. 25.

**§ 5366. 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. [R. C. 1905, § 4823; Civ. C. 1877, § 281; R. C. 1899, § 3387.]

Purchaser and incumbrancer stand on same ground and resulting trust will be enforced against either, taking with notice thereof. Cottonwood County Bank v. Case, 25 S. D. 77, 125 N. W. 298.

As to similar provision in Cal. Civ. Code, § 856, see Tripp v. Duane, 74 Cal. 85, 15 Pac. 439; Warnock v. Harlow, 96 Cal. 298, 31 Am. St. Rep. 209, 31 Pac. 166; Marshall v. Farmers' Bank, 115 Cal. 330, 42 Pac. 418, 47 Pac. 52; Chappius v. Blankman, 128 Cal. 362, 60 Pac. 925, 20 Mor. Min. Rep. 461.

**§ 5367. 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. [R. C. 1905, § 4824; Civ. C. 1877, § 282; R. C. 1899, § 3388.]

Deed of land to "L. as assignee of P. and B.," without declaring any purpose, P. and B. never having made an assignment, is void, and creates no trust. Murphey v. Cook, 11 S. D. 47, 75 N. W. 387.

Trust deed will be presumed to take effect immediately in the absence of provision to contrary. Brace v. Van Eps, 12 S. D. 191, 80 N. W. 197.

Power of sale dependent upon void trust falls with 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.

Trusts are within the rule against perpetuities. 49 Am. St. Rep. 128.

Trusts for burial and for keeping burial lots. 58 Am. Rep. 596.

Severability of trusts from perpetuities and forbidden trusts. 64 Am. St. Rep. 634.

Property of spendthrift, whether may be exempted from execution and creditors' suits. 9 Am. St. Rep. 405; 24 Am. St. Rep. 686.

What combinations constitute. 74 Am. St. Rep. 235.

As to similar provision in Cal. Civ. Code, § 857, see Hinckley's Estate, 58 Cal. 457; Oglesby v. Hollister, 76 Cal. 136, 9 Am. St. Rep. 177, 18 Pac. 146; Simpson v. Simpson, 80 Cal. 237, 22 Pac. 167; Morffew v. San Francisco & S. R. R. Co., 107 Cal. 587, 40 Pac. 810; Escondido High School Dist. v. Escondido Seminary, 130 Cal. 128, 62 Pac. 401; Re Fair, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000; Blackburn v. Webb, 133 Cal. 420, 65 Pac. 952; Banta v. Wise, 135 Cal. 277, 67 Pac. 129; Re Sanford, 136 Cal. 97, 68 Pac. 494; Keogh v. Noble, 136 Cal. 153, 68 Pac. 579; Re Pichoir, 139 Cal. 682, 73 Pac. 606.

**§ 5368. 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. [R. C. 1905, § 4825; Civ. C. 1877, § 283; R. C. 1899, § 3389.]

**§ 5369. 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. [R. C. 1905, § 4826; Civ. C. 1877, § 284; R. C. 1899, § 3390.]

Liens against trust estates in favor of creditors or trustees. 19 Am. St. Rep. 67.

As to similar provision in Cal. Civ. Code, § 859, see *Magner v. Crooks*, 139 Cal. 640, 73 Pac. 585.

**§ 5370. 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 41 of this code. [R. C. 1905, § 4827; Civ. C. 1877, § 285; R. C. 1899, § 3391.]

**§ 5371. 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. [R. C. 1905, § 4828; Civ. C. 1877, § 286; R. C. 1899, § 3392.]

**§ 5372. 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. [R. C. 1905, § 4829; Civ. C. 1877, § 287; R. C. 1899, § 3393.]

**§ 5373. 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. [R. C. 1905, § 4830; Civ. C. 1877, § 288; R. C. 1899, § 3394.]

Beneficiaries only can question validity of exchange of trust property for other property. *Brace v. Van Eps*, 12 S. D. 191, 80 N. W. 197.

Beneficiaries may enforce performance of trust in equity. *Penfield v. Tower*, 1 N. D. 216, 46 N. W. 413.

Who may execute trust after the death of one or all of the trustees. 130 Am. St. Rep. 508.

As to similar provision in Cal. Civ. Code, § 863, see *Ward v. Waterman*, 85 Cal. 488, 24 Pac. 930; *Wilhoit v. Cunningham*, 87 Cal. 453, 25 Pac. 675; *Morffew v. San Francisco & S. R. R. Co.*, 107 Cal. 587, 40 Pac. 810; *Re Walkerly*, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772; *Re Fair*, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000; *Blackburn v. Webb*, 133 Cal. 420, 65 Pac. 952.

**§ 5374. 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. [R. C. 1905, § 4831; Civ. C. 1877, § 289; R. C. 1899, § 3395.]

As to similar provision in Cal. Civ. Code, § 861, see *King v. Gotz*, 70 Cal. 236, 11 Pac. 656; *Schlessinger v. Mallard*, 70 Cal. 326, 11 Pac. 728; *Wilhoit v. Cunningham*, 87 Cal. 453, 25 Pac. 675; *Fatjo v. Swasey*, 111 Cal. 628, 44 Pac. 225; *Sacramento Bank v. Alcorn*, 121 Cal. 379, 53 Pac. 813; *Re Fair*, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000.

**§ 5375. 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. [R. C. 1905, § 4832; Civ. C. 1877, § 290; R. C. 1899, § 3396.]

As to similar provision in Cal. Civ. Code, § 865, see *King v. Gotz*, 70 Cal. 236, 11 Pac. 656; *Sacramento Bank v. Alcorn*, 121 Cal. 379, 53 Pac. 813.

**§ 5376. 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. [R. C. 1905, § 4833; Civ. C. 1877, § 291; R. C. 1899, § 3397.]

As to similar provision in Cal. Civ. Code, § 866, see *Schlessinger v. Mallard*, 70 Cal. 326, 11 Pac. 728; *Nichols v. Emery*, 109 Cal. 323, 50 Am. St. Rep. 43, 41 Pac. 1089; *Wittfield v. Forster*, 124 Cal. 418, 57 Pac. 219; *Re Fair*, 132 Cal. 523, 84 Am. St. Rep.

70, 60 Pac. 442, 64 Pac. 1000; *Re Sanford*, 136 Cal. 97, 68 Pac. 494; *Eakle v. Ingram*, 142 Cal. 15, 100 Am. St. Rep. 99, 75 Pac. 566.

§ 5377. **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 interests in such trust during his life or for a term of years by the instrument creating the trust. [R. C. 1905, § 4834; Civ. C. 1877, § 292; R. C. 1899, § 3398.]

As to similar provision in Cal. Civ. Code, § 867, *Fatjo v. Swasey*, 111 Cal. 628, 44 Pac. 225; *Blackburn v. Webb*, 133 Cal. 420, 65 Pac. 952; *Eakle v. Ingram*, 142 Cal. 15, 100 Am. St. Rep. 99, 75 Pac. 566.

§ 5378. **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. [R. C. 1905, § 4835; Civ. C. 1877, § 293; R. C. 1899, § 3399.]

§ 5379. **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. [R. C. 1905, § 4836; Civ. C. 1877, § 294; R. C. 1899, § 3400.]

As to similar provision in Cal. Civ. Code, § 870, see *Tripp v. Duane*, 2 Cal. Unrep. 757, 13 Pac. 860; *Savings & L. Soc. v. Burnett*, 106 Cal. 514, 39 Pac. 922; *Re Walkerly*, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772; *Chapman v. Hughes*, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982; *Callahan v. James*, 7 Cal. Unrep. 82, 71 Pac. 104; *Gardiner v. Cord*, 145 Cal. 157, 78 Pac. 544.

§ 5380. **When trust ceases.** When the purpose for which an express trust was created ceases, the estate of the trustees also ceases. [R. C. 1905, § 4837; Civ. C. 1877, § 295; R. C. 1899, § 3401.]

Sections 5359 to 5380 not qualified by section 6276. *Murphey v. Cook*, 11 S. D. 47, 75 N. D. 387.

Dissolution and termination of trusts, and decrees declaring. 100 Am. St. Rep. 101. Termination of trust and presumption of conveyance by the trustee to the beneficiary. 58 Am. Dec. 472.

As to similar provision in Cal. Civ. Code, § 871, see *Weisenberg v. Truman*, 58 Cal. 63; *Schlessinger v. Mallard*, 70 Cal. 326, 11 Pac. 728; *Sacramento Bank v. Alcorn*, 121 Cal. 379, 53 Pac. 813; *Wittfield v. Forster*, 124 Cal. 418, 57 Pac. 219; *Re Sanford*, 136 Cal. 97, 68 Pac. 494; *Gardiner v. Cord*, 145 Cal. 157, 78 Pac. 544.

## CHAPTER 41.

### POWERS.

§ 5381. **What powers permitted.** Powers in relation to real property are those only which are specified in this chapter. [R. C. 1905, § 4838; Civ. C. 1877, § 296; R. C. 1899, § 3402.]

§ 5382. **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. [R. C. 1905, § 4839; Civ. C. 1877, § 297; R. C. 1899, § 3403.]

§ 5383. **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. [R. C. 1905, § 4840; Civ. C. 1877, § 298; R. C. 1899, § 3404.]

Power of sale in mortgage is substantial part of the security, and is not revoked or suspended by mortgagor's death. *Reilly v. Phillips*, 4 S. D. 604, 57 N. W. 780; *Grandin v. Emmons*, 10 N. D. 223, 86 N. W. 723.

An invalid trust not providing for the doing of any act, or creation of any charge, or revocation of any estate in land conveyed, is not valid as a power in trust. *Murphey v. Cook*, 11 S. D. 47, 75 N. W. 387.

Interest in the thing itself is essential to a power coupled with an interest. *Wambole v. Foote*, 2 D. 1, 2 N. W. 239.

Marketability of title based on exercise of power of sale. 38 L.R.A.(N.S.) 18.

Is power to give option included in power to sell real estate. 10 L.R.A.(N.S.) 867.

**§ 5384. 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. [R. C. 1905, § 4841; Civ. C. 1877, § 299; R. C. 1899, § 3405.]

**§ 5385. Powers classified.** Powers are general or special and beneficial or in trust. [R. C. 1905, § 4842; Civ. C. 1877, § 300; R. C. 1899, § 3406.]

**§ 5386. 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. [R. C. 1905, § 4843; Civ. C. 1877, § 301; R. C. 1899, § 3407.]

Bequest of stocks, bonds or notes under power of appointment as general or specific. 11 L.R.A.(N.S.) 73.

**§ 5387. 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. [R. C. 1905, § 4844; Civ. C. 1877, § 302; R. C. 1899, § 3408.]

**§ 5388. Beneficial.** A power is beneficial when no person other than its holder has by the terms of its creation any interest in its execution. [R. C. 1905, § 4845; Civ. C. 1877, § 303; 1899, § 3409.]

Interest of donee in power of appointment. 41 Am. Dec. 704.

**§ 5389. 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. [R. C. 1905, § 4846; Civ. C. 1877, § 304; R. C. 1899, § 3410.]

**§ 5390. 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. [R. C. 1905, § 4847; Civ. C. 1877, § 305; R. C. 1899, § 3411.]

**§ 5391. 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. [R. C. 1905, § 4848; Civ. C. 1877, § 306; R. C. 1899, § 3412.]

**§ 5392. 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. [R. C. 1905, § 4849; Civ. C. 1877, § 307; R. C. 1899, § 3413.]

**§ 5393. In whom vested.** A power may be vested in any person. [R. C. 1905, § 4850; Civ. C. 1877, § 308; R. C. 1899, § 3414.]

**§ 5394. 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. [R. C. 1905, § 4851; Civ. C. 1877, § 309; R. C. 1899, § 3415.]

Mortgage containing power of sale may be foreclosed by advertisement. *Male v. Longstaff*, 9 S. D. 389, 69 N. W. 577.

**§ 5395. 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. [R. C. 1905, § 4852; Civ. C. 1877, § 310; R. C. 1899, § 3416.]

**§ 5396. 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. [R. C. 1905, § 4853; Civ. C. 1877, § 311; R. C. 1899, § 3417.]

**§ 5397. 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 incumbrances 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. [R. C. 1905, § 4854; Civ. C. 1877, § 312; R. C. 1899, § 3418.]

**§ 5398. 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. [R. C. 1905, § 4855; Civ. C. 1877, § 313; R. C. 1899, § 3419.]

Power of sale contained in real estate mortgage is one so coupled with an interest that it survives grantor's death. *Reilly v. Phillips*, 4 S. D. 604, 57 N. W. 780; *Grandin v. Emmons*, 10 N. D. 223, 86 N. W. 723.

Power of sale contained in mortgage is part of security, and passes by assignment of the mortgage. *Hickey v. Richards*, 3 D. 345, 20 N. W. 428.

Assignee for creditors may enforce power of sale in mortgage. *Thompson v. Browne*, 10 S. D. 344, 73 N. W. 194.

Effect of bar of other remedies to prevent a sale of property under a power in a trust deed or mortgage. 13 L.R.A.(N.S.) 1210.

Right to enjoin sale under power in mortgage against which the statute of limitations has run. 6 L.R.A.(N.S.) 510.

Injunction against sale under power in mortgage because of overstatement of amount due. 35 L.R.A.(N.S.) 909.

Reformation of mortgage after foreclosure under power of sale. 39 L.R.A.(N.S.) 93.

Right of mortgagee to exercise power of sale during pendency of mortgage foreclosure, or of action for debt secured. 2 B. R. C. 841.

Does power of sale in a mortgage or deed of trust confer an interest which prevents its revocation by death of mortgagor. 70 L.R.A. 135.

As to similar provision in Cal. Civ. Code, § 858, see *Sacramento Bank v. Alcorn*, 121 Cal. 379, 53 Pac. 813; *Re Fair*, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000.

**§ 5399. Who cannot execute power.** A power cannot be executed by any person not capable of disposing of real property. [R. C. 1905, § 4856; Civ. C. 1877, § 314; R. C. 1899, § 3420.]

Minor cannot give a delegation of power. *Wamble v. Foote*, 2 D. 1, 2 N. W. 239.

Right to recover money paid out at wrongful tax sale, is an assignable "thing in action." *Erickson v. Brookings County*, 3 S. D. 434, 53 N. W. 857, 18 L.R.A. 347.

Executor executing power of sale under will after discharge. 2 L.R.A.(N.S.) 623.

Will special power, other than power of sale, conferred on executor by will, pass to an administrator with the will annexed. 29 L.R.A.(N.S.) 264.

**§ 5400. 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. [R. C. 1905, § 4857; Civ. C. 1877, § 315; R. C. 1899, § 3421.]

**§ 5401. Married woman cannot execute before majority.** No power can be executed by a married woman before she attains her majority. [R. C. 1905, § 4858; Civ. C. 1877, § 316; R. C. 1895, § 3422.]

**§ 5402. 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. [R. C. 1905, § 4859; Civ. C. 1877, § 317; R. C. 1899, § 3423.]

Validity of exercise of a power of appointment by the creation of a charge. 6 L.R.A.(N.S.) 746.

**§ 5403. 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. [R. C. 1905, § 4860; Civ. C. 1877, § 318; R. C. 1899, § 3424.]

Construction of powers given to two or more. 22 Am. St. Rep. 726.

As to similar provision in Cal. Civ. Code, § 860, see *Re Fair*, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000.

**§ 5404. 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 52. [R. C. 1905, § 4861; Civ. C. 1877, § 319; R. C. 1899, § 3425.]

Powers in wills and who may execute. 80 Am. St. Rep. 96.

Sufficiency of execution of power by will. 64 L.R.A. 849.

**§ 5405. 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. [R. C. 1905, § 4862; Civ. C. 1877, § 320; R. C. 1899, § 3426.]

**§ 5406. 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. [R. C. 1905, § 4863; Civ. C. 1877, § 321; R. C. 1899, § 3427.]

**§ 5407. 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. [R. C. 1905, § 4864; Civ. C. 1877, § 322; R. C. 1899, § 3428.]

**§ 5408. 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. [R. C. 1905, § 4865; Civ. C. 1877, § 323; R. C. 1899, § 3429.]

**§ 5409. 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. [R. C. 1905, § 4866; Civ. C. 1877, § 324; R. C. 1899, § 3430.]

**§ 5410. 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. [R. C. 1905, § 4867; Civ. C. 1877, § 325; R. C. 1899, § 3431.]

**§ 5411. 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. [R. C. 1905, § 4868; Civ. C. 1877, § 326; R. C. 1899, § 3432.]

**§ 5412. 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. [R. C. 1905, § 4869; Civ. C. 1877, § 327; R. C. 1899, § 3433.]

**§ 5413. 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. [R. C. 1905, § 4870; Civ. C. 1877, § 328; R. C. 1899, § 3434.]

Assignment of mortgage in transfer of property within meaning of section. *Sommers v. Wagner*, 21 N. D. 531, 131 N. W. 797.

**§ 5414. 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. [R. C. 1905, § 4871; Civ. C. 1877, § 329; R. C. 1899, § 3435.]

**§ 5415. 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. [R. C. 1905, § 4872; Civ. C. 1877, § 330; R. C. 1899, § 3436.]

Effect of power of appointment on time for ascertaining member of class described as testator's "heirs," "next of kin," "relations," etc., to whom estate in real or personal property is limited by way of remainder or executory gift. 33 L.R.A. (N.S.) 20.

**§ 5416. 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. [R. C. 1905, § 4873; Civ. C. 1877, § 331; R. C. 1899, § 3437.]

**§ 5417. 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. [R. C. 1905, § 4874; Civ. C. 1877, § 332; R. C. 1899, § 3438.]

**§ 5418. 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. [R. C. 1905, § 4875; Civ. C. 1877, § 333; R. C. 1899, § 3439.]

**§ 5419. Fraud.** Instruments in execution of a power are affected by fraud in the same manner as like instruments executed by owners or trustees. [R. C. 1905, § 4876; Civ. C. 1877, § 334; R. C. 1899, § 3440.]

**§ 5420. 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. [R. C. 1905, § 4877; Civ. C. 1877, § 335; R. C. 1899, § 3441.]

**§ 5421. 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. [R. C. 1905, § 4878; Civ. C. 1877, § 336; R. C. 1899, § 3442.]

When interest in property with power to dispose of it amounts to an estate in fee. 49 Am. Dec. 115.

**§ 5422. 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. [R. C. 1905, § 4879; Civ. C. 1877, § 337; R. C. 1899, § 3443.]

**§ 5423. 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. [R. C. 1905, § 4880; Civ. C. 1877, § 338; R. C. 1899, § 3444.]

As to when sale of land by guardian of minors to corporation for railroad purposes passes unconditional fee title. *Sherman v. Sherman*, 23 S. D. 486, 122 N. W. 439.

See S. D. Rev. Pol. C. § 894, N. D. Rev. C. § 4923.



**§ 5424. 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. [R. C. 1905, § 4881; Civ. C. 1877, § 339; R. C. 1899, § 3445.]

Power to create remainder after life estate with absolute power of disposal. 6 L.R.A.(N.S.) 1186; 39 L.R.A.(N.S.) 805.

**§ 5425. 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. [R. C. 1905, § 4882; Civ. C. 1877, § 340; R. C. 1899, § 3446.]

Limitation to heirs under rule in Shelley's Case by power of appointment. 29 L.R.A.(N.S.) 1007.

Power of disposition bestowed on devisee as indicative of quantum of estate intended to be devised. 18 L.R.A.(N.S.) 463.

**§ 5426. 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. [R. C. 1905, § 4883; Civ. C. 1877, § 341; R. C. 1899, § 3447.]

**§ 5427. 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. [R. C. 1905, § 4884; Civ. C. 1877, § 342; R. C. 1899, § 3448.]

**§ 5428. 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. [R. C. 1905, § 4885; Civ. C. 1877, § 343; 1899, § 3449.]

**§ 5429. 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. [R. C. 1905, § 4886; Civ. C. 1877, § 344; R. C. 1899, § 3450.]

**§ 5430. 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. [R. C. 1905, § 4887; Civ. C. 1877, § 345; R. C. 1899, § 3451.]

**§ 5431. 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. [R. C. 1905, § 4888; Civ. C. 1877, § 346; R. C. 1899, § 3452.]

**§ 5432. 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. [R. C. 1905, § 4889; Civ. C. 1877, § 347; R. C. 1899, § 3453.]

**§ 5433. 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. [R. C. 1905, § 4890; Civ. C. 1877, § 348; R. C. 1899, § 3454.]

**§ 5434. Other powers void.** No beneficial power, general or special, not already specified and defined in this chapter can hereafter be created. [R. C. 1905, § 4891; Civ. C. 1877, § 349; R. C. 1899, § 3455.]

**§ 5435. 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. [R. C. 1905, § 4892; Civ. C. 1877, § 350; R. C. 1899, § 3456.]

**§ 5436. 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. [R. C. 1905, § 4893; Civ. C. 1877, § 351; R. C. 1899, § 3457.]

**§ 5437. 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. [R. C. 1905, § 4894; Civ. C. 1877, § 352; R. C. 1899, § 3458.]

**§ 5438. 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 persons in exclusion of the others. [R. C. 1905, § 4895; Civ. C. 1877, § 353; R. C. 1899, § 3459.]

**§ 5439. 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. [R. C. 1905, § 4896; Civ. C. 1877, § 354; R. C. 1899, § 3460.]

**§ 5440. 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. [R. C. 1905, § 4897; Civ. C. 1877, § 355; R. C. 1899, § 3461.]

**§ 5441. 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. [R. C. 1905, § 4898; Civ. C. 1877, § 356; R. C. 1899, § 3462.]

**§ 5442. 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. [R. C. 1905, § 4899; Civ. C. 1877, § 357; R. C. 1899, § 3463.]

**§ 5443. Certain other laws apply.** The provisions of chapters 69 and 70, 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 53, devolving express trusts upon the court on the death of the trustee; and the provisions of section 5380 apply equally to powers in trust and the trustees of such powers. [R. C. 1905, § 4900; Civ. C. 1877, § 358; R. C. 1899, § 3464.]

## CHAPTER 42.

## PERSONAL OR MOVABLE PROPERTY.

- ARTICLE 1. PERSONAL PROPERTY IN GENERAL, § 5444.**  
 2. THINGS IN ACTION, §§ 5445, 5446.  
 3. SHIPPING, §§ 5447-5453.  
 4. RULES OF NAVIGATION, §§ 5454-5457.

## ARTICLE 1.—PERSONAL PROPERTY IN GENERAL.

**§ 5444. 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. [R. C. 1905, § 4901; Civ. C. 1877, § 359; R. C. 1899, § 3465.]

Extraterritorial effect of transfers of personal property. 55 Am. Rep. 129.

## ARTICLE 2.—THINGS IN ACTION.

**§ 5445. Defined.** A thing in action is a right to recover money or other personal property by a judicial proceeding. [R. C. 1905, § 4902; Civ. C. 1877, § 360; R. C. 1899, § 3466.]

A chose in action is worth prima facie what appears due upon it. *Anderson v. Bank*, 6 N. D. 497, 72 N. W. 916.

Attachment of chose in action in hands of assignee for creditors. 26 L.R.A. 593.

Equitable remedy to subject chose in action to judgment after return of no property found. 63 L.R.A. 673; 15 L.R.A.(N.S.) 976.

As to similar provision in Cal. Civ. Code, § 953, see *Haskins v. Jordan*, 123 Cal. 157, 55 Pac. 786.

**§ 5446. 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. [R. C. 1905, § 4903; Civ. C. 1877, § 361; R. C. 1899, § 3467.]

Assignment of decree for alimony. 7 L.R.A.(N.S.) 179.

—of claim for penalty against national bank taking usurious interest. 56 L.R.A. 695.

—of option. 21 L.R.A. 133.

—of cause of action for personal tort. 14 L.R.A. 512.

—of cause of action for personal injury. 44 L.R.A. 177.

—of vendor's lien. 13 L.R.A. 188.

—of mechanics' lien. 13 L.R.A. 704.

—of insurance agent's right to commissions on renewal premiums. 18 L.R.A.(N.S.) 193.

Effect of statute declaring cause of action for death survivable, to render it assignable. 27 L.R.A.(N.S.) 404.

Right of third person to take advantage of champerty in assignment. 35 L.R.A.(N.S.) 512.

Effect of assignment of a claim ex delicto to one against whom it was asserted, to enable him to maintain an action thereon against a third party. 7 L.R.A.(N.S.) 534.

## ARTICLE 3.—SHIPPING.

**§ 5447. 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. [R. C. 1905, § 4904; Civ. C. 1877, § 362; R. C. 1899, § 3468.]

**§ 5448. 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. [R. C. 1905, § 4905; Civ. C. 1877, § 363; R. C. 1899, § 3469.]

What articles will pass as appurtenances on sale of ship. 8 L.R.A.(N.S.) 793.

**§ 5449. 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. [R. C. 1905, § 4906; Civ. C. 1877, § 364; R. C. 1899, § 3470.]

§ 5450. **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. [R. C. 1905, § 4907; Civ. C. 1877, § 365; R. C. 1899, § 3471.]

§ 5451. **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. [R. C. 1905, § 4908; Civ. C. 1877, § 366; R. C. 1899, § 3472.]

§ 5452. **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. [R. C. 1905, § 4909; Civ. C. 1877, § 367; R. C. 1899, § 3473.]

§ 5453. **Congress regulates.** The registry, enrollment and license of ships are regulated by acts of congress. [R. C. 1905, § 4910; Civ. C. 1877, § 368; R. C. 1899, § 3474.]

#### ARTICLE 4.—RULES OF NAVIGATION.

§ 5454. **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. [R. C. 1905, § 4911; Civ. C. 1877, § 369; R. C. 1899, § 3475.]

Private action for violation of law and rules of navigation. 9 L.R.A.(N.S.) 375.

Duty of navigator to avoid injury by propelling vessel against property of others. 64 L.R.A. 979.

Relative duties of steamers and small craft propelled by oars on rivers and in narrow channels. 5 L.R.A.(N.S.) 303.

§ 5455. **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. [R. C. 1905, § 4912; Civ. C. 1877, § 370; R. C. 1899, § 3476.]

Right of vessel causing collision to claim salvage for rescuing other vessel. 1 L.R.A.(N.S.) 873.

§ 5456. **Damage presumed from default.** Damage to person or property arising from the failure of a ship to observe any rule of section 5454 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. [R. C. 1905, § 4913; Civ. C. 1877, § 371; R. C. 1899, § 3477.]

§ 5457. **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. [R. C. 1905, § 4914; Civ. C. 1877, § 372; R. C. 1899, § 3478.]

When collisions at sea deemed acts of God. 46 Am. Dec. 592.

Liability for damages caused by collision of vessels. 45 Am. Dec. 51.

Liability of owners for wrongful or negligent acts of master of vessel causing collision. 27 L.R.A. 182.

Allowance of interest on value of property destroyed in collision. 18 L.R.A. 453.

Right to interest on unliquidated damages incurred in collision of vessels. 28 L.R.A. (N.S.) 7, 80.

## CHAPTER 43.

### PRODUCTS OF THE MIND.

§ 5458. **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. [R. C. 1905, § 4915; Civ. C. 1877, § 570; R. C. 1899, § 3479.]

Common-law rights of authors in intellectual productions. 51 L.R.A. 353.

Respective rights of master and servant in intellectual work of employe. 51 L.R.A. 359; 5 L.R.A. (N.S.) 1187; 1 B. R. C. 324.

§ 5459. **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. [R. C. 1905, § 4916; Civ. C. 1877, § 571; R. C. 1899, § 3480.]

§ 5460. **Transfer.** The owner of any product of the mind, or of any representation or expression thereof, may transfer his property in the same. [R. C. 1905, § 4917; Civ. C. 1877, § 572; R. C. 1899, § 3481.]

Validity of contract in restraint of trade in publications of authors. 22 L.R.A. 674.

Rights and remedies of author who has parted with property rights in work. 3 L.R.A. (N.S.) 622.

§ 5461. **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. [R. C. 1905, § 4918; Civ. C. 1877, § 573; R. C. 1899, § 3482.]

§ 5462. **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. [R. C. 1905, § 4919; Civ. C. 1877, § 574; R. C. 1899, § 3483.]

§ 5463. **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. [R. C. 1905, § 4920; Civ. C. 1877, § 575; R. C. 1899, § 3484.]

## CHAPTER 44.

## OTHER KINDS OF PERSONAL PROPERTY.

**§ 5464. Trade-marks.** One who produces or deals in a particular thing or conducts a particular business may appropriate to his exclusive use as a trade-mark 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. [R. C. 1905, § 4921; Civ. C. 1877, § 576; R. C. 1899, § 3485.]

Tests of trademarks and tradenames. 44 Am. Rep. 737.

What constitutes trademark and what are infringements of it. 47 Am. Dec. 284.

What words may constitute valid trademark. 85 Am. St. Rep. 83.

Descriptive word adopted from foreign language as subject of trademark. 32 L.R.A.(N.S.) 439.

Letters of the alphabet as trademark. 34 Am. Rep. 593.

Right to protection against use of a particular number by a competitor. 8 L.R.A.(N.S.) 1153.

Right to use geographical name as trademark. 26 L.R.A.(N.S.) 73.

Right to protection in use of geographical name as a trademark or tradename or upon the ground of unfair competition. 26 L.R.A.(N.S.) 73.

Right of members of organization to protection in use of name which their efforts have made valuable. 28 L.R.A.(N.S.) 458.

Relief against infringement of tradename not used in connection with manufactured article. 15 L.R.A.(N.S.) 625.

Right to use a word substantially similar to that used by another, as tradename, as affected by differences in appearance in other respects. 12 L.R.A.(N.S.) 729.

Power of equity on enjoining infringement of tradename to require defendant to pay damages sustained by complainant as distinguished from profits realized by defendant. 21 L.R.A.(N.S.) 526.

When equity will interfere to restrain infringement of trademark or tradename. 25 Am. St. Rep. 191.

When use of names will be enjoined. 33 Am. Rep. 335.

—family name. 38 Am. Rep. 81.

Limitation of right to use one's own name as tradename. 1 L.R.A.(N.S.) 660; 28 L.R.A.(N.S.) 934.

Restraining one from use of his own name. 12 Am. Rep. 410.

Invalidity of deceptive trademark. 19 L.R.A. 53.

Use of trademark on articles other than those to which it is applied by the owner. 30 L.R.A.(N.S.) 167.

Territorial extent of right in trademark or tradename used in limited locality where used by another in a different locality. 35 L.R.A.(N.S.) 251.

Acquisition of tradename in restricted locality notwithstanding use in other places. 2 L.R.A.(N.S.) 964.

Sale of a trademark. 1 L.R.A.(N.S.) 705.

Transfer of trademark by bankruptcy or insolvency assignment. 46 L.R.A. 541.

Assignment of trademark or tradename of which assignor's name is a part. 17 Am. St. Rep. 496.

As to similar provision in Cal. Civ. Code, § 991, see *Schmidt v. Brieg*, 100 Cal. 672, 22 L.R.A. 790, 35 Pac. 623; *Castle v. Siegfried*, 103 Cal. 71, 37 Pac. 210; *Hainque v. Cyclops Iron Works*, 136 Cal. 351, 68 Pac. 1014.

**§ 5465. 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. [R. C. 1905, § 4922; Civ. C. 1877, § 577; R. C. 1899, § 3486.]

Tradename as part of good will of business. 15 L.R.A. 462.

Does good will pass with transfer of business without specific mention. 5 L.R.A.(N.S.) 1077.

Devise or bequest of property as passing good will with business conducted in connection therewith. 16 L.R.A.(N.S.) 240.

Taxation of good will as part of capital stock. 58 L.R.A. 566.

Good will of a partnership, and the means of making it productive on the death of a member, or other dissolution of the firm. 96 Am. St. Rep. 610.

§ 5466. **Is property. Transferable.** The good will of a business is property, transferable like any other. [R. C. 1905, § 4923; Civ. C. 1877, § 578; R. C. 1899, § 3487.]

Good will may form subject-matter of contract of sale. *Mapes v. Metcalf*, 10 N. D. 601, 88 N. W. 713.

Failure to comply with statute must be taken advantage of by answer. *Acme Mercantile Agency v. Rochford*, 10 S. D. 203, 72 N. W. 466, 65 Am. St. Rep. 714.

Whether sale of good will prevents vendor from setting up a rival establishment. 48 Am. Rep. 223.

Right of one selling good will of professional practice to solicit patronage of former clients. 10 L.R.A.(N.S.) 1200.

Sale of business and good will as a limitation upon vendor's right to engage in competing business. 19 L.R.A.(N.S.) 762.

Effect on right of individual partners of sale by firm of good will of business with or without an agreement not to engage in the same business. 19 L.R.A.(N.S.) 769.

§ 5467. **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. [R. C. 1905, § 4924; Civ. C. 1877, § 579; R. C. 1899, § 3488.]

Replevin to recover deed of real property. 20 L.R.A.(N.S.) 507.

## CHAPTER 45.

### ACQUISITION OF PROPERTY.

ARTICLE 1. MODES IN WHICH PROPERTY MAY BE ACQUIRED, § 5468.

2. OCCUPANCY, §§ 5469-5471.

3. ACCESSION TO REAL PROPERTY, §§ 5472-5478.

4. ACCESSION TO PERSONAL PROPERTY, §§ 5479-5487.

ARTICLE 1.—MODES IN WHICH PROPERTY MAY BE ACQUIRED.

§ 5468. **How property acquired.** Property is acquired by:

1. Occupancy.

2. Accession.

3. Transfer.

4. Will; or,

5. Succession. [R. C. 1905, § 4925; Civ. C. 1877, § 580; R. C. 1899, § 3489.]

ARTICLE 2.—OCCUPANCY.

§ 5469. **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. [R. C. 1905, § 4926; Civ. C. 1877, § 581; R. C. 1899, § 3490.]

Prima facie title shown by occupancy of land as against those having no title may be overcome by evidence showing superior right in one holding legal or equitable title. *Joy v. Midland State Bank*, 28 S. D. 262, 133 N. W. 276.

As to similar provision in Cal. Civ. Code, § 1006, see *King v. Gotz*, 70 Cal. 236, 11 Pac. 656.

§ 5470. **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. [R. C. 1905, § 4927; Civ. C. 1877, § 582; R. C. 1899, § 3491.]

Right to flood another's land is easement acquisition of which by prescription requires continuous enjoyment for period of statute of limitations governing actions to recover land. *Shearer v. Hutterische, Bruder Gemeinde*, 28 S. D. 509, 134 N. W. 63.

Power of state to secure title to private property by adverse possession. 15 L.R.A.(N.S.) 1120.

Acquisition of title by prescription against public. 26 L.R.A. 451.

Acquisition by prescription of title to land for purposes of canal. 61 L.R.A. 877.

Adverse possession of railroad right of way. 2 L.R.A.(N.S.) 272.

Acquisition of prescriptive right of way across railroad tracks. 35 L.R.A.(N.S.) 190.

Rights acquired as against the public by adverse possession of highway or city street. 18 L.R.A. 146.

Encroachment on public street or alley by occupier of abutting property, for storage or other similar purposes, as basis of adverse possession. 36 L.R.A.(N.S.) 1056.

As to similar provision in Cal. Civ. Code, § 1007, see *Langford v. Poppe*, 56 Cal. 73; *Thomas v. England*, 71 Cal. 456, 12 Pac. 491; *Labory v. Los Angeles Orphan Asylum*, 97 Cal. 270, 32 Pac. 231; *Sullivan v. Zeiner*, 98 Cal. 346, 20 L.R.A. 730, 33 Pac. 209; *Goodwin v. Scheerer*, 106 Cal. 690, 40 Pac. 18; *Woodward v. Faris*, 109 Cal. 12, 41 Pac. 781; *Rice v. Meiners*, 136 Cal. 292, 68 Pac. 817.

**§ 5471. 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. [R. C. 1905, § 4928; 1899, ch. 158; R. C. 1899, § 3491a.]

Valid as against claim that bill was not constitutionally passed. *Woolfolk v. Albrecht*, 22 N. D. 36, 133 N. W. 310.

Inapplicable to payment of taxes by devisee of tenant in common. *Barrett v. McCarty*, 20 S. D. 75, 104 N. W. 907.

Compliance with section operates to confer good and valid title. *Woolfolk v. Albrecht*, 22 N. D. 36, 133 N. W. 310.

Technically illegal assessment of taxes for part of ten years will not affect title acquired by payment of taxes. *Murphy v. Nelson*, 19 S. D. 197, 102 N. W. 691.

Tacking statutory right; payment of taxes. *Streeter v. Fredrickson*, 11 N. D. 300, 91 N. W. 692; *Power v. Kitching*, 10 N. D. 254, 86 N. W. 737.

Deed from heirs of Indian within five years after issuance of homestead patent and tax deed, constitute color of title. *Murphy v. Pierce*, 17 S. D. 207, 95 N. W. 925.

Taxes need not be paid for ten successive years within each year to acquire title. *Murphy v. Redeker*, 16 S. D. 615, 102 Am. St. Rep. 722, 94 N. W. 697.

Statutory limitation may be shortened by legislature, provided reasonable time is allowed within which actions may be brought. *Power v. Kitching*, 10 N. D. 254, 86 N. W. 737; *Osborne v. Lindstrom*, 9 N. D. 1, 81 N. W. 72, 46 L.R.A. 715.

Adverse possession cannot be made out in part by adverse possession and payment of taxes by claimant's grantor. *J. B. Streeter, Jr., Co. v. Fredrickson*, 11 N. D. 300, 91 N. W. 692.

As to form of pleading. *Schneller v. Plankinton*, 12 N. D. 561, 98 N. W. 77.

As to sufficiency of title as color of title. *Stiles v. Granger*, 17 N. D. 502, 117 N. W. 777.

Person bound to pay taxes as owner of land cannot purchase at tax sale and such purchase operates only as payment of taxes. *Grant v. Burton*, 26 S. D. 52, 127 N. W. 480.

Conveyance of homestead void because wife did not join was color of title. *Ford v. Ford*, 24 S. D. 644, 124 N. W. 1108.

Abstract failing to show when action involving title to land was commenced is not sufficient to show period of adverse possession as such period could not be computed. *Hohn v. Bidwell*, 27 S. D. 249, 130 N. W. 837.

Proof must be made of open adverse possession for full period of ten years under color of title and that taxes were paid by claimant. *Wright v. Jones*, 23 N. D. 191, 135 N. W. 1120.

The ten-year period is to be reckoned from the time the adverse possession begins, and not from the time the first payment of taxes is made. *Schauble v. Schulz*, 137 Fed. 389.

The title to land becomes valid by ten years' adverse possession and payment of taxes, as against minors as well as adults notwithstanding the provisions of section 7372. *Schauble v. Schulz*, 137 Fed. 389.

The possession of a vendee of land who enters under an executory contract for the sale of land and subsequently receives a conveyance in fulfillment thereof, is adverse from the time of the entry as to all persons except the vendor. *Schauble v. Schulz*, 137 Fed. 389.

The statute is retrospective in its operation but is not for that reason unconstitutional as a deprivation of property without due process of law as against one who had an opportunity for more than a year after its passage to assert a claim to the land or pay the taxes thereon before his title was extinguished by the statute. *Schauble v. Schulz*, 137 Fed. 389.

Title by adverse possession as marketable title. 38 L.R.A.(N.S.) 26.

Use of possessory title as a weapon of offense. 46 L.R.A.(N.S.) 487.



## ARTICLE 3.—ACCESSION TO REAL PROPERTY.

**§ 5472. 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. [R. C. 1905, § 4929; Civ. C. 1877, § 583; R. C. 1899, § 3492.]

Fixtures remaining attached to a building at expiration of lease belong to owner of building. *Sweet v. Myers*, 3 S. D. 324, 53 N. W. 187.

Fixtures may become personal property by agreement. *Myrick v. Bill*, 3 D. 284, 17 N. W. 268.

Provisions relating to right of tenant to remove property placed on leased land is incorporated in lease by relation. *Joslin v. Linder*, 26 S. D. 420, 128 N. W. 500.

Effect upon the rights of the owner of a building, or of an interest in or a lien thereon, of its wrongful removal and attachment to the land of a third person without the former's consent. 14 L.R.A.(N.S.) 435.

When and against whom may fixtures retain character of personal property. 84 Am. St. Rep. 877.

When tenants may remove fixtures. 11 Am. Dec. 241.

Effect of agreement to prevent fixtures from becoming part of realty as to purchasers. 19 L.R.A. 443.

Heating apparatus as part of realty, as between landlord and tenant. 1 B. R. C. 980.

Is the right, as between landlord and tenant, to remove trade fixtures, conditional upon their susceptibility to removal without injury to themselves. 18 L.R.A.(N.S.) 423.

Right of tenant to remove electric chandeliers, etc. 3 L.R.A.(N.S.) 69.

Effect of renewing tenancy without reserving right to remove fixtures. 1 L.R.A.(N.S.) 1192; 17 L.R.A.(N.S.) 1135.

Agreement between landlord and tenant as to removal of fixtures and improvements by latter as affecting third person claiming a mechanic's lien. 45 L.R.A.(N.S.) 100.

Effect of agreement to prevent erections by tenant from becoming part of realty. 19 L.R.A. 443.

Removal of fixtures by tenant as violation of covenant to leave premises in good condition. 64 L.R.A. 662.

Are things placed on land with the intention of annexing them fixtures, where they are never actually attached. 69 L.R.A. 892.

Scope of provision that lessee shall leave alterations, improvements, additions, etc., on the premises. 42 L.R.A.(N.S.) 546.

**§ 5473. 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. [R. C. 1905, § 4930; Civ. C. 1877, § 584; R. C. 1899, § 3493.]

Land formed by accretion and gradual reliction of nonnavigable lake belongs to adjoining owner. *Olson v. Huntamer*, 6 S. D. 364, 66 N. W. 313.

Does public easement in street terminating at shore line follow recession of shore line. 22 L.R.A.(N.S.) 593.

What constitutes accretions. 58 L.R.A. 193.

Alluvium and reliction and the title acquired thereby. 33 Am. Dec. 276; 35 Am. St. Rep. 307.

Leaseholder's right to accretions to shore lands. 58 L.R.A. 210.

Right to follow accretions across division line previously submerged by the action of the water. 51 L.R.A. 425.

Meander line or water line as basis for division of accretions. 12 L.R.A.(N.S.) 687.

Division of alluvium between adjoining riparian owners. 21 L.R.A. 776; 25 L.R.A.(N.S.) 257.

As to similar provision in Cal. Civ. Code, § 1014 see *Fillmore v. Jennings*, 78 Cal. 634, 21 Pac. 536.

**§ 5474. 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. [R. C. 1905, § 4931; Civ. C. 1877, § 585; R. C. 1899, § 3494.]

**§ 5475. 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. [R. C. 1905, § 4932; Civ. C. 1877, § 586; R. C. 1899, § 3495.]

Title to islands. 33 Am. Dec. 281.

— as between governments. 58 L.R.A. 673.

— as between state and subject. 58 L.R.A. 673.

— as between opposite owners. 58 L.R.A. 674.

— island attached to shore by accretion. 6 L.R.A.(N.S.) 194.

How far islands included in government grants. 58 L.R.A. 675.

Accretions to islands. 35 Am. St. Rep. 312; 72 Am. St. Rep. 280.

**§ 5476. 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. [R. C. 1905, § 4933; Civ. C. 1877, § 587; R. C. 1899, § 3496.]

Effect of island on division of rights between opposite riparian owners. 26 L.R.A. 285.

Right to island attached to shore by accretion. 6 L.R.A.(N.S.) 194.

**§ 5477. 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. [R. C. 1905, § 4934; Civ. C. 1877, § 588; R. C. 1899, § 3497.]

**§ 5478. 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. [R. C. 1905, § 4935; Civ. C. 1877, § 589; R. C. 1899, § 3498.]

#### ARTICLE 4.—ACCESSION OF PERSONAL PROPERTY.

**§ 5479. 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. [R. C. 1905, § 4936; Civ. C. 1877, § 590; R. C. 1899, § 3499.]

Inventor of secret cost and selling marks has a property which law will protect. *Simmons Hwd. Co. v. Waibel*, 1 S. D. 488, 47 N. W. 814, 36 Am. St. Rep. 755, 11 L.R.A. 267.

Title by accession. 54 Am. Dec. 583.

May title to personal property taken by one not the owner be acquired by accession. 44 Am. St. Rep. 444.

Accession, alteration in the form of property which do not affect the title. 4 Am. Dec. 369; 5 Am. Dec. 205.

Replevin for undivided interest in commingled goods. 37 L.R.A.(N.S.) 270.

Title by accession to crops, fruit and timber wrongfully severed. 32 L.R.A. 422.

**§ 5480. 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. [R. C. 1905, § 4937; Civ. C. 1877, § 591; R. C. 1899, § 3500.]

**§ 5481. 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. [R. C. 1905, § 4938; Civ. C. 1877, § 592; R. C. 1899, § 3501.]

**§ 5482. 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. [R. C. 1905, § 4939; Civ. C. 1877, § 593; R. C. 1899, § 3502.]

Accession by labor bestowed on personal property. 26 Am. Rep. 525.

Rights and remedies of owner of standing timber which has been manufactured into lumber after expiration of time stipulated for removal. 29 L.R.A.(N.S.) 552.

**§ 5483. 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. [R. C. 1905, § 4940; Civ. C. 1877, § 594; R. C. 1899, § 3503.]

**§ 5484. 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. [R. C. 1905, § 4941; Civ. C. 1877, § 595; R. C. 1899, § 3504.]

**§ 5485. 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. [R. C. 1905, § 4942; Civ. C. 1877, § 596; R. C. 1899, § 3505.]

**§ 5486. 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. [R. C. 1905, § 4943; Civ. C. 1877, § 597; R. C. 1899, § 3506.]

**§ 5487. 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. [R. C. 1905, § 4944; Civ. C. 1877, § 598; R. C. 1899, § 3507.]

## CHAPTER 46.

### TRANSFER.

- ARTICLE 1. DEFINITION OF TRANSFER, §§ 5488, 5489.**  
**2. WHAT MAY BE TRANSFERRED, §§ 5490-5492.**  
**3. MODE OF TRANSFER, §§ 5493-5500.**  
**4. INTERPRETATION OF GRANTS, §§ 5501-5507.**  
**5. EFFECT OF TRANSFER, §§ 5508-5510.**

#### ARTICLE 1.—DEFINITION OF TRANSFER.

**§ 5488. 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. [R. C. 1905, § 4945; Civ. C. 1877, § 599; R. C. 1899, § 3508.]

Transfer of corporate stock under execution. *Van Cise v. Bank*, 4 D. 485, 33 N. W. 897.

Conveyance without consideration is valid between parties. *Bernardy v. Colonial & U. S. Mortg. Co.*, 17 S. D. 637, 106 Am. St. Rep. 791, 98 N. W. 166.

As to real estate being subject to mortgage by holder of legal title between foreclosure sale and expiration of redemption period. *North Dakota Horse & Cattle Co. v. Serumgard*, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 117 N. W. 453.

**§ 5489. 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. [R. C. 1905, § 4946; Civ. C. 1877, § 600; R. C. 1899, § 3509.]

Acknowledgment of consideration in deed and its effect. 17 Am. Dec. 523.

Consideration necessary to sustain covenant to stand seized. 8 Am. Dec. 366.

As to similar provision in Cal. Civ. Code, § 1040, see *Feeney v. Howard*, 79 Cal. 525, 4 L.R.A. 826, 12 Am. St. Rep. 162, 21 Pac. 984.

#### ARTICLE 2.—WHAT MAY BE TRANSFERRED.

**§ 5490. What may be transferred.** Property of any kind may be transferred except as otherwise provided by this article. [R. C. 1905, § 4947; Civ. C. 1877, § 601; R. C. 1899, § 3510.]

As to real estate being subject to mortgage by holder of legal title between foreclosure sale and expiration of redemption period. *North Dakota Horse & Cattle Co. v. Serumgard*, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 117 N. W. 453.

As to similar provision in Cal. Civ. Code, § 1044, see *La Rue v. Groezinger*, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42.

**§ 5491. Possibility not transferable.** A mere possibility, not coupled with an interest, cannot be transferred. [R. C. 1905, § 4948; Civ. C. 1877, § 602; 1899, § 3511.]

Release by heir in lifetime of ancestor of his interest in estate of ancestor is inoperative. *Re Thompson*, 26 S. D. 576, 128 N. W. 1127, Ann. Cas. 1913B, 446.

**§ 5492. 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. [R. C. 1905, § 4949; Civ. C. 1877, § 603; R. C. 1899, § 3512.]

What law determines the right to a divorce. 59 L.R.A. 141.

#### ARTICLE 3.—MODE OF TRANSFER.

**§ 5493. How made.** A transfer may be made without writing in every case in which a writing is not expressly required by statute. [R. C. 1905, § 4950; Civ. C. 1877, § 604; R. C. 1899, § 3513.]

Chose in action transferable by parol or written assignment. *Roberts v. Bank*, 8 N. D. 474, 79 N. W. 993.

Validity of oral agreement to assume or assign land contract. 3 L.R.A.(N.S.) 147.

As to similar provision in Cal. Civ. Code, § 1052, see *Edwards v. Wagner*, 121 Cal. 376, 53 Pac. 821; *Smith v. Peck*, 128 Cal. 527, 61 Pac. 77.

**§ 5494. 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. [R. C. 1905, § 4951; Civ. C. 1877, § 605; R. C. 1899, § 3514.]

**§ 5495. 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. [R. C. 1905, § 4952; Civ. C. 1877, § 606; 1899, § 3515.]

Deed passes no title if neither actually nor constructively delivered. *McManus v. Commow*, 10 N. D. 340, 87 N. W. 8.

Undelivered written transfer or assignment of property as a gift. 21 L.R.A. 693.

Undelivered deed as memorandum to satisfy statute of frauds. 22 L.R.A. 273.

Validation of undelivered deed by ratification or estoppel of grantor. 9 L.R.A.(N.S.) 945.

**§ 5496. Delivery presumed at its date.** A grant duly executed is presumed to have been delivered at its date. [R. C. 1905, § 4953; Civ. C. 1877, § 607; R. C. 1899, § 3516.]

On presumption as to delivery of deed on day of its date. *Leonard v. Fleming*, 13 N. D. 629, 102 N. W. 308.

Presumption that grant was delivered at its date does not apply to deed in possession of grantor. *Cassidy v. Holland*, 27 S. D. 287, 130 N. W. 771.

Whether delivery of deeds presumed to have been at their dates or at the dates of their acknowledgment. 86 Am. Dec. 63.

As to similar provision in Cal. Civ. Code, § 1055, see *Ward v. Dougherty*, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193; *Lewis v. Burns*, 122 Cal. 358, 55 Pac. 132.

**§ 5497. 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. [R. C. 1905, § 4954; Civ. C. 1877, § 608; R. C. 1899, § 3517.]

No conditional delivery of duplicate of valid contract which has already been actually delivered and taken effect. *Bank of Gilby v. Farnsworth*, 7 N. D. 6, 72 N. W. 901, 38 L.R.A. 843.

Delivery of deed to grantee or his agent as such is absolute. *Merrill v. Hurley*, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859.

Agent cannot deliver grant conditionally reserving benefit to himself adverse to his employer. *Holt v. Colton*, 4 D. 67, 22 N. W. 495.

Mortgage takes effect on its delivery discharged of any condition on which delivery was made. *Sargent v. Cooley*, 12 N. D. 1, 94 N. W. 576.

Manual delivery of deed of land by grantor to grantee is absolute and conveys title to grantee. *Ueland v. More Bros.*, 22 N. D. 283, 133 N. W. 543.

Fact that party may have manual possession of contract does not show complete delivery as question is still open whether other party intended delivery beyond power of recall. *Koester v. Northwestern Port Huron Co.*, 24 S. D. 546, 124 N. W. 740.

Delivery of deed. 16 Am. Dec. 35; 58 Am. Rep. 289; 53 Am. St. Rep. 537.

Effect of delivery of deed to grantee, subject to a future extrinsic condition. 16 L.R.A.(N.S.) 941.

**§ 5498. 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. [R. C. 1905, § 4955; Civ. C. 1877, § 609; R. C. 1899, § 3518.]

Transfer and pledge of corporate stock. *Van Cise v. Bank*, 4 D. 485, 33 N. W. 897.

What constitutes escrow. *Nichols & Shepard Co. v. Bank*, 6 N. D. 404, 71 N. W. 135.

Escrows. 130 Am. St. Rep. 910.

—deeds delivered in. 53 Am. St. Rep. 555.

Effect of deed delivered in escrow as further security for mortgage debt. 2 L.R.A.(N.S.) 628.

Effect of delivery in escrow of bond unsigned by principal obligor. 12 L.R.A.(N.S.) 1120.

Effect of delivery in escrow as to bona fide purchaser from grantee who has wrongfully obtained and recorded the deed. 17 L.R.A. 511.

Delivery of deed in escrow as change of title or interest. 38 L.R.A.(N.S.) 142.

Effect upon escrow of the imposition of conditions in violation of vendor's contract. 11 L.R.A.(N.S.) 1183.

Proof of escrow agreement by parol. 18 L.R.A.(N.S.) 337.

When deeds remain in escrow and when deemed presently operative. 28 Am. Dec. 408.

Negotiable instruments deposited in escrow and put in circulation without authority. 11 Am. St. Rep. 314.

**§ 5499. Redelivery does not retransfer.** Redelivering a grant of real property to the grantor or cancelling it does not operate to retransfer the title. [R. C. 1905, § 4956; Civ. C. 1877, § 610; R. C. 1899, § 3519.]

Return and cancellation of deed will not revert legal title in grantor. *Parszyk v. Mach*, 10 S. D. 555, 74 N. W. 1027.

Destruction of deed does not divest title; person deliberately destroying his deed not permitted to produce secondary evidence to sustain it. *Russell v. Meyer*, 7 N. D. 335, 75 N. W. 262, 47 L.R.A. 637.

Offer to redeliver deed is not an offer to restore property. *Johnson v. Burnside*, 3 S. D. 230, 52 N. W. 1057.

As to redelivery of deed transferring equitable title. *Barnhart v. Anderson*, 22 S. D. 395, 118 N. W. 31.

Effect of destruction, cancellation or delivery to grantor for that purpose of delivered but unrecorded deed. 18 L.R.A.(N.S.) 1167; 34 L.R.A.(N.S.) 495.

**§ 5500. 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. [R. C. 1905, § 4957; Civ. C. 1877, § 611; R. C. 1899, § 3520.]

Grantee may accept a deed first delivered to stranger; such acceptance relates back to time of delivery. *Arnegaard v. Arnegaard*, 7 N. D. 475, 75 N. W. 797, 41 L.R.A. 258.

Right of grantor to revoke deed delivered to stranger to be delivered by him to grantee after grantor's death. 4 L.R.A.(N.S.) 816; 9 L.R.A.(N.S.) 317.

Permitting undelivered deed wrongfully recorded by grantee to remain on record, as estoppel of grantor or his successors to deny its delivery as against one purchasing in reliance on the record. 7 L.R.A.(N.S.) 712.

Delivery to third person, or for record, or record of deed. 54 L.R.A. 865; 9 L.R.A.(N.S.) 224; 38 L.R.A.(N.S.) 941.

Delivery of deed to a third person for the use of the grantee. 40 Am. Rep. 217.

As to similar provision in Cal. Civ. Code, § 1059, see *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46.

#### ARTICLE 4.—INTERPRETATION OF GRANTS.

§ 5501. **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. [R. C. 1905, § 4958; Civ. C. 1877, § 612; R. C. 1899, § 3521.]

Where grantor describes land properly and then adds an incorrect specific description by metes and bounds, first description prevails. *Novotny v. Danforth*, 9 S. D. 301, 68 N. W. 749.

Words sufficient to constitute a conveyance. 31 Am. St. Rep. 26.

When words of present grant do not convey title. 48 Am. Dec. 45.

As to similar provision in Cal. Civ. Code, § 1066, see *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049.

§ 5502. **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. [R. C. 1905, § 4959; Civ. C. 1877, § 613; R. C. 1899, § 3522.]

Construction of the words "more or less" and "from" or "to." 28 Am. St. Rep. 631.

As to similar provision in Cal. Civ. Code, § 1067, see *Watson v. Sutro*, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64.

§ 5503. **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. [R. C. 1905, § 4960; Civ. C. 1877, § 614; R. C. 1899, § 3523.]

§ 5504. **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. [R. C. 1905, § 4961; Civ. C. 1877, § 615; R. C. 1899, § 3524.]

As to when sale of land by guardian of minors to corporation for railroad purposes passes unconditional fee title. *Sherman v. Sherman*, 23 S. D. 486, 122 N. W. 439.

As to similar provision in Cal. Civ. Code, § 1069, see *Cullen v. Sprigg*, 83 Cal. 56, 23 Pac. 222; *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712.

§ 5505. **Former part prevails.** If several parts of a grant are absolutely irreconcilable the former part prevails. [R. C. 1905, § 4962; 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.

Construction of repugnant clauses of deed. 111 Am. St. Rep. 770.

Effect of other language in deed to cut down estate conveyed by granting clause. 12 L.R.A.(N.S.) 956; 24 L.R.A.(N.S.) 514; 42 L.R.A.(N.S.) 379.

As to similar provision in Cal. Civ. Code, § 1070, see *Pellissier v. Corker*, 103 Cal. 516, 37 Pac. 465.

§ 5506. **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. [R. C. 1905, § 4963; Civ. C. 1877, § 617; R. C. 1899, § 3526.]

**§ 5507. Words unnecessary to fee.** Words of inheritance or succession are not requisite to transfer a fee in real property. [R. C. 1905, § 4964; Civ. C. 1877, § 618; R. C. 1899, § 3527.]

Instrument in writing may transfer title without words of inheritance. *Evenson v. Webster*, 3 S. D. 382, 53 N. W. 747, 44 Am. St. Rep. 802.

As to similar provision in Cal. Civ. Code, § 1072, see *Painter v. Pasadena Land & Water Co.*, 91 Cal. 74, 27 Pac. 539; *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049.

#### ARTICLE 5.—EFFECT OF TRANSFER

**§ 5508. Vests actual title.** A transfer vests in the transferee all the actual title to the thing transferred which the transferor then has unless a different intention is expressed or is necessarily implied. [R. C. 1905, § 4965; Civ. C. 1877, § 619; R. C. 1899, § 3528.]

Transfer of note secured by mortgage carries mortgage with it. *Parker v. Randolph*, 5 S. D. 549, 59 N. W. 722, 29 L.R.A. 33.

Transfer vests only such title as the grantor has. *Rosenbaum v. Foss*, 7 S. D. 83, 63 N. W. 538.

As to real estate being subject to mortgage by holder of legal title between foreclosure sale and expiration of redemption period. *North Dakota Horse & Cattle Co. v. Sarungard*, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 117 N. W. 453.

**§ 5509. 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. [R. C. 1905, § 4966; Civ. C. 1877, § 620; R. C. 1899, § 3529.]

Transfer of note carries with it lien of mortgage given to secure it. *State v. Mellette*, 16 S. D. 297, 92 N. W. 395.

What appurtenances pass by deed. 81 Am. St. Rep. 764.

Will real estate pass under the word "effects" in a written instrument. 13 L.R.A.(N.S.) 661.

How far title to islands is included in private grant. 58 L.R.A. 677.

How far grant of mill includes water rights. 58 L.R.A. 487.

Right to use water for irrigation passing by deed. 65 L.R.A. 409.

Grants of parcel abutting on abandoned street as carrying grantor's title to fee of former street. 32 L.R.A.(N.S.) 778.

Conveyance of real property as carrying right to telephone service. 42 L.R.A.(N.S.) 1021.

Right to subjacent support upon conveyance of minerals apart from surface. 2 L.R.A.(N.S.) 1115.

Condemnation or grant of land for railroad right of way as carrying right to lateral and subjacent support. 32 L.R.A.(N.S.) 155.

Devise or bequest of property as passing good will with business conducted in connection therewith. 16 L.R.A.(N.S.) 240.

What articles will pass as appurtenances on sale of business plant. 8 L.R.A.(N.S.) 795.

What articles will pass as appurtenances upon sale of chattels. 8 L.R.A.(N.S.) 793.

Assignment of copyrighted story as carrying exclusive right to dramatize it. 41 L.R.A.(N.S.) 1002.

As to similar provision in Cal. Civ. Code, § 1084, see *Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558, 10 Pac. 409; *Duncan v. Hawn*, 104 Cal. 10, 37 Pac. 626.

**§ 5510. 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. [R. C. 1905, § 4967; Civ. C. 1877, § 621; R. C. 1899, § 3530.]

## CHAPTER 47.

## TRANSFER OF REAL PROPERTY.

- ARTICLE 1. MODE OF TRANSFER, §§ 5511-5517.  
 2. TRANSFERS SUBJECT TO COAL DEPOSITS, §§ 5518, 5519.  
 3. EFFECT OF TRANSFER, §§ 5520-5532.

## ARTICLE 1.—MODE OF TRANSFER.

§ 5511. **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. [R. C. 1905, § 4968; Civ. C. 1877, § 622; R. C. 1899, § 3531.]

Any instrument in writing subscribed by grantor in which grantor, grantee, consideration and property are specified, is sufficient, though term "grant" not used. *Evenson v. Webster*, 3 S. D. 382, 53 N. W. 747, 44 Am. St. Rep. 802.

Section not applicable to oral contract to reconvey land held as security. *Phillips v. Swenson*, 16 S. D. 357, 92 N. W. 1065.

Lease for a year need not be in writing. *Pitta Agricultural Works v. Young*, 6 S. D. 557, 62 N. W. 432.

As to what constitutes valid transfer of real property. *State v. Mellette*, 16 S. D. 297, 92 N. W. 395.

Inapplicable to oral advancement of purchase price by one taking title. *Phillips v. Swenson*, 16 S. D. 357, 92 N. W. 1065.

Agent not authorized by writing cannot insert grantee's name in an acknowledged deed. *Lund v. Thackery*, 18 S. D. 113, 99 N. W. 856.

Standing timber cannot be transferred by oral contract. *Polk v. Carney*, 21 S. D. 295, 130 Am. St. Rep. 719, 112 N. W. 147.

Railway right of way across land of another constitutes interest in land under statute of frauds, which must be evidenced by grant in writing. *Spawn v. South Dakota C. R. Co.*, 26 S. D. 1, 127 N. W. 648, Ann. Cas. 1912D, 979.

When may instrument otherwise ineffective as a conveyance of real property be upheld as a covenant to stand seized to uses. 38 L.R.A.(N.S.) 937.

Execution of deed in name of deputy. 42 L.R.A.(N.S.) 880.

Execution of deed by attorney in fact or agent. 41 L.R.A.(N.S.) 805.

Signing deeds by proxy. 22 L.R.A. 297.

Proof of signature by mark when attesting witnesses are dead or cannot remember transaction. 44 L.R.A. 146.

As to similar provision in Cal. Civ. Code, § 1091, see *Blaisdell v. Leach*, 101 Cal. 405, 40 Am. St. Rep. 65, 35 Pac. 1019; *Tuffree v. Polhemus*, 108 Cal. 670, 41 Pac. 806; *Siddall v. Haight*, 132 Cal. 320, 64 Pac. 410; *Nathan v. Dierssen*, 134 Cal. 282, 66 Pac. 485.

§ 5512. **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. [R. C. 1905, § 4969; 1893, ch. 42, § 1; R. C. 1899, § 3532.]

§ 5513. **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 instruments when authorized by resolution of the board of directors. [R. C. 1905, § 4970; 1893, ch. 42, § 5; R. C. 1899, § 3533.]

§ 5514. **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. [R. C. 1905, § 4971; 1893, ch. 42, § 3; 1895, § 3534.]



§ 5515. Form of corporation signature. The signature of a corporation to any instrument mentioned in section 5512 shall be as follows:

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. 1905, § 4972; R. C. 1895, § 3535.]

§ 5516. 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 5571 and 5572. 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.
[R. C. 1905, § 4973; Civ. C. 1877, §§ 623, 624; R. C. 1899, §§ 3536, 3537.]

Validity of tax deed unaffected by omission of seal therefrom. Northwestern Mortg. Trust Co. v. Levtzow, 23 S. D. 562, 122 N. W. 600.

§ 5517. Separate deeds of husband and wife to same property legalized. In all cases where a married man or woman has heretofore conveyed real property which may have been the homestead of himself or herself, or family, by a deed duly signed and acknowledged, but not signed by the wife or husband of such grantor, and such wife or husband, either before or after, by a deed duly signed and acknowledged, conveys the same real estate to the same grantee or a subsequent grantee from him, this conveyance by such separate deeds shall be valid and effectual to pass the title to such grantee or subsequent grantee, the same as if the conveyance had been made by a single instrument duly executed and acknowledged by both husband and wife. [1913, ch. 182; R. C. 1905, § 4974; 1905, ch. 156.]

ARTICLE 2.—TRANSFERS SUBJECT TO COAL DEPOSITS.

§ 5518. Reservation of coal or other deposits limited to description. That all deeds and transfers of real property in this state that reserve to the grantor the coal or other deposits in said property shall contain an accurate description of the coal or other mineral deposits reserved to the grantor, its nature, length, width and thickness and the coal or other mineral deposits reserved to the grantor shall be limited to such description. Provided that the provisions hereof shall not apply to state and school lands. [1911, ch. 304, § 1.]

§ 5519. Reservation without description ineffectual. Every deed and transfer of real property in this state that recites a reservation to the grantor of the coal deposits in said property, but which does not contain an accurate description of such deposits as required in section 5518 shall be construed to transfer to the grantee named in such deed, all right, title and interest to such property and all deposits of coal or other minerals imbedded therein, notwithstanding such attempted reservation. [1911, ch. 304, § 2.]

## ARTICLE 3.—EFFECT OF TRANSFER

**§ 5520. 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. [R. C. 1905, § 4975; Civ. C. 1877, § 627; R. C. 1899, § 3538.]

Implied easement by exhibiting unfiled plat to intending purchaser. 35 L.R.A. (N.S.) 938.

Right of purchaser of property according to plat to easements in streets or ways indicated thereon, other than those on which his property abuts. 28 L.R.A. (N.S.) 1024.

Right of grantee to claim an easement, implied covenant or estoppel, as against the grantor, by a call in the deed for a street or alley in which the grantor owns the fee. 14 L.R.A. (N.S.) 878.

Effect of bounding grant on private way to carry title thereto. 24 L.R.A. (N.S.) 539.

Bounding land on alley as covenant that alley exists, where grantor does not own the fee thereof. 10 L.R.A. (N.S.) 964.

Implied grant of easement in partition deed. 3 L.R.A. (N.S.) 1082.

Devise as carrying visible easement. 38 L.R.A. (N.S.) 882.

Effect of division of tract with visible servitude in favor of one parcel upon another. 6 L.R.A. (N.S.) 410.

Easement by severance of tract of land with apparent benefit existing. 26 L.R.A. (N.S.) 316.

Implication from necessity of easement other than right of way. 8 L.R.A. (N.S.) 328.

Creation of easements of light and air by severance of tract of land with apparent benefit existing. 26 L.R.A. (N.S.) 369.

As to similar provision in Cal. Civ. Code, § 1104, see *Cave v. Crafts*, 53 Cal. 135; *Blum v. Weston*, 102 Cal. 362, 41 Am. St. Rep. 188, 36 Pac. 778; *Jones v. Sanders*, 138 Cal. 405, 71 Pac. 506; *Pendola v. Ramm*, 138 Cal. 517, 71 Pac. 624.

**§ 5521. 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. [R. C. 1905, § 4976; Civ. C. 1877, § 628; R. C. 1899, § 3539.]

Deed may omit covenants of warranty and grantor is bound by such covenants as he chooses to insert in addition to those implied by word "grant." *Citizens' Bank v. Shaw*, 14 S. D. 197, 84 N. W. 779.

Rule that grantee in quitclaim deed of realty takes subject to prior equities not applicable to bill of sale of personalty given and intended as mortgage. *Rosenbaum v. Foss*, 14 S. D. 184, 56 N. W. 114.

Wife joining in quitclaim deed not purporting to convey fee-simple title is not within statute, so that her after-acquired title will not pass to grantee. *State v. Kemmerer*, 14 S. D. 169, 84 N. W. 771.

Implied covenant raised by word "grant" is restrained by express covenant against incumbrances, limited by its terms. *Dunn v. Dietrich*, 3 N. D. 3, 53 N. W. 81.

Covenants implied in deeds. 2 Am. Dec. 234.

As to similar provision in Cal. Civ. Code, § 1113, see *Jeffers v. Easton, E. & Co.*, 113 Cal. 345, 45 Pac. 680; *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542; *Holzheuer v. Hayes*, 133 Cal. 456, 55 Pac. 968; *Lyles v. Perrin*, 134 Cal. 417, 66 Pac. 472.

**§ 5522. 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. [R. C. 1905, § 4977; Civ. C. 1877, § 629; R. C. 1899, § 3540.]

Grantee of land from entryman before issuance of patent has title paramount to mortgagee after issuance, where grantee's deed was recorded. *Bernardy v. Colonial & U. S. Mortg. Co.*, 17 S. D. 637, 106 Am. St. Rep. 791, 98 N. W. 166.

When grantees become liable upon covenants. 47 Am. Rep. 473.

As to similar provision in Cal. Civ. Code, § 1107, see *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680; *Warnock v. Harlow*, 96 Cal. 298, 31 Am. St. Rep. 209, 31 Pac. 166; *Riley v. Martinelli*, 97 Cal. 575, 21 L.R.A. 33, 33 Am. St. Rep. 209, 32 Pac. 579; *Adler v. Sargent*, 109 Cal. 42, 41 Pac. 799; *Murphy v. Clayton*, 113 Cal. 153, 45 Pac. 267.

**§ 5523. 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. [R. C. 1905, § 4978; Civ. C. 1877, § 630; R. C. 1899, § 3541.]

**§ 5524. 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. [R. C. 1905, § 4979; Civ. C. 1877, § 631; R. C. 1899, § 3542.]

Conveyance of property fronting on highway is presumed to carry title to center thereof, unless the fee is expressly reserved. *Sweatman v. Bathrick*, 17 S. D. 138, 95 N. W. 422.

Construction of deed when lands are bounded by streets or highways. 23 Am. Rep. 233.

Grants of parcel abutting on abandoned street as carrying grantor's title to fee of former street. 32 L.R.A.(N.S.) 778.

**§ 5525. 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. [R. C. 1905, § 4980; Civ. C. 1877, § 632; R. C. 1899, § 3543.]

As to similar provision in Cal. Civ. Code, § 1111, see *McDonald v. Hanlon*, 79 Cal. 442, 21 Pac. 861; *Dreyfus v. Hart*, 82 Cal. 621, 23 Pac. 193; *Harris v. Foster*, 97 Cal. 292, 33 Am. St. Rep. 187, 32 Pac. 246.

**§ 5526. 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. [R. C. 1905, § 4981; Civ. C. 1877, § 633; R. C. 1899, § 3544.]

Instrument not purporting to convey fee simple not within this section. *State v. Kemmerer*, 14 S. D. 169, 84 N. W. 771.

Action not maintainable against heir until claim has been presented for payment in due course of administration of estate. This section does not create new and independent cause of action against heirs, but simply declares remedy upon covenant of ancestors. *Woods v. Ely*, 7 S. D. 471, 64 N. W. 531.

Tax title subsequently acquired by vendor under warranty deed based on outstanding certificate inures to benefit of vendee. *Zerfing v. Seelig*, 12 S. D. 25, 80 N. W. 140.

A wife not owner of the property, merely joining husband in quitclaim deed, not estopped to assert title in her own right subsequently acquired. *State v. Kemmerer*, 15 S. D. 504, 90 N. W. 150.

Applicable to deed absolute in form. *Bernardy v. Colonial & U. S. Mortg. Co.*, 20 S. D. 193, 105 N. W. 737.

As to when sale of land by guardian of minors to corporation for railroad purposes passes unconditional fee title. *Sherman v. Sherman*, 23 S. D. 486, 122 N. W. 439.

Indian's warranty deed conveys valid title to land on which he subsequently receives patent. *Simonson v. Monson*, 22 S. D. 238, 117 N. W. 133; *Bernardy v. Colonial & U. S. Mortg. Co.*, 17 S. D. 637, 106 Am. St. Rep. 791, 98 N. W. 166.

Liability of heirs on covenant or specialty debt of ancestor. 21 L.R.A. 90.

**§ 5527. 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. [R. C. 1905, § 4982; Civ. C. 1877, § 633; R. C. 1899, § 3545.]

As to similar provision in Cal. Civ. Code, § 1105, see *Klumpke v. Baker*, 68 Cal. 559, 10 Pac. 197; *People v. Blake*, 84 Cal. 611, 22 Pac. 1142, 24 Pac. 313; *Painter v. Pasadena*

Land & Water Co., 91 Cal. 74, 27 Pac. 539; Pellissier v. Corker, 103 Cal. 516, 37 Pac. 465; Bates v. Howard, 105 Cal. 173, 38 Pac. 715.

**§ 5528. 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. [R. C. 1905, § 4983; Civ. C. 1877, § 633; R. C. 1899, § 3546.]

What are conditions precedent in deed. 103 Am. St. Rep. 366.

Impossibility of performance of conditions precedent and subsequent. 70 Am. St. Rep. 829.

**§ 5529. 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. [R. C. 1905, § 4984; 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.

As to similar provision in Cal. Civ. Code, § 1105, see Klumpke v. Baker, 68 Cal. 559, 10 Pac. 197; Re Ryder, 141 Cal. 366, 74 Pac. 993.

Acquisition of after-acquired title by estoppel. 37 Am. Dec. 129; 54 Am. Dec. 635; 41 Am. St. Rep. 722.

When after-acquired title passes to grantee. 58 Am. Dec. 583.

Effect of quitclaim deed upon after-acquired title. 35 L.R.A.(N.S.) 1182.

Right of grantor of mining claim to relocate same for his own benefit. 50 L.R.A. 186.

Estoppel of one who executes deed as executor or administrator to set up an existing title in himself. 21 L.R.A.(N.S.) 60.

Right of one receiving advancement and executing release of interest in estate to share in after-acquired property. 65 L.R.A. 578.

Estoppel of heir to claim interest in expectancy from ancestor. 32 L.R.A. 597.

Doctrine of estoppel as applied to sale of expectancy by prospective heir. 33 L.R.A. 273, 281.

**§ 5530. 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. [R. C. 1905, § 4985; Civ. C. 1877, § 633; R. C. 1899, § 3548.]

Conditions precedent and subsequent, impossibility of performance. 70 Am. St. Rep. 829.

Conditions subsequent in deed. 31 Am. St. Rep. 46.

—mode of taking advantage of breaches of. 93 Am. St. Rep. 372.

—what language creates. 57 Am. Rep. 63; 79 Am. St. Rep. 747.

—when and at whose instance may be avoided for a breach of. 44 Am. Dec. 743.

**§ 5531. Incumbrances defined.** The term "incumbrances" includes taxes, assessments and all liens upon real property. [R. C. 1905, § 4986; Civ. C. 1877, § 633; 1899, ch. 89; R. C. 1899, § 3549.]

**§ 5532. 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. [R. C. 1905, § 4987; Civ. C. 1877, § 633; 1899, ch. 89; R. C. 1899, § 3549.]

Effect of purchaser's knowledge of incumbrance in action for breach of covenant. 4 L.R.A.(N.S.) 310; 32 L.R.A.(N.S.) 737.

Will covenant of general warranty sustain action by remote grantee evicted under incumbrance, where deed also contains covenants against incumbrances not running with the land. 26 L.R.A.(N.S.) 1094.

Actions for breach of covenant of seisin or of good right to convey, what damages recoverable in. 99 Am. Dec. 73.

Damages recoverable for breach of warranty of title. 24 Am. St. Rep. 266.

Measure of damages in actions for breach of covenant of quiet enjoyment. 58 Am. Rep. 606.

CHAPTER 48.

TRANSFERS OF PERSONAL PROPERTY.

- ARTICLE 1. MODE OF TRANSFER, §§ 5533, 5534.  
 2. WHAT OPERATES AS A TRANSFER, §§ 5535-5537.  
 3. GIFTS, §§ 5538-5545.

ARTICLE 1.—MODE OF TRANSFER.

§ 5533. **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. [R. C. 1905, § 4988; Civ. C. 1877, § 634; R. C. 1899, § 3550.]

§ 5534. **Other personalty.** The mode of transferring other personal property by sale is regulated by the chapter on that subject in this code. [R. C. 1905, § 4989; Civ. C. 1877, § 635; R. C. 1899, § 3551.]

ARTICLE 2.—WHAT OPERATES AS A TRANSFER.

§ 5535. **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. [R. C. 1905, § 4990; Civ. C. 1877, § 636; R. C. 1899, § 3552.]

As to what constitutes executory contract for sale of personalty. *Lumley v. Miller*, 23 S. D. 16, 119 N. W. 1014.

Separation is immaterial on sale of personal property mixed with like property, where same is identified. *O'Keefe v. Leistikow*, 14 N. D. 355, 104 N. W. 515, 9 A. & E. Ann. Cas. 25.

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.

If there is no condition in agreement permitting mortgagor to sell property as his own title passes to buyer and mortgagee could not recover possession. *Mariner v. Patten*, 28 S. D. 613, 132 N. W. 685.

Title to property does not pass so long as contract of sale made by agent in excess of authority remains executory. *Westby v. J. I. Case Threshing Mach. Co.*, 21 N. D. 575, 132 N. W. 137.

Seller's mistake as to identity of vendee, as affecting the passing of title to the goods sold. 13 L.R.A. (N.S.) 413.

Effect of indorsing and mailing to purchaser a bill of lading, naming seller as consignee, to pass title to purchaser. 34 L.R.A. (N.S.) 293.

Sufficiency of selection or designation of goods sold out of larger lot. 26 L.R.A. (N.S.) 5.

As to similar provision in Cal. Civ. Code, § 1140, see *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 9 Am. St. Rep. 199, 18 Pac. 248.

§ 5536. **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 54. [R. C. 1905, § 4991; Civ. C. 1877, § 637; R. C. 1899, § 3553.]

When title to personal property is transferred. *Dowagiac Mfg. Co. v. Higinbotham*, 15 S. D. 547, 91 N. W. 330.

Property not in being may be transferred; future earnings of a threshing rig may be mortgaged. *Sykes v. Hannawalt*, 5 N. D. 335, 65 N. W. 682.

Under executory contract, no title passes until buyer accepts. *Nichols & Shepard Co. v. Paulson*, 6 N. D. 400, 71 N. W. 136.

As to what constitutes executory contract for sale of personalty. *Lumley v. Miller*, 23 S. D. 16, 119 N. W. 1014.

Until acceptance no title to threshing machine passes under agreement to purchase which provided that it might be returned if defective. *Colean Mfg. Co. v. Feckler*, 20 N. D. 188, 126 N. W. 1019.

Provision for payment of installments of price of article during construction as indicating intention to pass title. 2 B. R. C. 646.

- Necessity of delivery of goods sold to pass title. 17 L.R.A. 177.  
 Right of purchasers of, or creditors levying on, goods sold for cash, but delivered without payment. 13 L.R.A.(N.S.) 696; 29 L.R.A.(N.S.) 709.  
 Effect of premature delivery to pass title to purchaser. 31 L.R.A.(N.S.) 942.  
 Effect on sale, of destruction of property after actual or constructive delivery, preventing the ascertainment of the price according to the terms of the contract. 19 L.R.A.(N.S.) 197.  
 When title passes under consignment of goods for sale with provision in effect that consignee purchase balance of consignment. 39 L.R.A.(N.S.) 620.  
 Passing of title to property by delivery thereof to a carrier for transportation to consignee or vendee. 22 L.R.A. 415.  
 Where title passes upon shipment of intoxicating liquor C. O. D. 2 L.R.A.(N.S.) 383; 24 L.R.A.(N.S.) 143.  
 Passing of title to consignee on delivery to carrier as affected by provisions of bill of lading and attachment of draft thereto. 2 L.R.A.(N.S.) 79.  
 When title passes where vendor consigns goods to himself and vendee is to be notified of their arrival and to receive them upon payment of draft. 39 L.R.A.(N.S.) 309.  
 Passing of title by delivery f. o. b. 62 L.R.A. 802; 83 L.R.A.(N.S.) 54.

**§ 5537. 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. [R. C. 1905, § 4992; 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. 969.

Title to property does not pass so long as contract of sale made by agent in excess of authority remains executory. *Westby v. J. I. Case Threshing Mach. Co.*, 21 N. D. 575, 132 N. W. 137.

#### ARTICLE 3.—GIFTS.

**§ 5538. Gift defined.** A gift is a transfer of personal property made voluntarily and without consideration. [R. C. 1905, § 4993; 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.

Gift of check. 18 L.R.A. 855; 27 L.R.A.(N.S.) 308.

Note as subject of gift by maker. 27 L.R.A.(N.S.) 308.

May a promissory note executed by a parent to a child be the subject of a valid gift by the former to the latter. 7 L.R.A.(N.S.) 156.

Gift amounting to a disposition of property with intent to defraud, sustaining attachment. 30 L.R.A. 476.

Gift by testator as ademption of general legacy to donee. 38 L.R.A.(N.S.) 588.

Does donor's expectation that donee will allow him to share in the benefit of the property raise an implied trust to that effect. 24 L.R.A.(N.S.) 1043.

Conveyances which must be regarded as gift. 65 Am. St. Rep. 798.

Parol gift as conveyance. 67 L.R.A. 461.

Degree of proof necessary to establish parol gift of real estate. 9 L.R.A.(N.S.) 508.

As to similar provision in Cal. Civ. Code, § 1146, see *Yosemite Stage & Turnp. Co. v. Dunn*, 83 Cal. 264, 23 Pac. 369; *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267; *Calkins v. Equitable Bldg. & L. Asso.*, 126 Cal. 531, 59 Pac. 30; *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19, 66 Pac. 740, 71 Pac. 83; *Driscoll v. Driscoll*, 143 Cal. 528, 77 Pac. 471.

**§ 5539. 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. [R. C. 1905, § 4994; Civ. C. 1877, § 640; R. C. 1899, § 3556.]

To constitute a gift inter vivos delivery must clearly appear. *Luther v. Hunter*, 7 N. D. 544, 75 N. W. 916.

Delivery sufficient to support gift. 50 Am. Rep. 178.

When deposit in bank amounts to gift. 23 Am. Rep. 451.

Gift of deposit of money in bank in the name of another. 39 Am. Rep. 310.  
 Gifts by an assignment of a fund or by check on a bank. 26 Am. Rep. 684.  
 Effect of delivery of bank book to sustain gift of money in bank. 18 L.R.A. 171; 19 L.R.A. 700.

Delivery necessary to complete gift of a savings bank account when the book is already in the possession of the donee. 17 L.R.A.(N.S.) 181.

Effect of delivery of order for savings account without a book to complete a gift of the account. 22 L.R.A.(N.S.) 568.

Necessity of actual delivery of certificate to complete gift of shares of stock. 29 L.R.A.(N.S.) 166.

Sufficiency of constructive delivery to sustain gift causa mortis. 18 L.R.A. 170.

Transfer of key to receptacle as delivery of possession sustaining gift of contents. 40 L.R.A.(N.S.) 901.

Retention or resumption of possession by donor as affecting gift. 32 L.R.A.(N.S.) 219

Undelivered written transfer or assignment of property as gift. 21 L.R.A. 693.

Gift to a class, who entitled to take. 73 Am. St. Rep. 413.

Subsequent lunacy of donor as affecting incomplete gift. 34 L.R.A. 297.

As to similar provision in Cal. Civ. Code, § 1147, see *Ruiz v. Dow*, 113 Cal. 490, 45 Pac. 867; *Hart v. Ketchum*, 121 Cal. 426, 53 Pac. 931; *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267; *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19, 66 Pac. 740, 71 Pac. 83; *Driscoll v. Driscoll*, 143 Cal. 528, 77 Pac. 471.

§ 5540. **Irrevocable. Exception.** A gift, other than a gift in view of death, cannot be revoked by the giver. [R. C. 1905, § 4995; Civ. C. 1877, § 641; R. C. 1899, § 3557.]

Revocability of gift. 11 L.R.A. 687; 2 L.R.A.(N.S.) 285.

Retention or resumption of possession by donor as affecting gift. 32 L.R.A.(N.S.) 219.

Specific performance of gift. 23 Am. Dec. 429.

§ 5541. **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. [R. C. 1905, § 4996; Civ. C. 1877, § 642; R. C. 1899, § 3558.]

Gift causa mortis. 99 Am. St. Rep. 890.

—delivery sufficient to support. 50 Am. Rep. 178; 18 L.R.A. 170.

—of money on deposit in savings bank. 26 Am. Rep. 684; 48 Am. Rep. 506.

—of promissory note. 26 L.R.A. 305.

—of notes and other choses in action payable to order. 23 Am. Dec. 600; 25 Am. Dec. 389.

As to similar provision in Cal. Civ. Code, § 1149, see *Zeller v. Jordan*, 105 Cal. 143, 38 Pac. 640.

§ 5542. **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. [R. C. 1905, § 4997; Civ. C. 1877, § 643; R. C. 1899, § 3559.]

As to similar provision in Cal. Civ. Code, § 1150, see *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267.

§ 5543. **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. [R. C. 1905, § 4998; Civ. C. 1877, § 644; R. C. 1899, § 3560.]

As to similar provision in Cal. Civ. Code, § 1151, see *Adams v. Atherton*, 132 Cal. 164, 64 Pac. 283.

§ 5544. **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. [R. C. 1905, § 4999; Civ. C. 1877, § 645; R. C. 1899, § 3561.]

§ 5545. **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. [R. C. 1905, § 5000; Civ. C. 1877, § 646; R. C. 1899, § 3562.]

Subject of gift causa mortis forms no part of donor's estate; personal representative cannot claim it, except when necessary to pay debts. *Seybold v. Bank*, 5 N. D. 460, 67 N. W. 682.

Recovery of gift by administrator for benefit of creditors. *Bright v. Ecker*, 9 S. D. 192, 68 N. W. 326.

## CHAPTER 49.

## RECORDING TRANSFERS.

- ARTICLE 1. WHAT MAY BE RECORDED, §§ 5546-5552.  
 2. REGISTRATION OF FARM NAMES, §§ 5553-5556.  
 3. MODE OF RECORDING, §§ 5557-5562.  
 4. PROOF AND ACKNOWLEDGMENT OF INSTRUMENTS, §§ 5563-5593.  
 5. EFFECT OF RECORDING OR THE WANT THEREOF, §§ 5594-5598.

## ARTICLE 1.—WHAT MAY BE RECORDED.

§ 5546. **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, duplicate final registers' receipts, or certificates, 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 duplicate final registers' receipts or certificates, 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. [1911, ch. 258; R. C. 1905, § 5001; Civ. C. 1877, § 647; 1879, ch. 47, § 1; R. C. 1899, § 3563; 1905, ch. 159.]

Bond for deed may be recorded; notice to public of its contents. *Shelly v. Mikkelson*, 5 N. D. 22, 63 N. W. 210.

Lease as conveyance within meaning of recording statutes. 24 L.R.A.(N.S.) 879.

Right of abstracters to have access to public records. 124 Am. St. Rep. 911.

§ 5547. **Abstract prima facie evidence of title.** In any and all cases where the records of deeds, mortgages, liens, judgments and instruments of like nature in any county have been lost or destroyed, the abstract of a regular bonded abstractor or abstractors of said county in which the same are lost or destroyed shall be deemed prima facie evidence of title and any regularly certified abstract may be recorded as are other instruments. [1907, ch. 2.]

§ 5548. **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. [R. C. 1905, § 5002; Civ. C. 1877, § 648; R. C. 1895, § 3564.]

Record of instrument recorded without prescribed acknowledgment not constructive notice. *Cannon v. Deming*, 3 S. D. 421, 53 N. W. 863; *American Mort. Co. v. Live Stock Co.*, 10 N. D. 290, 86 N. W. 965.

No deed recorded except upon proper certificate of acknowledgment. *Wamble v. Foote*, 2 D. 1. 2 N. W. 239.



Mortgage must be acknowledged in order to be recorded. *N. W. L. & B. Co. v. Jonason*, 11 S. D. 566, 79 N. W. 840.

Conveyance of homestead by husband and wife not required to be acknowledged, except for purpose of record. *First Nat. Bank v. Prior*, 10 N. D. 146, 86 N. W. 362.

Instrument executed in foreign state cannot be recorded unless it shows that officer taking acknowledgment had power. *Goss v. Herman*, 20 N. D. 295, 127 N. W. 78.

§ 5549. **When proved instrument recorded.** An instrument proved and certified pursuant to sections 5571 and 5572 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. [R. C. 1905, § 5003; Civ. C. 1877, § 649; R. C. 1899, § 3565.]

§ 5550. **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. [R. C. 1905, § 5004; Civ. C. 1877, § 650; R. C. 1895, § 3566.]

As to similar provision in Cal. Civ. Code, § 1164, see *Cardenas v. Miller*, 108 Cal. 250, 49 Am. St. Rep. 84, 39 Pac. 783, 41 Pac. 472.

§ 5551. **Variation in spelling, etc. Affidavit to cure.** Wherever, in the record of title to real estate, in the office of the register of deeds of any county of this state, there appears in the chain of title any variation in the spelling of the names of any persons appearing in such chain of title, or any instruments affecting the title to real estate, or where any grantor, mortgagor, vendor, lessor or other maker of any such instruments signs without the joinder of the spouse, any person may make an affidavit setting forth therein that he is personally cognizant of the facts stated by him in such affidavit, and may state the identity of any person appearing in such chain of title under names varying in the spelling thereof, or in the use of initials, and such affidavit may also state whether or not, at the time of the transfer or incumbrance, to which the affidavit relates, that the land described therein was or was not the homestead of the grantors, mortgagors or vendors or the person whose title is divested or incumbered, wholly or in part, or in any way affected by such transfer or conveyance. [1909, ch. 220, § 1.]

§ 5552. **Affidavit entitled to record.** The affidavit provided for in section 5551, duly verified according to law, and containing a description of the land to which it relates, may be recorded in the office of the register of deeds of any county in this state, in the proper book of miscellaneous records, in such office. [1909, ch. 220, § 2.]

#### ARTICLE 2.—REGISTRATION OF FARM NAMES.

§ 5553. **Registration of farm names authorized. Certificate.** Any owner of a farm in the state of North Dakota may have the name of his farm, together with a description of his land to which said name applies, recorded in a register kept for that purpose in the office of the register of deeds of the county in which said farm is located, and said register of deeds shall furnish to such land owner a proper certificate setting forth said name and the description of such land. When any name shall have been recorded as the name of any farm in such county, such name shall not be recorded as the name of any other farm in the same county. [1913, ch. 164, § 1.]

§ 5554. **Fee.** Any person having the name of his farm recorded, as provided in this act, shall first pay to the register of deeds a fee of one dollar, which fee shall be paid to the county treasurer in the same manner as other fees are paid to the county treasurer by the register of deeds, and credited to the special salary fund. [1913, ch. 164, § 2.]

§ 5555. **Transfer of farm may include registered name.** When any owner of a farm, the name of which has been recorded as provided in this article, his heirs, executors or administrators, transfers by deed or otherwise, the whole of such farm, such transfer may include the registered name thereof; but if it is desired to transfer only a portion of such farm, then in that event the reg-

istered name thereof shall not be transferred to the purchaser unless so stated in the deed of conveyance. [1913, ch. 164, § 3.]

**§ 5556. Cancellation of registered name. Fee.** Whenever any owner of a registered farm, his heirs, executors or administrators, desires to cancel the registered name thereof, the same shall be accomplished in the same manner as now provided for cancellation of real estate mortgages. For such service the register of deeds shall be paid a fee of fifty cents, which shall be paid to the county treasurer in the same manner as other fees herein provided for. [1913, ch. 164, § 4.]

#### ARTICLE 3.—MODE OF RECORDING.

**§ 5557. 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. [R. C. 1905, § 5005; Civ. C. 1877, § 651; R. C. 1899, § 3567.]

Instrument filed for record when deposited with the register of deeds and proper fee paid. *Coler v. Rhoda Twp.*, 6 S. D. 640, 63 N. W. 158; *Stone v. Crow*, 2 S. D. 525, 51 N. W. 335.

Where grantee's agent delivered deed for record, his subsequent unauthorized withdrawal before record will not affect operation as recorded instrument. *Parish v. Mahany*, 10 S. D. 276, 73 N. W. 97, 65 Am. St. Rep. 715.

Unless party is actually misled by error in record of instrument, no rights are affected by such mistake. *Citizens' Bank v. Shaw*, 14 S. D. 197, 84 N. W. 779.

Mortgage containing power of sale may be foreclosed by advertisement although recording officer omitted to transcribe such power. *Shelby v. Bowden*, 16 S. D. 531, 94 N. W. 416.

**§ 5558. 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. [R. C. 1905, § 5006; 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.

What constitutes filing of papers. 15 Am. St. Rep. 294.

Federal courts following state decisions as to construction and effect of recording acts. 40 L.R.A. (N.S.) 420.

Effect of failure to pay registration tax or fee. 43 L.R.A. (N.S.) 146.

As to similar provision in Cal. Civ. Code, § 1170, see *Watkins v. Wilhoit*, 4 Cal. Unrep. 450, 35 Pac. 646; *Watkins v. Wilhoit*, 104 Cal. 395, 38 Pac. 53; *Edwards v. Grand*, 121 Cal. 254, 53 Pac. 796; *Cady v. Purser*, 131 Cal. 552, 82 Am. St. Rep. 391, 63 Pac. 844.

**§ 5559. 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. [R. C. 1905, § 5007; 1881, ch. 121, § 1; R. C. 1899, § 3569.]

**§ 5560. Separate books for grants and mortgages.** Grants, absolute in terms, are to be recorded in one set of books and mortgages in another. [R. C. 1905, § 5008; Civ. C. 1877, § 652; R. C. 1899, § 3570.]

Deed absolute in form, although intended as mortgage, is properly recorded in record of deeds. *Merchants State Bank v. Tufts*, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760.

**§ 5561. Duty of register.** The duties of registers of deeds in respect to recording instruments are prescribed by statute. [R. C. 1905, § 5009; Civ. C. 1877, § 653; R. C. 1899, § 3571.]

Liability of register of deeds for nonperformance or misperformance of his duties. 95 Am. St. Rep. 85.

Liability of registrar of deeds for neglect, delay or mistake in registering or indexing instrument affecting title to real property. 23 L.R.A. (N.S.) 127.

**§ 5562. Transfers of vessels.** The mode of recording transfers of vessels registered under the laws of the United States is regulated by acts of congress. [R. C. 1905, § 5010; Civ. C. 1877, § 654; R. C. 1899, § 3572.]

#### ARTICLE 4.—PROOF AND ACKNOWLEDGMENT OF INSTRUMENTS.

**§ 5563. 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. [R. C. 1905, § 5011; Civ. C. 1877, § 655; R. C. 1899, § 3573.]

Validity of acknowledgment taken over telephone. 30 L.R.A. (N.S.) 358.

**§ 5564. 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 commissioners; or,
6. A county auditor. [R. C. 1905, § 5012; Civ. C. 1877, § 656; 1885, ch. 1, § 1; R. C. 1895, § 3574.]

As to similar provision in Cal. Civ. Code, § 1181, see *Ex parte Carpenter*, 64 Cal. 267, 30 Pac. 816; *Malone v. Bosch*, 104 Cal. 680, 38 Pac. 516.

**§ 5565. 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. [R. C. 1905, § 5013; Civ. C. 1877, § 657; R. C. 1899, § 3575.]

Signature of notary public need not be attested by certificate of officer of higher rank. *Grandin v. Emmons*, 10 N. D. 223, 86 N. W. 723.

Instrument executed in foreign state cannot be recorded unless it shows that officer taking acknowledgment had power. *Goss v. Herman*, 20 N. D. 295, 127 N. W. 78.

**§ 5566. 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'affaires 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. [R. C. 1905, § 5014; Civ. C. 1877, § 658; 1889, ch. 4, § 1; R. C. 1895, § 3576; 1901, ch. 3; 1903, ch. 1.]

Power of consul to take acknowledgment of deeds and powers of attorney. 45 L.R.A. 499.

**§ 5567. 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 5512 and 5513. [R. C. 1905, § 5015; Civ. C. 1877, § 659; R. C. 1895, § 3577.]

Acknowledgment by married woman. *Wambole v. Foote*, 2 D. 1, 2 N. W. 239.

Recorded deed without prescribed certificate not constructive notice. *Cannon v. Deming*, 3 S. D. 421, 53 N. W. 863.

Deputy sheriff may, in his principal's name, execute and acknowledge certificate of sale. *Wilson v. Russell*, 4 D. 376, 31 N. W. 645.

Certificate of acknowledgment by officer of corporation, which does not state that person signing same was known to him to be such officer, is insufficient. *Holt v. Trust Co.*, 11 S. D. 456, 78 N. W. 947.

Proof of execution of chattel mortgage, when in issue and subscribing witnesses are absent. *Brynjolfson v. Elevator Co.*, 6 N. D. 450, 71 N. W. 555, 66 Am. St. Rep. 612.

Sufficiency of acknowledgment of assignment of trust deed by corporation to record same. *Erickson v. Conniff*, 19 S. D. 41, 101 N. W. 1104.

Sufficiency of notary's certificate of acknowledgment by corporation. *State v. Coughran*, 19 S. D. 271, 103 N. W. 31.

Validity of acknowledgment taken over telephone. 30 L.R.A.(N.S.) 358.

Acknowledgment of deed executed by attorney in fact or agent. 41 L.R.A.(N.S.) 823.

Impeachment of certificate of acknowledgment. 41 L.R.A.(N.S.) 1161.

Sufficiency of evidence to impeach certificate of acknowledgment of deed, 6 L.R.A.(N.S.) 442.

Effect of defective acknowledgment on marketability of title. 38 L.R.A.(N.S.) 20.

As to similar provision in Cal. Civ. Code, § 1185, see *Hatton v. Holmes*, 97 Cal. 208, 31 Pac. 1131; *Joost v. Craig*, 131 Cal. 504, 82 Am. St. Rep. 374, 63 Pac. 840.

**§ 5568. 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. [R. C. 1905, § 5016; Civ. C. 1877, § 661; 1881, ch. 2, § 2; R. C. 1895, § 3578.]

Form and sufficiency of certificate of married woman's acknowledgment. 45 L.R.A.(N.S.) 1109.

As to similar provision in Cal. Civ. Code, § 1187, see *Wedel v. Herman*, 59 Cal. 507; *Loupe v. Smith*, 123 Cal. 491, 56 Pac. 254.

**§ 5569. 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. [R. C. 1905, § 5017; Civ. C. 1877, § 662; R. C. 1899, § 3579.]

This and two following sections inapplicable to proof of execution of note. *Mississippi Lumber & Coal Co. v. Kelly*, 19 S. D. 577, 104 N. W. 265, 9 A. & E. Ann. Cas. 449.

**§ 5570. 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. [R. C. 1905, § 5018; Civ. C. 1877, § 662; R. C. 1899, § 3580.]

§ 5571. **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 subpoena 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. [R. C. 1905, § 5019; Civ. C. 1877, § 663; R. C. 1899, § 3581.]

§ 5572. **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. [R. C. 1905, § 5020; Civ. C. 1877, § 664; R. C. 1899, § 3582.]

§ 5573. **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. [R. C. 1905, § 5021; Civ. C. 1877, § 665; R. C. 1899, § 3583.]

§ 5574. **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. [R. C. 1905, § 5022; Civ. C. 1877, § 666; 1887, ch. 2, § 1; R. C. 1899, § 3584.]

Certificate of acknowledgment must substantially conform to statute. *Cannon v. Deming*, 3 S. D. 421, 53 N. W. 863; *Holt v. Trust Co.*, 11 S. D. 456, 78 N. W. 947.

Recitals of certificate are evidence without further proof. *N. W. Loan Co. v. Jonassen*, 11 S. D. 566, 79 N. W. 840.

When defects in certificate of acknowledgment fatal and when not. 108 Am. St. Rep. 525.

Sufficiency of abbreviation to show official character of officer. 14 L.R.A. 815.

Effect of grammatical defects in certificates of acknowledgment. 11 L.R.A.(N.S.) 643.

Conclusiveness of certificate of acknowledgment. 1 Am. Dec. 81; 54 Am. St. Rep. 150.

Amending and perfecting certificates of acknowledgment. 52 Am. Dec. 519.

Right to attach or correct certificate of acknowledgment after date of acknowledgment. 22 L.R.A.(N.S.) 216.

Leaving blank for name of party in certificate of acknowledgment. 19 L.R.A. 279.

Presumption as to time of alteration in acknowledgment. 39 L.R.A.(N.S.) 115.

As to similar provision in Cal. Civ. Code, § 1188, see *Banbury v. Arnold*, 91 Cal. 606, 27 Pac. 934.

2. Sufficiency of acknowledgment by corporation. *Gessner v. Minneapolis*, St. P. & S. Ste. M. R. Co., 15 N. D. 560, 108 N. W. 786.

Sufficiency of acknowledgment of assignment of trust deed by corporation to record same. *Erickson v. Conniff*, 19 S. D. 41, 101 N. W. 1104.

Sufficiency of notary's certificate of acknowledgment by corporation. *State v. Coughran*, 19 S. D. 271, 103 N. W. 31.

3. Deeds signed and sealed "Patrick M. Atty. in fact for Amelia B.," is deed of Amelia, although words "he," "his," etc., are used in deed. *Donovan v. Welch*, 11 N. D. 113, 90 N. W. 262.

4. Acknowledgment by deputy sheriff. *Wilson v. Russell*, 4 D. 376, 31 N. W. 645; *Hodgdon v. Davis*, 6 D. 21, 50 N. W. 478.

Defective acknowledgments by deputy sheriffs legalized in North Dakota. *McCardia v. Billings*, 10 N. D. 373, 87 N. W. 1008.

§ 5575. **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. [R. C. 1905, § 5023; 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.

**§ 5576. Defective acknowledgments.** The acknowledgments of all deeds, mortgages or other instruments in writing, taken and certified previous to January first, 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 first, 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. [R. C. 1905, § 5024; 1901, ch. 2.]

Inapplicable to prior foreclosure of mortgage void because assignment was not properly acknowledged. *Cooper v. Harvey*, 21 S. D. 471, 113 N. W. 717.

Invalid foreclosure proceedings had several years prior, is not validated. *Kenny v. McKenzie*, 23 S. D. 111, 120 N. W. 781.

Certificate of acknowledgment which does not show authority of officer cannot be cured. *Goss v. Herman*, 20 N. D. 295, 127 N. W. 78.

Constitutionality of statute validating acknowledgment. 22 L.R.A. 382.

Constitutionality of statutes curing defective acknowledgments of conveyances of real property. 31 L.R.A. (N.S.) 1076.

**§ 5577. 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, 1913, and which have been filed or recorded in the proper counties of this state, be, and the same 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. [1913, ch. 133, § 1; 1911, ch. 99, § 1; 1909, ch. 151, § 1; R. C. 1905, § 5025; 1905, ch. 155, § 1.]

**§ 5578. Acts of executors, administrators, deputies, officers or attorneys in fact legalized.** The acts of all properly appointed and constituted executors, administrators, officers of corporations, 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 law in force at that 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. [1913, ch. 133, § 2; 1911, ch. 99, § 2; 1909, ch. 151, § 2; R. C. 1905, § 5026; 1905, ch. 155, § 2.]

**§ 5579. Acknowledgments legalized.** The acts of all notaries public or other officers, done in good faith in taking or certifying to the acknowledgments of such instruments, whether such officers were qualified or otherwise by law at the time to do so or not, are hereby declared legal and valid for all purposes. [1913, ch. 133, § 3; 1911, ch. 99, § 3; 1909, ch. 151, § 3; R. C. 1905, § 5027; 1905, ch. 155, § 3.]

**§ 5580. Good faith presumed.** Good faith shall be presumed on the part of all persons and officers in the execution, acknowledgment, filing and recording of such instruments, and it shall be prima facie presumed that such officer acted within the scope of his authority. [1913, ch. 133, § 4; 1911, ch. 99, § 4; 1909, ch. 151, § 4; R. C. 1905, § 5027; 1905, ch. 155, § 4.]

Impeachment of certificate of acknowledgment. 41 L.R.A.(N.S.) 1161.

**§ 5581. Deeds, judgments, decrees legalized.** Deeds, judgments or decrees affecting the title to real property in this state, in good faith taken, made or rendered in favor of the estate of a person deceased prior to the first day of January, 1913, shall be construed and held to be made in favor of, and be in favor of, the executor or administrator (as the case may be) of the estate of such person deceased, subject, however, to administration of such estate in the probate court of this state which shall be entitled to jurisdiction, and the same are hereby declared to be legal and valid for all purposes. [1913, ch. 126.]

**§ 5582. 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. [R. C. 1905, § 5028; Civ. C. 1877, § 666; R. C. 1899, § 3586.]

Certificate of acknowledgment must substantially conform to statute. Cannon v. Deming, 3 S. D. 421, 53 N. W. 863; Holt v. Trust Co., 11 S. D. 456, 78 N. W. 947.

Recitals of certificate are evidence without further proof. N. W. Loan Co. v. Jonassen, 11 S. D. 566, 79 N. W. 840.

Defective acknowledgments by deputy sheriffs legalized in North Dakota. McCardia v. Bulings, 10 N. D. 373, 87 N. W. 1008.

Deed signed and sealed "Patrick M., Atty. in fact for Amelia B." is deed of Amelia, although words "he," "his," etc., are used in deed. Donovan v. Welch, 11 N. D. 113, 90 N. W. 262.

Sufficiency of acknowledgment by corporation. Gessner v. Minneapolis, St. P. & S. Ste. M. R. Co., 15 N. D. 560, 108 N. W. 786.

Sufficiency of acknowledgment of assignment of trust deed by corporation to record same. Erickson v. Conniff, 19 S. D. 41, 101 N. W. 1104.

Sufficiency of notary's certificate of acknowledgment by corporation. State v. Coughran, 19 S. D. 271, 103 N. W. 31.

As to similar provision in Cal. Civ. Code, § 1193, see Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356.

**§ 5583. 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. [R. C. 1905, § 5029; Civ. C. 1877, § 666; R. C. 1899, § 3587.]

Certificate of acknowledgment must substantially conform to statute. Cannon v. Deming, 3 S. D. 421, 53 N. W. 863; Holt v. Trust Co., 11 S. D. 456, 78 N. W. 947.

Recitals of certificate are evidence without further proof. N. W. Loan Co. v. Jonassen, 11 S. D. 566, 79 N. W. 840.



Defective acknowledgments by deputy sheriffs legalized in North Dakota. *McCardia v. Billings*, 10 N. D. 373, 87 N. W. 1008.

Deed signed and sealed "Patrick M., Atty. in fact for Amelia B." is deed of Amelia, although words "he," "his," etc., are used in deed. *Donovan v. Welch*, 11 N. D. 113, 90 N. W. 262.

Sufficiency of acknowledgment by corporation. *Gessner v. Minneapolis*, St. P. & S. Ste. M. R. Co., 15 N. D. 560, 108 N. W. 786.

Sufficiency of acknowledgment of assignment of trust deed by corporation to record same. *Erickson v. Conniff*, 19 S. D. 41, 101 N. W. 1104.

Sufficiency of notary's certificate of acknowledgment by corporation. *State v. Coughran*, 19 S. D. 271, 103 N. W. 31.

**§ 5584. 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. [R. C. 1905, § 5030; Civ. C. 1877, § 667; R. C. 1899, § 3588.]

Defective certificate to be reformed in accordance with the truth. *Cannon v. Deming*, 3 S. D. 421, 53 N. W. 863.

As to similar provision in Cal. Civ. Code, § 1202, see *Hutchinson v. Ainsworth*, 63 Cal. 286; *Hutchinson v. Ainsworth*, 73 Cal. 452, 2 Am. St. Rep. 823, 15 Pac. 82; *Poledori v. Newman*, 116 Cal. 375, 48 Pac. 325.

**§ 5585. 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. [R. C. 1905, § 5031; Civ. C. 1877, § 667; R. C. 1899, § 3589.]

As to similar provision in Cal. Civ. Code, § 1203, see *Judson v. Porter*, 53 Cal. 482.

**§ 5586. 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. [R. C. 1905, § 5032; Civ. C. 1877, § 667; R. C. 1899, § 3590.]

**§ 5587. 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 subpoenas, obedience to which may be enforced as provided in the code of civil procedure. [R. C. 1905, § 5033; Civ. C. 1877, § 668; R. C. 1899, § 3591.]

**§ 5588. 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. [R. C. 1905, § 5034; Civ. C. 1877, § 669; R. C. 1899, § 3592.]

As to similar provision in Cal. Civ. Code, § 1205, see *Judson v. Porter*, 53 Cal. 482.

**§ 5589. 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. [R. C. 1905, § 5035; Civ. C. 1877, § 670; R. C. 1899, § 3593.]

**§ 5590. 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. [R. C. 1905, § 5036; 1903, ch. 150.]

**§ 5591. Who may execute instruments for partnership.** Any one member of a partnership may execute and acknowledge in behalf of the partnership and in behalf of all of the members thereof, assignments of, releases of, satisfactions of and other instruments affecting liens upon real property situated in this state. [1909, ch. 177, § 1.]

**§ 5592. Former acknowledgments for partnership validated.** All assignments of, releases of, satisfactions of and other instruments affecting liens upon real estate heretofore executed and acknowledged by one member of any partnership in behalf of such partnership are declared valid and effectual to the same extent as they would have been if section one hereof had been in force at the time of their execution. [1909, ch. 177, § 2.]

**§ 5593. 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 partnership 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. [R. C. 1905, § 5037; 1899, ch. 2; R. C. 1899, § 3593a.]

Disqualification of officer taking acknowledgment. 32 Am. Dec. 757; 58 Am. St. Rep. 707.

Right of interested persons to take acknowledgment. 33 L.R.A. 332; 56 Am. St. Rep. 798.

Validity of acknowledgment of deed of trust taken by trustee. 16 L.R.A. 719.

Acknowledgment before a stockholder or officer of a corporation which is a party to the instrument. 23 L.R.A.(N.S.) 1075; 41 L.R.A.(N.S.) 375.

#### ARTICLE 5.—EFFECT OF RECORDING OR THE WANT THEREOF.

**§ 5594. 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. [R. C. 1905, § 5038; Civ. C. 1877, § 671; R. C. 1899, § 3594; 1903, ch. 152, § 1.]

Grantee of land from entryman before issuance of patent has title paramount to mortgagee after issuance, where grantee's deed was recorded. *Bernardy v. Colonial & U. S. Mortg. Co.*, 17 S. D. 637, 106 Am. St. Rep. 791, 98 N. W. 166.

Recording of mortgage or deed is notice only as to subsequent incumbrancers or purchasers. *Sarles v. McGee*, 1 N. D. 365, 48 N. W. 231, 26 Am. St. Rep. 633.

Record of defectively acknowledged deed not entitled to record does not carry constructive notice of contents. *Banbury v. Sherin*, 4 S. D. 88, 55 N. W. 723.

Deed once delivered for record is valid as against subsequent deed by grantor, though first deed withdrawn without authority before recording. *Parrish v. Mahany*, 10 S. D. 276, 73 N. W. 97, 65 Am. St. Rep. 715.

An unrecorded deed or mortgage is good as against an attaching creditor. *Kohn v. Lapham*, 13 S. D. 78, 82 N. W. 408; *Murphy v. Bank*, 13 S. D. 501, 83 N. W. 575.

An unrecorded deed; protection of registry law to those taking titles or security upon faith of records; how destroyed or lost; want of good faith. *Betts v. Letcher*, 1 S. D. 182, 46 N. W. 193.

Actual notice of prior unrecorded conveyance impeaches good faith of subsequent purchaser. *Gress v. Evans*, 1 D. 371, 46 N. W. 1132.

Protects only purchasers in good faith. *Hunter v. Coe*, 12 N. D. 505, 97 N. W. 869.

Judgment creditors as innocent purchasers. *Merchants State Bank v. Tufts*, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760.

Sheriff's deed under execution conveys good title as against unrecorded deed unknown to creditor and purchaser. *Enderlin Invest. Co. v. Nordhagen*, 18 N. D. 517, 123 N. W. 390.

Unrecorded warranty deed has precedence over subsequently recorded quit claim deed. *Fowler v. Will*, 19 S. D. 131, 117 Am. St. Rep. 938, 102 N. W. 598, 8 A. & E. Ann. Cas. 1093.

Mortgage given by insolvent and recorded within four months of his bankruptcy constitutes preference. *Bowler v. First Nat. Bank*, 21 S. D. 449, 130 Am. St. Rep. 725, 113 N. W. 618.

Lease not recorded is void as against subsequent lessee in so far as removal of fixtures is concerned. *Joslin v. Linder*, 26 S. D. 420, 128 N. W. 500.

Words "in good faith" have reference not only to subsequent purchasers, but to attachment and judgment creditors as well. *Iiveldsen v. First State Bank*, 24 N. D. 227, 139 N. W. 105.

Effect of defects and irregularities in recording deeds. 30 Am. Dec. 463; 91 Am. Dec. 106; 26 Am. Rep. 309; 96 Am. St. Rep. 397.

First and last days in computing time for recording deeds. 49 L.R.A. 242.

Delay in recording conveyance as fraud against creditors. 32 L.R.A. 69.

Failure to record conveyance as a fraud upon creditors. 31 L.R.A. 638.

Estoppel by allowing record title to remain in another. 22 L.R.A. 256.

Protection of purchaser from apparent vendee under instrument apparently a conveyance but intended as a mortgage. 32 L.R.A.(N.S.) 1046.

Right of one claiming through heir or devisee to protection against unrecorded conveyance by ancestor or his personal representative. 34 L.R.A.(N.S.) 328.

Protection under recording acts of mortgage given as security for pre-existing debt. 33 L.R.A.(N.S.) 57.

Priority of unrecorded deed as against purchaser at judicial sale. 21 L.R.A. 33.

When mechanics' lien superior to earlier unrecorded mortgage. 14 L.R.A. 306.

Precedence as between quitclaim deed and senior unrecorded deed. 12 L.R.A.(N.S.) 240; 26 L.A.R.(N.S.) 159.

Precedence as between conveyance of land for a nominal or inadequate consideration and senior unrecorded conveyance. 16 L.R.A.(N.S.) 1073.

Necessity for recording assignment for creditors as against attaching creditor. 26 L.R.A. 594.

Burden of proof as to bona fides of purchaser claiming against prior unrecorded conveyance or incumbrance. 36 L.R.A.(N.S.) 1124.

Failure to file defeasance as affecting right of creditors of grantee in deed intended as a mortgage. 5 L.R.A.(N.S.) 387.

When local law deemed to require registering or recording of a transfer within meaning of section 60a of the bankruptcy law. 5 L.R.A.(N.S.) 148; 18 L.R.A.(N.S.) 1233.

Failure to record conveyance to insured as affecting his sole unconditional ownership. 22 L.R.A.(N.S.) 732.

Remedy of one who fails to record a deed against his grantor who subsequently conveys to an innocent third person. 26 L.R.A.(N.S.) 284.

Effect of destruction or cancellation, or redelivery to grantor for that purpose, of delivered but unrecorded deed. 18 L.R.A.(N.S.) 1167; 34 L.R.A.(N.S.) 495.

Record of deed by grantor as delivery to grantee. 54 L.R.A. 865; 9 L.R.A.(N.S.) 224; 38 L.R.A.(N.S.) 941.

Effect of recording undelivered transfer or assignment. 21 L.R.A. 696.

Permitting undelivered deed wrongfully recorded by grantee to remain on record, as estoppel of grantor or his successors to deny its delivery as against one purchasing in reliance on the record. 7 L.R.A.(N.S.) 712.

Effect of quitclaim deed in otherwise perfect record title. 29 L.R.A. 33.

As to similar provision in Cal. Civ. Code, § 1214, see *Odd Fellows' Sav. Bank v. Banton*, 46 Cal. 603; *Walker v. Buffandeau*, 63 Cal. 312; *Schluter v. Harvey*, 65 Cal. 158, 3 Pac. 659; *Gassen v. Hendrick*, 74 Cal. 444, 16 Pac. 242; *Dreyfus v. Hirt*, 82 Cal. 621, 23 Pac. 193; *Bank of Ukiah v. Petaluma Sav. Bank*, 100 Cal. 590, 35 Pac. 170.

**§ 5595. Conveyances and purchasers 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 incumbered, or by which the title to any real property may be affected, except wills and powers of attorney. The word "purchaser" as used shall embrace every person to whom any estate or interest in real estate is conveyed for a valuable consideration, and also every assignee of a mortgage, lease or other conditional estate. [1907, ch. 250; R. C. 1905, § 5039; Civ. C. 1877, § 672; R. C. 1899, § 3595; 1903, ch. 152, § 2.]

Assignments of real estate mortgages are conveyances within this section. *Henniges v. Paschke*, 9 N. D. 489, 84 N. W. 350, 81 Am. St. Rep. 588.

Mortgage and assignment thereof are "conveyances." *Merril v. Luce*, 6 S. D. 354, 61 N. W. 43, 55 Am. St. Rep. 844.

Assignment of mortgage is a transfer of property within section. *Sommers v. Wagner*, 21 N. D. 531, 131 N. W. 797.

Mortgage, though given to secure antecedent debt, is supported by sufficient consideration to constitute mortgagee an incumbrance for value, where extension of time is granted. *Farmers' & M. Bank v. Citizens' Nat. Bank*, 25 S. D. 91, 125 N. W. 642.

Executory contract for the sale or purchase of land not a conveyance, and execution does not destroy legal estate. *State ex rel. Dillman v. Weide*, 29 S. D. 109, 135 N. W. 696.

Quitclaim deed is a conveyance within recording act. *Shutz v. Tidrick*, 26 S. D. 505, 128 N. W. 811.

As to similar provision in Cal. Civ. Code, § 1215, see *Odd Fellows' Sav. Bank v. Banton*, 46 Cal. 603; *Re McConnell*, 74 Cal. 217, 15 Pac. 746; *Tolman v. Smith*, 74 Cal. 345, 16 Pac. 189; *Warnock v. Harlow*, 96 Cal. 298, 31 Am. St. Rep. 209, 31 Pac. 166; *Stewart v. Powers*, 98 Cal. 514, 33 Pac. 486; *Garber v. Gianella*, 98 Cal. 527, 33 Pac. 458; *Savings & L. Asso. v. McKoon*, 120 Cal. 177, 52 Pac. 305.

**§ 5596. 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 acknowledged or proved, certified and recorded in the same office in which the instrument containing the power was recorded. [R. C. 1905, § 5040; 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.

**§ 5597. 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 5549, 5569, 5570, 5571 and 5572 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. [R. C. 1905, § 5041; Civ. C. 1877, § 674; R. C. 1899, § 3597; 1901, ch. 145.]

Grantee of land from entryman before issuance of patent has title paramount to mortgagee after issuance, where grantee's deed was recorded. *Bernardy v. Colonial & U. S. Mortg. Co.*, 17 S. D. 637, 106 Am. St. Rep. 791, 98 N. W. 166.

Right to rely on representations as to title to real property. 37 L.R.A. 603.

Purchaser's duty to examine records to determine location of property. 38 L.R.A. (N.S.) 307.

Right to inspect public records. 27 L.R.A. 82.

Certainty and accuracy necessary in respect to Christian names or initials in record or index relied on as imparting constructive notice. 7 L.R.A. (N.S.) 415; 25 L.R.A. (N.S.) 1211.

Effect of recording conveyance by one cotenant to third person to found adverse possession against others. 32 L.R.A. (N.S.) 708.

Effect of recorded agreement not incorporated in a conveyance restricting use of property upon successor in title. 15 L.R.A. (N.S.) 1129.

Doctrine of notice from registration, of conveyance recorded before grantor obtained title. 23 L.R.A. 565.

Recordation of lien on fixtures as personalty, as notice to purchaser or mortgagee of realty. 1 B. R. C. 691.

Notice by record as affecting fraudulent statements. 37 L.R.A. 603.

Destruction of record of deed or mortgage as affecting constructive notice imparted thereby. 23 L.R.A. (N.S.) 1180.

Record of instrument not entitled to be recorded as actual notice. 38 L.R.A. (N.S.) 400

Record of instrument acknowledged before a stockholder or officer of a corporation which is a party to the instrument, as notice. 41 L.R.A. (N.S.) 376.

**§ 5598. 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. [R. C. 1905, § 5042; 1899, ch. 167; R. C. 1899, § 3598.]

Knowledge of facts sufficient to put prudent man on inquiry precludes bona fide purchase. *Doran v. Dazey*, 5 N. D. 167, 64 N. W. 1023, 57 Am. St. Rep. 550.

Unrecorded instrument valid as between parties. *Mach v. Blanchard*, 15 S. D. 432, 90 N. W. 1042.

Unrecorded title of occupant is good as against claimant under sheriff's deed against original owner, in absence of estoppel. *Bliss v. Waterbury*, 27 S. D. 429, 131 N. W. 731.

Possession under unrecorded instrument as notice of title. 13 L.R.A. (N.S.) 51.

Effect of notice of prior unrecorded conveyance on rank of lien of judgment. 16 L.R.A. 670.

Priority of unrecorded mortgage as against purchaser at judicial sale. 21 L.R.A. 38.

Possession as notice of an unrecorded instrument. 64 Am. Dec. 241.

As to similar provision in Cal. Civ. Code, § 1217, see *Scheerer v. Cuddy*, 85 Cal. 270, 24 Pac. 713; *Warnock v. Harlow*, 96 Cal. 298, 31 Am. St. Rep. 209, 31 Pac. 166; *Bank of Ukiah v. Petaluma Sav. Bank*, 100 Cal. 590, 35 Pac. 170; *Fette v. Lane*, 4 Cal. Unrep. 813, 37 Pac. 914; *Prouty v. Devin*, 118 Cal. 258, 50 Pac. 380; *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955; *Farmers' Exchange Bank v. Purdy*, 130 Cal. 455, 62 Pac. 738.

## CHAPTER 50.

### UNLAWFUL TRANSFERS.

**§ 5599. 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. [R. C. 1905, § 5043; Civ. C. 1877, § 676; R. C. 1899, § 3599.]

Conveyance of land by husband to wife without consideration while deeply in debt not necessarily fraudulent. *First State Bank v. O'Leary*, 13 S. D. 204, 83 N. W. 45.

That mortgagee is brother of mortgagor not evidence of fraudulent intent. *Lane v. Starr*, 1 S. D. 107, 45 N. W. 212.

Husband's fraudulent intent will not invalidate conveyance to wife in payment of debt, if wife has no knowledge of fraud. *Williams v. Harris*, 4 S. D. 22, 54 N. W. 926, 46 Am. St. Rep. 753.

Purchaser of property must show his good faith, where another purchaser shows that sale was made with intent to defraud him. *Barnhart v. Anderson*, 22 S. D. 395, 118 N. W. 31.

Effect on legal title of conveyance of land in fraud of creditors. 67 L.R.A. 865.

Is a judgment in a suit to set aside a fraudulent conveyance, which purports to de-vest entirely the title of the grantee, *res judicata*, as between grantor and grantee or their privies. 21 L.R.A.(N.S.) 481.

Right of client to recover property placed in name of his attorney in order to defraud creditors. 37 L.R.A.(N.S.) 161.

What intent to defraud by sale of property will sustain an attachment. 30 L.R.A. 476.

Recovery of nonexempt property conveyed to avoid nonexistent or unfounded demand. 1 L.R.A.(N.S.) 1007.

**§ 5600. 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. [R. C. 1905, § 5044; Civ. C. 1877, § 677; R. C. 1899, § 3600.]

Purchaser of property must show his good faith, where another purchaser shows that sale was made with intent to defraud him. *Barnhart v. Anderson*, 22 S. D. 395, 118 N. W. 31.

Purchaser's ignorance of debtor's fraudulent intent in conveyance to him. 36 L.R.A. 338.

Participation by purchaser in vendor's fraud which will invalidate transfer for good consideration. 32 L.R.A. 33.

**§ 5601. 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. [R. C. 1905, § 5045; Civ. C. 1877, § 678; R. C. 1899, § 3601.]

**§ 5602. 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. [R. C. 1905, § 5046; Civ. C. 1877, § 679; R. C. 1899, § 3602.]

**§ 5603. 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. [R. C. 1905, § 5047; Civ. C. 1877, § 680; R. C. 1899, § 3603.]

Purchaser of property must show his good faith, where another purchaser shows that sale was made with intent to defraud him. *Barnhart v. Anderson*, 22 S. D. 395, 118 N. W. 31.

**§ 5604. Other unlawful transfers.** Other provisions concerning unlawful transfers are contained in chapter 111 of this code concerning the special relations of debtor and creditor. [R. C. 1905, § 5048; Civ. C. 1877, § 682; R. C. 1899, § 3604.]

Action maintainable by grantee to recover land possessed adversely to grantor, although grant made before passage of act. *Campbell v. Equitable Loan & T. Co.*, 17 S. D. 31, 94 N. W. 401.

Mesne conveyances, by which land was conveyed from mortgagor while one claiming under foreclosure was in actual, notorious and peaceable possession, are void. *Shelby v. Bowden*, 16 S. D. 531, 94 N. W. 416.

## CHAPTER 51.

## HOMESTEAD.

**§ 5605. 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. [R. C. 1905, § 5049; 1891, ch. 67, § 1; R. C. 1895, § 3605.]

As to "homestead estate" attaching only to such property as constituted decedent's homestead at time of death. *Calmer v. Calmer*, 15 N. D. 120, 106 N. W. 684.

Homestead laws are remedial and should be liberally construed with view of carrying out their obvious purpose. *Dieter v. Fraine*, 20 N. D. 484, 128 N. W. 684.

Depends on the intention. *Clark v. Evans*, 6 S. D. 244, 60 N. W. 862.

Three years' absence from home and her husband not abandonment by a wife. *Rosholt v. Mehus*, 3 N. D. 513, 57 N. W. 783, 23 L.R.A. 239.

Purchase of site and erection of dwelling house thereon, with intent to establish a homestead, impresses character. *Kingman v. O'Callahan*, 4 S. D. 628, 57 N. W. 912; *Brown v. Edmonds*, 9 S. D. 273, 68 N. W. 734.

Mere intention to occupy land as not sufficient to exempt it as such, in absence of act indicative of carrying intention into immediate execution. *Brokken v. Baumann*, 10 N. D. 453, 88 N. W. 84.

Partner cannot obtain homestead right in firm real estate, as against his copartner. Divorced wife retains no homestead right in husband's real estate, in absence of decree to that effect. *Brady v. Kreuger*, 8 S. D. 464, 66 N. W. 1083, 59 Am. St. Rep. 771.

Prior to act of 1890, unmarried person entitled to homestead rights. *Hesnard v. Plunkett*, 6 S. D. 73, 60 N. W. 159.

Unmarried man not entitled to homestead rights in 1888. *McCanna v. Anderson*, 6 N. D. 482, 71 N. W. 769.

Exempt from sale for purchase money. *N. W. Loan Co. v. Jonasen*, 11 S. D. 566, 79 N. W. 840.

Will attach to land held under contract of purchase. *Myrick v. Bill*, 5 D. 167, 37 N. W. 369.

Estate in the land is essential. *Myrick v. Bill*, 3 D. 284, 17 N. W. 268.

May be claimed in an undivided interest in land. *Oswald v. McCauley*, 6 D. 289, 42 N. W. 769.

Cannot be determined on affidavits on motion to set aside a levy. *Dorsey v. Hall*, 5 D. 505, 41 N. W. 471; *Froelick v. Aylward*, 11 S. D. 635, 80 N. W. 131.

Secret antenuptial transfer of homestead by husband is void as to his wife. *Arnegaard v. Arnegaard*, 7 N. D. 475, 75 N. W. 797, 41 L.R.A. 258.

Right of, not extended to lands included within limits of incorporated city or town, by repeal of pre-emption law. *King v. McAndrews*, 104 Fed. 430.

Temporary removal from land will not destroy. *Edmonson v. White*, 8 N. D. 72, 76 N. W. 986.

May be selected from any portion of lands owned by debtor contiguous to residence. *Foogmann v. Patterson*, 9 N. D. 254, 83 N. W. 15.

Homestead is not bound by lien of judgments against owner. *Dalrymple v. Security Improv. Co.*, 11 N. D. 65, 88 N. W. 1033.

Sale of homestead under execution conveys no title. *Johnson v. Twitchell*, 13 N. D. 426, 100 N. W. 318.

Term "homestead" is not defined by statute. *Calmer v. Calmer*, 15 N. D. 120, 106 N. W. 684.

Husband is entitled to claim homestead exempt from execution sale, although fee is vested in wife. *Bremseth v. Olson*, 16 N. D. 242, 13 L.R.A.(N.S.) 170, 112 N. W. 1056, 14 A. & E. Ann. Cas. 1155.

Title, after acquired by patent to homesteader, inures to mortgagee as of date of execution and delivery of mortgage. *Adams v. McClintock*, 21 N. D. 483, 131 N. W. 394.

Constitutionality of statutes exempting homestead as applied to pre-existing contracts. 57 Am. Dec. 464.

What may be exempt as homestead. 70 Am. Dec. 344.

May homestead be acquired in an undivided interest in lands. 63 Am. Dec. 122.

Homestead rights in land held under estate by entireties. 30 L.R.A. 313.

Homestead rights in partnership land. 28 L.R.A. 105.

Right to claim homestead in property used as a hotel or boarding house. 41 L.R.A.(N.S.) 303.

Is continuance of family a condition of the continuance of homestead, where its existence is a condition of the inception of the homestead. 16 L.R.A.(N.S.) 111.

Exemption of proceeds of homestead. 45 Am. St. Rep. 237.

Exemption of proceeds of homestead sold for reinvestment. 19 L.R.A. 36.

Does homestead exemption attach to the surplus upon foreclosure of a lien paramount to the homestead right. 18 L.R.A.(N.S.) 491.

Crops grown on homestead, or proceeds thereof, as exempt. 32 L.R.A.(N.S.) 577.

Exemption of homestead from liability for torts. 24 L.R.A. 789; 16 L.R.A.(N.S.) 947.

Abandonment of homestead by parent, effect on rights of children. 56 L.R.A. 80.

Right to testify as to intent with reference to residence, occupation or use of homestead. 23 L.R.A.(N.S.) 397.

Abandonment of homestead during insanity of one spouse. 13 L.R.A.(N.S.) 430.

Effect of insanity and imprisonment as abandonment of homestead. 3 L.R.A.(N.S.) 515.

What constitutes abandonment of homestead. 60 Am. Dec. 607; 36 Am. Rep. 728; 102 Am. St. Rep. 388.

Adverse possession of homestead by wife or husband. 18 Am. St. Rep. 113.

Husband's insurable interest in homestead. 66 L.R.A. 660.

Injunction against sale of homestead under execution. 30 L.R.A. 100.

As to similar provision in Cal. Civ. Code, § 1237, see *Babcock v. Gibbs*, 52 Cal. 629; *Tiernan v. His Creditors*, 62 Cal. 286; *Re Noah*, 73 Cal. 590, 2 Am. St. Rep. 834, 15 Pac. 290; *Maloney v. Hefer*, 75 Cal. 422, 7 Am. St. Rep. 180, 17 Pac. 539; *Re Liggett*, 117 Cal. 352, 59 Am. St. Rep. 190, 49 Pac. 211; *Bank of Woodland v. Oberhaus*, 125 Cal. 320, 57 Pac. 1070; *Reid v. Englehart-Davidson Mercantile Co.*, 126 Cal. 527, 77 Am. St. Rep. 206, 58 Pac. 1063.

**§ 5606. 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. [R. C. 1905, § 5050; 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.

Husband is entitled to claim homestead exempt from execution sale, although fee is vested in wife. *Bremseth v. Olson*, 16 N. D. 242, 13 L.R.A.(N.S.) 170, 112 N. W. 1056, 14 A. & E. Ann. Cas. 1155.

Right of husband, as against creditors, to claim homestead as exempt where title is vested in wife. 13 L.R.A.(N.S.) 170.

As to similar provision in Cal. Civ. Code, § 1238, see *King v. Gotz*, 70 Cal. 236, 11 Pac. 656; *Arendt v. Mace*, 76 Cal. 315, 9 Am. St. Rep. 207, 18 Pac. 376.

**§ 5607. When subject to execution.** The homestead is subject to execution or forced sale in satisfaction of judgments obtained:

1. On debts secured by mechanics' or laborers' 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. [R. C. 1905, § 5051; 1891, ch. 67, § 3; R. C. 1899, § 3607.]

Homestead or proceeds thereof are absolutely exempt from seizure by creditor, except as specified in statute. *Dieter v. Fraine*, 20 N. D. 484, 128 N. W. 684.

Attachment and judgment liens against homestead. 34 Am. St. Rep. 496; 38 Am. St. Rep. 247.

For what claims and credits homestead is liable. 45 Am. St. Rep. 383.

Money decree for permanent alimony or separate maintenance as lien on. 25 L.R.A.(N.S.) 137.

As to similar provision in Cal. Civ. Code, § 1241, see *Chalmers v. Stockton Bldg. & L. Soc.*, 64 Cal. 77, 28 Pac. 59; *Richards v. Shear*, 70 Cal. 187, 11 Pac. 607; *Fitzell v. Leaky*, 72 Cal. 477, 14 Pac. 198; *Walsh v. McMenemy*, 74 Cal. 356, 16 Pac. 17; *Davies-Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860; *First Nat. Bank v. Bruce*, 94 Cal. 77, 29 Pac. 488; *Beaton v. Reid*, 111 Cal. 484, 44 Pac. 167; *Glas v. Glas*, 114 Cal. 566, 55 Am. St. Rep. 90, 46 Pac. 667; *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955; *Edwards v. Grand*, 121 Cal. 254, 53 Pac. 796.

1. Enforcement of mechanics' lien against building only erected upon homestead lands. 62 L.R.A. 375.

3. S. D. Laws 1890, ch. 86, exempting from all process, levy or sale; bestows immunity from sale for purchase money. *N. W. Loan Co. v. Jonasen*, 11 S. D. 566, 79 N. W. 840.



Mortgage of, to secure purchase price, executed by fee owner, need not be signed by husband or wife. *Roby v. Bank*, 4 N. D. 156, 59 N. W. 719, 50 Am. St. Rep. 633.

Lien for purchase money of homestead. 99 Am. Dec. 574; 86 Am. St. Rep. 174.

Mortgage to secure money advanced to purchase property as a purchase money mortgage not subject to homestead rights. 40 L.R.A.(N.S.) 275.

Is money loaned to improve land part of the purchase price within the rule that a purchase money lien takes priority over homestead rights. 41 L.R.A.(N.S.) 89.

**§ 5608. 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. [R. C. 1905, § 5052; 1891, ch. 67, § 4; R. C. 1899, § 3608.]

Homestead exemption is intended for protection and preservation of home for benefit of family as whole. *Dieter v. Fraine*, 20 N. D. 484, 128 N. W. 684.

Contract by husband to convey 320 acres of land, 160 acres of which, to knowledge of purchaser, was homestead, was wholly invalid. *Kaiser v. Klein*, 29 S. D. 464, 137 N. W. 52.

Requiring spouse to join in execution of deed to homestead does not confer on spouse any estate in land, but valid deed cannot be made without spouse joining therein. *Somers v. Somers*, 27 S. D. 500, 36 L.R.A.(N.S.) 1024, 131 N. W. 1091.

Mortgage of, by husband and wife binds latter, whether she acknowledged same or not. *Karcher v. Gans*, 13 S. D. 383, 83 N. W. 431, 79 Am. St. Rep. 833.

Signature of wife may be made by notary taking acknowledgment. *N. W. Loan Co. v. Jonasen*, 11 S. D. 566, 79 N. W. 840.

Wife's signature not necessary to mortgage on government homestead on which she has never resided. *Brokken v. Baumann*, 10 N. D. 453, 88 N. W. 84.

Husband alone cannot continue a mortgage on, after payment. *Luce v. Mortgage Co.*, 6 D. 122, 50 N. W. 621.

Wife not bound by implied warranty when she joins in mortgage only to release homestead right. *Dunn v. Dietrich*, 3 N. D. 3, 53 N. W. 81.

Wife retains no interest in homestead in husband's name after divorce in the absence of a provision in the decree to that effect. *Brady v. Kreuger*, 8 S. D. 464, 66 N. W. 1083, 59 Am. St. Rep. 771.

Insolvency of husband; claim of wife as head of family. *Neas v. Jones*, 10 N. D. 587, 88 N. W. 706.

Mortgage of, for unpaid purchase money is good, although not signed by husband. *Roby v. Bank*, 4 N. D. 156, 59 N. W. 719, 50 Am. St. Rep. 633.

Statute to be liberally construed. *Kingman v. O'Callaghan*, 4 S. D. 628, 57 N. W. 912.

Exempt from sale for mechanic's lien. *Morgan v. Beuthein*, 10 S. D. 650, 75 N. W. 204, 65 Am. St. Rep. 733; *Fallibee v. Wittmayer*, 9 S. D. 479, 70 N. W. 642.

Inapplicable where homestead is not selected. *Wegner v. Lubenow*, 12 N. D. 95, 95 N. W. 442.

Concurrence of husband and wife essential to conveyance of homestead. *Helgebye v. Dammen*, 13 N. D. 167, 100 N. W. 245.

On necessity of both husband and wife acknowledging conveyance of homestead. *Patnode v. Deschenes*, 15 N. D. 100, 106 N. W. 573.

Not unconstitutional as interfering with vested rights. *Gaar, S. & Co. v. Collin*, 15 N. D. 622, 110 N. W. 81.

As to necessity of wife executing contract for sale of homestead. *Silander v. Gronna*, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544.

As not affecting general equity doctrine of estoppel in pais. *Engholm v. Ekrem*, 18 N. D. 185, 119 N. W. 35.

Effect of conveyance of homestead by husband to wife. 69 L.R.A. 379.

Constructive trust in deed of homestead by husband to wife, with proviso attempting to derogate from her right of survivorship. 1 L.R.A.(N.S.) 312.

Conveyance or incumbrance by one spouse only. 95 Am. St. Rep. 909.

Conveyance by one spouse, whether may become operative on abandonment or other future event. 12 Am. St. Rep. 683.

Husband's power without wife's consent to abandon homestead or convey premises by his sole deed after abandonment. 37 L.R.A.(N.S.) 807.

Conveyance of homestead by husband after abandonment by wife. 8 L.R.A.(N.S.) 565.

Power of husband to create easements in homestead without wife's consent. 27 L.R.A.(N.S.) 963.

Power of legislature to take away husband's right to convey or incumber homestead property. 36 L.R.A.(N.S.) 1029.

Validity of conveyance or incumbrance of homestead by wife after abandonment by husband. 36 L.R.A.(N.S.) 1024.

Effect of a wife's separate deed of homestead in connection with a conveyance or incumbrance by husband, or her subsequent joinder therein. 8 L.R.A.(N.S.) 748.

Effect of mistake of law as to contract with reference to homestead as ground of reformation. 28 L.R.A.(N.S.) 872.

As to similar provision in Cal. Civ. Code, § 1242, see *Gleason v. Spray*, 81 Cal. 217,

15 Am. St. Rep. 47, 22 Pac. 551; *Powell v. Patison*, 100 Cal. 236, 34 Pac. 677; *Mathews v. Davis*, 102 Cal. 202, 36 Pac. 358; *Dickey v. Gibson*, 113 Cal. 26, 54 Am. St. Rep. 321, 45 Pac. 15; *San Francisco v. Grote*, 120 Cal. 59, 41 L.R.A. 335, 65 Am. St. Rep. 155, 52 Pac. 127; *California Fruit Transp. Co. v. Anderson*, 79 Fed. 404.

**§ 5609. 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. 1905, § 5053; R. C. 1895, § 3609.]

**§ 5610. 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 5609, 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 5609. [R. C. 1905, § 5054; 1905, ch. 3.]

Mortgagor of homestead cannot set up homestead rights unless they are asserted within period fixed by this section. *Justice v. Souder*, 19 N. D. 613, 125 N. W. 1029.

**§ 5611. When appraised.** When an execution for the enforcement of a judgment obtained in a case not within the classes enumerated in section 5607 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. [R. C. 1905, § 5055; 1891, ch. 67, § 5; R. C. 1895, § 3610.]

**§ 5612. 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. [R. C. 1905, § 5056; 1891, ch. 67, § 6; R. C. 1895, § 3611.]

**§ 5613. 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. [R. C. 1905, § 5057; 1891, ch. 67, § 7; R. C. 1899, § 3612.]

**§ 5614. 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. [R. C. 1905, § 5058; 1891, ch. 67, § 8; R. C. 1895, § 3613.]

As to similar provision in Cal. Civ. Code, §§ 1249, 1251, see *Brown v. Starr*, 79 Cal. 608, 12 Am. St. Rep. 180, 21 Pac. 973; *Harrier v. Bassford*, 145 Cal. 529, 78 Pac. 1038.

**§ 5615. 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. 1905, § 5059; R. C. 1895, § 3614.]

**§ 5616. 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. [R. C. 1905, § 5060; 1891, ch. 67, § 9; R. C. 1895, § 3615.]

**§ 5617. 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. [R. C. 1905, § 5061; 1891, ch. 67, § 10; R. C. 1895, § 3616.]

**§ 5618. 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. [R. C. 1905, § 5062; 1891, ch. 67, § 11; R. C. 1895, § 3617.]

**§ 5619. 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 5617 and 5618 the amount paid must be added as costs on execution and collected accordingly. [R. C. 1905, § 5063; 1891, ch. 67, § 12; R. C. 1899, § 3618.]

**§ 5620. Proceeds of sale exempt.** If the homestead is conveyed as provided in section 5608 or sold for the satisfaction of any lien mentioned in section 5607, 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. [R. C. 1905, § 5064; 1891, ch. 67, § 13; R. C. 1895, § 3619.]

**§ 5621. 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. 1905, § 5065; R. C. 1895, § 3620.]

**§ 5622. 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. 1905, § 5066; R. C. 1895, § 3621.]

As to similar provision in Cal. Civ. Code, § 1262, see *Ham v. Santa Rosa Bank*, 62 Cal. 125, 45 Am. Rep. 654; *Farley v. Hopkins*, 79 Cal. 203, 21 Pac. 737.

**§ 5623. 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. 1905, § 5067; R. C. 1895, § 3622.]

As to similar provision in Cal. Civ. Code, § 1263, see *Ashley v. Olmstead*, 54 Cal. 616; *Ames v. Eldred*, 55 Cal. 136; *Ham v. Santa Rosa Bank*, 62 Cal. 125, 45 Am. Rep. 654; *Read v. Rahm*, 65 Cal. 343, 4 Pac. 111; *Jones v. Waddy*, 66 Cal. 457, 6 Pac. 92; *Re Crowey*, 71 Cal. 300, 12 Pac. 230; *Farley v. Hopkins*, 79 Cal. 203, 21 Pac. 737; *Knock v. Bunnell*, 3 Cal. Unrep. 105, 21 Pac. 961; *Cunha v. Hughes*, 122 Cal. 111, 68 Am. St. Rep. 27, 54 Pac. 535; *Reid v. Englehart-Davidson Mercantile Co.*, 126 Cal. 527, 77 Am. St. Rep. 206, 58 Pac. 1063.

**§ 5624. 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. 1905, § 5068; R. C. 1895, § 3623.]

**§ 5625. 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. [R. C. 1905, § 5069; 1891, ch. 67, § 14; R. C. 1899, § 3624.]

**§ 5626. "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. [R. C. 1905, § 5070; 1891, ch. 67, § 15; R. C. 1899, § 3625.]

A single person was entitled to homestead right prior to act of 1890. *Hesnard v. Plunkett*, 6 S. D. 73, 60 N. W. 159. *Contra*, *McCanna v. Anderson*, 6 N. D. 482, 71 N. W. 769.

Selection; extent and value; presumption from failure to assert. *Foogman v. Patterson*, 9 N. D. 254, 83 N. W. 15.

As to when divorced husband is no longer head of family entitled to homestead exemption. *Holcomb v. Holcomb*, 18 N. D. 561, 120 N. W. 547.

Widow without children may occupy during her lifetime. *Fore v. Fore*, 2 N. D. 260, 50 N. W. 712.

Who is head of family and what constitutes a family. 61 Am. Dec. 586; 70 Am. St. Rep. 107.

What constitutes a family. 4 L.R.A.(N.S.) 366.

Who is within the meaning of the law allowing exemption to head of family. 32 Am. Rep. 30.

As to similar provision in Cal. Civ. Code, § 1261, see *Roth v. Insley*, 86 Cal. 134, 24 Pac. 853; *Simonson v. Burr*, 121 Cal. 582, 54 Pac. 87.

As to similar provision in Neb. Comp. Stat. 1897, ch. 36, § 15, see *Schaller v. Kurtz*, 25 Neb. 658, 41 N. W. 642.

**§ 5627. 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. [R. C. 1905, § 5071; 1891, ch. 67, § 16; R. C. 1895, § 3626.]

No homestead estate can survive, descend or be distributed where decedent was not entitled to homestead exemption at time of death. *Holcomb v. Holcomb*, 18 N. D. 561, 120 N. W. 547.

Homestead cannot be partitioned among heirs, while occupied as homestead by surviving husband, wife or minor child. *Wells v. Sweeney*, 16 S. D. 489, 102 Am. St. Rep. 813, 94 N. W. 394.

Widow's right to convey, lease or incumber homestead during minority of children. 10 L.R.A.(N.S.) 787.

Effect of alienation of incumbrance of homestead by surviving spouse on rights of children. 56 L.R.A. 71.

Right of child in homestead of parent as affected by will. 56 L.R.A. 38.

Right of adopted children to take parent's homestead. 56 L.R.A. 54.

Federal courts following state decisions as to construction and effect of wills. 40 L.R.A.(N.S.) 430.

As to similar provision in Cal. Civ. Code, § 1265, see *Re Headen*, 52 Cal. 294; *Gagliardo v. Dumont*, 54 Cal. 496; *Schuler v. Savings & L. Soc.*, 64 Cal. 397, 1 Pac. 479; *Beck v. Soward*, 76 Cal. 527, 18 Pac. 650; *Re Burdick*, 76 Cal. 639, 18 Pac. 805; *Tyrrell v. Baldwin*, 78 Cal. 470, 21 Pac. 116; *Farley v. Hopkins*, 79 Cal. 203, 21 Pac. 737; *Re Ackerman*, 80 Cal. 208, 13 Am. St. Rep. 116, 22 Pac. 141; *Gleason v. Spray*, 81 Cal. 217, 15 Am. St. Rep. 47, 22 Pac. 551; *Roth v. Insley*, 86 Cal. 134, 24 Pac. 853; *Re Walkerly*, 108 Cal. 627, 48 Am. St. Rep. 97, 41 Pac. 772; *Dickey v. Gibson*, 113 Cal. 26, 54 Am. St. Rep. 321, 45 Pac. 15.

§ 5628. "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. 1905, § 5072; R. C. 1895, § 3627.]

§ 5629. 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 5627 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 5605. [R. C. 1905, § 5073; R. C. 1895, § 3628.]

§ 5630. 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. 1905, § 5074; R. C. 1895, § 3629.]

§ 5631. **Estate decends 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 5607 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 53 until all the decedent's debts are fully paid. [R. C. 1905, § 5075; R. C. 1895, § 3630.]

§ 5632. **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 5631 like other real property of the testator. [R. C. 1905, § 5076; 1891, ch. 67, § 18; R. C. 1895, § 3631.]

§ 5633. **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. [R. C. 1905, § 5077; 1891, ch. 67, § 19; R. C. 1895, § 3632.]

§ 5634. **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. 1905, § 5078; R. C. 1895, § 3633.]

§ 5635. **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. 1905, § 5079; R. C. 1895, § 3634.]

§ 5636. **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. 1905, § 5080; R. C. 1895, § 3635.]

§ 5637. **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. [R. C. 1905, § 5081; 1891, ch. 67, § 21; R. C. 1895, § 3636.]

§ 5638. **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. [R. C. 1905, § 5082; 1891, ch. 67, § 22; 1895, § 3637.]

§ 5639. **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. 1905, § 5083; R. C. 1895, § 3638.]

## CHAPTER 52.

## WILL.

- ARTICLE 1. EXECUTION AND REVOCATION OF WILL, §§ 5640-5684.  
 2. INTERPRETATION OF WILLS AND EFFECT OF VARIOUS PROVISIONS,  
 §§ 5685-5719.  
 3. GENERAL PROVISIONS, §§ 5720-5740.

## ARTICLE 1.—EXECUTION AND REVOCATION OF WILL.

§ 5640. **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 53 of this code, being chargeable in both cases with the payment of all the decedent's debts as provided in the probate code. [R. C. 1905, § 5084; Civ. C. 1877, § 683; R. C. 1895, § 3639.]

Person making will must be of sound mind at the time. Re Corson, 29 S. D. 14, 135 N. W. 666.

What constitutes testamentary capacity or incapacity. 27 L.R.A.(N.S.) 2.

Testamentary capacity at the time of giving instructions for will as affecting measure of capacity which must exist at time of execution. 2 B. R. C. 41.

Drunkenness as affecting testamentary capacity. 39 L.R.A. 220.

Conflict of laws as to testator's capacity. 2 L.R.A.(N.S.) 414.

Adjudication of insanity, or existence of guardianship, as showing want of testamentary capacity. 140 Am. St. Rep. 346.

Insane delusions. 8 Am. Rep. 184; 63 Am. St. Rep. 94; 12 L.R.A. 161; 27 L.R.A.(N.S.) 62.

Belief in spiritualism. 36 Am. Rep. 426; 15 L.R.A.(N.S.) 673.

Aversion to relatives. 117 Am. St. Rep. 582.

As to similar provision in Cal. Civ. Code, § 1270, see *Hinckley's Estate*, 58 Cal. 457; Re Ross, 140 Cal. 282, 73 Pac. 976.

§ 5641. **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. [R. C. 1905, § 5085; Civ. C. 1877, § 684; R. C. 1899, § 3640.]

Right of wife under statute removing disabilities of married woman to devise property held by her husband and herself as joint tenants. 7 L.R.A.(N.S.) 701.

Sufficiency of husband's consent to wife's will. 37 L.R.A.(N.S.) 1133.

§ 5642. **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. [R. C. 1905, § 5086; Civ. C. 1877, § 685; R. C. 1899, § 3641.]

Undue influence affecting will. 16 Am. Dec. 257; 31 Am. St. Rep. 670.

—presumption of. 44 Am. Rep. 537; 21 Am. St. Rep. 94.

—burden of proof as to. 17 L.R.A. 494; 36 L.R.A. 724, 733.

Will prepared by beneficiaries. 71 Am. Dec. 129.

Effect of unnatural testamentary disposition on question of undue influence. 6 L.R.A.(N.S.) 202; 22 L.R.A.(N.S.) 1024.

Character of presumption as to undue influence in bequest to mistress. 11 L.R.A.(N.S.) 554.

Effect of meretricious relations between testator and beneficiary on validity of devise or bequest. 17 L.R.A.(N.S.) 477.

Ante-testamentary declarations as evidence of undue influence. 3 L.R.A.(N.S.) 749.

Omitting part of will from probate because of undue influence. 34 L.R.A.(N.S.) 749.

Evidentiary force of circumstance that one benefited by a will was the draftsman thereof, or was active in procuring its execution. 28 L.R.A.(N.S.) 270.

As to similar provision in Cal. Civ. Code, § 1272, see *Re Kohler*, 79 Cal. 313, 21 Pac. 758.

§ 5643. **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. [R. C. 1905, § 5087; Civ. C. 1877, § 686; R. C. 1899, § 3642.]

Will of adopting parent cannot defeat rights of adopted child as established by contract with natural parent and by decree of court at time of adoption. *Quinn v. Quinn*, 5 S. D. 328, 58 N. W. 808, 49 Am. St. Rep. 875.

Parent's right to will custody of child. 2 L.R.A.(N.S.) 203.

Right of entry for condition broken as subject of a devise. 60 L.R.A. 762.

Burial lot as subject of devise. 67 L.R.A. 121.

Right of entryman to devise claim or interest in public lands. 34 L.R.A.(N.S.) 397.

Contingent remainder as subject of devise by remainderman. 21 L.R.A.(N.S.) 121.

Applicability to devise, of rule against conveyance of land held adversely. 35 L.R.A.(N.S.) 734.

Power of insured to destroy rights of beneficiary by bequeathing policy. 49 L.R.A. 748, 752.

Right to change beneficiary in policy by will. 4 L.R.A.(N.S.) 939.

Bequest of policy of insurance or proceeds thereof as a specific legacy. 7 L.R.A.(N.S.) 592.

Right to designate by will the beneficiary of benefit insurance. 42 L.R.A.(N.S.) 1161.

As to similar provision in Cal. Civ. Code, § 1274, see *Re Burdick*, 112 Cal. 387, 44 Pac. 734.

**§ 5644. 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. [R. C. 1905, § 5088; Civ. C. 1877, § 687; R. C. 1895, § 3643.]

Right of private person to contest power of corporation to take or hold property under a will. 32 L.R.A. 297.

Right to question power of corporation to take by will property in excess of its charter authority. 9 L.R.A.(N.S.) 689.

Who may take advantage of statute rendering foreign corporation incapable of taking title to real estate. 33 L.R.A.(N.S.) 355.

As to similar provision in Cal. Civ. Code, § 1275, see *Bulmer's Estate*, 59 Cal. 131; *Eastman's Estate*, 60 Cal. 308; *Re Robinson*, 63 Cal. 620; *Re Royer*, 123 Cal. 614, 44 L.R.A. 364, 56 Pac. 461; *Tobin's Estate*, *Myrick*, Prob. Ct. Rep. (Cal.) 134; *Wright's Estate*, *Myrick*, Prob. Ct. Rep. (Cal.) 213.

**§ 5645. 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. [R. C. 1905, § 5089; Civ. C. 1877, § 688; R. C. 1899, § 3644.]

Nuncupative wills. 20 Am. Dec. 44; 67 Am. St. Rep. 572.

What is "last sickness" permitting a nuncupative will. 13 L.R.A.(N.S.) 1092.

**§ 5646. 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. [R. C. 1905, § 5090; Civ. C. 1877, § 689; R. C. 1899, § 3645.]

Joint wills and their effect. 68 Am. Dec. 407.

Joint, mutual, reciprocal or multi wills. 136 Am. St. Rep. 592.

Contents of joint or mutual wills as affecting right to probate. 34 L.R.A.(N.S.) 976.

Revocability of mutual will. 27 L.R.A.(N.S.) 508; 37 L.R.A.(N.S.) 1196.

**§ 5647. 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. [R. C. 1905, § 5091; Civ. C. 1877, § 690; R. C. 1899, § 3646.]

**§ 5648. 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. [R. C. 1905, § 5092; Civ. C. 1877, § 691; R. C. 1899, § 3647.]

Deed not having essentials of will but passing present interest in land in fee simple is not a will. *Jones v. Jones*, 20 S. D. 632, 108 N. W. 23.



What are olographic or holographic wills. 52 Am. Dec. 591; 104 Am. St. Rep. 22.  
 Revocation of previous will by holographic will. 37 L.R.A. 566.  
 Writing name in body of holographic will as a signature thereto. 29 L.R.A.(N.S.) 64.  
 Violation of requirement that holographic will shall be written by testator. 26 L.R.A.(N.S.) 1145.  
 Necessity of witnesses to an holographic will. 14 L.R.A.(N.S.) 968.  
 Sufficiency of showing that paper offered as a holographic will was intended as such. 33 L.R.A.(N.S.) 1018.  
 Custody of holographic will. 37 L.R.A.(N.S.) 842.  
 As to similar provision in Cal. Civ. Code, § 1277, see *Martin's Estate*, 58 Cal. 530; *Re Rand*, 61 Cal. 468, 44 Am. Rep. 555; *Billings's Estate*, 64 Cal. 427, 1 Pac. 701; *Re Learned*, 70 Cal. 140, 11 Pac. 587; *Mitchell v. Donohue*, 100 Cal. 202, 38 Am. St. Rep. 279, 34 Pac. 614; *Re Stratton*, 112 Cal. 513, 44 Pac. 1028; *Re Lakemeyer*, 135 Cal. 28, 87 Am. St. Rep. 96, 66 Pac. 961; *Re Fay*, 145 Cal. 82, 104 Am. St. Rep. 17, 78 Pac. 340; *Re Clisby*, 145 Cal. 407, 104 Am. St. Rep. 58, 78 Pac. 964; *Donoho's Estate*, *Myrick*, *Prob. Ct. Rep.* (Cal.) 140.

**§ 5649. 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. [R. C. 1905, § 5093; Civ. C. 1877, § 691; R. C. 1899, § 3648.]

When will not fully executed is valid. 36 Am. Dec. 316.

As to similar provision in Cal. Civ. Code, § 1276, see *Toomes's Estate*, 54 Cal. 509, 35 Am. Rep. 83; *Re McCabe*, 68 Cal. 519, 9 Pac. 554; *Re Guilfoyle*, 96 Cal. 598, 22 L.R.A. 370, 31 Pac. 553; *Re Comassi*, 107 Cal. 1, 28 L.R.A. 414, 40 Pac. 15; *Re Walker*, 110 Cal. 387, 30 L.R.A. 460, 52 Am. St. Rep. 104, 42 Pac. 815; *Re Tyler*, 5 Cal. Unrep. 851, 50 Pac. 927; *Re Lynch*, 142 Cal. 373, 75 Pac. 1086; *Re Clisby*, 145 Cal. 407, 104 Am. St. Rep. 58, 78 Pac. 964; *Re Seaman*, 146 Cal. 455, 106 Am. St. Rep. 53, 80 Pac. 700, 2 Ann. Cas. 726; *Taney's Estate*, *Myrick*, *Prob. Ct. Rep.* (Cal.) 210; *Donoho's Estate*, *Myrick*, *Prob. Ct. Rep.* (Cal.) 140.

1. What is a sufficient signing of will. 42 Am. Dec. 571.

Signature by other person. 6 L.R.A. 357; 22 L.R.A. 299.

Signature by mark. 22 L.R.A. 370.

Does ability to write invalidate signature made by mark or by aid of other person guiding the pen. 7 L.R.A.(N.S.) 1193.

Proof of signature by mark when attesting witnesses are dead or cannot remember. 44 L.R.A. 142.

When will deemed to have been signed or subscribed at the end. 17 L.R.A.(N.S.) 353; 23 L.R.A.(N.S.) 515; 30 L.R.A.(N.S.) 1173.

Writing name in body of will as a signature thereto. 29 L.R.A.(N.S.) 63.

Writing name in body of holographic will as signature thereto. 29 L.R.A.(N.S.) 64.

Signing of will at end of instrument where name follows attestation clause. 17 L.R.A.(N.S.) 354.

Collateral attack on probate where decree or will affirmatively shows matter below testator's signature. 42 L.R.A.(N.S.) 458.

2. Necessity that witnesses see testator sign or that they see his signature, 38 L.R.A.(N.S.) 161.

What amounts to signing in the presence of witnesses. 60 Am. Rep. 285.

4. Attestation and witnessing of will. 10 Am. Dec. 516; 114 Am. St. Rep. 209.

Effect of fact that person who executed will was not previously known to witness. 21 L.R.A.(N.S.) 531.

Collateral attack on probate where decree or will affirmatively shows the will to be invalid because of defects as to attesting witnesses. 42 L.R.A.(N.S.) 456.

Signature of witnesses to will before testator signs it. 14 L.R.A. 160; 26 L.R.A.(N.S.) 1126.

When witness is deemed to subscribe in testator's presence. 1 L.R.A.(N.S.) 393; 28 Am. Rep. 595.

Attestation of will by mark. 22 L.R.A. 372.

Necessity of attestation clause of will. 14 L.R.A.(N.S.) 255.

**§ 5650. What unnecessary in nuncupative wills.** A nuncupative will is not required to be in writing, nor to be declared or attested with any formalities. [R. C. 1905, § 5094; Civ. C. 1877, § 692; R. C. 1899, § 3649.]

**§ 5651. 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. [R. C. 1905, § 5095; Civ. C. 1877, § 693; R. C. 1899, § 3650.]

**§ 5652. 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. [R. C. 1905, § 5096; Civ. C. 1877, § 694; R. C. 1899, § 3651.]

How far will modified by codicil. 1 L.R.A. (N.S.) 397.

Revocation of prior will by codicil. 37 L.R.A. 571.

Effect of republication of will by codicil to incorporate extrinsic document into will. 68 L.R.A. 381.

Effect of signature to codicil of will not signed at the end. 17 L.R.A. (N.S.) 357.

As to similar provision in Cal. Civ. Code, § 1287, see *Re Ladd*, 94 Cal. 670, 30 Pac. 99; *Re McCauley*, 138 Cal. 432, 71 Pac. 512.

**§ 5653. 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. [R. C. 1905, § 5097; Civ. C. 1877, § 695; R. C. 1899, § 3652.]

Law of testator's domicile controls as to personal property. 2 Am. Dec. 454.

**§ 5654. 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. [R. C. 1905, § 5098; Civ. C. 1877, § 696; R. C. 1899, § 3653.]

**§ 5655. 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. [R. C. 1905, § 5099; Civ. C. 1877, § 697; R. C. 1899, § 3654.]

**§ 5656. 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. [R. C. 1905, § 5100; Civ. C. 1877, § 698; R. C. 1899, § 3655.]

**§ 5657. 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. [R. C. 1905, § 5101; Civ. C. 1877, § 699; R. C. 1899, § 3656.]

**§ 5658. 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 jurisdic-

tion of its probate. [R. C. 1905, § 5102; Civ. C. 1877, § 700; R. C. 1899, § 3657.]

**§ 5659. 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. [R. C. 1905, § 5103; Civ. C. 1877, § 701; R. C. 1899, § 3658.]

Presumption as to revocation of missing will. 38 L.R.A. 433.

**§ 5660. 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, cancelled, 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. [R. C. 1905, § 5104; Civ. C. 1877, § 702; R. C. 1899, § 3659.]

Revocation of will. 45 Am. Rep. 338; 28 Am. St. Rep. 344.

—by implication. 15 Am. Dec. 659.

—by mistake or under an erroneous assumption of fact. 48 Am. St. Rep. 198.

—by subsequent birth of issue. 26 Am. Rep. 159.

—from change in condition or circumstances of testator, other than marriage or birth of issue. 130 Am. St. Rep. 628.

—how accomplished. 45 Am. Rep. 338.

Partition deed as revocation of will. 57 L.R.A. 339.

Effect of divorce to revoke gift by will. 69 L.R.A. 940.

Divorce as affecting right to take under gift to "husband," "wife" or "widow." 33 L.R.A.(N.S.) 826.

Settlement of property rights between husband and wife on account of divorce as implied revocation of will. 20 L.R.A.(N.S.) 1073.

Power of one lacking testamentary capacity to revoke will. 18 L.R.A.(N.S.) 99.

Revocability of mutual will. 27 L.R.A.(N.S.) 508; 37 L.R.A.(N.S.) 1196.

Republication of revoked will. 76 Am. St. Rep. 249.

As to similar provision in Cal. Civ. Code, § 1292, see *Clarke v. Ransom*, 50 Cal. 595; *Re Tillman*, 3 Cal. Unrep. 677, 31 Pac. 563; *Re Hickman*, 101 Cal. 609, 36 Pac. 118; *Re Comassi*, 107 Cal. 1, 28 L.R.A. 414, 40 Pac. 15; *Re Lones*, 108 Cal. 688, 41 Pac. 771; *Re McCauley*, 138 Cal. 432, 71 Pac. 512.

2. Revocation by obliterations or interlineations. 25 Am. Rep. 35.

Cancellation or mutilation of will as affected by invalidity of a second will. 6 L.R.A.(N.S.) 1107.

Attempt to revoke portions of a will by burning, tearing, cancelling, obliterating or destroying. 38 L.R.A.(N.S.) 797.

Declarations of testator as admissible on issue of his intent in destroying will. 24 L.R.A.(N.S.) 180.

Subsequent ratification of unauthorized destruction as revocation of will. 2 B. R. C. 550.

**§ 5661. How cancellation must be proved.** When a will is cancelled 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. [R. C. 1905, § 5105; Civ. C. 1877, § 703; R. C. 1899, § 3660.]

**§ 5662. 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. [R. C. 1905, § 5106; Civ. C. 1877, § 704; R. C. 1899, § 3661.]

Attempt to revoke portions of a will by burning, tearing, cancelling, obliterating or destroying. 38 L.R.A.(N.S.) 797.

Burden of explaining erasures or alterations appearing on face of will. 17 L.R.A.(N.S.) 184.

**§ 5663. Revocation of will in duplicate.** The revocation of a will, executed in duplicate, may be made by revoking one of the duplicates. [R. C. 1905, § 5107; Civ. C. 1877, § 705; R. C. 1899, § 3662.]

**§ 5664. 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. [R. C. 1905, § 5108; Civ. C. 1877, § 706; R. C. 1899, § 3663.]

Revocation of will by subsequent will. 37 L.R.A. 561.

As to similar provision in Cal. Civ. Code, § 1296, see *Re Murphy*, 104 Cal. 554, 38 Pac. 543.

**§ 5665. 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, cancelling 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, cancelling or revocation he duly republishes the prior will. [R. C. 1905, § 5109; Civ. C. 1877, § 707; R. C. 1895, § 3664.]

Presumption that one of two wills known to have been made was destroyed for purpose of revocation, and that the one retained is the last one, is overcome by uncontradicted testimony of person who drew both that the one not found was drawn last. *Starkweather v. Bell*, 13 S. D. 475, 83 N. W. 566.

Effect of revocation of later will to revive an earlier one. 37 L.R.A. 575; 14 L.R.A. (N.S.) 937; 37 L.R.A. (N.S.) 291; 76 Am. Dec. 652; 45 Am. Rep. 327.

As to similar provision in Cal. Civ. Code, § 1297, see *Re Lones*, 108 Cal. 688, 41 Pac. 771.

**§ 5666. 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. [R. C. 1905, § 5110; Civ. C. 1877, § 707; R. C. 1899, § 3665.]

Husband and wife are heirs at law to each other's estate, the portion which each will inherit depending upon presence or absence of other heirs. *Fore v. Fore*, 2 N. D. 260, 50 N. W. 712.

Will is revoked by testator's subsequent marriage where wife is not mentioned therein nor otherwise provided for. *Griffing v. Gilason*, 21 S. D. 56, 109 N. W. 646.

Will made before death of first wife without issue, revoked on marriage to second. *Re Larsen*, 18 S. D. 335, 100 N. W. 738, 5 A. & E. Ann. Cas. 794.

Revocation of will by marriage. 80 Am. Dec. 516.

Adopted child as a "child" within statute relating to revocation of will. 30 L.R.A. (N.S.) 916.

As to similar provision in Cal. Civ. Code, § 1298, see *Sanders v. Simcich*, 65 Cal. 50, 2 Pac. 741; *Re Comassi*, 107 Cal. 1, 28 L.R.A. 414, 40 Pac. 15.

**§ 5667. 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. [R. C. 1905, § 5111; Civ. C. 1877, § 708; R. C. 1899, § 3666.]

Collateral attack on probate where decree or will affirmatively shows its revocation by testator's marriage. 42 L.R.A. (N.S.) 457.

As to similar provision in Cal. Civ. Code, § 1299, see *Sanders v. Simcich*, 65 Cal. 50, 2 Pac. 741; *Corker v. Corker*, 87 Cal. 643, 25 Pac. 922; *Re Comassi*, 107 Cal. 1, 28 L.R.A. 414, 40 Pac. 15.

**§ 5668. 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. [R. C. 1905, § 5112; Civ. C. 1877, § 709; R. C. 1899, § 3667.]

Revocation of will by marriage of a woman. 49 Am. Rep. 329.

Collateral attack on probate where decree or will affirmatively shows its revocation by testator's marriage. 42 L.R.A. (N.S.) 457.

As to similar provision in Cal. Civ. Code, § 1300, see *Re Comassi*, 107 Cal. 1, 28 L.R.A. 414, 40 Pac. 15.

**§ 5669. 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. [R. C. 1905, § 5113; Civ. C. 1877, § 710; R. C. 1899, § 3668.]

**§ 5670. 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. [R. C. 1905, § 5114; Civ. C. 1877, § 711; R. C. 1899, § 3669.]

**§ 5671. 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. [R. C. 1905, § 5115; Civ. C. 1877, § 712; R. C. 1899, § 3670.]

**§ 5672. 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. [R. C. 1905, § 5116; Civ. C. 1877, § 713; R. C. 1899, § 3671.]

**§ 5673. Revocation revokes codicils.** The revocation of a will revokes all its codicils. [R. C. 1905, § 5117; Civ. C. 1877, § 714; R. C. 1899, § 3672.]

**§ 5674. 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. [R. C. 1905, § 5118; Civ. C. 1877, § 715; R. C. 1899, § 3673.]

When children entitled to inherit notwithstanding will. 12 Am. St. Rep. 97.

Admissibility of extrinsic circumstances in ascertaining intention of testator in respect to disinheriting an after-born child. 13 L.R.A. (N.S.) 781.

Capacity of child en ventre sa mere to take under devise or bequest to "children," etc. 1 B. R. C. 582.

As to similar provision in Cal. Civ. Code, § 1306, see *Re Wardell*, 57 Cal. 484; *Smith v. Olmstead*, 88 Cal. 582, 12 L.R.A. 46, 22 Am. St. Rep. 336, 26 Pac. 521; *Painter v. Painter*, 113 Cal. 371, 45 Pac. 689; *Re Smith*, 145 Cal. 118, 78 Pac. 369.

**§ 5675. 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. [R. C. 1905, § 5119; Civ. C. 1877, § 715; R. C. 1899, § 3674.]

As to omission to provide for children in will. *Hedderich v. Hedderich*, 18 N. D. 488, 123 N. W. 276.

Unexplained omission of children in will does not necessarily invalidate instrument, even though such will may be ineffectual as to such persons, and distribution to such children will be made uninfluenced by will. *Lowery v. Hawker*, 22 N. D. 318, 37 L.R.A. (N.S.) 1143, 133 N. W. 918.

Parol testimony is admissible to establish fact that child omitted from will was intentionally omitted. *Re Schultz*, 19 N. D. 688, 125 N. W. 555.

When child deemed intentionally omitted from. 39 Am. Dec. 740.

As to similar provision in Cal. Civ. Code, § 1307, see *Re Wardell*, 57 Cal. 484; *Re Grider*, 81 Cal. 571, 22 Pac. 908; *Re Stevens*, 83 Cal. 322, 17 Am. St. Rep. 252, 23 Pac. 379; *Re Barter*, 86 Cal. 441, 25 Pac. 15; *Smith v. Olmstead*, 88 Cal. 583, 12 L.R.A.

46, 22 Am. St. Rep. 336, 26 Pac. 521; Rhoton v. Blevin, 99 Cal. 645, 34 Pac. 513; Re Salmon, 107 Cal. 614, 48 Am. St. Rep. 164, 40 Pac. 1030; Re Callaghan, 119 Cal. 571, 39 L.R.A. 689, 51 Pac. 860; Re Ross, 140 Cal. 282, 73 Pac. 976; Wardell's Estate, Myrick, Prob. Ct. Rep. (Cal.) 224.

**§ 5676. 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. [R. C. 1905, § 5120; Civ. C. 1877, § 715; R. C. 1899, § 3675.]

As to similar provision in Cal. Civ. Code, § 1308, see Re Ross, 140 Cal. 282, 73 Pac. 976; Re Smith, 145 Cal. 118, 78 Pac. 369.

**§ 5677. 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. [R. C. 1905, § 5121; Civ. C. 1877, § 715; R. C. 1899, § 3676.]

**§ 5678. What devise of land conveys.** Every devise of land in any will conveys all the estate of the deviser therein, which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate. [R. C. 1905, § 5122; Civ. C. 1877, § 715; R. C. 1899, § 3677.]

What is appurtenant to land for the purposes of wills. 15 L.R.A. 654.

Devise or bequest of property as passing good will of business conducted in connection with such property. 16 L.R.A.(N.S.) 240.

Devise as carrying visible easement. 38 L.R.A.(N.S.) 882.

Will real estate pass under the word "effects" in a will. 12 L.R.A.(N.S.) 661.

Right to proceeds of land under a devise. 58 L.R.A. 719.

Necessity of word "heirs" in devise in trust to pass fee to trustee. 2 L.R.A.(N.S.) 172.

Right of husband under a devise and bequest to others subject to the "legal rights" of the husband. 2 L.R.A.(N.S.) 1193.

Expression of intent to make provision for family as affecting estate taken by beneficiaries of trust in absence of any express definition thereof. 17 L.R.A.(N.S.) 1215.

Effect of reference to extrinsic document to control or modify the character of the estate that would otherwise pass under instrument. 8 L.R.A.(N.S.) 1038.

**§ 5679. 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. [R. C. 1905, § 5123; Civ. C. 1877, § 716; R. C. 1899, § 3678.]

Effect of death of beneficiary before testator. 94 Am. Dec. 156.

As to similar provision in Cal. Civ. Code, § 1310, see Re Sutro, 139 Cal. 87, 72 Pac. 827; Re Ross, 140 Cal. 282, 73 Pac. 976.

**§ 5680. 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. [R. C. 1905, § 5124; Civ. C. 1877, § 717; R. C. 1899, § 3679.]

**§ 5681. 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. [R. C. 1905, § 5125; Civ. C. 1877, § 718; R. C. 1899, § 3680.]

**§ 5682. 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. [R. C. 1905, § 5126; Civ. C. 1877, § 718; R. C. 1899, § 3681.]

**§ 5683. 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. 1905, § 5127; R. C. 1895, § 3682.]

Homicide as affecting devolution of property. 3 L.R.A.(N.S.) 726; 39 L.R.A.(N.S.) 1088.

Effect on right to probate will of fact that legatee is murderer of testator. 34 L.R.A.(N.S.) 967.

**§ 5684. 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. [R. C. 1905, § 5128; Civ. C. 1877, § 719; R. C. 1899, § 3683.]

Whether and when after-acquired property passes by will. 135 Am. St. Rep. 794.

#### ARTICLE 2.—INTERPRETATION OF WILLS AND EFFECT OF VARIOUS PROVISIONS.

**§ 5685. 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. [R. C. 1905, § 5129; Civ. C. 1877, § 720; R. C. 1899, § 3684.]

Jurisdiction of equity to construe will. 129 Am. St. Rep. 78.

As to similar provision in Cal. Civ. Code, § 1317, see *Re Willey*, 128 Cal. 1, 56 Pac. 550, 60 Pac. 471; *Re Fair*, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000; *Re Fair*, 136 Cal. 79, 68 Pac. 306.

**§ 5686. 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. [R. C. 1905, § 5130; Civ. C. 1877, § 721; R. C. 1899, § 3685.]

In construction of ambiguous expressions situation of parties may be taken into view. *Rock v. Zimmermann*, 25 S. D. 237, 126 N. W. 265.

Admissibility of declarations of testators in controversies respecting wills. 3 Am. Dec. 395; 107 Am. St. Rep. 459.

Competency of scrivener or draftsman to testify to his own or the testator's intention. 38 L.R.A.(N.S.) 91.

Parol or extrinsic evidence as to intention to incorporate extrinsic document into will. 68 L.R.A. 384.

—of testator's intent to adeem legacy or devise. 40 L.R.A.(N.S.) 551, 558.

—as to testator's intent to adeem general legacy by gift. 38 L.R.A.(N.S.) 592.

—for the purpose of charging property with payment of legacies or debts where the will is silent on that point. 19 L.R.A.(N.S.) 457.

—to ascertain testator's intention as to disinheriting after-born child. 13 L.R.A.(N.S.) 781.

—to show that instrument, on its face a will, was not intended as such. 28 L.R.A.(N.S.) 417.

—to show that instrument not on its face of a testamentary character was intended to be such, so as to take effect as a will. 13 L.R.A.(N.S.) 1203.

As to similar provision in Cal. Civ. Code, § 1318, see *Re Young*, 123 Cal. 337, 55 Pac. 1011.

§ 5687. **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. [R. C. 1905, § 5131; Civ. C. 1877, § 722; R. C. 1899, § 3686.]

§ 5688. **Construed together, if several.** Several testamentary instruments executed by the same testator are to be taken and construed together as one instrument. [R. C. 1905, § 5132; Civ. C. 1877, § 723; R. C. 1899, § 3687.]

§ 5689. **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. [R. C. 1905, § 5133; Civ. C. 1877, § 724; R. C. 1899, § 3688.]

§ 5690. **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. [R. C. 1905, § 5134; Civ. C. 1877, § 725; R. C. 1899, § 3689.]

As to similar provision in Cal. Civ. Code, § 1322, see *Re Marti*, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071.

§ 5691. **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. [R. C. 1905, § 5135; Civ. C. 1877, § 726; R. C. 1899, § 3690.]

§ 5692. **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. [R. C. 1905, § 5136; Civ. C. 1877, § 727; R. C. 1899, § 3691.]

Construction of "and" for "or" and vice versa. 48 Am. Dec. 565.

What property passes by term "goods." 1 Am. Dec. 294.

As to similar provision in Cal. Civ. Code, § 1324, see *Re Marti*, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071.

§ 5693. **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. [R. C. 1905, § 5137; Civ. C. 1877, § 728; R. C. 1899, § 3692.]

§ 5694. **So as to prevent intestacy.** Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy. [R. C. 1905, § 5138; Civ. C. 1877, § 729; R. C. 1899, § 3693.]

§ 5695. **Technical words.** Technical words in a will are to be taken in their technical sense unless the context clearly indicates a contrary intention. [R. C. 1905, § 5139; Civ. C. 1877, § 730; R. C. 1899, § 3694.]

§ 5696. **Same. Unnecessary.** Technical words are not necessary to give effect to any species of disposition by will [R. C. 1905, § 5140; Civ. C. 1877, § 731; R. C. 1899, § 3695.]

Liberal construction of charitable trust in will should be adopted, in order to render trust effective. *Hagen v. Sacrison*, 19 N. D. 160, 26 L.R.A.(N.S.) 724, 123 N. W. 518.

§ 5697. **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. [R. C. 1905, § 5141; Civ. C. 1877, § 732; R. C. 1899, § 3696.]

§ 5698. **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. [R. C. 1905, § 5142; Civ. C. 1877, § 733; R. C. 1899, § 3697.]

Devise including absolute power of disposition necessarily vests an estate in fee. 28 Am. Rep. 4.



Devise or bequest for life with power of disposal. 139 Am. St. Rep. 82.

As to similar provision in Cal. Civ. Code, § 1330, see *Re Fair*, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000.

**§ 5699. 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. [R. C. 1905, § 5143; Civ. C. 1877, § 734; R. C. 1899, § 3698.]

Clause in will by which rest, residue and remainder of his real property is devised, but provided that such devise should not affect land specifically devised, meant that testator intended by such clause to devise all land not specifically devised, whether he had more or less than he could remember when he gave description. *Rock v. Zimmermann*, 25 S. D. 237, 126 N. W. 265.

**§ 5700. 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. [R. C. 1905, § 5144; Civ. C. 1877, § 735; R. C. 1899, § 3699.]

Devolution of lapsed legacy or devise where will contains residuary clause. 44 L.R.A.(N.S.) 789.

As to similar provision in Cal. Civ. Code, § 1332, see *Re Upham*, 127 Cal. 90, 59 Pac. 315.

**§ 5701. 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. [R. C. 1905, § 5145; Civ. C. 1877, § 736; R. C. 1899, § 3700.]

As to similar provision in Cal. Civ. Code, § 1333, see *Re Upham*, 127 Cal. 90, 59 Pac. 315.

**§ 5702. 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. [R. C. 1905, § 5146; Civ. C. 1877, § 737; R. C. 1899, § 3701.]

What words in will pass real estate. 14 Am. Dec. 576.

Meaning of "next of kin." 15 L.R.A. 300.

Right of persons claiming through deceased relative to participate with those standing in equal degree of relationship with such relative, in provision for "next of kin," etc. 28 L.R.A.(N.S.) 479.

Do terms "child," "children," "issue," etc., in a will, include adopted children. 27 L.R.A.(N.S.) 1158.

Who takes under gift to "husband," "wife" or "widow." 33 L.R.A.(N.S.) 816.

Who are relatives or relations. 13 L.R.A. 37; 14 L.R.A. 342.

**§ 5703. 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. [R. C. 1905, § 5147; Civ. C. 1877, § 738; R. C. 1899, § 3702.]

**§ 5704. 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. [R. C. 1905, § 5148; Civ. C. 1877, § 739; R. C. 1899, § 3703.]

As to similar provision in Cal. Civ. Code, § 1336, see *Re Winter*, 114 Cal. 186, 45 Pac. 1063.

**§ 5705. 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. [R. C. 1905, § 5149; Civ. C. 1877, § 740; R. C. 1899, § 3704.]

To justify operation of rule laid down in this section there must at least be delivery of deed, which implies intent that it shall become at once operative, either absolutely or conditionally. *Koester v. Northwestern Port Huron Co.*, 24 S. D. 546, 124 N. W. 740.

Who entitled to take under bequests and devises to class. 73 Am. St. Rep. 413.

Devises and bequests to children as a class. 46 Am. Dec. 666.

Time for ascertaining members of class described as testator's "heirs," "next of kin," "relations," etc., to whom an estate in real or personal property is limited by way of remainder or executory gift. 33 L.R.A.(N.S.) 1.

**§ 5706. 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. [R. C. 1905, § 5150; Civ. C. 1877, § 741; R. C. 1899, § 3705.]

Real property converted into personalty by will is governed by laws of jurisdiction in which testator was domiciled at time of death. *Penfield v. Tower*, 1 N. D. 216, 46 N. W. 413.

Conflict of laws as to equitable conversion. 2 L.R.A.(N.S.) 457.

When is there such a failure of testator's purpose or object as to preclude the application of the doctrine of equitable conversion. 20 L.R.A.(N.S.) 117.

Conversion by directing sale after devising land. 39 L.R.A.(N.S.) 817.

As of what time conversion takes place under direction to sell real property which postpones sale to definitely ascertainable time subsequent to testator's death. 20 L.R.A.(N.S.) 65.

As to similar provision in Cal. Civ. Code, § 1338, see *Bank of Ukiah v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118, 76 Pac. 1020; *Re Pforr*, 144 Cal. 121, 77 Pac. 825.

**§ 5707. 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. [R. C. 1905, § 5151; Civ. C. 1877, § 742; R. C. 1899, § 3706.]

Devise or bequest to "children" or grandchildren. 1 B. R. C. 583.

Admissibility of extrinsic circumstances in ascertaining intention of testator in respect to disinheriting an after-born child. 13 L.R.A.(N.S.) 780.

**§ 5708. 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. [R. C. 1905, § 5152; Civ. C. 1877, § 743; R. C. 1899, § 3707.]

Extrinsic evidence to aid the interpretation or application of will. 46 Am. Rep. 72; 58 Am. Rep. 74; 50 Am. St. Rep. 279.

Correction of misdescription of land in will. 16 L.R.A. 321; 6 L.R.A.(N.S.) 943.

Parol evidence to correct description of property. 8 Am. Rep. 669.

Parol evidence to show a mistake in drafting will. 8 Am. Rep. 669.

Reforming and correcting will in equity. 66 Am. Dec. 633.

As to similar provision in Cal. Civ. Code, § 1340, see *Re Callaghan*, 119 Cal. 571, 39 L.R.A. 689, 51 Pac. 860.

**§ 5709. 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. [R. C. 1905, § 5153; Civ. C. 1877, § 744; R. C. 1899, § 3708.]

Legacies, when vested and when contingent. 10 Am. St. Rep. 471.

As to similar provision in Cal. Civ. Code, § 1341, see *Re Fair*, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000.

**§ 5710. 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. [R. C. 1905, § 5154; Civ. C. 1877, § 745; R. C. 1899, § 3709.]

**§ 5711. 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 5679. [R. C. 1905, § 5155; Civ. C. 1877, § 746; R. C. 1899, § 3710.]

As to similar provision in Cal. Civ. Code, § 1343, see *Re Bennett*, 134 Cal. 320, 66 Pac. 370; *Re Sutro*, 139 Cal. 87, 72 Pac. 827.

**§ 5712. 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. [R. C. 1905, § 5156; Civ. C. 1877, § 747; R. C. 1899, § 3711.]

**§ 5713. 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. [R. C. 1905, § 5157; Civ. C. 1877, § 748; R. C. 1899, § 3712.]

Effect of provision in will that any beneficiary who contests the instrument shall forfeit his interest. 68 L.R.A. 447.

Will court determine whether condition in devise or bequest as to good conduct or character of beneficiary has been satisfied, where that duty has been imposed on no one else. 25 L.R.A.(N.S.) 424.

Effect of fact that breach of condition in devise or legacy relating to conduct of legatee or devisee is involuntary on latter's part. 27 L.R.A.(N.S.) 684.

Equitable relief against forfeiture of devise on condition of support. 69 L.R.A. 841.

Equitable relief against forfeiture of devise on condition of payment of money. 69 L.R.A. 842.

Character of estate created by grant, lease or devise of property to person so long as he shall desire to live upon it, or devote it to a particular use. 21 L.R.A.(N.S.) 575.

Validity of bequest to individual on condition of adhering to, or renouncing, particular religious belief. 5 L.R.A.(N.S.) 804.

Validity of provision that money shall be payable to obligee only and not to his estate. 17 L.R.A.(N.S.) 1239.

To what time is the contingency of death of a legatee or devisee without child or issue, upon which a gift is conditioned, referable. 25 L.R.A.(N.S.) 1045.

**§ 5714. Condition precedent.** A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect. [R. C. 1905, § 5158; Civ. C. 1877, § 749; R. C. 1899, § 3713.]

What are conditions precedent in will. 102 Am. St. Rep. 366.

**§ 5715. 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. [R. C. 1905, § 5159; Civ. C. 1877, § 750; R. C. 1899, § 3714.]

**§ 5716. 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. [R. C. 1905, § 5160; Civ. C. 1877, § 751; R. C. 1899, § 3715.]

**§ 5717. 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. [R. C. 1905, § 5161; Civ. C. 1877, § 752; R. C. 1899, § 3716.]

Will directing that testatrix's land be equally divided between her four children except that specified son should have privilege of buying "homestead" did not create condition subsequent upon devise of homestead so as to make devise subject to be divested by son's election to purchase. Re Sjurson, 29 S. D. 566, 137 N. W. 341.

Effect upon remainder of forfeiture of life estate for breach of condition subsequent. 21 L.R.A.(N.S.) 605.

Effect of specifying use of real estate in devise to religious society. 11 L.R.A.(N.S.) 509.

**§ 5718. Owners in common.** A devise or legacy given to more than one person vests in them as owners in common. [R. C. 1905, § 5162; Civ. C. 1877, § 753; R. C. 1899, § 3717.]

As to similar provision in Cal. Civ. Code, § 1350, see Re Hittell, 141 Cal. 432, 75 Pac. 53.

**§ 5719. 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. [R. C. 1905, § 5163; Civ. C. 1877, § 754; R. C. 1899, § 3718.]

Ademption of legacies. 37 Am. Dec. 667; 95 Am. St. Rep. 342.

Disposal, loss or destruction of subject-matter, or payment of debt, as ademption of specific legacy or devise. 40 L.R.A.(N.S.) 542.

Change in subject-matter or substitution of other property as ademption of a specific legacy or devise. 40 L.R.A.(N.S.) 553.

Collection of insurance policy during lifetime of testator as ademption of specific legacy thereof. 40 L.R.A.(N.S.) 561.

Gift by testator as ademption of general legacy to donee. 38 L.R.A.(N.S.) 589.

Gift to one spouse by parent of the other as ademption. 26 L.R.A.(N.S.) 1050.

#### ARTICLE 3.— GENERAL PROVISIONS.

§ 5720. **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. [R. C. 1905, § 5164; Civ. C. 1877, § 755; R. C. 1899, § 3719.]

As to specific legacy. *Adair v. Adair*, 11 N. D. 175, 90 N. W. 804.

Demonstrative, general and specific legacies. 11 Am. Dec. 468; 8 Am. St. Rep. 721.

Specific, demonstrative and general bequests defined and distinguished. 140 Am. St. Rep. 577.

Right of devisee or legatee to attack conveyance or transfer by testator. 30 L.R.A.(N.S.) 194.

Bequest of policy of insurance, or proceeds thereof, as specific legacy. 7 L.R.A.(N.S.) 592.

Is bequest of stocks, bonds or notes general or specific. 11 L.R.A.(N.S.) 49.

As to similar provision in Cal. Civ. Code, § 1357, see *Apple's Estate*, 66 Cal. 432, 6 Pac. 7; *Re Mackay*, 107 Cal. 303, 40 Pac. 558; *Re Williams*, 112 Cal. 521, 53 Am. St. Rep. 224, 44 Pac. 808.

§ 5721. **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. [R. C. 1905, § 5165; Civ. C. 1877, § 756; R. C. 1895, § 3720.]

§ 5722. **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. [R. C. 1905, § 5166; Civ. C. 1877, § 757; R. C. 1895, § 3721.]

Executor of insured may claim proceeds of life policy as against special legatee and proceeds are burdened with payment of decedent's debts. *Meyer v. Meyer*, 25 S. D. 596, 127 N. W. 595.

Contribution as between specific legatees and specific devisees to pay testator's debts. 1 L.R.A.(N.S.) 461.

Order of abatement to pay debts as between demonstrative legacies and specific legacies. 4 L.R.A.(N.S.) 922.

Subrogation of specific legatees to rights of creditors. 16 Am. Dec. 105.

**§ 5723. 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. [R. C. 1905, § 5167; Civ. C. 1877, § 758; R. C. 1895, § 3722.]

Is a legacy given to a creditor in satisfaction of his debt entitled to priority over other legacies of same class. 2 B. R. C. 509.

Right of devisee to completion of improvements at the expense of the estate. 36 L.R.A.(N.S.) 303.

Right of devisee of incumbered property to exoneration at expense of legatee. 3 L.R.A.(N.S.) 898.

Remedies for enforcement of legacy when charged upon devise. 30 L.R.A.(N.S.) 815.

Admissibility of extrinsic evidence for purpose of charging property with payment of legacies or debts where the will is silent on that point. 19 L.R.A.(N.S.) 457.

As to similar provision in Cal. Civ. Code, § 1360, see *Re Neistrath*, 66 Cal. 330, 5 Pac. 507.

**§ 5724. Preferred legacies.** Legacies to husband, widow or kindred of any class are chargeable only after legacies to persons not related to the testator. [R. C. 1905, § 5168; Civ. C. 1877, § 759; R. C. 1899, § 3723.]

As to similar provision in Cal. Civ. Code, § 1361, see *Apple's Estate*, 66 Cal. 432, 6 Pac. 7.

**§ 5725. 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. [R. C. 1905, § 5169; Civ. C. 1877, § 760; R. C. 1899, § 3724.]

Abatement of legacies in case of deficiency of assets. 8 Am. St. Rep. 720.

As to similar provision in Cal. Civ. Code, § 1362, see *Re Neistrath*, 66 Cal. 330, 5 Pac. 507.

**§ 5726. 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. [R. C. 1905, § 5170; Civ. C. 1877, § 761; R. C. 1899, § 3725.]

**§ 5727. 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. [R. C. 1905, § 5171; Civ. C. 1877, § 762; R. C. 1899, § 3726.]

**§ 5728. 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. [R. C. 1905, § 5172; Civ. C. 1877, § 763; R. C. 1899, § 3727.]

Right of estate of one entitled by will or statute to an allowance for support and maintenance to accumulations undrawn and unexpended at time of her death. 9 L.R.A.(N.S.) 997.

**§ 5729. 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. [R. C. 1905, § 5173; Civ. C. 1877, § 764; R. C. 1899, § 3728.]

As to similar provision in Cal. Civ. Code, § 1366, see *Re Brown*, 143 Cal. 450, 77 Pac. 160.

**§ 5730. 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. [R. C. 1905, § 5174; Civ. C. 1877, § 765; R. C. 1899, § 3729.]

**§ 5731. 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. [R. C. 1905, § 5175; Civ. C. 1877, § 766; R. C. 1899, § 3730.]

As to similar provision in Cal. Civ. Code, § 1368, see *Re Brown*, 143 Cal. 450, 77 Pac. 160.

**§ 5732. 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. [R. C. 1905, § 5176; Civ. C. 1877, § 767; R. C. 1899, § 3731.]

Personal liability of executor or administrator to distributees for interest during litigation involving construction and interpretation of will. 31 L.R.A.(N.S.) 357.

Conflict of laws as to interest on legacy. 2 L.R.A.(N.S.) 468.

As to similar provision in Cal. Civ. Code, § 1369, see *Dunne v. Mastick*, 50 Cal. 244; *Mackay v. Mackay*, 107 Cal. 303, 40 Pac. 558; *Re Williams*, 112 Cal. 521, 53 Am. St. Rep. 224, 44 Pac. 808; *Re Blake*, 137 Cal. 429, 70 Pac. 303; *Re Brown*, 143 Cal. 450, 77 Pac. 160.

**§ 5733. Intention controls.** The four preceding sections are in all cases to be controlled by a testator's express intention. [R. C. 1905, § 5177; Civ. C. 1877, § 768; R. C. 1899, § 3732.]

As to similar provision in Cal. Civ. Code, § 1370, see *Re Williams*, 112 Cal. 521, 53 Am. St. Rep. 224, 44 Pac. 808.

**§ 5734. 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. [R. C. 1905, § 5178; Civ. C. 1877, § 769; R. C. 1899, § 3733.]

As to similar provision in Cal. Civ. Code, § 1371, see *Re Ogier*, 101 Cal. 381, 40 Am. St. Rep. 61, 35 Pac. 900.

**§ 5735. Authority to executor to appoint, void.** An authority to an executor to appoint an executor is void. [R. C. 1905, § 5179; Civ. C. 1877, § 770; R. C. 1899, § 3734.]

**§ 5736. 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. [R. C. 1905, § 5180; Civ. C. 1877, § 771; R. C. 1899, § 3735.]

**§ 5737. Executor of executor.** No executor of an executor, as such, has any power over the estate of the first testator. [R. C. 1905, § 5181; Civ. C. 1877, § 772; R. C. 1899, § 3736.]

**§ 5738. Will includes codicil.** The term "will" as used in this code includes all codicils as well as wills. [R. C. 1905, § 5182; Civ. C. 1877, § 773; R. C. 1899, § 3737.]

**§ 5739. 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. [R. C. 1905, § 5183; Civ. C. 1877, § 774; R. C. 1899, § 3738.]

Provisions of will relating to personal property situate in this state must be construed according to law of testator's domicile at time of death. *Crandell v. Barker*, 8 N. D. 263, 78 N. W. 347; *Penfield v. Tower*, 1 N. D. 216, 46 N. W. 413; *Knox v. Barker*, 8 N. D. 272, 78 N. W. 352.

Law governing construction of will. 2 L.R.A.(N.S.) 443.

By what law members of class to whom testamentary gift is made are to be ascertained. 2 B. R. C. 557.

**§ 5740. 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. [R. C. 1905, § 5184; Civ. C. 1877, § 775; R. C. 1895, § 3739.]

## CHAPTER 53.

## SUCCESSION.

**§ 5741. Succession defined.** Succession is the coming in of another to take the property of one who dies without disposing of it by will. [R. C. 1905, § 5185; Civ. C. 1877, § 776; R. C. 1899, § 3740.]

As to inheritance by illegitimate child. *Moen v. Moen*, 16 S. D. 210, 92 N. W. 12.  
Is the right to take property by inheritance a natural or statutory right. 9 L.R.A.(N.S.) 121.

As to similar provision in Cal. Civ. Code, § 1383, see *Re Burdick*, 112 Cal. 387, 44 Pac. 734.

**§ 5742. 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. [R. C. 1905, § 5186; Civ. C. 1877, § 777; R. C. 1899, § 3741.]

Realty passes at once to heirs without appointment of administrator. *Elder v. Horsehoe Min. Co.*, 9 S. D. 636, 70 N. W. 1060, 62 Am. St. Rep. 895.

Administrator may reduce real estate to actual possession, but is not required to do so. *Territory v. Bramble*, 2 D. 189, 5 N. W. 945.

On death of wife, husband and children become tenants in common of her property. *Johnson v. Brauch*, 9 S. D. 116, 68 N. W. 173, 62 Am. St. Rep. 857.

As to descent of property not disposed of by will. *Friese v. Friese*, 12 N. D. 82, 95 N. W. 446.

As to title to liquors passing to heirs on death of liquor dealer pending action against him. *State ex rel. Kelly v. McMaster*, 13 N. D. 58, 99 N. W. 58.

Rights of heirs in partnership real estate. 27 L.R.A. 348.

Right to rents on lease of intestate's property. 40 L.R.A. 321.

Homicide as affecting devolution of property. 3 L.R.A.(N.S.) 726; 39 L.R.A.(N.S.) 1088.

Does grantor's right to rescind for breach of condition as to support descend to his heirs or representatives. 23 L.R.A.(N.S.) 232.

Rights of heirs in personal property of ancestor. 112 Am. St. Rep. 727.

Who entitled to succeed to estates of intestates. 12 Am. St. Rep. 82.

Liability of heirs for obligations of ancestor. 21 L.R.A. 89.

Upon whom does the liability of an heir or devisee for his decedent's debts devolve at his own death. 39 L.R.A.(N.S.) 689.

Levy on interest of heir in ancestor's land. 23 L.R.A. 643.

As to similar provision in Cal. Civ. Code, § 1384, see *Watson v. Sutro*, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; *Smith v. Olmstead*, 88 Cal. 582, 13 L.R.A. 46, 22 Am. St. Rep. 336, 26 Pac. 521; *Phelan v. Smith*, 100 Cal. 158, 34 Pac. 667; *Bates v. Howard*, 105 Cal. 173, 38 Pac. 715.

**§ 5743. Order of succession.** When any person having title to any estate, not otherwise limited by marriage contract, expressly dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise 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 the time of 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, but if the decedent's child or children be dead, leaving issue, all the estate goes to such issue by right of representation.

2. If the decedent leaves no issue and the estate does not exceed in value the sum of ten thousand dollars, all the estate goes to the surviving husband or wife, and all property in excess of ten thousand dollars in value, one-half thereof goes to the surviving husband or wife and the other half goes to decedent's father and mother in equal shares, and if either is dead to the survivor, and if both father and mother are dead, and 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 mother in equal shares, and if either is dead, to the survivor. 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, and no father, nor mother, nor brother, nor sister, then 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 other children who are dead, by right of representation.

5. 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 parents; 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.

6. If the decedent leaves no husband, wife or kindred, the estate escheats to the state for the support of the common schools.

7. If the decedent be an infant, and leave no parents, nor brother nor sister, but leaving any person of kin, acting in the capacity of a foster parent, who may have assumed or have had imposed upon him, the duty or obligation of the personal care, custody, support or maintenance of such infant after the decease of its natural parents, and until its decease, but where such relationship was not created by a guardianship of the estate of such infant, then the estate of such infant shall descend to such foster parent or such person acting in such capacity. [1911, ch. 223; R. C. 1905, § 5187; Civ. C. 1877, § 778; 1893, ch. 50, § 1; R. C. 1899, § 3742; 1903, ch. 94.]

As to descent of property. *Dalrymple v. Security Improv. Co.*, 11 N. D. 65, 88 N. W. 1033.

An illegitimate child of one acknowledging the child in writing in the presence of witnesses is an heir to his realty, where the statute took effect before the father's death. *Moen v. Moen*, 16 S. D. 210, 92 N. W. 13.

Right of persons claiming through deceased relative to participate with those standing in equal degree of relationship with such relative, in provision for "next of kin" etc. 28 L.R.A.(N.S.) 479.

Alimony as wife's distributive share. 2 L.R.A.(N.S.) 239.

Widow's right to proceeds of insurance on deceased husband's life, payable to himself or his executors or administrators. 35 L.R.A.(N.S.) 964.



As to similar provision in Cal. Civ. Code, § 1886, see *Re Magee*, 63 Cal. 414; *Re Ingram*, 78 Cal. 586, 12 Am. St. Rep. 80, 21 Pac. 435; *Re Jessup*, 81 Cal. 408, 6 L.R.A. 594, 21 Pac. 976, 22 Pac. 742, 1028; *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269; *Smith v. Olmstead*, 88 Cal. 582, 12 L.R.A. 46, 22 Am. St. Rep. 336, 26 Pac. 521; *Re Carmody*, 88 Cal. 616, 26 Pac. 373; *Re Parsons*, 110 Cal. 524, 42 Pac. 960; *Re Eggers*, 114 Cal. 464, 46 Pac. 380; *Re Wilmerding*, 117 Cal. 281, 49 Pac. 181; *Knott v. McGilvray*, 124 Cal. 128, 56 Pac. 789, 6 Am. Neg. Rep. 7; *Re Smith*, 131 Cal. 433, 83 Am. St. Rep. 358, 63 Pac. 729; *Re McCauley*, 138 Cal. 546, 71 Pac. 458; *Re Miner*, 143 Cal. 194, 76 Pac. 968.

§ 5744. **Dower and curtesy abolished.** Dower and curtesy are abolished. [R. C. 1905, § 5188; Civ. C. 1877, § 779; 1893, ch. 52, § 1; R. C. 1899, § 3743.] Power of legislature to change or destroy estates by dower or curtesy. 19 L.R.A. 256.

—to increase dower right. 17 L.R.A. (N.S.) 319.

§ 5745. **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. [R. C. 1905, § 5189; Civ. C. 1877, § 780; R. C. 1899, § 3744.]

If adopted under section 4450 is clothed with full rights of inheritance of legitimate child. *Eddie v. Eddie*, 8 N. D. 376, 79 N. W. 856.

Illegitimate child may inherit from father who has acknowledged him by instrument in writing properly witnessed, but not from lineal or collateral kindred. *Eddie v. Eddie*, 8 N. D. 376, 79 N. W. 856, 73 Am. St. Rep. 765.

An illegitimate child of one acknowledging the child in writing in the presence of witnesses is an heir to his realty, where the statute took effect before the father's death. *Moen v. Moen*, 16 S. D. 210, 92 N. W. 13.

Inheritance by illegitimates. 23 L.R.A. 754.

Illegitimates as next of kin. 15 L.R.A. 301.

Conflict of laws as to legitimacy of distributee. 65 L.R.A. 178.

As to similar provision in Cal. Civ. Code, § 1387, see *Re Magee*, 63 Cal. 414; *Re Jessup*, 81 Cal. 406, 6 L.R.A. 594, 21 Pac. 976, 22 Pac. 742, 1028; *Blythe v. Ayres*, 96 Cal. 532, 19 L.R.A. 40, 31 Pac. 915; *Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522; *Re Blythe*, 112 Cal. 689, 45 Pac. 6.

§ 5746. **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. [R. C. 1905, § 5190; Civ. C. 1877, § 781; R. C. 1899, § 3745.]

Inheritance through or from illegitimate. 23 L.R.A. 753; 27 L.R.A. (N.S.) 220.

§ 5747. **How degree of kindred established.** The degree of kindred is established by the number of generations and each generation is called a degree. [R. C. 1905, § 5191; Civ. C. 1877, § 782; R. C. 1899, § 3746.]

§ 5748. **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. [R. C. 1905, § 5192; Civ. C. 1877, § 783; R. C. 1899, § 3747.]

§ 5749. **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. [R. C. 1905, § 5193; Civ. C. 1877, § 784; R. C. 1899, § 3748.]

**§ 5750. 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. [R. C. 1905, § 5194; Civ. C. 1877, § 785; R. C. 1899, § 3749.]

How degrees of consanguinity and affinity are computed for the purposes of descent and distribution. 56 Am. Dec. 293.

**§ 5751. 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. [R. C. 1905, § 5195; Civ. C. 1877, § 786; R. C. 1899, § 3750.]

As to similar provision in Cal. Civ. Code, § 1393, see *Robinson v. Southern P. Co.*, 105 Cal. 526, 28 L.R.A. 773, 38 Pac. 94, 722.

**§ 5752. 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. [R. C. 1905, § 5196; Civ. C. 1877, § 787; R. C. 1899, § 3751.]

Descent and distribution among kindred of the half blood. 29 L.R.A. 541; 26 L.R.A. (N.S.) 603; 61 Am. Dec. 665.

As to similar provision in Cal. Civ. Code, § 1394, see *Re Pearsons*, 110 Cal. 524, 42 Pac. 960; *Re Smith*, 131 Cal. 433, 82 Am. St. Rep. 358, 63 Pac. 729.

**§ 5753. 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. [R. C. 1905, § 5197; Civ. C. 1877, § 788; R. C. 1899, § 3752.]

Amount of advancement must equal or exceed share to which the heir would otherwise be entitled to exclude him from a distribution. *Aspey v. Barry*, 13 S. D. 220, 83 N. W. 91.

Interest on or to equalize advancement. 14 L.R.A. 716.

Right of one receiving advancement and executing release of interest in estate to share in after-acquired property. 65 L.R.A. 578.

**§ 5754. 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. [R. C. 1905, § 5198; Civ. C. 1877, § 789; R. C. 1899, § 3753.]

**§ 5755. 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. [R. C. 1905, § 5199; Civ. C. 1877, § 790; R. C. 1899, § 3754.]

What constitute advancements. 80 Am. Dec. 559.

Support of adult child as an advancement. 22 L.R.A. (N.S.) 1165.

Gift to one spouse by parent of the other as advancement or ademption. 26 L.R.A. (N.S.) 1050.

Grantee's oral promise to grantor to hold in trust as giving rise to constructive trust where conveyance was by way of advancement to child. 39 L.R.A. (N.S.) 920.

Admissibility of books of account to prove advancement. 52 L.R.A. 707.

Admissibility of parol evidence to show an advancement as consideration for a deed. 20 L.R.A. 108.

Parol evidence to show that deed was intended as an advancement. 25 L.R.A. (N.S.) 1205.

§ 5756. **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. [R. C. 1905, § 5200; Civ. C. 1877, § 791; R. C. 1899, § 3755.]

§ 5757. **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. [R. C. 1905, § 5201; Civ. C. 1877, § 792; R. C. 1899, § 3756.]

§ 5758. **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. [R. C. 1905, § 5202; Civ. C. 1877, § 793; R. C. 1899, § 3757.]

§ 5759. **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. [R. C. 1905, § 5203; Civ. C. 1877, § 794; R. C. 1899, § 3758.]

Inheritance by, through or from alien. 31 L.R.A. 177; 37 L.R.A.(N.S.) 108.

—effect of state constitutions and statutes. 31 L.R.A. 85.

—effect of treaties. 32 L.R.A. 177.

§ 5760. **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. [R. C. 1905, § 5204; Civ. C. 1877, § 795; R. C. 1899, § 3759.]

As to giving state's attorney notice of proceedings as to appointment of administrator. Re McClellan, 20 S. D. 498, 107 N. W. 681.

As to similar provision in Cal. Civ. Code, §§ 1405, 1406, see People ex rel. Atty.-Gen. v. Roach, 76 Cal. 298, 18 Pac. 407.

§ 5761. **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. [R. C. 1905, § 5205; Civ. C. 1877, § 796; R. C. 1899, § 3760.]

Right of state to escheat property of person dying without heirs is right which accrues only after administration and payment of debts, charges and expenses. Re McClellan, 27 S. D. 109, 129 N. W. 1037, Ann. Cas. 1913C, 1029.

As to similar provision in Cal. Civ. Code, § 1407, see People ex rel. Atty.-Gen. v. Roach, 76 Cal. 299, 18 Pac. 407.

§ 5762. **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. [R. C. 1905, § 5206; Civ. C. 1877, § 797; R. C. 1899, § 3761.]

Liability of heirs for obligations of ancestor. 21 L.R.A. 89.

Upon whom does the liability of an heir or devisee for his decedent's debts devolve at his own death. 39 L.R.A.(N.S.) 689.

Liability of heirs or devisee for legacy charged on devise. 30 L.R.A.(N.S.) 818.

## CHAPTER 54.

## OBLIGATIONS.

- ARTICLE 1. DEFINITION OF OBLIGATIONS, §§ 5763, 5764.  
 2. INTERPRETATION OF OBLIGATIONS, §§ 5765-5781.  
 3. TRANSFER OF OBLIGATIONS, §§ 5782-5792.  
 4. EXTINCTION OF OBLIGATIONS, §§ 5793-5820.  
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 6. ACCORD AND SATISFACTION OF OBLIGATIONS, §§ 5825-5828.  
 7. NOVATION, §§ 5829-5832.  
 8. RELEASE, §§ 5833-5835.

## ARTICLE 1.— DEFINITION OF OBLIGATIONS.

§ 5763. **Obligation defined.** An obligation is a legal duty by which a person is bound to do or not to do a certain thing. [R. C. 1905, § 5207; Civ. C. 1877, § 798; R. C. 1899, § 3762.]

As to similar provisions in Cal. Civ. Code, § 1427, see *Wood v. Franks*, 56 Cal. 217.

§ 5764. **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. [R. C. 1905, § 5208; Civ. C. 1877, § 799; R. C. 1899, § 3763.]

As to similar provision in Cal. Civ. Code, § 1428, see *Wood v. Franks*, 56 Cal. 217.

## ARTICLE 2.— INTERPRETATION OF OBLIGATIONS.

§ 5765. **Rules of interpretation.** The rules which govern the interpretation of contracts are prescribed by article 7 of chapter 55. Other obligations are interpreted by the same rules by which statutes of a similar nature are interpreted. [R. C. 1905, § 5209; Civ. C. 1877, § 800; R. C. 1899, § 3764.]

§ 5766. **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. [R. C. 1905, § 5210; Civ. C. 1877, § 801; R. C. 1899, § 3765.]

As to similar provision in Cal. Civ. Code, § 1430, see *Farmers' Exch. Bank v. Morse*, 129 Cal. 239, 61 Pac. 1088.

§ 5767. **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. [R. C. 1905, § 5211; Civ. C. 1877, § 802; R. C. 1899, § 3766.]

Principal and surety; right of offset by surety. *Clark v. Sullivan*, 2 N. D. 103, 49 N. W. 416. 13 L.R.A. 233.

Negotiable instruments; payment by one joint debtor. *Grovenor v. Signor*, 10 N. D. 503, 88 N. W. 278.

Obligations imposed upon several as joint obligations. *Clements v. Miller*, 13 N. D. 176, 100 N. W. 239.

Presumption that obligation is joint does not depend on particular language in bail bond, but on particular obligation imposed on persons therein named as bail. *State v. Western Surety Co.*, 26 S. D. 170, 128 N. W. 173.

As to similar provision in Cal. Civ. Code, § 1431, see *Leonard v. Leonard*, 7 Cal. Unrep. 99, 70 Pac. 1071.

§ 5768. **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. [R. C. 1905, § 5212; Civ. C. 1877, § 803; R. C. 1899, § 3767.]

Contribution, actions for, not founded on an express promise. 98 Am. St. Rep. 31.  
—against a co-obligor who by the statute of limitations was protected from suit by the original obligee. 60 Am. St. Rep. 201.

—among joint principals, one being insolvent. 20 Am. Dec. 559.

—among persons holding lands affected by a mortgage. 16 Am. Dec. 141.

—as between legatees and devisees to pay testator's debts. 1 L.R.A.(N.S.) 461.

—as between accommodation parties. 28 L.R.A.(N.S.) 1039.

—between stockholders of foreign corporation. 34 L.R.A. 763.

—among cotenants. 35 Am. St. Rep. 416.

—, —liability of cotenants for improvements and repairs. 29 L.R.A. 449.

—, —liability of cotenants to account for use and occupation and rents and profit. 28 L.R.A. 829.

—right of sureties to, and remedies for its enforcement. 10 Am. St. Rep. 639; 70 Am. St. Rep. 444.

—between persons liable for negligence. 16 Am. St. Rep. 254.

Right of action of one legally responsible for another's death against a third person whose negligence caused the death. 36 L.R.A.(N.S.) 60.

Right of one constructively liable for a tort, to contribution from one actually responsible for its commission. 40 L.R.A.(N.S.) 1147.

Rule denying contribution between joint tortfeasors as affected by question of proximate cause. 36 L.R.A.(N.S.) 583.

Conclusiveness of judgment against a constructive tortfeasor in a subsequent action for contribution. 40 L.R.A.(N.S.) 1172.

Right of one stockholder to sue another for contribution outside state of incorporation. 33 L.R.A.(N.S.) 909.

Revival of partnership debt by contribution between partners. 15 L.R.A. 660.

As to similar provision in Cal. Civ. Code, § 1432, see *Tulare County v. Kings County*, 117 Cal. 195, 49 Pac. 8.

**§ 5769. Conditional defined.** An obligation is conditional when the rights or duties of any party thereto depend upon the occurrence of an uncertain event. [R. C. 1905, § 5213; Civ. C. 1877, § 804; R. C. 1899, § 3768.]

**§ 5770. Conditions classified.** Conditions may be precedent, concurrent or subsequent [R. C. 1905, § 5214; Civ. C. 1877, § 805; R. C. 1899, § 3769.]

**§ 5771. 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. [R. C. 1905, § 5215; Civ. C. 1877, § 806; R. C. 1899, § 3770.]

Condition precedent must be performed before other party can be called upon to perform his part. *Johnson v. Schar*, 9 S. D. 536, 70 N. W. 838.

What are conditions precedent in deeds. 102 Am. St. Rep. 366.

Sale with particular description as to kind or quality as a condition precedent or a warranty. 35 L.R.A.(N.S.) 265.

Condition in fire policy as to keeping, producing and preserving books as a condition precedent. 51 L.R.A. 699, 702, 710.

Execution of contract on condition that others shall sign. 45 L.R.A. 321.

—condition against taking effect of deed until signed by others. 45 L.R.A. 341.

**§ 5772. Concurrent.** Conditions concurrent are those which are mutually dependent and are to be performed at the same time. [R. C. 1905, § 5216; Civ. C. 1877, § 807; R. C. 1899, § 3771.]

**§ 5773. 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. [R. C. 1905, § 5217; Civ. C. 1877, § 808; R. C. 1899, § 3772.]

Conditions subsequent in deed. 57 Am. Rep. 63; 31 Am. St. Rep. 46; 79 Am. St. Rep. 747.

Effect on a condition subsequent of a succeeding law or act of God preventing its performance. 21 L.R.A. 58.

Effect of license to commit a breach of a condition subsequent, or waiver of a past breach thereof, to extinguish the condition. 11 L.R.A.(N.S.) 398.

**§ 5774. 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. [R. C. 1905, § 5218; Civ. C. 1877, § 809; R. C. 1899, § 3773.]

Contemporaneous agreements constituting condition of delivery of note. 43 L.R.A. 480.

Admissibility of parol evidence to show that bill or note was delivered upon condition. 18 L.R.A.(N.S.) 288.

Admissibility of parol evidence that written instrument for payment of money was executed in reliance upon parol promise that payment was subject to a condition not incorporated therein. 18 L.R.A.(N.S.) 434.

Extrinsic evidence to show who is liable as maker of note where signature is conditional. 20 L.R.A. 713.

As to similar provision in Cal. Civ. Code, § 1439, see *Hanson v. Slaven*, 98 Cal. 377, 33 Pac. 266.

**§ 5775. 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. [R. C. 1905, § 5219; Civ. C. 1877, § 810; R. C. 1899, § 3774.]

Refusal to perform contract at time for performance, or before, and not withdrawn, is equivalent to offer to perform by other party, followed by refusal to accept. *Stanford v. McGill*, 6 N. D. 536, 72 N. W. 938, 38 L.R.A. 760.

Unwithdrawn notice of refusal to perform a contract relieves the other party from making further offer of performance. *Gleckler v. Slavens*, 5 S. D. 364, 59 N. W. 323; *McPherson v. Fargo*, 10 S. D. 611, 74 N. W. 1097, 65 Am. St. Rep. 723.

Purchaser of land who was not bound to make second payment before accepting deed, was not in default before deed was tendered, so as to require him to tender second payment upon vendor's default. *Sullivan v. Bromley*, 26 S. D. 147, 128 N. W. 586.

What excuses nonperformance. 18 Am. Dec. 453.

**§ 5776. 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. [R. C. 1905, § 5220; Civ. C. 1877, § 811; R. C. 1899, § 3775.]

**§ 5777. Forfeiture strictly interpreted against party benefited.** A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created. [R. C. 1905, § 5221; Civ. C. 1877, § 812; R. C. 1899, § 3776.]

Forfeitures are not favored, must always rest upon substantial grounds. *Enos v. Ins. Co.*, 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796.

Failure for three months to declare a forfeiture of a contract of sale of land waives the forfeiture. *Pier v. Lee*, 14 S. D. 600, 80 N. W. 642.

Equitable relief against forfeiture of estate for breach of condition. 69 L.R.A. 836, 841, 842.

Suit for damages as waiver of right to forfeit deed for breach of condition. 5 L.R.A.(N.S.) 603.

Forfeiture for breach of conditional pardon. 14 L.R.A. 288.

Municipal declaration of forfeiture of street franchise or privilege for breach of conditions as a judicial determination. 4 L.R.A.(N.S.) 321.

Effect of provision for forfeiture of sums paid or retained under executory contract to prevent recovery of any other damages after breach of contract. 4 L.R.A.(N.S.) 755.

What amounts to a contest within forfeiture clause in a will. 21 L.R.A.(N.S.) 953.

As to similar provision in Cal. Civ. Code, § 1442, see *Sauer v. Meyer*, 87 Cal. 34, 25 Pac. 153.

**§ 5778. 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. [R. C. 1905, § 5222; Civ. C. 1877, § 813; R. C. 1899, § 3777.]

**§ 5779. 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. [R. C. 1905, § 5223; Civ. C. 1877, § 814; R. C. 1899, § 3778.]

**§ 5780. 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. [R. C. 1905, § 5224; Civ. C. 1877, § 815; R. C. 1899, § 3779.]

**§ 5781. 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. [R. C. 1905, § 5225; Civ. C. 1877, § 816; R. C. 1899, § 3780.]

### ARTICLE 3.—TRANSFER OF OBLIGATIONS.

**§ 5782. 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 5791. [R. C. 1905, § 5226; Civ. C. 1877, § 817; R. C. 1899, § 3781.]

As to similar provision in Cal. Civ. Code, § 1457, see *La Rue v. Groezinger*, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42; *Cutting Packing Co. v. Packers' Exchange*, 86 Cal. 574, 10 L.R.A. 369, 21 Am. St. Rep. 63, 25 Pac. 52; *Anderson v. De Urioste*, 96 Cal. 404, 31 Pac. 266; *Royal v. Dennison*, 4 Cal. Unrep. 851, 38 Pac. 39; *Odd Fellows' Sav. Bank v. Brander*, 124 Cal. 255, 56 Pac. 1109.

**§ 5783. 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. [R. C. 1905, § 5227; Civ. C. 1877, § 818; R. C. 1899, § 3782.]

As to similar provision in Cal. Civ. Code, § 1458, see *La Rue v. Groezinger*, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42.

**§ 5784. Nonnegotiable 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. [R. C. 1905, § 5228; Civ. C. 1877, § 819; R. C. 1899, § 3783.]

Transfer on nonnegotiable contract without indorsement. *Kirby v. Jameson*, 9 S. D. 8, 67 N. W. 854.

Cause of action arising after transfer by indorsement of nonnegotiable note cannot be set up as defense. *State Bank v. Hayes*, 16 S. D. 365, 92 N. W. 1068.

As to "assigns" not applying to indorsee of note. *National Bank of Commerce v. Pick*, 13 N. D. 74, 99 N. W. 63.

Right of action accruing to maker of nonnegotiable note three years after transfer does not attach to note. *State Bank v. Hayes*, 16 S. D. 365, 92 N. W. 1068.

As to similar provision in Cal. Civ. Code, § 1459, see *Cutting Packing Co. v. Packers' Exchange*, 86 Cal. 574, 10 L.R.A. 369, 21 Am. St. Rep. 63, 25 Pac. 52; *First Nat. Bank v. Falkenhan*, 94 Cal. 141, 29 Pac. 866; *St. Louis Nat. Bank v. Gay*, 101 Cal. 286, 35 Pac. 376; *First Nat. Bank v. Perris Irrig. Dist.*, 107 Cal. 55, 40 Pac. 45.

**§ 5785. 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. [R. C. 1905, § 5229; Civ. C. 1877, § 819; R. C. 1899, § 3784.]

Covenants which do not run with land are covenants of seisin of right to convey and covenants against incumbrances. *Gale v. Frazer*, 4 D. 196, 30 N. W. 138.

Covenants running with land not confined to those specifically named, but include those implied. *N. P. Ry. Co. v. McClure*, 9 N. D. 73, 81 N. W. 52, 47 L.R.A. 149.

Covenants of seisin do not run with land. *Bowne v. Wolcott*, 1 N. D. 497, 48 N. W. 426.

As defining what covenants run with the land. *Bull v. Beiseker*, 16 N. D. 290, 14 L.R.A.(N.S.) 514, 113 N. W. 870.

What covenants run with the land. 56 Am. Rep. 151; 82 Am. St. Rep. 664.

Danger of litigation to enforce or restrain violation of covenants running with the land as affecting marketability of title. 38 L.R.A.(N.S.) 16.

**§ 5786. What so run.** The only covenants which run with the land are those specified in this article and those which are incidental thereto. [R. C. 1905, § 5230; Civ. C. 1877, § 820; R. C. 1899, § 3785.]

**§ 5787. 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. [R. C. 1905, § 5231; Civ. C. 1877, § 821; R. C. 1899, § 3786.]

Necessity of use of word "assigns" in order to make covenant as to a thing not in esse run with the land. 14 L.R.A.(N.S.) 185.

May covenant running with the land be created by acceptance of deed poll with stipulations purporting to bind grantee. 6 L.R.A.(N.S.) 436.

As to similar provision in Cal. Civ. Code, § 1462, see *Fresno Canal & Irrig. Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53; *Fresno Canal & Irrig. Co. v. Dunbar*, 80 Cal. 530, 22 Pac. 275; *Lyford v. North Pacific Coast R. Co.*, 92 Cal. 93, 28 Pac. 103; *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36, 68 Pac. 308.

**§ 5788. 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. [R. C. 1905, § 5232; Civ. C. 1877, § 822; R. C. 1899, § 3787.]

Covenants for quiet enjoyment. 53 Am. St. Rep. 113.

Does action for damages to real property run with land. 2 L.R.A.(N.S.) 819.

Covenant to contribute to cost of party wall as one running with the land. 66 L.R.A. 673.

Covenant in grant of water power as one running with the land. 67 L.R.A. 402.

Covenant of lessor to pay for repairs or improvements as one running with the land. 4 L.R.A.(N.S.) 466.

Parol agreement as to fences as a covenant running with the land. 27 L.R.A.(N.S.) 229.

Right of remote grantee to sue for breach of covenant when covenantor had neither title nor possession. 14 L.R.A.(N.S.) 514.

**§ 5789. 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. [R. C. 1905, § 5233; Civ. C. 1877, § 823; R. C. 1899, § 3788.]

As to similar provision in Cal. Civ. Code, § 1464, see *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910.

**§ 5790. 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. [R. C. 1905, § 5234; Civ. C. 1877, § 824; R. C. 1899, § 3789.]

**§ 5791. 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. [R. C. 1905, § 5235; Civ. C. 1877, § 825; R. C. 1899, § 3790.]

When grantees become liable upon covenants in deed. 47 Am. Rep. 473.

As to similar provision in Cal. Civ. Code, § 1466, see *Gardner v. Samuels*, 116 Cal. 84, 58 Am. St. Rep. 135, 47 Pac. 935.

**§ 5792. 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. [R. C. 1905, § 5236; Civ. C. 1877, § 826; R. C. 1899, § 3791.]

#### ARTICLE 4.—EXTINCTION OF OBLIGATIONS.

**§ 5793. 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. [R. C. 1905, § 5237; Civ. C. 1877, § 827; R. C. 1899, § 3792.]

As to similar provision in Cal. Civ. Code, § 1473, see *Wright v. Mix*, 76 Cal. 465, 18 Pac. 645; *Yule v. Bishop*, 133 Cal. 574, 65 Pac. 1094.

**§ 5794. 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. [R. C. 1905, § 5238; Civ. C. 1877, § 828; R. C. 1899, § 3793.]

**§ 5795. 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. [R. C. 1905, § 5239; Civ. C. 1877, § 829; R. C. 1899, § 3794.]

**§ 5796. 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. [R. C. 1905, § 5240; Civ. C. 1877, § 830; R. C. 1899, § 3795.]

**§ 5797. 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. [R. C. 1905, § 5241; Civ. C. 1877, § 831; R. C. 1899, § 3796.]

Part payment of obligation does not prevent recovery of balance due. *Anderson v. Bank*, 4 N. D. 182, 59 N. W. 1029.

The law under general collateral agreement makes application of payment and discharges debt pro tanto. *Styles v. Dickey*, 22 N. D. 515, 134 N. W. 702.

**§ 5798. Payment defined.** Performance of an obligation for the delivery of money only is called payment. [R. C. 1905, § 5242; Civ. C. 1877, § 832; R. C. 1899, § 3797.]

Plea of payment may be sustained by proof of accord and satisfaction. *Green v. Hughitt Township*, 5 S. D. 452, 59 N. W. 224.

Taking collateral security is not payment. *Star Wagon Co. v. Matthiessen*, 3 D. 233, 14 N. W. 107.

Payment in bills of an insolvent bank. 27 Am. Dec. 188.

What amounts to cash payment. 54 Am. Rep. 781.

When checks constitute payment. 69 Am. St. Rep. 346.

**§ 5799. 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.

3. 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. [R. C. 1905, § 5243; Civ. C. 1877, § 833; R. C. 1899, § 3798.]

Direction as to application of payment made some time prior thereto, but not changed at or before such payment, is sufficient. *First Nat. Bank v. Roberts*, 2 N. D. 195, 49 N. W. 722.

As to right of creditor to apply payments where debtor does not direct application. *Foster County State Bank v. Hester*, 18 N. D. 135, 119 N. W. 1044.

Consistency of rule as to payments of interest. *Northwestern Mortg. Trust Co. v. Ellis*, 20 S. D. 543, 108 N. W. 22.

Application of payment must be made as directed. *Stebbins v. Lardner*, 2 S. D. 127, 48 N. W. 847.

Unless requested to make particular application, creditor may apply payment upon any debt. *Fargo v. Jennings*, 8 S. D. 99, 65 N. W. 432.

The law under general collateral agreement makes application of payment and discharges debt pro tanto. *Styles v. Dickey*, 22 N. D. 515, 134 N. W. 702.

Payment by continuing partner, assuming firm debts, made immediately after demand by firm creditor with suggestion that it be applied on firm debt, must be so applied. *Paxton & G. Co. v. Starkweather*, 26 S. D. 99, 128 N. W. 479.

Application of payments. 13 Am. Dec. 505; 14 Am. Dec. 694; 96 Am. St. Rep. 44.

Application as between principal and interest when payment made before due. 15 L.R.A. 169.

Application by bank of individual partner's deposit on firm debt. 23 L.R.A. 111.

Forger's application of proceeds of check to an indebtedness to depositor as affecting bank's right to charge same against depositor's account. 25 L.R.A.(N.S.) 996.

Application of doctrine of appropriation of payments to effect on surety or indorser of bank's failure to apply principal's deposit account on note. 8 L.R.A.(N.S.) 944.

Effect of specific application of payment to last item of open account on statute of limitations. 19 L.R.A.(N.S.) 126.

Duty of mortgagee to hold proceeds of insurance and apply them on indebtedness as it falls due. 10 L.R.A.(N.S.) 1166.

Right to apply payments made on stock in building and loan association upon mortgage given for a loan by the same member. 29 L.R.A. 120.

As to similar provision in Cal. Civ. Code, § 1479, see *Murdock v. Clarke*, 88 Cal. 384, 26 Pac. 601; *Hanson v. Cordano*, 96 Cal. 441, 31 Pac. 457.

**§ 5800. 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. [R. C. 1905, § 5244; 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.

Offer of performance pursuant to contract with present ability to perform, is sufficient without actual production. *Foster Implement Co. v. Smith*, 17 N. D. 178, 115 N. W. 663.

Vendee, sending notice to vendor without the state and depositing money for conveyance after vendor's prior refusal to convey, may sue for specific performance. *Herman v. Winter*, 20 S. D. 196, 105 N. W. 457.

Effect of unaccepted tender on lien of mortgage. 33 L.R.A. 231; 23 L.R.A.(N.S.) 403.

Effect of unaccepted tender on lien of pledge. 33 L.R.A. 231.

**§ 5801. Not by offer of partial performance.** An offer of partial performance is of no effect. [R. C. 1905, § 5245; Civ. C. 1877, § 835; R. C. 1899, § 3800.]

**§ 5802. 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. [R. C. 1905, § 5246; Civ. C. 1877, § 836; R. C. 1899, § 3801.]

**§ 5803. 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. [R. C. 1905, § 5247; Civ. C. 1877, § 837; R. C. 1899, § 3802.]

**§ 5804. 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. [R. C. 1905, § 5248; Civ. C. 1877, § 838; R. C. 1899, § 3803.]

Place and requisites of tender of interest which will prevent acceleration of maturity of mortgage under interest clause. 36 L.R.A.(N.S.) 308.

§ 5805. **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. [R. C. 1905, § 5249; Civ. C. 1877, § 839; R. C. 1899, § 3804.]

Effect of tender by vendee of purchase price before due, to put other party in default. 20 L.R.A.(N.S.) 338.

§ 5806. **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. [R. C. 1905, § 5250; Civ. C. 1877, § 840; R. C. 1899, § 3805.]

§ 5807. **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. [R. C. 1905, § 5251; Civ. C. 1877, § 841; R. C. 1899, § 3806.]

When time is of essence of contract, failure to perform at time named debars person in default from claiming any rights thereunder. *Fergusson v. Talcott*, 7 N. D. 183, 73 N. W. 207.

Vendor may not refuse to accept payments after there has been delay, unless time is of essence of contract and delay is incapable of compensation by payment of interest. *J. I. Case Threshing Mach. Co. v. Farnsworth*, 28 S. D. 432, 134 N. W. 819.

As to similar provision in Cal. Civ. Code, § 1492, see *Loughborough v. McNevin*, 74 Cal. 250, 5 Am. St. Rep. 435, 14 Pac. 369, 15 Pac. 773; *Bennett v. Hyde*, 92 Cal. 131, 28 Pac. 104; *Seventy-Six Land & Water Co. v. Superior Ct.*, 93 Cal. 139; 28 Pac. 813; *Miller v. Cox*, 96 Cal. 339, 31 Pac. 161; *Glock v. Howard & W. Colony Co.*, 123 Cal. 1, 43 L.R.A. 199, 69 Am. St. Rep. 17, 55 Pac. 713.

§ 5808. **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. [R. C. 1905, § 5252; Civ. C. 1877, § 842; R. C. 1899, § 3807.]

§ 5809. **Free from condition.** An offer of performance must be free from any conditions which the creditor is not bound on his part to perform. [R. C. 1905, § 5253; Civ. C. 1877, § 843; R. C. 1899, § 3808.]

Tender of deed from third party, owner of land agreed to be conveyed, is not compliance with contract calling for deed from vendor. *McVeety v. Harvey Mercantile Co.*, 24 N. D. 245, 139 N. W. 586.

As to similar provision in Cal. Civ. Code, § 1494, see *Royal v. Dennison*, 4 Cal. Unrep. 851; 38 Pac. 39; *Ferrea v. Tubbs*, 125 Cal. 687, 58 Pac. 308.

§ 5810. **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. [R. C. 1905, § 5254; Civ. C. 1877, § 844; R. C. 1899, § 3809.]

§ 5811. **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. [R. C. 1905, § 5255; Civ. C. 1877, § 845; R. C. 1899, § 3810.]

Debtor must either produce the money or have it in his possession. *Stakke v. Chapman*, 13 S. D. 269, 83 N. W. 261.

Tender not necessary after unrecalled refusal to accept. *McPherson v. Fargo*, 10 S. D. 611, 74 N. W. 1057, 65 Am. St. Rep. 723.

As to similar provision in Cal. Civ. Code, § 1496, see *Peckham v. Stewart*, 97 Cal. 147, 31 Pac. 928.

**§ 5812. 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. [R. C. 1905, § 5256; Civ. C. 1877, § 846; R. C. 1899, § 3811.]

Where defendant contracted to buy a machine of plaintiff, to be consigned to the care of plaintiff's agent, it was necessary, to constitute a valid offer of delivery to defendant, that the machine be separated and set part from other machinery with which it was mixed on arrival. *International Harvester Co. v. Hayworth*, 23 S. D. 514, 122 N. W. 412.

Tender of a sum in excess of that due with demand for change. 13 L.R.A.(N.S.) 624.

Necessity that tender, as a condition of rescission for breach of warranty, shall cover all the property sold. 8 L.R.A.(N.S.) 727.

**§ 5813. 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. [R. C. 1905, § 5257; Civ. C. 1877, § 847; R. C. 1899, § 3812.]

As to similar provision in Cal. Civ. Code, § 1498, see *Loughborough v. McNevin*, 74 Cal. 250, 5 Am. St. Rep. 435, 14 Pac. 369, 15 Pac. 773.

**§ 5814. Receipt obligatory.** A debtor has a right to require from his creditor a written receipt for any property delivered in performance of his obligation. [R. C. 1905, § 5258; Civ. C. 1877, § 848; R. C. 1899, § 3813.]

Tender by owner to subcontractor, conditioned that subcontractor give satisfaction in full, was bad where amount due was disputed. *Pittsburg Plate Glass Co. v. Leary*, 25 S. D. 256, 31 L.R.A.(N.S.) 746, 126 N. W. 271, Ann. Cas. 1912B, 928.

As to similar provision in Cal. Civ. Code, § 1499, see *Ferrea v. Tubbs*, 125 Cal. 687, 58 Pac. 308.

**§ 5815. 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. [R. C. 1905, § 5259; Civ. C. 1877, § 849; R. C. 1899, § 3814.]

Tender must be kept good in manner provided by statute to defeat accumulation of interest. *Brakhage v. Tracy*, 13 S. D. 343, 83 N. W. 363.

Compliance with this section renders mortgagee liable for penalty under section 6749. *Kronebusch v. Raumin*, 6 D. 243, 42 N. W. 656.

Deposit must be made in name of creditor; mere direction for bank to pay not sufficient. *Stakke v. Chapman*, 13 S. D. 269, 83 N. W. 261.

Offer of payment of proper amount of taxes due operates to stop running of interest. *Dakota Loan & Trust Co. v. Codrington County*, 9 S. D. 159, 68 N. W. 314.

Necessity of keeping tender of amount required to redeem from foreclosure good by deposit. *Brown v. Smith*, 13 N. D. 580, 102 N. W. 171.

It is unnecessary for owner to extinguish obligation resting upon contractor to pay subcontractor, before lien, as cloud on title, could be removed. *Pittsburg Plate Glass Co. v. Leary*, 25 S. D. 256, 31 L.R.A.(N.S.) 746, 126 N. W. 271, Ann. Cas. 1912B, 928.

Notice of tender and deposit need not state that bank in which deposit was made was of good repute. *Ugland v. Farmers' & M. State Bank*, 23 N. D. 536, 137 N. W. 572.

Effect of tender on deposit of money on right to interest on damages allowed in eminent domain. 28 L.R.A.(N.S.) 63.

As to similar provision in Cal. Civ. Code, § 1500, see *Randol v. Tatum*, 98 Cal. 390, 33 Pac. 433; *O'Connor v. Morse*, 112 Cal. 31, 53 Am. St. Rep. 155, 44 Pac. 305; *Sayward v. Houghton*, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44; *William Wolff & Co. v. Canadian P. R. Co.*, 123 Cal. 535, 56 Pac. 453; *Baker v. San Francisco Gas & Electric Co.*, 141 Cal. 710, 75 Pac. 342.

**§ 5816. 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. [R. C. 1905, § 5260; Civ. C. 1877, § 850; R. C. 1899, § 3815.]

Tender of cashier's check instead of currency is waived unless objections are made on that ground. *Ugland v. Farmers' & M. State Bank*, 23 N. D. 536, 137 N. W. 572.

Vendor in land contract waived unauthorized condition in tender by assignee of vendee, by failing to object to tender made on trial in action for specific performance. *J. I. Case Threshing Mach. Co. v. Farnsworth*, 28 S. D. 432, 134 N. W. 819.

As to similar provision in Cal. Civ. Code, § 1501, see *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115.

**§ 5817. 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. [R. C. 1905, § 5261; Civ. C. 1877, § 851; R. C. 1899, § 3816.]

**§ 5818. 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. [R. C. 1905, § 5262; Civ. C. 1877, § 852; R. C. 1899, § 3817.]

Vendor can only sue for damages for breach of contract on vendee's failure to accept where title remained in vendor until payment. *International Harvester Co. v. Hayworth*, 23 S. D. 514, 122 N. W. 412.

**§ 5819. 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 5815, 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. [R. C. 1905, § 5263; Civ. C. 1877, § 853; R. C. 1895, § 3818.]

**§ 5820. 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. [R. C. 1905, § 5264; Civ. C. 1877, § 854; R. C. 1899, § 3819.]

#### ARTICLE 5.—PERFORMANCE OF OBLIGATIONS OR OFFER.

**§ 5821. 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. [R. C. 1905, § 5265; Civ. C. 1877, § 855; R. C. 1899, § 3820.]

Right to rescind or abandon contract for other party's default. 30 L.R.A. 33.

Right of grantor to rescind deed executed in consideration of future support where performance by grantee is, without fault on his part, prevented by grantor. 25 L.R.A.(N.S.) 932.

Effect of preventing performance on right to recover for profits lost by breach of contract. 53 L.R.A. 59.

Right to rescind or abandon contract because of failure or inability of other party to perform within time designated, where time is not of the essence of the contract. 21 L.R.A.(N.S.) 691.

As to similar provision in Cal. Civ. Code, § 1511, see *Klauber v. San Diego Street Car Co.*, 95 Cal. 353, 30 Pac. 555; *Ryan v. Rogers*, 96 Cal. 349, 31 Pac. 244; *Remy v. Olds*, 4 Cal. Unrep. 240, 34 Pac. 216; *Herzog v. Purdy*, 119 Cal. 99, 51 Pac. 27; *Sample v. Fresno Flume & Irrig. Co.*, 129 Cal. 222, 61 Pac. 1085.

**§ 5822. 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. [R. C. 1905, § 5266; Civ. C. 1877, § 856; R. C. 1899, § 3821.]

Party preventing performance of contract can derive no benefit from failure of other party to perform. *Shelly v. Mikkelson*, 5 N. D. 22, 63 N. W. 210.

As to similar provision in Cal. Civ. Code, § 1512, see *Mattingly v. Pennie*, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200.

§ 5823. **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. [R. C. 1905, § 5267; Civ. C. 1877, § 857; R. C. 1899, § 3822.]

§ 5824. **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. [R. C. 1905, § 5268; Civ. C. 1877, § 858; R. C. 1899, § 3823.]

Vendee need not tender performance in order to recover part payment, where vendor has refused to be bound by contract. *Hogan v. Bechtel*, 27 S. D. 98, 129 N. W. 914.

#### ARTICLE 6.—ACCORD AND SATISFACTION OF OBLIGATIONS.

§ 5825. **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. [R. C. 1905, § 5269; Civ. C. 1877, § 859; R. C. 1899, § 3824.]

Accord and satisfaction is not shown by statement that there was computation of amounts mutually due between parties, and that it was agreed that accounts should offset each other, although one was less than the other. *Webster v. McLaren*, 19 N. D. 751, 123 N. W. 395.

Accord does not distinguish obligation until it is fully executed. *Troy Min. Co. v. Thomas*, 15 S. D. 238, 88 N. W. 106.

Allegation that agreement for accord was executed by acceptance of consideration therefor is sufficient. *Troy Min. Co. v. White*, 10 S. D. 475, 74 N. W. 236, 42 L.R.A. 549.

There must not only be an agreement to accept less than amount due, but an actual acceptance. *Carpenter v. C. M. & St. P. Ry. Co.*, 7 S. D. 584, 64 N. W. 1120.

Accord and satisfaction; how pleaded. *Green v. Hughitt Township*, 5 S. D. 452, 59 N. W. 224.

Agreement to accept less sum in satisfaction of debt is not defense to action for balance. *Egglund v. South*, 22 S. D. 467, 118 N. W. 719.

Agreement to receive less sum without payment does not constitute accord and satisfaction. *Egglund v. South*, 22 S. D. 467, 118 N. W. 719.

Acceptance of warrant for claim against county is presumed to be in full payment of claims presented. *Paulson v. Ward County*, 23 N. D. 601, 42 L.R.A.(N.S.) 111, 137 N. W. 486.

Law of accord and satisfaction. 100 Am. St. Rep. 390.

When payment of a less sum than due enforceable as accord and satisfaction. 64 Am. Dec. 138; 28 Am. Rep. 293.

Distinction between novation and accord executory. 12 L.R.A.(N.S.) 1134.

Accord and satisfaction of pastor's claim for salary. 38 L.R.A. 689.

—of partly performed contract for services. 24 L.R.A. 233.

Acceptance of principal sum as affecting right to interest. 40 L.R.A.(N.S.) 588.

§ 5826. **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. [R. C. 1905, § 5270; Civ. C. 1877, § 860; R. C. 1899, § 3825.]

§ 5827. **Acceptance is satisfaction.** Acceptance by the creditor of the consideration of an accord extinguishes the obligation and is called satisfaction. [R. C. 1905, § 5271; Civ. C. 1877, § 861; R. C. 1899, § 3826.]

Accord and satisfaction with one joint tortfeasor, effect on liability of other. 58 L.R.A. 300.

Effect of payment of debt by a volunteer or stranger to the original undertaking. 23 L.R.A. 120.

§ 5828. **Part performance accepted extinguishes.** Part performance of an obligation either before or after a breach thereof, when expressly accepted by the creditor in writing in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration,

extinguishes the obligation. [R. C. 1905, § 5272; Civ. C. 1877, § 862; R. C. 1899, § 3827.]

Part performance does not extinguish an obligation, unless accepted as such. *Anderson v. Bank*, 4 N. D. 182, 59 N. W. 1029.

Acceptance of amount to which party is clearly entitled does not constitute accord and satisfaction where there is no claim of facts showing satisfaction. *Chrystal v. Gerlach*, 25 S. D. 128, 125 N. W. 633.

Creditor, who receives in payment check for less sum than is claimed to be due, and who indorses check, which does not purport to be in full payment, cannot be held to have it received in full settlement. *Hagen v. Townsend*, 27 S. D. 457, 131 N. W. 512.

Accord and satisfaction by part payment. 20 L.R.A. 785.

Payment of part of liquidated and undisputed debt as consideration for discharge of whole. 11 L.R.A.(N.S.) 1018; 21 L.R.A.(N.S.) 1005.

Acceptance of remittance of part of the amount of an unliquidated or disputed claim, accompanied with the statement that it is "in full," or words of similar import, as assent to its receipt in full payment. 14 L.R.A.(N.S.) 443; 27 L.R.A.(N.S.) 439.

Right of town, county or municipality to surrender valid claim on partial payment thereof. 19 L.R.A.(N.S.) 320.

Acceptance of partial allowance of claim by public body as an accord and satisfaction. 42 L.R.A.(N.S.) 112.

#### ARTICLE 7.—NOVATION.

**§ 5829. Defined.** Novation is the substitution of a new obligation for an existing one. [R. C. 1905, § 5273; Civ. C. 1877, § 863; R. C. 1899, § 3828.]

On burden of proof of payment of debt where debtor sends check which was not paid by bank. *Schafer v. Olson*, 24 N. D. 542, 43 L.R.A.(N.S.) 762, 139 N. W. 283.

Distinction between novation and accord executory. 12 L.R.A.(N.S.) 1134.

Novation, action by a third person on a promise made for his benefit. 39 Am. St. Rep. 531.

**§ 5830. 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. [R. C. 1905, § 5274; Civ. C. 1877, § 864; R. C. 1899, § 3829.]

Effect of judgment against garnishee to merge or satisfy liability of principal debtor. 47 L.R.A. 131.

As to similar provision in Cal. Civ. Code, § 1531, see *Re Sullenberger*, 72 Cal. 549, 14 Pac. 513; *Carpv v. Dowdell*, 131 Cal. 495, 63 Pac. 778; *Talcott v. Hurlbert*, 143 Cal. 4, 76 Pac. 647.

1. Payment by commercial paper. 35 L.R.A.(N.S.) 1.

New obligation given by debtor to creditor to secure the release of a lien as a novation of the original obligation. 36 L.R.A.(N.S.) 464.

**§ 5831. Made by contract.** Novation is made by contract and is subject to all the rules concerning contracts in general. [R. C. 1905, § 5275; Civ. C. 1877, § 865; R. C. 1899, § 3830.]

**§ 5832. 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 fulfilling 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. [R. C. 1905, § 5276; Civ. C. 1877, § 866; R. C. 1895, § 3831.]

#### ARTICLE 8.—RELEASE.

**§ 5833. 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. [R. C. 1905, § 5277; Civ. C. 1877, § 867; R. C. 1899, § 3832.]

Right to show that note given by one of two joint makers of an old note for one-half amount was received in full satisfaction of debt. *Nat. Bank v. Guthrie*, 11 S. D. 517, 78 N. W. 995.

Release of expectancy by prospective heir to ancestor. 25 L.R.A.(N.S.) 439.

—of drawer or indorser by certification of check. 9 L.R.A.(N.S.) 698; 29 L.R.A.(N.S.) 205.

—of one partner by other partner's assumption of debts on dissolution of partnership. 9 L.R.A.(N.S.) 90.

—of interest in estate by one receiving advancement; effect on right to share in after-acquired property. 65 L.R.A. 578.

—by personal representatives of claim due estate. 14 L.R.A. 414.

—as affecting right of action for death. 34 L.R.A. 790.

Stipulation making execution of release from liability for damages a condition precedent to payment of benefits out of relief fund. 11 L.R.A.(N.S.) 194.

Formal release under seal or in writing on payment of part of liquidated and undisputed debt. 11 L.R.A.(N.S.) 1026.

Law governing release of claim for damages for death or bodily injury. 56 L.R.A. 223.

Admissibility of parol evidence that release was delivered on condition. 36 L.R.A.(N.S.) 1147.

Right in action at law to attack release for fraud. 20 L.R.A.(N.S.) 915.

Effect of misrepresentations or undue influence by physician to avoid release. 5 L.R.A.(N.S.) 663.

Return or tender of consideration for release of claim for personal injuries set aside on ground of fraud. 35 L.R.A.(N.S.) 660.

As to similar provision in Cal. Civ. Code, § 1541, see *Upper San Joaquin Irrig. Canal Co. v. Roach*, 78 Cal. 552, 21 Pac. 304; *Rogers v. Kimball*, 5 Cal. Unrep. 725, 49 Pac. 719; *Rogers v. Kimball*, 121 Cal. 247, 53 Pac. 648.

**§ 5834. 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. [R. C. 1905, § 5278; Civ. C. 1877, § 868; R. C. 1899, § 3833.]

Does release of damages for construction of railroad in highway include damages from elevation of grade. 10 L.R.A.(N.S.) 1202.

Effect of specification of particular claim to limit import of general release. 8 L.R.A.(N.S.) 1034.

Scope of release under policy indemnifying insured against loss of time by sickness or accident. 24 L.R.A.(N.S.) 211.

Right to reinstatement of mortgage when released by mistake. 58 L.R.A. 788.

As to similar provision in Cal. Civ. Code, § 1542, see *Rued v. Cooper*, 119 Cal. 463, 51 Pac. 704.

**§ 5835. 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. [R. C. 1905, § 5279; Civ. C. 1877, § 869; R. C. 1899, § 3834.]

Release of one joint maker of note does not exonerate others from liability. *Central Banking & T. Co. v. Pusey*, 22 S. D. 223, 116 N. W. 1126.

Effect of release of one joint tortfeasor on liability of the other. 58 L.R.A. 293; 11 Am. St. Rep. 906; 92 Am. St. Rep. 872; 111 Am. St. Rep. 281; 138 Am. St. Rep. 834.

Release of principal after maturity of obligation as affecting guarantor. 38 L.R.A.(N.S.) 875.

Effect on prior surety of release of later surety. 21 L.R.A. 252.

Discharge of one primarily liable for loss of insured property as affecting insured's right of action against insurer. 29 L.R.A.(N.S.) 698.

As to similar provision in Cal. Civ. Code, § 1543, see *Northern Ina. Co. v. Potter*, 63 Cal. 157.



## CHAPTER 55.

## CONTRACTS.

- ARTICLE 1. DEFINITION, §§ 5836, 5837.  
 2. PARTIES, §§ 5838-5841.  
 3. CONSENT, §§ 5842-5866.  
 4. OBJECT OF A CONTRACT, §§ 5867-5871.  
 5. CONSIDERATION, §§ 5872-5882.  
 6. MANNER OF CREATING CONTRACTS, §§ 5883-5894.  
 7. INTERPRETATION OF CONTRACTS, §§ 5895-5921.  
 8. UNLAWFUL CONTRACTS, §§ 5922-5931.  
 9. RESCISSION OF CONTRACTS, §§ 5932-5936.  
 10. ALTERATION AND CANCELLATION OF CONTRACTS, §§ 5937-5941.

## ARTICLE 1.— DEFINITION.

§ 5836. **Defined.** A contract is an agreement to do or not to do a certain thing. [R. C. 1905, § 5280; Civ. C. 1877, § 870; R. C. 1899, § 3835.]

As to similar provision in Cal. Civ. Code, § 1549, see *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179.

§ 5837. **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. [R. C. 1905, § 5281; Civ. C. 1877, § 871; R. C. 1899, § 3836.]

Consent of parties is essential to acceptance of contract. *Grissel v. Bank*, 12 S. D. 93, 80 N. W. 161.

As to contract induced by deceit being voidable because consent was not free. *Beare v. Wright*, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 8 A. & E. Ann. Cas. 1057.

As to rescission of agreement to make repayment under mutual mistake as to legal rights of parties. *Arnett v. Smith*, 11 N. D. 55, 88 N. W. 1037.

Contract for extension of time made between mortgagee and one assuming mortgage under mutual mistake in believing that he had acquired title to property, is void. *Iowa Loan & Trust Co. v. Schnose*, 19 S. D. 248, 103 N. W. 22, 8 A. & E. Ann. Cas. 255.

As to similar provision in Cal. Civ. Code, § 1550, see *Harris v. Harris*, 64 Cal. 108, 28 Pac. 63; *Loaiza v. Superior Ct.*, 85 Cal. 11, 9 L.R.A. 376, 20 Am. St. Rep. 197, 24 Pac. 707; *Frick v. Los Angeles*, 115 Cal. 512, 47 Pac. 250; *Nevills v. Moore Min. Co.*, 135 Cal. 561, 67 Pac. 1054; *Kyle v. Hamilton*, 6 Cal. Unrep. 893, 68 Pac. 484; *Jacks v. Estee*, 139 Cal. 507, 73 Pac. 247.

## ARTICLE 2.— PARTIES.

§ 5838. **Who may make.** All persons are capable of contracting, except minors, persons of unsound mind and persons deprived of civil rights. [R. C. 1905, § 5282; Civ. C. 1877, § 872; R. C. 1899, § 3837.]

As to similar provision in Cal. Civ. Code, § 1556, see *Butler v. Baber*, 54 Cal. 178.

§ 5839. **Minors, etc.** Minors and persons of unsound mind have only such capacity as is defined by chapter 2 of this code. [R. C. 1905, § 5283; Civ. C. 1877, § 873; R. C. 1899, § 3838.]

§ 5840. **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. [R. C. 1905, § 5284; Civ. C. 1877, § 874; R. C. 1899, § 3839.]

§ 5841. **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. [R. C. 1905, § 5285; Civ. C. 1877, § 875; R. C. 1899, § 3840.]

Stranger cannot enforce a contract, though he would be benefited. *Parlin v. Hall*, 2 N. D. 473, 52 N. W. 405.

A contract contemplates present consideration passing between the contracting parties. *McArthur v. Dryden*, 6 N. D. 438, 71 N. W. 125.

Third party cannot intervene upon promise of vendor. *Bray v. Booker*, 6 N. D. 526, 72 N. W. 933.

Stranger to promise may not sue thereon where there was no consideration therefor from him, and no duty or obligation to him, outside contract, from promisee. *Fish & H. Co. v. New England Homestake Co.*, 27 S. D. 221, 130 N. W. 841.

Provision in a deed that grantee assume mortgage debt is insufficient as basis of action in absence of evidence of intent to contract for benefit of holder of note and mortgage. *Fry v. Ausman*, 29 S. D. 30, 39 L.R.A.(N.S.) 150, 135 N. W. 708.

Right of a third party to sue upon a contract made for his benefit. 25 L.R.A. 257; 2 L.R.A.(N.S.) 783.

Effect of provision in deed for benefit of stranger thereto. 20 L.R.A.(N.S.) 221.

Right of creditor to enforce promise of one allowed to secure property at judicial sale on faith of his promise to pay owner's debts. 15 L.R.A.(N.S.) 399.

Right of third person to maintain action upon promise of beneficiary to insured to pay all or part of proceeds of policy to such third person. 40 L.R.A.(N.S.) 692.

Will breach of contract with municipality to keep a street or highway in repair sustain an action by a person injured directly against the contractor. 39 L.R.A.(N.S.) 1112.

May one, not a party to an agreement, injured thereby in his business, assail the validity thereof on the ground that it tends to create or promote a monopoly. 26 L.R.A.(N.S.) 148.

Consumer's right to maintain suit to compel water company to furnish water at rates stipulated in contract with municipality. 1 L.R.A.(N.S.) 958.

Right of property owner to maintain action against water company for failure to supply sufficient water for fire purposes, as required by its contract with municipality. 6 L.R.A.(N.S.) 1171; 21 L.R.A.(N.S.) 1021.

Right of subcontractor, materialman or laborer to maintain action on contractor's bond to owner. 27 L.R.A.(N.S.) 573.

The right of addressee of telegram to sue for delay in delivery. 30 L.R.A.(N.S.) 1116.

Right of person not mentioned in the telegram and whose interest is not communicated to the company to recover for mental anguish. 8 L.R.A.(N.S.) 249; 19 L.R.A.(N.S.) 475.

Character of contract as affecting right of undisclosed principal to sue thereon. 29 L.R.A.(N.S.) 472; 39 L.R.A.(N.S.) 324.

Right of consignee to maintain action against carrier. 36 L.R.A.(N.S.) 68

Right of consignee who refuses to accept goods to maintain an action for damages against carrier. 30 L.R.A.(N.S.) 1071.

Right of mortgagee to maintain personal action against grantee who has assumed payment. 25 L.R.A. 275.

Right of mortgagee to enforce purchaser's promise to pay the mortgage where the grantor or promisee was not himself liable. 22 L.R.A.(N.S.) 492; 39 L.R.A.(N.S.) 151.

Right of creditor to enforce promise of one allowed to secure property at judicial sale upon faith of his promise to pay owner's debt. 15 L.R.A.(N.S.) 399.

As to similar provision in Cal. Civ. Code, § 1559, see *Wickersham v. Denman*, 68 Cal. 383, 9 Pac. 723; *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100; *Thomson v. Bettens*, 94 Cal. 82, 29 Pac. 336; *Tyler v. Mayre*, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196; *Hamilton v. Bates*, 4 Cal. Unrep. 371, 35 Pac. 304; *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547, 40 Pac. 27; *Hopkins v. Warner*, 109 Cal. 133, 41 Pac. 868; *Buckley v. Gray*, 110 Cal. 339, 31 L.R.A. 862, 52 Am. St. Rep. 88, 42 Pac. 900; *Savings Bank v. Thornton*, 112 Cal. 255, 44 Pac. 466; *Lisenby v. Newton*, 120 Cal. 571, 65 Am. St. Rep. 203, 52 Pac. 813; *Washer v. Independent Min. & Development Co.*, 142 Cal. 702, 76 Pac. 654.

#### ARTICLE 3.—CONSENT.

**§ 5842. 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. [R. C. 1905, § 5286; Civ. C. 1877, § 876; R. C. 1899, § 3841.]

As to similar provision in Cal. Civ. Code, § 1565, see *Colton v. Stanford*, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16; *Loaiza v. Superior Ct.*, 85 Cal. 11, 9 L.R.A. 376, 20 Am. St. Rep. 197, 24 Pac. 707; *Leszynsky v. Meyer*, 6 Cal. Unrep. 53, 53 Pac. 703; *London & S. F. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164; *Nevills v. Moore Min. Co.*, 135 Cal. 561, 67 Pac. 1054; *Jacks v. Estee*, 139 Cal. 507, 73 Pac. 247; *Niles v. Hancock*, 140 Cal. 157, 73 Pac. 840.

**§ 5843. 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. [R. C. 1905, § 5287; Civ. C. 1877, § 877; R. C. 1899, § 3842.]

Widow may rescind agreement, made under mistake, to take less portion of husband's estate than she has right to. *Griffing v. Gilason*, 21 S. D. 56, 109 N. W. 646.

As to similar provision in Cal. Civ. Code, § 1566, see *Fish v. Benson*, 71 Cal. 428, 12 Pac. 454; *Colton v. Stanford*, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16; *Loaiza v. Superior Ct.*, 85 Cal. 11, 9 L.R.A. 376, 20 Am. St. Rep. 197, 24 Pac. 707; *Bancroft v. Bancroft*, 110 Cal. 374, 42 Pac. 896; *Westerfeld v. New York L. Ins. Co.*, 129 Cal. 68, 58 Pac. 92, 61 Pac. 667; *Kyle v. Hamilton*, 6 Cal. Unrep. 893, 68 Pac. 484.

**§ 5844. 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. [R. C. 1905, § 5288; Civ. C. 1877, § 878; R. C. 1899, § 3843.]

Invalidity of contract entered into under mutual mistake of law. *Silander v. Gronna*, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544.

Obligee's concealment of facts on obtaining guaranty or surety as fraud. 21 L.R.A. 411.

As to similar provision in Cal. Civ. Code, § 1567, see *Fish v. Benson*, 71 Cal. 428, 12 Pac. 454; *Colton v. Stanford*, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16; *Loaiza v. Superior Ct.*, 85 Cal. 11, 9 L.R.A. 376, 20 Am. St. Rep. 197, 24 Pac. 707; *Bancroft v. Bancroft*, 5 Cal. Unrep. 31, 40 Pac. 488; *Westerfeld v. New York L. Ins. Co.*, 129 Cal. 68, 58 Pac. 92, 61 Pac. 667; *Wingert v. San Francisco*, 134 Cal. 547, 86 Am. St. Rep. 294, 66 Pac. 730; *Donnelly v. Rees*, 141 Cal. 56, 74 Pac. 433.

**§ 5845. 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.** [R. C. 1905, § 5289; Civ. C. 1877, § 879; R. C. 1899, § 3844.]

As to similar provision in Cal. Civ. Code, § 1568, see *Colton v. Stanford*, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16; *Loaiza v. Superior Ct.*, 85 Cal. 11, 9 L.R.A. 376, 20 Am. St. Rep. 197, 24 Pac. 707; *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398; *Hartwig v. Clark*, 138 Cal. 668, 72 Pac. 149.

**§ 5846. 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. [R. C. 1905, § 5290; 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.

Nature and character of threats or coercion which would avoid contract. *McCormick v. Volsack*, 4 S. D. 67, 55 N. W. 145.

Payment of illegal tax under protest to avoid seizure of property is involuntary, and may be recovered. *St. Anthony Elevator Co. v. Bottineau County*, 9 N. D. 346, 83 N. W. 212, 50 L.R.A. 262.

As to compulsory payments. *C. & J. Michel Brewing Co. v. State*, 19 S. D. 302, 70 L.R.A. 911, 103 S. W. 40.

What is duress sufficient to invalidate contract. 26 Am. Dec. 370.

Contracts procured by threats of prosecution of relative. 26 L.R.A. 48; 20 L.R.A.(N.S.) 484; 37 L.R.A.(N.S.) 539.

Duress as affecting compromise. 25 L.R.A.(N.S.) 308.

Impeachment of certificate of acknowledgment because of duress. 41 L.R.A.(N.S.) 1169.

Duress as ground of injunction against judgment. 30 L.R.A. 802.

Duress which will avoid marriage. 43 L.R.A. 814; 27 L.R.A.(N.S.) 803.

Right to avoid marriage entered into to escape prosecution for seduction, upon ground of duress. 16 L.R.A.(N.S.) 938.

Effect of shipping contract limiting carrier's common law liability signed under compulsion. 28 L.R.A.(N.S.) 637.

Duress by demanding receipt as a condition of payment. 1 L.R.A.(N.S.) 867.

When payment of license fee is made under duress. 22 L.R.A.(N.S.) 873.

Duress by lien on real property. 16 L.R.A. 376.

As to similar provision in Cal. Civ. Code, § 1569, see *Morrill v. Nightingale*, 93 Cal. 452, 27 Am. St. Rep. 207, 28 Pac. 1068; *Stockton Combined Harvester & Agri. Works v. Glens Falls Ins. Co.*, 98 Cal. 557, 33 Pac. 633; *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398.

**§ 5847. 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. [R. C. 1905, § 5291; Civ. C. 1877, § 881; R. C. 1899, § 3846.]

As to similar provision in Cal. Civ. Code, § 1570, see *Morrill v. Nightingale*, 93 Cal. 452, 27 Am. St. Rep. 207, 28 Pac. 1068; *Bancroft v. Bancroft*, 5 Cal. Unrep. 31, 40 Pac. 488; *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398.

**§ 5848. Fraud classified.** Fraud is either actual or constructive. [R. C. 1905, § 5292; Civ. C. 1877, § 882; R. C. 1899, § 3847.]

As to similar provision in Cal. Civ. Code, § 1571, see *Colton v. Stanford*, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16; *Loaiza v. Superior Ct.*, 85 Cal. 11, 9 L.R.A. 376, 20 Am. St. Rep. 197, 24 Pac. 707.

**§ 5849. 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. [R. C. 1905, § 5293; Civ. C. 1877, § 883; R. C. 1899, § 3848.]

Statement without positive knowledge, with intent to deceive, may be fraud. *Knowlton v. Schultz*, 6 N. D. 417, 71 N. W. 550; *Whitbeck v. Sees*, 10 S. D. 417, 73 N. W. 915.

Promise made without intention of performance is actual fraud. *Grewing v. Min. Thresh. Mach. Co.*, 12 S. D. 127, 80 N. W. 176.

Secret reservation in sale; public policy; effect as to attaching creditors. *Newell v. Wagness*, 1 N. D. 62, 44 N. W. 1014.

Chattel mortgage embodying secret trust. *Red River Valley v. Barnes*, 8 N. D. 432, 79 N. W. 880.

As to measure of damages for deceit. *Beare v. Wright*, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 8 A. & E. Ann. Cas. 1057.

Promise made with intent to deceive and without intention to fulfill is fraud. *Tamlyn v. Peterson*, 15 N. D. 488, 107 N. W. 1081.

As to fraud in obtaining note. *Rochford v. Barrett*, 22 S. D. 83, 115 N. W. 522.

False representations by seller relied on by buyer are fraudulent, though seller believes them to be true. *McCabe v. Desnoyers*, 20 S. D. 581, 108 N. W. 341.

Failure of owner of stock to disclose to party taking it in exchange for deed, known insolvent condition of corporation, entitles grantor to rescission of deed. *Liland v. Tweto*, 19 N. D. 551, 125 N. W. 1032.

Statements regarding future as a fraud. 35 L.R.A. 420, 437.

Future promise as fraud. 10 L.R.A.(N.S.) 640; 24 L.R.A.(N.S.) 735.

Misstatement as to title to real property. 28 L.R.A.(N.S.) 202; 39 L.R.A.(N.S.) 1142.

False statement as to cost, selling or market price of property, or as to offers therefor. 35 L.R.A.(N.S.) 175.

Expression of opinion as fraud. 35 L.R.A. 417.

Statements as to credit as a fraud. 35 L.R.A. 421.

Right to rely on representations as to credit of third person. 37 L.R.A. 607.

Receiving deposit when bank insolvent, as a fraud. 34 L.R.A. 533.

As to similar provision in Cal. Civ. Code, § 1572, see *Brady v. Bartlett*, 56 Cal. 350;

*Roberts v. Haley*, 65 Cal. 397, 4 Pac. 385; *Brison v. Brison*, 75 Cal. 525, 7 Am. St.

Rep. 189, 17 Pac. 689; *Newman v. Smith*, 77 Cal. 22, 18 Pac. 791; *Lawrence v. Gayetty*,

78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382, 17 Mor. Min. Rep. 169; *Wenzel v. Shulz*,

78 Cal. 221, 20 Pac. 404; *Re Kohler*, 79 Cal. 313, 21 Pac. 758; *Colton v. Stanford*,

82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16; Mayer v. Salazar, 84 Cal. 646, 24 Pac. 597; Klose v. Hillenbrand, 88 Cal. 473, 26 Pac. 352; Hays v. Gloster, 88 Cal. 560, 26 Pac. 367; Schultz v. McLean, 93 Cal. 329, 28 Pac. 1053; Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358; Groppengiesser v. Lake, 103 Cal. 37, 36 Pac. 1036; Langley v. Rodriguez, 122 Cal. 580, 68 Am. St. Rep. 70, 55 Pac. 406; Benson v. Bunting, 127 Cal. 532, 78 Am. St. Rep. 81, 59 Pac. 991; Re Benton, 131 Cal. 472, 63 Pac. 775; Smith v. Blandin, 133 Cal. 441, 65 Pac. 894; Re Johnson, 134 Cal. 662, 66 Pac. 847; People v. Klee, 6 Cal. Unrep. 956, 69 Pac. 696; Hartwig v. Clark, 138 Cal. 668, 72 Pac. 149; Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433; Becker v. Schwerttle, 141 Cal. 386, 74 Pac. 1029; Muller v. Palmer, 144 Cal. 305, 77 Pac. 954.

2. Statements made without knowledge of falsity as ground for action for fraud. 18 L.R.A.(N.S.) 379.

Effect of representing things sold to be "good." 15 L.R.A. 795.

3. Concealment of material fact as a fraud. 4 L.R.A. 159; 5 L.R.A. 428.

Obligee's concealment of facts on obtaining guaranty or surety. 21 L.R.A. 411.

Landlord's concealment of defects in premises. 34 L.R.A. 827.

4. Whether lack of reasonable expectation of being able to pay is equivalent, as a matter of law, to an intention not to pay. 6 L.R.A.(N.S.) 556.

**§ 5850. 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 omission as the law specifically declares to be fraudulent without respect to actual fraud. [R. C. 1905, § 5294; Civ. C. 1877, § 884; R. C. 1899, § 3849.]

Failure of grantee to record his conveyance does not render deed itself void, but only him from claiming his rights under deed, to prejudice of creditors of grantor. Smith v. Cleaver, 25 S. D. 351, 126 N. W. 589.

As to similar provision in Cal. Civ. Code, § 1573, see Brady v. Bartlett, 56 Cal. 350; Roberts v. Haley, 65 Cal. 397, 4 Pac. 385; Carty v. Connolly, 91 Cal. 15, 27 Pac. 599; Re Johnson, 134 Cal. 662, 66 Pac. 847.

**§ 5851. Actual, question of fact.** Actual fraud is always a question of fact. [R. C. 1905, § 5295; Civ. C. 1877, § 885; R. C. 1899, § 3850.]

Question of fraud is for jury. Bank of Spearfish v. Graham, 16 S. D. 49, 91 N. W. 340.

As to whether purchaser was induced by forged orders and fraudulent representations to execute notes is question for jury. Bank of Spearfish v. Graham, 16 S. D. 49, 91 N. W. 340.

Actual fraud as ground for cancelling recorded contract affecting land is question of fact. Winter v. Johnson, 27 S. D. 512, 131 N. W. 1020.

As to similar provision in Cal. Civ. Code, § 1574, see Moore v. Copp, 119 Cal. 429, 51 Pac. 630.

**§ 5852. 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. [R. C. 1905, § 5296; Civ. C. 1877, § 886; R. C. 1899, § 3851.]

Of what undue influence consists. Ingwaldson v. Skrivseth, 7 N. D. 388, 75 N. W. 772.

Consent essential to execution of a contract. Grissel v. Bank, 12 S. D. 93, 90 N. W. 161.

Complaint for recovery of money paid under duress is sufficient where it alleges that plaintiff having borrowed sum of money from defendant had land deeded to him, and that defendant refused to deed land to purchaser found except on payment of sum as usury, which sum was paid in order to make sale. Redford v. Weller, 27 S. D. 334, 131 N. W. 296.

Undue influence as a ground for relief from a voluntary trust. 19 L.R.A. 767.

Effect of undue influence by physician to avoid release. 5 L.R.A.(N.S.) 663.

Undue influence in contract requiring servant to elect between acceptance of benefits out of relief fund and a prosecution of his claims in an action for damages. 11 L.R.A.(N.S.) 192.

Presumption of undue influence when indulged. 21 Am. St. Rep. 94.

Presumption and burden of proof as to undue influence respecting gifts inter vivos from parent to child. 35 L.R.A.(N.S.) 944.

As to similar provision in Cal. Civ. Code, § 1575, see *Moore v. Moore*, 56 Cal. 89; *Re Kohler*, 79 Cal. 313, 21 Pac. 758; *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186; *Dolliver v. Dolliver*, 94 Cal. 642, 30 Pac. 4; *Hayne v. Hermann*, 97 Cal. 259, 32 Pac. 171; *Dimond v. Sanderson*, 103 Cal. 97, 37 Pac. 189; *Stiles v. Cain*, 134 Cal. 170, 66 Pac. 231; *McDougall v. McDougall*, 135 Cal. 316, 67 Pac. 778; *Donnelly v. Rees*, 141 Cal. 56, 74 Pac. 433.

**§ 5853. Mistake classified.** Mistake may be either of fact or of law. [R. C. 1905, § 5297; Civ. C. 1877, § 887; R. C. 1899, § 3852.]

Contract for extension of time made between mortgagee and one assuming mortgage under mutual mistake in believing that he had acquired title to property, is void. *Iowa Loan & Trust Co. v. Schmose*, 19 S. D. 248, 103 N. W. 22, 9 A. & E. Ann. Cas. 255.

Mistake as to effect of foreclosure proceedings in divestiture of plaintiff's title to land is mistake of law. *Kenny v. McKenzie*, 25 S. D. 485, 49 L.R.A.(N.S.) 775, 127 N. W. 597.

As to similar provision in Cal. Civ. Code, § 1576, see *Douglass v. Todd*, 96 Cal. 655, 31 Am. St. Rep. 247, 31 Pac. 623.

**§ 5854. 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.

[R. C. 1905, § 5298; Civ. C. 1877, § 888; R. C. 1899, § 3853.]

Describing more land in writing than was intended by verbal agreement is a mistake of fact. *Beuësh v. Travelers' Ins. Co.*, 14 N. D. 39, 103 N. W. 405.

Mistake of fact. 45 Am. Dec. 631.

Right to reinstatement of mortgage released or discharged by mistake. 58 L.R.A. 788; 26 L.R.A.(N.S.) 816; 28 L.R.A.(N.S.) 825, 904.

Effect of mistake on compromise. 25 L.R.A.(N.S.) 309.

Effect of mistake of servant, as to extent of injuries received by him for which he has given a release. 11 L.R.A.(N.S.) 201.

Mistake as defense against action on assessment by mutual fire insurance companies. 32 L.R.A. 491.

Necessity for reforming insurance policy before recovery in case of mistake. 3 L.R.A.(N.S.) 548.

Reformation of insurance policy for mistake of soliciting agent. 11 L.R.A.(N.S.) 357.

Effect of honest mistake in answer as to health of insured warranted by him to be true. 15 L.R.A.(N.S.) 1277.

Effect of mistake as to price on meeting of minds in contract for sale of personalty. 32 L.R.A.(N.S.) 433.

Seller's mistake as to identity of vendee, as affecting the passing of the title to the goods sold. 13 L.R.A.(N.S.) 413.

Rights and liabilities under contract for sale of personalty as affected by a vendor's mistake in fixing price. 23 L.R.A.(N.S.) 1109.

Relief from purchase at auction on ground of mistake. 34 L.R.A.(N.S.) 927.

Rescission because of mistake as to extent of grantor's title to land. 15 L.R.A.(N.S.) 1039.

Right of grantee in possession to question grantor's right to collect purchase money in case of mistake. 21 L.R.A.(N.S.) 395.

Conclusiveness of stated or settled account containing inaccuracy or error in method of mathematical calculation. 23 L.R.A.(N.S.) 787.

Effect of mistake in name of payee in negotiable instrument. 22 L.R.A.(N.S.) 506.

Mistake as to identity of payee or indorser of bill or note. 17 L.R.A.(N.S.) 514.

Alteration of note by mistake. 35 L.R.A. 467.

Effect of alteration of date of note to correct mistake. 32 L.R.A.(N.S.) 517.

Alteration of instrument to correct mistake in designation of party. 31 L.R.A.(N.S.) 127.

Mistake as affecting question whether commercial paper operates as payment of debt. 35 L.R.A.(N.S.) 75.

Right of bank to recover amount paid on check or other paper drawn upon or payable at it under mistaken belief that there were sufficient funds to meet it. 23 L.R.A.(N.S.) 1092; 33 L.R.A.(N.S.) 1023.

Estoppel to enforce contract of suretyship or guaranty released through mistake. 13 L.R.A.(N.S.) 576.

Mistake in computation by contractor as ground for relief. 10 L.R.A.(N.S.) 114.

Effect of mistake of fact by defendant on right to specific performance of a contract induced thereby. 15 L.R.A.(N.S.) 81.

As to similar provision in Cal. Civ. Code, § 1577, see *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; *Rued v. Cooper*, 119 Cal. 463, 51 Pac. 704; *Ward v. Yorba*, 6 Cal. Unrep.

101, 54 Pac. 80; *San Diego Land & Town Co. v. La Presa School Dist.*, 122 Cal. 98, 54 Pac. 528; *Hardison v. Davis*, 131 Cal. 635, 63 Pac. 1005; *Palace Hardware Co. v. Smith*, 134 Cal. 381, 66 Pac. 474; *Hartwig v. Clark*, 138 Cal. 668, 72 Pac. 149; *White v. Stevenson*, 144 Cal. 104, 77 Pac. 828.

**§ 5855. 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. [R. C. 1905, § 5299; Civ. C. 1877, § 889; R. C. 1899, § 3854.]

As to rescission of agreement to make repayment under mutual mistake as to legal rights of parties. *Arnett v. Smith*, 11 N. D. 55, 88 N. W. 1037.

Invalidity of contract entered into under mutual mistake of law. *Silander v. Gronna*, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544.

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.

Right to reinstatement of mortgage released or discharged by mistake. 58 L.R.A. 788; 26 L.R.A.(N.S.) 816; 28 L.R.A.(N.S.) 825, 904.

Relief from mistake of law as to effect of instrument. 28 L.R.A.(N.S.) 785.

Servant's misconception as to the legal effect of a release from an injury received by him, the contents of which is known to him. 11 L.R.A.(N.S.) 198.

As to similar provision in Cal. Civ. Code, § 1578, see *Kopp v. Gunther*, 95 Cal. 63, 30 Pac. 301; *Rued v. Cooper*, 119 Cal. 463, 51 Pac. 704; *Benson v. Bunting*, 127 Cal. 532, 78 Am. St. Rep. 81, 59 Pac. 991; *Gregory v. Clabrough*, 129 Cal. 475, 62 Pac. 72; *Ellis v. Jefferds*, 130 Cal. 478, 62 Pac. 734; *Wingert v. San Francisco*, 134 Cal. 547, 86 Am. St. Rep. 294, 66 Pac. 730; *Kyle v. Hamilton*, 6 Cal. Unrep. 893, 68 Pac. 484; *Hartwig v. Clark*, 138 Cal. 668, 72 Pac. 149.

**§ 5856. Of foreign laws, fact.** Mistake of foreign laws is a mistake of fact. [R. C. 1905, § 5300; Civ. C. 1877, § 890; R. C. 1899, § 3855.]

**§ 5857. 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. [R. C. 1905, § 5301; Civ. C. 1877, § 891; R. C. 1899, § 3856.]

As to necessity of minds of parties meeting to form contract. *Kaster v. Mason*, 13 N. D. 107, 99 N. W. 1083.

Necessity of meeting of minds as to price in contract for sale of personalty. 32 L.R.A.(N.S.) 429.

Mutuality of obligation where one party's obligation is not definite and certain. 1 L.R.A.(N.S.) 445.

Validity and effect of stipulation in contract to renew on terms to be agreed upon. 32 L.R.A.(N.S.) 201.

Effect of leaving price indefinite in contract. 53 L.R.A. 289.

As to similar provision in Cal. Civ. Code, § 1580, see *Farmers' Nat. Gold Bank v. Stover*, 60 Cal. 387; *Farmers' & M. Bank v. De Shorb*, 137 Cal. 685, 70 Pac. 771.

**§ 5858. 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. [R. C. 1905, § 5302; Civ. C. 1877, § 892; R. C. 1899, § 3857.]

**§ 5859. 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. [R. C. 1905, § 5303; Civ. C. 1877, § 893; R. C. 1899, § 3858.]

As to similar provision in Cal. Civ. Code, § 1582, see *Frick v. Los Angeles*, 115 Cal. 512, 47 Pac. 250; *Pacific Pine Lumber Co. v. Western U. Teleg. Co.*, 123 Cal. 428, 56 Pac. 103.

**§ 5860. 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. [R. C. 1905, § 5304; Civ. C. 1877, § 894; R. C. 1899, § 3859.]

Time and place of consummation of contract when offer by letter accepted by telegram, or vice versa. 6 L.R.A.(N.S.) 1016.

As to similar provision in Cal. Civ. Code, § 1583, see *Pacific Pine Lumber Co. v. Western U. Teleg. Co.*, 123 Cal. 428, 56 Pac. 103.

**§ 5861. 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. [R. C. 1905, § 5305; Civ. C. 1877, § 895; R. C. 1899, § 3860.]

As to similar provision in Cal. Civ. Code, § 1584, see *Gallagher v. Equitable Gaslight Co.*, 141 Cal. 699, 75 Pac. 329.

**§ 5862. 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. [R. C. 1905, § 5306; Civ. C. 1877, § 896; R. C. 1899, § 3861.]

Counter proposition to offer of dedication to the effect that site would be accepted, provided, that terms of resolution in regard to abstract, etc., was complied with, was not acceptance of offer. *Grow v. Taylor*, 23 N. D. 469, 137 N. W. 451.

Offer and acceptance without execution of contemplated formal instrument. 29 L.R.A. 431.

Illustrations of the distinction between a definite proposal or acceptance and a mere preliminary step in the negotiation of a contract. 4 L.R.A.(N.S.) 177.

Validity of contract of employment indefinite and uncertain as to kind of employment or amount of remuneration. 48 L.R.A.(N.S.) 435.

As to similar provision in Cal. Civ. Code, § 1585, see *Wristen v. Bowles*, 82 Cal. 84, 22 Pac. 1136; *Niles v. Hancock*, 140 Cal. 157, 73 Pac. 840; *Four Oil Co. v. United Oil Producers*, 145 Cal. 623, 68 L.R.A. 226, 79 Pac. 366.

**§ 5863. When proposal revoked.** A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards. [R. C. 1905, § 5307; Civ. C. 1877, § 897; R. C. 1899, § 3862.]

As to acceptance of contract before revocation. *Reeves v. Bruening*, 13 N. D. 157, 100 N. W. 241.

Order for machinery given to plaintiff's agent providing that it was subject to plaintiff's approval, did not become binding contract until approval and acceptance. *Thomas Mfg. Co. v. Lyons*, 29 S. D. 600, 137 N. W. 340.

In action for price of goods purchased upon order, defendant may show under general denial that order was cancelled before acceptance by seller. *A. A. Cooper Wagon & Buggy Co. v. Stedronaky Bros. Co.*, 24 S. D. 381, 123 N. W. 846.

Right to withdraw order given agent before acceptance by principal. 10 L.R.A.(N.S.) 1138.

As to similar provision in Cal. Civ. Code, § 1586, see *Wristen v. Bowles*, 82 Cal. 84, 22 Pac. 1136.

**§ 5864. 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 5858 and 5860 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. [R. C. 1905, § 5308; Civ. C. 1877, § 898; R. C. 1899, § 3863.]

Acceptance of offer, after depositing notice of revocation in post office, ineffectual. *Watters v. Lincoln*, 29 S. D. 98, 135 N. W. 712.

Effect of death of party after the mailing, but before the receipt, of his letter accepting an offer. 12 L.R.A.(N.S.) 439.

**§ 5865. Subsequent consent.** A contract which is voidable solely for want of due consent may be ratified by a subsequent consent. [R. C. 1905, § 5309; Civ. C. 1877, § 899; R. C. 1899, § 3864.]

As to similar provision in Cal. Civ. Code, § 1588, see *Phillips v. Sanger Lumber Co.*, 130 Cal. 431, 62 Pac. 749.

**§ 5866. 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. [R. C. 1905, § 5310; Civ. C. 1877, § 900; R. C. 1899, § 3865.]

Party accepting benefits of transaction cannot repudiate. *Morris v. Ewing*, 8 N. D. 99, 77 N. W. 1047.

Corporation accepting benefit of contract in its behalf by officer cannot repudiate. *Dedrick v. Land Co.*, 12 S. D. 59, 80 N. W. 153; *Huron P. & B. Co. v. Kittleson*, 4 S. D. 520, 57 N. W. 233.

As to acceptance of novation. *Lemon v. Little*, 21 S. D. 628, 114 N. W. 1001.

No implied contract to pay for services of engineer arose against holder of mining claim, where company to whom he gave option to purchase employed engineer to make survey, so that patent might be obtained. *Fish & H. Co. v. New England Homestake Co.*, 27 S. D. 221, 130 N. W. 841.

Effect of using building by owner as an acceptance of work of construction or repair. 16 L.R.A.(N.S.) 489.

Taking possession of building with knowledge of defects as waiver thereof, as against contractor. 20 L.R.A.(N.S.) 872.

As to similar provision in Cal. Civ. Code, § 1589, see *Cutting Packing Co. v. Packers' Exchange*, 86 Cal. 574, 10 L.R.A. 369, 21 Am. St. Rep. 63, 25 Pac. 52; *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 34 Pac. 527; *Stone v. Owens*, 105 Cal. 292, 38 Pac. 726; *Blood v. LaSerena Land & Water Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; *Thomasson v. Grace M. E. Church*, 113 Cal. 558, 45 Pac. 838; *Lisenby v. Newton*, 120 Cal. 571, 65 Am. St. Rep. 203, 52 Pac. 813; *Phillips v. Sanger Lumber Co.*, 130 Cal. 431, 62 Pac. 749; *Canale v. Copello*, 137 Cal. 22, 69 Pac. 698; *Gallagher v. Equitable Gaslight Co.*, 141 Cal. 699, 75 Pac. 329; *White v. Stevenson*, 144 Cal. 104, 77 Pac. 828.

#### ARTICLE 4.—OBJECT OF A CONTRACT.

**§ 5867. 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. [R. C. 1905, § 5311; Civ. C. 1877, § 901; R. C. 1899, § 3866.]

As to similar provision in Cal. Civ. Code, § 1595, see *Mackenzie v. Hodgkin*, 126 Cal. 591, 77 Am. St. Rep. 209, 59 Pac. 36.

**§ 5868. 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. [R. C. 1905, § 5312; Civ. C. 1877, § 902; R. C. 1899, § 3867.]

**§ 5869. Possible defined.** Everything is deemed possible except that which is impossible in the nature of things. [R. C. 1905, § 5313; Civ. C. 1877, § 903; R. C. 1899, § 3868.]

As to similar provision in Cal. Civ. Code, § 1597, see *Peterson v. Hubbard*, 2 Cal. Unrep. 607, 9 Pac. 106.

**§ 5870. 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. [R. C. 1905, § 5314; Civ. C. 1877, § 904; R. C. 1899, § 3869.]

As to similar provision in Cal. Civ. Code, § 1598, see *Sutliff v. Seidenberg*, 132 Cal. 63, 64 Pac. 131, 469.

**§ 5871. 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. [R. C. 1905, § 5315; Civ. C. 1877, § 905; R. C. 1899, § 3870.]

As to similar provision in Cal. Civ. Code, § 1599, see *Granger v. Original Empire Mill. & Min. Co.*, 59 Cal. 678; *Porter v. Fisher*, 4 Cal. Unrep. 324, 34 Pac. 700; *McVicker v. McKenzie*, 136 Cal. 656, 69 Pac. 495.

#### ARTICLE 5.—CONSIDERATION.

**§ 5872 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. [R. C. 1905, § 5316; Civ. C. 1877, § 906; R. C. 1899, § 3871.]

Unfounded claim not sufficient to support promise to pay money upon settlement. *McGlynn v. Scott*, 4 N. D. 18, 58 N. W. 460.

Consideration for promise may be some prejudice suffered. *Roberts v. Bank*, 8 N. D. 474, 79 N. W. 993.

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.

Relinquishment of a timber culture entry a good consideration. *Peoples v. Evens*, 8 N. D. 121, 77 N. W. 93.

Inadequacy of consideration as a defense. 56 Am. Rep. 332.

Sufficiency of consideration received upon disposal of municipal property. 43 L.R.A.(N.S.) 1137.

— for assumption of debts on dissolution of partnership. 48 L.R.A.(N.S.) 547.

— for subscription to charity. 48 L.R.A.(N.S.) 785.

— for compromise of void, invalid or unfounded claim. 25 L.R.A.(N.S.) 288.

— for contract requiring servant to elect between acceptance of benefits out of a relief fund and a prosecution of his claims in an action for damages. 11 L.R.A.(N.S.) 187; 48 L.R.A.(N.S.) 442.

Furnishing medical attention as a consideration for release of liability for personal injuries or death. 46 L.R.A.(N.S.) 419.

Cancellation of invalid contract as consideration for bill or note. 5 L.R.A.(N.S.) 725.

Release of promise to marry as consideration for contract. 19 L.R.A.(N.S.) 656.

New promise as consideration when original promise was illegal. 53 L.R.A. 370.

Forbearance to sue as consideration for promise. 60 Am. Dec. 524.

— for promise by a third person to pay an existing obligation. 19 L.R.A.(N.S.) 842.

Cancellation of invalid contract as consideration for a promise. 5 L.R.A.(N.S.) 725.

As to similar provision in Cal. Civ. Code, § 1605, see *Golden State & M. Iron Works v. Angell*, 89 Cal. 643, 27 Pac. 65; *Blyth v. Robinson*, 104 Cal. 239, 37 Pac. 904; *Heim v. Butin*, 5 Cal. Unrep. 19, 40 Pac. 39; *Mackenzie v. Hodgkin*, 126 Cal. 591, 77 Am. St. Rep. 209, 59 Pac. 36; *Kyle v. Hamilton*, 6 Cal. Unrep. 893, 68 Pac. 484; *Aden v. Vallejo*, 139 Cal. 165, 72 Pac. 905; *Kellogg v. Lopez*, 145 Cal. 497, 78 Pac. 1056.

**§ 5873. 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. [R. C. 1905, § 5317; Civ. C. 1877, § 907; R. C. 1899, § 3872.]

Extension of time for payment of notes may be sufficient. *First Nat. Bank v. Lamont*, 5 N. D. 393, 67 N. W. 145; *Red River Valley Bank v. Barnes*, 8 N. D. 432, 79 N. W. 880.

Moral obligation as a consideration. *Rankin v. Mitthiesen*, 10 S. D. 628, 75 N. W. 196.

Where person is surety for another's debt to amount of \$800, subsequent signing note of similar tenor needs no other consideration. *Frick Co. v. Hoff*, 26 S. D. 360, 128 N. W. 495.

Pre-existing debt as consideration for bona fide purchase of nonnegotiable property. 36 L.R.A. 161.

Pre-existing debt as consideration for chattel mortgage as against other creditors or equities. 33 L.R.A. 305.

Discharge of antecedent debt as a consideration sustaining one's character as a bona fide purchaser or incumbrancer for value entitled to protection of recording acts. 27 L.R.A.(N.S.) 620.

Payment of existing debt as consideration for contract. 34 L.R.A. 33.

Payment of part of liquidated and undisputed debt as consideration for discharge of whole. 11 L.R.A.(N.S.) 1018; 21 L.R.A.(N.S.) 1005.

Promise of additional compensation for completing an executory contract other than a contract for the payment of money. 11 L.R.A.(N.S.) 789; 28 L.R.A.(N.S.) 450.

Moral obligation as a consideration for a promise. 53 L.R.A. 353; 26 L.R.A.(N.S.) 520; 39 Am. St. Rep. 735.

Does moral obligation arising from relationship afford a sufficient consideration to support a promise to become responsible for another's debt. 3 L.R.A.(N.S.) 436.

Validity of husband's express promise to pay debt contracted by wife. 7 L.R.A.(N.S.) 1048.

Validity of new promise by woman after discoverture to pay debt incurred during coverture. 7 L.R.A.(N.S.) 1053; 33 L.R.A.(N.S.) 741.

New promise after bar of limitations or discharge in bankruptcy. 53 L.R.A. 862.

As to similar provision in Cal. Civ. Code, § 1606, see *Bernstein v. Downs*, 112 Cal. 197, 44 Pac. 557.

**§ 5874. Consideration must be lawful.** The consideration of a contract must be lawful within the meaning of section 5922. [R. C. 1905, § 5318; Civ. C. 1877, § 908; R. C. 1899, § 3873.]

As to similar provision in Cal. Civ. Code, § 1607, see *Sharon v. Sharon*, 68 Cal. 29, 8 Pac. 614; *Connolly v. Hingley*, 82 Cal. 642, 23 Pac. 273; *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286; *Berka v. Woodward*, 125 Cal. 119, 45 L.R.A. 420, 73 Am. St. Rep. 31, 57 Pac. 777.

**§ 5875. 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. [R. C. 1905, § 5319; Civ. C. 1877, § 909; R. C. 1899, § 3874.]

Party cannot avoid contract because of his unlawful purpose in making it. *Gage v. Fisher*, 5 N. D. 297, 65 N. W. 809, 31 L.R.A. 557.

Consideration which is partly illegal or has partly failed. 117 Am. St. Rep. 493.

As to similar provision in Cal. Civ. Code, § 1608, see *Sharon v. Sharon*, 68 Cal. 29, 8 Pac. 614; *Connolly v. Hingley*, 82 Cal. 642, 23 Pac. 273; *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286; *Moffatt v. Bulsom*, 96 Cal. 106, 31 Am. St. Rep. 192, 60 Pac. 1022; *Berka v. Woodward*, 125 Cal. 119, 45 L.R.A. 420, 73 Am. St. Rep. 31, 57 Pac. 777; *Field v. Austin*, 131 Cal. 379, 63 Pac. 692; *Humboldt Co. v. Stern*, 136 Cal. 63, 68 Pac. 324.

**§ 5876. 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. [R. C. 1905, § 5320; Civ. C. 1877, § 910; R. C. 1899, § 3875.]

**§ 5877. 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. [R. C. 1905, § 5321; Civ. C. 1877, § 911; R. C. 1895, § 3876.]

As to similar provision in Cal. Civ. Code, § 1610, see California Annual Conference v. Seitz, 74 Cal. 287, 15 Pac. 839.

**§ 5878. 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. [R. C. 1905, § 5322; Civ. C. 1877, § 912; R. C. 1899, § 3877.]

Court may require plaintiff to remit a portion of verdict for money which is unsupported by evidence. *Doyle v. Edwards*, 15 S. D. 648, 91 N. W. 322.

**§ 5879. 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. [R. C. 1905, § 5323; Civ. C. 1877, § 913; R. C. 1899, § 3878.]

**§ 5880. 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. [R. C. 1905, § 5324; Civ. C. 1877, § 914; R. C. 1899, § 3879.]

Writing "extended to December 1st, 1891" by payee on a promissory note, is a written extension and presumptive evidence of consideration. *Corbett v. Clough*, 8 S. D. 176, 65 N. W. 1074.

A promissory note imports consideration. *McGlynn v. Scott*, 4 N. D. 18, 58 N. W. 460.

Written extension of contract giving option to purchase real estate implies consideration and is valid. *Gira v. Harris*, 14 S. D. 537, 86 N. W. 624.

Chattel mortgage may be admitted in evidence without proof of consideration, unless want of consideration has been shown. *First Nat. Bank v. Bank*, 9 N. D. 319, 63 N. W. 221.

Sufficient consideration will be presumed from written agreement to pay account. *Grimmerud Shoe Co. v. Jackson*, 22 S. D. 114, 115 N. W. 656.

All written instruments, sealed or unsealed, upon a parity in respect to consideration. *Heffleman v. Pennington County*, 3 S. D. 162, 52 N. W. 851.

Recitals in deed as to consideration not conclusive. *Fraleay v. Bently*, 1 D. 24, 46 N. W. 506.

One claiming to have signed contract only as witness must prove that fact. *Hermiston v. Green*, 11 S. D. 81, 75 N. W. 819.

Telegram containing warranty of goods ordered by addressee is a contract in writing. *Western Twine Co. v. Wright*, 11 S. D. 521, 78 N. W. 942, 44 L.R.A. 438.

Facts constituting a written agreement and delivery of the same must be affirmatively alleged. *Smith v. Gale*, 13 S. D. 162, 82 N. W. 385.

**§ 5881. Writing presumes consideration.** A written instrument is presumptive evidence of a consideration. [R. C. 1905, § 5325; Civ. C. 1877, § 914; R. C. 1899, § 3880.]

Written instrument is presumptive evidence of consideration and burden of proof to show lack of consideration is upon party seeking to avoid it. *Frick Co. v. Hoff*, 26 S. D. 360, 128 N. W. 495.

Note, containing clause, "less taxes on land for 1906" was presumably based upon consideration. *Kimm v. Wolters*, 28 S. D. 255, 133 N. W. 277.

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.

Deed being written instrument, is presumptive evidence of having been executed and delivered for consideration. *Styles v. Dickey*, 22 N. D. 515, 134 N. W. 702.

Deed of land is presumed to have been made for valuable consideration. *Smith v. Gaub*, 19 N. D. 337, 123 N. W. 827.

As to similar provision in Cal. Civ. Code, § 1614, see *Brickell v. Batchelder*, 62 Cal. 623; *Goad v. Moulton*, 67 Cal. 536, 8 Pac. 63; *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. 179; *Martin v. Splivalo*, 69 Cal. 611, 11 Pac. 484; *Metropolitan Loan Asso. v. Esche*, 75 Cal. 513, 17 Pac. 675; *Williams v. Hall*, 79 Cal. 606, 21 Pac. 965; *McLaughlin v. Clausen*, 85 Cal. 322, 24 Pac. 636; *Toomy v. Dunphy*, 86 Cal. 639, 25 Pac. 130; *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962; *Henke v. Eureka Endowment Asso.*, 100 Cal. 429, 34 Pac. 1089; *Dimond v. Sanderson*, 103 Cal. 97, 37 Pac. 189; *Giselman v. Starr*, 106 Cal. 651, 40 Pac. 8; *Younglove v. Cunningham*, 5 Cal. Unrep. 281, 43 Pac. 755; *Rogers v. Schulenburg*, 111 Cal. 281, 43 Pac. 899; *Rogers v. Kimball*, 5 Cal. Unrep. 725, 49 Pac. 719; *Van Loben Sels v. Bunnell*, 120 Cal. 680, 53 Pac. 266; *Main Street & Agri. Park R. Co. v. Los Angeles Traction Co.*, 129 Cal. 301, 61 Pac. 937; *Field v. Austin*, 131 Cal. 379, 63 Pac. 692; *Driscoll v. Driscoll*, 143 Cal. 528, 77 Pac. 471.

**§ 5882. 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. [R. C. 1905, § 5326; Civ. C. 1877, § 914; R. C. 1899, § 3881.]

Burden of proof as to consideration for transfer by husband to wife. 56 L.R.A. 828.

As to similar provision in Cal. Civ. Code, § 1615, see *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. 179; *Martin v. Splivalo*, 69 Cal. 611, 11 Pac. 484; *Metropolitan Loan Asso. v. Esche*, 75 Cal. 513, 17 Pac. 675; *Williams v. Hall*, 79 Cal. 606, 21 Pac. 965; *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962; *Dimond v. Sanderson*, 103 Cal. 97, 37 Pac. 189; *Rogers v. Schulenburg*, 111 Cal. 281, 43 Pac. 899; *Van Loben Sels v. Bunnell*, 120 Cal. 680, 53 Pac. 266; *Main Street & Agri. Park R. Co. v. Los Angeles Traction Co.*, 129 Cal. 301, 61 Pac. 937; *Field v. Austin*, 131 Cal. 379, 63 Pac. 692; *Shain v. Goodwin*, 46 Fed. 564.

#### ARTICLE 6.—MANNER OF CREATING CONTRACTS.

**§ 5883. Contracts classified.** A contract is either express or implied. [R. C. 1905, § 5327; Civ. C. 1877, § 915; R. C. 1899, § 3882.]

**§ 5884. Express.** An express contract is one the terms of which are stated in words. [R. C. 1905, § 5328; Civ. C. 1877, § 916; R. C. 1899, § 3883.]

Contract to pay board for another person not implied from contract with previous landlord so to do. *Dempsey v. Billingshurst*, 7 S. D. 564, 64 N. W. 1124.

Smallpox patient in pest house; implied contract to pay county physician for attendance. *Ostland v. Porter*, 4 D. 98, 25 N. W. 731.

When oral contract is ambiguous, intention of parties may be gathered from their acts and surrounding circumstances. *Blood v. Fargo Elevator Co.*, 1 S. D. 71, 45 N. W. 200.

Parol contract for sale of realty partly performed may be enforced. *Fideler v. Norton*, 4 D. 258, 30 N. W. 128.

As to similar provision in Cal. Civ. Code, § 1620, see *Nevills v. Moore Min. Co.*, 135 Cal. 561, 67 Pac. 1054.

**§ 5885. Implied.** An implied contract is one the existence and terms of which are manifested by conduct. [R. C. 1905, § 5329; Civ. C. 1877, § 917; R. C. 1899, § 3884.]

Implied promise to share expense of party wall erected without express contract. 66 L.R.A. 705.

—to compensate one furnishing relief to poor person. 39 L.R.A.(N.S.) 161.

—with intoxicated person. 54 L.R.A. 440.

—for compensation of partner. 17 L.R.A.(N.S.) 412.

—for through carriage by initial or first contracting carrier. 31 L.R.A.(N.S.) 5.

Right of physician to recover for emergency services rendered unconscious person. 12 L.R.A.(N.S.) 1090.

Implied power of attorney to bind client for expenses incidental to trial including associate counsel's office. 23 L.R.A.(N.S.) 702.

Husband's liability under implied contract for wife's purchases on his credit of articles for personal use. 65 L.R.A. 549.

Acceptance of chattel before agreement as to purchase price as assent to seller's price. 11 L.R.A.(N.S.) 254.

Placing one's child in another's custody as implying contract not to reclaim child. 16 L.R.A.(N.S.) 1004.

Employer's duties as to acts of independent contractor arising out of implied contract. 66 L.R.A. 150.

Statute of limitations applicable to action to enforce an implied promise arising from acceptance of devise chargeable with payment of legacy. 8 L.R.A.(N.S.) 393.

Right of third person to sue on implied contract. 25 L.R.A. 263.

Implication of agreement to pay for services rendered by relative or member of household. 11 L.R.A.(N.S.) 873.

Right of child who supports parent at request of other children to recover therefor from the latter. 27 L.R.A.(N.S.) 683.

Implied contract to pay for services to relative not living as part of same family. 1 L.R.A.(N.S.) 819.

Right of husband or wife to compensation for services rendered to other. 15 L.R.A. 215.

Implied contract to pay for household services where parties are living in illicit relations. 29 L.R.A.(N.S.) 787.

Municipal liability on implied contracts. 27 L.R.A.(N.S.) 1117; 39 L.R.A.(N.S.) 72; 41 L.R.A.(N.S.) 473.

As to similar provision in Cal. Civ. Code, § 1621, see *Jennings v. Bank of California*, 79 Cal. 323, 5 L.R.A. 233, 12 Am. St. Rep. 145, 21 Pac. 852.

**§ 5886. What contracts may be oral.** All contracts may be oral, except such as are specially required by statute to be in writing. [R. C. 1905, § 5330; Civ. C. 1877, § 918; R. C. 1899, § 3885.]

Oral lease of real estate for one year to begin in future is valid. *Paulton v. Kreiser*, 18 S. D. 487, 101 N. W. 46, 5 A. & E. Ann. Cas. 827.

Oral agreement to waive statute of limitations. 63 L.R.A. 195.

As to similar provision in Cal. Civ. Code, § 1622, see *Frick v. Los Angeles*, 115 Cal. 512, 47 Pac. 250; *Converse v. Scott*, 137 Cal. 239, 70 Pac. 13.

**§ 5887. 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. [R. C. 1905, § 5331; Civ. C. 1877, § 919; R. C. 1899, § 3886.]

Use of statute of frauds as protection to fraud. 25 L.R.A. 569.

**§ 5888. 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 6655.

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. [R. C. 1905, § 5332; Civ. C. 1877, § 920; R. C. 1899, § 3887.]

Oral agreement entered into as result of written correspondence relied on as contract is inadmissible. *Phelan v. Neary*, 22 S. D. 265, 117 N. W. 142.

Written contract not invalidated by prior void parol contract. *Larison v. Wilbur*, 1 N. D. 284, 47 N. W. 381.

Indorsement of note; liability as guarantor. *Rankin v. Matthiesen*, 10 S. D. 628, 75 N. W. 196.

That trees had to be dug and packed before delivery by seller did not bring sale within statute. *Jones v. Pettigrew*, 25 S. D. 432, 127 N. W. 538.

When statute of frauds may be relied upon as a defense. 15 Am. Dec. 62.

Persons to whom statute of frauds is available. 127 Am. St. Rep. 756.

When and how must statute be pleaded. 86 Am. Dec. 684; 76 Am. St. Rep. 644.

Whether statute applies to contracts made beyond the state. 93 Am. Dec. 776.

Damages for failure to perform contract not valid under statute of frauds. 6 Am. St. Rep. 495.

Recovery of money paid under a contract invalid under statute of frauds. 105 Am. St. Rep. 793.

What amounts to subscription by the parties. 25 Am. Rep. 543.

Memorandum of auction sales sufficient to satisfy statute of frauds. 13 Am. Dec. 398.

Contracts of indemnity within statute of frauds. 42 Am. St. Rep. 186.

When letters constitute parts of memorandum. 7 Am. Dec. 288; 42 Am. Rep. 347.

What constitute memoranda and by whom must be signed. 47 Am. Rep. 532.

Memorandum may be in any kind of letters and in pencil. 7 Am. Dec. 288.

Telegrams as writings to make a contract within the statute of frauds. 50 L.R.A. 240.

May the statute of frauds be satisfied by a declaration of trust signed by the trustee alone. 38 L.R.A.(N.S.) 646.

Effect of part performance under statute of frauds. 14 L.R.A. 863.

Will as part performance to satisfy statute of frauds. 14 L.R.A. 863.

Part performance of grantee's oral promise to grantor to hold in trust as taking case out of statute of frauds. 39 L.R.A.(N.S.) 928.

Validity of oral insurance contract. 22 L.R.A. 768.

Requisites of present oral contract of insurance. 5 L.R.A.(N.S.) 407.

Validity of parol promise to accept an order or bill of exchange. 26 L.R.A. 620.

Necessity for writing to support failure to give notice of dishonor or subsequent promise by indorser. 29 L.R.A. 315.

As to similar provision in Cal. Civ. Code, § 1624, see *Swain v. Burnette*, 89 Cal. 564, 26 Pac. 1093; *Gorham v. Heiman*, 90 Cal. 346, 27 Pac. 289; *Byers v. Locke*, 93 Cal. 493, 27 Am. St. Rep. 212, 29 Pac. 119; *Platt v. Butcher*, 112 Cal. 634, 44 Pac. 1060; *Kilbride v. Moss*, 113 Cal. 432, 54 Am. St. Rep. 361, 45 Pac. 812; *McKeany v. Black*, 117 Cal. 587, 49 Pac. 710; *Wickson v. Monarch Cycle Mfg. Co.*, 128 Cal. 156, 79 Am. St. Rep. 36, 60 Pac. 764.

1. Oral contract which can be performed within year is valid, though not actually completed within that time. *Sarles v. Sharlow*, 5 D. 100, 37 N. W. 748.

Agreements not to be performed within a year. 93 Am. Dec. 86; 43 Am. Rep. 42; 138 Am. St. Rep. 590.

Effect of statute of frauds upon contracts for services which may, but are not intended to, be performed within a year. 15 L.R.A.(N.S.) 313.

Right to recover for services rendered beyond statutory period of limitations on breach of parol contract to make provision by will. 6 L.R.A.(N.S.) 703.

Estoppel from pleading statute in actions on contracts not to be performed within one year. 134 Am. St. Rep. 172.

2. Promise to pay the debt of another. 5 Am. Dec. 321; 95 Am. Dec. 251; 46 Am. Rep. 296; 126 Am. St. Rep. 487.

- Promise to pay third person. 25 L.R.A. 264.  
 Guaranty of the contract of a person under disability. 33 L.R.A. 359.  
 Contracts between sureties to fix their shares of liability. 39 L.R.A. 378.  
 Statute of frauds as affecting parol violations of collateral contract. 28 L.R.A.(N.S.) 882.
- Is agreement by vendee to pay incumbrance within statute of frauds as promise to answer for the debt of another. 15 L.R.A.(N.S.) 1087.  
 Statute of frauds as affecting right to assume debts on dissolution of partnership. 9 L.R.A.(N.S.) 54.  
 Applicability of statute requiring that representations as to another's credit must be in writing in order to sustain an action. 13 L.R.A.(N.S.) 212.  
 Contemporary promise of one person to pay where benefit inures to another as a promise to answer for default of another within statute of frauds. 15 L.R.A.(N.S.) 214; 32 L.R.A.(N.S.) 598.  
 Is oral promise to pay another's pre-existing debt made in order to secure benefit to promisor without releasing original debtor within statute of frauds. 22 L.R.A.(N.S.) 1077; 40 L.R.A.(N.S.) 242.  
 Statute of frauds as affecting accommodation indorser. 28 L.R.A.(N.S.) 1045.  
 Subscribing one's name under word "surety" in written contract as satisfying statute of frauds. 23 L.R.A.(N.S.) 1197.  
 Oral contract extending initial carrier's undertaking beyond its own line. 31 L.R.A.(N.S.) 32.
4. Necessity of writing to make binding commission to purchase personal property. 11 L.R.A.(N.S.) 650.  
 Who may enforce contract for sale of goods where only one party signed contract. 28 L.R.A.(N.S.) 694.  
 When contract for sales of goods is within statute. 9 Am. Dec. 188.  
 Contracts for the purchase of property not then in existence. 54 Am. Rep. 164.  
 Validity of verbal chattel mortgage. 7 L.R.A.(N.S.) 418.  
 Distinction between sales and contracts for work and labor. 14 L.R.A. 230; 30 L.R.A.(N.S.) 319.  
 Sale distinguished from contract to manufacture. 14 L.R.A. 230; 30 L.R.A.(N.S.) 319.
- Work in fitting up for delivery as payment of price to take the contract out of the statute of frauds. 15 L.R.A.(N.S.) 654.  
 Contract to transfer personal property in consideration of services, as affected by statute of frauds relating to contracts for the sale of goods, etc. 16 L.R.A.(N.S.) 381.  
 Acceptance and delivery of goods to satisfy statute of frauds. 49 Am. Dec. 325, 37 Am. Rep. 16; 96 Am. St. Rep. 215; 10 L.R.A.(N.S.) 638.  
 Receipt and acceptance to satisfy the statute of frauds, when goods are in possession of purchaser at time of agreement. 11 L.R.A.(N.S.) 1186; 20 L.R.A.(N.S.) 498.  
 Symbolic delivery by sample to satisfy statute. 70 L.R.A. 321.  
 Delivery to carrier. 35 L.R.A.(N.S.) 1039.  
 Enforcement of contracts because of part performance. 32 Am. Dec. 129.  
 Acts which may constitute part performance. 53 Am. Dec. 539.
5. Validity of written contract for sale of real property. *Hughes v. Payne*, 22 S. D. 293, 117 N. W. 363.  
 Plaintiff in action for specific performance of contract to convey land must prove valid written contract. *Moody v. Howe*, 17 S. D. 545, 97 N. W. 841.  
 Proof of conversations with purchaser relative to defective condition of title to part of property sold, offered for purpose of showing subsequent oral modification of written contract, not admissible. *McCulloch v. Bauer*, 24 N. D. 109, 139 N. W. 318.  
 Unexecuted verbal agreement for conveyance of land is invalid. *Cleveland v. Evans*, 5 S. D. 53, 58 N. W. 8.  
 Agreement to purchase real estate and share in profits need not be in writing. *Davenport v. Buchanan*, 6 S. D. 376, 61 N. W. 47.  
 "Note or memorandum" may be made subsequent to agreement and may be contained in more than one paper. *Townsend v. Kennedy*, 6 S. D. 47, 60 N. W. 164.  
 Agreement as to terms on which sheriff's certificate of sale was assigned not required to be in writing. *Whiffen v. Hollister*, 12 S. D. 68, 80 N. W. 156.  
 Railway right of way constitutes interest in land under statute of frauds. *Spawn v. South Dakota C. R. Co.*, 26 S. D. 1, 127 N. W. 648, *Ann. Cas.* 1912D, 979.  
 Permission given without consideration by owner for use by township of his land for discharge across his land of surplus water of artesian well is license and need not be in writing, but is revocable. *Butz v. Richland Twp.*, 28 S. D. 442, 134 N. W. 895.  
 Oral lease of real estate for one year, to begin in future, is valid. *Paulton v. Kreiser*, 18 S. D. 487, 101 N. W. 46, 5 A. & E. *Ann. Cas.* 827.  
 Parol lease of land for two years is invalid. *Merchants State Bank v. Ruettell*, 12 N. D. 519, 97 N. W. 853.  
 Verbal lease for less than one year may be created as part of consideration for deed of land without varying its terms. *Bjornson v. Rostad*, 30 S. D. 40, 137 N. W. 567.

Agent's authority to execute contract for sale of real property must be in writing. *Brandrup v. Britten*, 11 N. D. 376, 92 N. W. 453; *Watters v. Dancey*, 23 S. D. 481, 123 N. W. 430; *Lichty v. Daggett*, 23 S. D. 380, 121 N. W. 862.

Contract of agent for sale of real estate void unless authorized in writing. *Ballou v. Bergvendsen*, 9 N. D. 285, 83 N. W. 10.

Employment of agent to find purchaser for realty need not be in writing. *McLaughlin v. Wheeler*, 1 S. D. 497, 47 N. W. 816.

Sufficiency of letters employing real estate broker to authorize him to enter into written contract. *Purkey v. Harding*, 23 S. D. 632, 123 N. W. 69.

Authority to bind principal for sale of land may be established by letters and telegrams. *Farrell v. Edwards*, 8 S. D. 425, 66 N. W. 812.

Ratification of lease executed by agent without written authority, by owner after parting with title, is ineffectual. *Dobbs v. Atlas Elevator Co.*, 22 S. D. 226, 117 N. W. 128.

What amount to contracts for the sale of land within the meaning of statute of frauds. 102 Am. St. Rep. 230.

Agreement to hold land purchased on execution for defendant. 40 Am. Dec. 207.

Validity of transaction between heir and ancestor relating to expectancy. 32 L.R.A. 597.

Right to compensation for improvements on land made in good faith under oral contract or gift. 53 L.R.A. 337.

Parol agreement to construct private way across railroad. 17 L.R.A.(N.S.) 702; 24 L.R.A.(N.S.) 375.

Right of a purchaser of real estate to rely on the statute of frauds against contract by his vendor with a third person. 40 L.R.A.(N.S.) 883.

Validity of oral agreement to share contract for purchase of land. 3 L.R.A.(N.S.) 147.

Parol agreement to take title to real property, sell the same, and divide the proceeds, as affected by the statute of frauds. 8 L.R.A.(N.S.) 1137; 20 L.R.A.(N.S.) 298; 42 L.R.A.(N.S.) 1160.

Agreement to share real property in payment for services. 41 L.R.A.(N.S.) 184.

Right to recover value of services rendered in consideration of contract to convey or devise property which is void by the statute of frauds. 37 L.R.A.(N.S.) 639.

Effect of statute of frauds upon partnership lands. 27 L.R.A. 477.

Applicability of statute to partnership real estate. 37 L.R.A.(N.S.) 302.

Validity of parol partnership for dealing in lands. 16 L.R.A. 745; 4 L.R.A.(N.S.) 427; 33 L.R.A.(N.S.) 883.

Assignment of lease. 15 L.R.A. 754.

Insurable interest of tenant in leased property under parol agreement. 42 L.R.A.(N.S.) 135.

Validity of oral sale of standing timber. 19 L.R.A. 721; 86 Am. Dec. 182; 17 Am. Rep. 595.

Contract for timber to be sawed as a sale within the statute of frauds. 14 L.R.A. 233; 30 L.R.A.(N.S.) 324.

Purchase of standing timber as a purchase of realty. 13 L.R.A.(N.S.) 278.

Sale or mortgage of crops. 23 L.R.A. 450.

Must a contract for the sale of growing crops or a reservation of the same by the grantor in deed be in writing? 23 L.R.A.(N.S.) 1218.

Oral agreement as to erection or maintenance of fences. 27 L.R.A.(N.S.) 226.

Contract by real estate broker to find purchaser or effect exchange of principal's property. 44 L.R.A. 601.

Necessity that authority of agent to purchase or sell real property be in writing to enable him to recover compensation for his services. 9 L.R.A.(N.S.) 933.

Ratification of agent's unauthorized contract for purchase or sale of real property as affected by statute of frauds. 38 L.R.A.(N.S.) 783.

Written authority to agent to contract for sale of property as dispensing with necessity that contract of sale itself be in writing. 28 L.R.A.(N.S.) 738.

Statute of frauds as affecting legal remedy for breach of contract to purchase land for and in the name of another. 5 L.R.A.(N.S.) 123.

Statute of frauds as affecting right to equitable relief against one who has purchased land in his own name in violation of his agreement to purchase it for and in the name of another. 5 L.R.A.(N.S.) 112.

Validity of oral agreement to assume or assign land contract. 3 L.R.A.(N.S.) 147.

Applicability of statute of frauds to assignment or surrender of purchaser's interest under land contract. 19 L.R.A.(N.S.) 879.

Printed or stamped signature. 37 L.R.A.(N.S.) 352.

Description of property by local appellation. 36 L.R.A.(N.S.) 154.

Sufficiency of description in land contract which gives right to select particular tract to be conveyed. 34 L.R.A.(N.S.) 147.

Undelivered deed as memorandum to satisfy statute of frauds. 22 L.R.A. 273.

May statute of frauds relating to sales of real property be satisfied by a memorandum which discloses that one of the parties acted for an undisclosed principal. 8 L.R.A.(N.S.) 733.



May an extrinsic document, not referred to in a memorandum of sale of real property, be resorted to in aid of a defective description in the memorandum or contract, so as to satisfy the statute of frauds. 18 L.R.A.(N.S.) 616.

Necessity of specifying time of payment of purchase price in contract or memorandum for the sale of real property. 33 L.R.A.(N.S.) 84.

Who must sign note or memorandum of executory contract for the sale of real property. 28 L.R.A.(N.S.) 680.

Effect of performance to take parol assignment of lease out of statute of frauds. 15 L.R.A. 754; 42 L.R.A.(N.S.) 162.

Entry under parol agreement for a lease as part performance. 20 L.R.A. 36.

Nature of tenancy by entry under lease void under statute of frauds. 42 L.R.A.(N.S.) 648.

Effect of making improvements under oral lease for term beyond that permitted by statute, to entitle lessee to hold during term. 3 L.R.A.(N.S.) 852.

Taking possession of real property as part performance. 3 L.R.A.(N.S.) 790.

Sufficiency of possession alone as ground for granting specific performance of parol gift of, or contract to convey, real property. 8 L.R.A.(N.S.) 870.

Measure of damages for breach of oral contract to convey realty. 2 L.R.A.(N.S.) 713.

**§ 5889. 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. [R. C. 1905, § 5333; Civ. C. 1877, § 921; R. C. 1899, § 3888.]

Does not preclude proof of existence of any separate oral stipulation as to any matter on which written contract is silent, and which is not inconsistent with its terms, if it appears written document was not intended to be complete. Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93.

Parol evidence to vary indorsement or draft not admissible. Thompson v. McKee, 5 D. 172, 37 N. W. 367; Washabaugh v. Hall, 4 S. D. 168, 56 N. W. 82.

Written contract not changed by parol evidence. Black Hills Bank v. Kellog, 4 S. D. 312, 56 N. W. 1071; Dean v. Bank, 6 D. 222, 50 N. W. 831.

Rule as to written instrument applies only between parties, not to those attacking collaterally. Jewett v. Sundback, 5 S. D. 111, 58 N. W. 20; Roberts v. Bank, 8 N. D. 474, 79 N. W. 993.

Parol evidence not admissible to vary writing. Lewis v. Ry. Co., 5 S. D. 148, 58 N. W. 580; National Bank v. Lang, 2 N. D. 66, 49 N. W. 414; Hutchinson v. Cleary, 3 N. D. 270, 55 N. W. 729; N. W. Fuel Co. v. Bruns, 1 N. D. 137, 45 N. W. 699; Schmitz v. Hawkeye Gold Min. Co., 8 S. D. 544, 67 N. W. 618.

Parol evidence inadmissible to show that parties intend that time should be of essence of written contract. Strunk v. Smith, 8 S. D. 407, 66 N. W. 926; Washabaugh v. Hall, 4 S. D. 168, 56 N. W. 82.

Relation of signers to note may be explained. Aultman & Co. v. Gunderson, 6 S. D. 226, 60 N. W. 859, 55 Am. St. Rep. 837.

Receipt or incomplete contract may be explained. Prairie Township v. Haseleu, 3 N. D. 328, 55 N. W. 938; Nat. Register Co. v. Pfister, 5 S. D. 143, 58 N. W. 270; D. M. Osborne & Co. v. Stringham, 4 S. D. 593, 57 N. W. 776.

Parol evidence admissible when there is doubt as to parties intended. Miller v. Way, 5 S. D. 468, 59 N. W. 467.

Ambiguous or uncertain writings may be explained by oral evidence. Kennedy v. Falde, 4 D. 319, 29 N. W. 667.

Parol evidence admissible to prove that written contract was never accepted. 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.

Circumstances under which contract made may be explained. Pearson v. Post, 2 D. 220, 9 N. W. 684.

Contract for sale of land; parol evidence admissible to explain description when indefinite. Farrell v. Edwards, 8 S. D. 425, 66 N. W. 812.

Parol evidence admissible to show noncompliance with written instrument. Manufacturers' Furnishing Co. v. Kremer, 7 S. D. 463, 64 N. W. 528; McCormick Co. v. Faulkner, 7 S. D. 363, 64 N. W. 163, 58 Am. St. Rep. 839.

Independent parol agreement may be proved. Grand Forks Lumb. Co. v. Tourtelot, 7 N. D. 587, 75 N. W. 901; Nat. Refining Co. v. Miller, 1 S. D. 548, 47 N. W. 962.

Parol evidence admissible to explain indorsement on note. Dickinson v. Burke, 8 N. D. 118, 77 N. W. 279.

As to all prior negotiations being deemed to be incorporated in written contract. Reeves v. Bruening, 13 N. D. 157, 100 N. W. 241.

As to inability to change terms of written contract by addition of other warranties. Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516, 101 N. W. 903.

As to written contract superseding prior oral negotiations and stipulations. Alsterberg v. Bennett, 14 N. D. 596, 106 N. W. 49.

Surety on note cannot show that he signed under certain oral agreement. *Anderson v. Matheny*, 17 S. D. 225, 95 N. W. 911.

Parol evidence inadmissible to show that binding insurance receipt was not binding. *Bowen v. Mutual L. Ins. Co.*, 20 S. D. 103, 104 N. W. 1040.

Parol evidence of contemporaneous transaction inadmissible to show party to written contract was agent. *Schriner v. Dickinson*, 20 S. D. 433, 107 N. W. 536.

Parol evidence inadmissible to vary terms of written contract which expresses understanding and intention of parties. *Gardner v. Welch*, 21 S. D. 151, 110 N. W. 110.

Evidence as to agreement between parties made prior to original contract is inadmissible to vary terms of written contract. *Kimm v. Wolters*, 28 S. D. 255, 133 N. W. 277.

Right to show by parol evidence that vendee had agreed to accept warranty deed from vendor with knowledge of existing defects in the title. *McCulloch v. Bauer*, 24 N. D. 109, 139 N. W. 318.

Defendant may show as defense to action for price of drilling artesian well that plaintiff knew purpose and that well was insufficient for that purpose. *DeRue v. McIntosh*, 26 S. D. 42, 127 N. W. 532.

Merger of oral and written contracts limiting initial carrier's undertaking to its own line. 31 L.R.A.(N.S.) 64.

Merger of stipulations as to title in executory contract for the sale of real estate in subsequently executed conveyance. 31 L.R.A.(N.S.) 457.

Admissibility of evidence of conversation expressly referred to in written contract. 32 L.R.A.(N.S.) 383.

Admissibility of evidence of custom to create an exception to written contract. 3 L.R.A.(N.S.) 248.

Extrinsic evidence of custom or usage as to time for delivery of goods where none is specified in written contract. 31 L.R.A.(N.S.) 619.

General rule that parol evidence not admissible to vary, add to or alter a written contract. 17 L.R.A. 270.

Subsequent parol agreement to vary a writing. 56 Am. St. Rep. 659.

Parol evidence rule as to varying or contradicting written contracts as affected by the doctrine of waiver or estoppel as applied to policies of insurance. 16 L.R.A.(N.S.) 1165.

Parol evidence that written instrument for payment of money was executed in reliance on parol promise that payment was subject to a condition not incorporated therein. 18 L.R.A.(N.S.) 434.

Right to show parol warranty in connection with a contract of sale of personalty. 19 L.R.A.(N.S.) 1133.

Admissibility of parol evidence, as between indorser and indorsee, that unrestricted indorsement was made merely to transfer title to the owner. 28 L.R.A.(N.S.) 530.

Parol evidence that written instrument for the payment of money was executed in reliance upon parol promise that payment was subject to a condition not incorporated therein. 18 L.R.A.(N.S.) 434.

Parol evidence to aid in construction of contract. 5 Am. Rep. 241.

— to show intention of party indorsing paper before delivery. 18 L.R.A. 33.

— to show who is liable as maker of note. 20 L.R.A. 705.

— to show that indorsement unrestricted in form was made for purpose of collection only. 17 L.R.A.(N.S.) 838.

— to disclose and charge principal on negotiable paper executed by agent. 21 L.R.A.(N.S.) 1080.

— to vary the liability of an irregular party to a bill or note from that declared by the negotiable instruments act. 19 L.R.A.(N.S.) 136.

— as to liability of accommodation parties inter se. 28 L.R.A.(N.S.) 1045.

— to show that bill or note was delivered upon condition. 18 L.R.A.(N.S.) 288.

— to prove agreement by bank officer that liability of party to commercial paper shall not be enforced. 28 L.R.A.(N.S.) 501.

— as to consideration of deed. 20 L.R.A. 101; 68 L.R.A. 928; 25 L.R.A.(N.S.) 1194.

— to show true nature of transaction where the recited consideration of a deed is shown not to have been paid. 24 L.R.A.(N.S.) 413.

— to explain telegrams. 50 L.R.A. 245.

— to aid in construction of fire insurance policy covering "additions." 33 L.R.A.(N.S.) 161.

— to vary or contradict insurance policy which is ambiguous. 16 L.R.A.(N.S.) 1181.

— to show persons meant by ambiguous designation in policy on property belonging to decedent's estate. 42 L.R.A.(N.S.) 82.

— to show that payment of judgment against, or consideration for release of, alleged joint tortfeasor was not a satisfaction of claim. 14 L.R.A.(N.S.) 329.

— to show that the parties to a written contract which merely names a class or species contemplated a particular quality or kind. 9 L.R.A.(N.S.) 967.

— to show that release was delivered upon condition. 36 L.R.A.(N.S.) 1147.

— to extend scope of mortgage clause. 34 L.R.A.(N.S.) 503.

- as to warehouse receipts. 19 L.R.A. 304.
  - to show nature of partition deed. 57 L.R.A. 341.
  - to show partnership in real estate. 27 L.R.A. 464; 37 L.R.A.(N.S.) 898.
  - to vary contract between heir and ancestor relating to expectancy. 32 L.R.A. 597.
  - as to whether guaranty was a continuing one. 39 L.R.A.(N.S.) 740.
  - in aid of enrolled bill. 40 L.R.A.(N.S.) 35.
  - to impeach enrolled bill. 40 L.R.A.(N.S.) 32.
  - as to time for delivery of goods where none is specified in written contract. 31 L.R.A.(N.S.) 619.
  - as to manner or means of paying written contract not within statute of frauds, purporting to be payable in money. 31 L.R.A.(N.S.) 235.
  - to show reservation of growing crops from deed. 23 L.R.A.(N.S.) 1218.
- As to similar provision in Cal. Civ. Code, § 1625, see *Moffatt v. Bulson*, 96 Cal. 106, 31 Am. St. Rep. 192, 30 Pac. 1022.

**§ 5890. 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 filing or 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 contract must be proved in the same manner as one having no subscribing witness whatever. [1907, ch. 139, § 2; R. C. 1905, § 5334; 1897, ch. 59; R. C. 1899, § 3888a.]

Proof of a written contract by subscribing witnesses no longer necessary. *McManus v. Commow*, 10 N. D. 340, 87 N. W. 8.

**§ 5891. 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. [R. C. 1905, § 5335; Civ. C. 1877, § 922; R. C. 1899, § 3889.]

Mortgage takes effect on its delivery discharged of any condition on which delivery was made. *Sargent v. Cooley*, 12 N. D. 1, 94 N. W. 576.

Fact that party may have manual possession of contract does not show complete delivery, as question is still open whether other party intended delivery beyond power of recall. *Koester v. Northwestern Port Huron Co.*, 24 S. D. 546, 124 N. W. 740.

**§ 5892. Chapter on transfers applies.** The provisions of the chapter on transfers in general concerning the delivery of grants, absolute and conditional, apply to all written contracts. [R. C. 1905, § 5336; Civ. C. 1877, § 923; R. C. 1899, § 3890.]

As to similar provision in Cal. Civ. Code, § 1627, see *Harrigan v. Home L. Ins. Co.*, 128 Cal. 531, 58 Pac. 180, 61 Pac. 99.

**§ 5893. 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 instrument is written. [R. C. 1905, § 5337; Civ. C. 1877, § 924; R. C. 1899, § 3891.]

**§ 5894. Seals abolished.** All distinctions between sealed and unsealed instruments are abolished. [R. C. 1905, § 5338; Civ. C. 1877, § 925; R. C. 1899, § 3892.]

Section restricted only by statute limiting period within which action on sealed instrument can be commenced. *Landauer v. Implement Co.*, 10 S. D. 205, 72 N. W. 467.

County warrant is a sealed instrument; action thereon must be brought within twenty years. *Heffleman v. Pennington County*, 3 S. D. 162, 52 N. W. 851.

All distinction between sealed and unsealed instruments abolished. *Pearson v. Post*, 2 D. 220, 9 N. W. 684; *Post v. Pearson*, 108 U. S. 418, 27 L.ed. 774, 2 S. Ct. R. 739.

Deed signed and sealed "Patrick M., Atty. in fact for Amelia B." is deed of Amelia although words "he," "his," etc., are used in deed. *Donovan v. Welch*, 11 N. D. 131, 90 N. W. 262.

Validity of tax deed unaffected by omission of seal therefrom. *Northwestern Mortg. Trust Co. v. Levtzow*, 23 S. D. 562, 122 N. W. 600.

Distinction between sealed and unsealed instruments is abolished except as to statute of limitations. *Gibson v. Allen*, 19 S. D. 617, 104 N. W. 275.

As to similar provision in Cal. Civ. Code, § 1629, see *Tracy v. Alvord*, 118 Cal. 654, 80 Pac. 757.

## ARTICLE 7.— INTERPRETATION OF CONTRACTS.

§ 5895. **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 code. [R. C. 1905, § 5339; Civ. C. 1877, § 926; R. C. 1899, § 3893.]

§ 5896. **Must be interpreted to give effect to mutual intention.** A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertainable and lawful. [R. C. 1905, § 5340; Civ. C. 1877, § 927; R. C. 1899, § 3894.]

**As to interpretation of contract.** *Young v. Metcalf Land Co.*, 18 N. D. 441, 122 N. W. 1101.

Court in construing fire policy must determine intention of parties at time of execution of policy. *Miller v. St. Paul F. & M. Ins. Co.*, 26 S. D. 454, 128 N. W. 609.

Must be reasonable. *Richison v. Mead*, 11 S. D. 639, 80 N. W. 131.

Intention of parties must prevail if ascertainable. *Fletcher v. Arnett*, 4 S. D. 615, 57 N. W. 915; *Frost v. Williams*, 2 S. D. 457, 50 N. W. 964.

Language must be followed when clear and explicit. *Strunk v. Smith*, 8 S. D. 407, 66 N. W. 926; *Washabaugh v. Hall*, 4 S. D. 168, 56 N. W. 82.

Written contract to be interpreted from its own language if possible. *Roberts v. Min. Thresh. Mach. Co.*, 8 S. D. 579, 67 N. W. 607, 59 Am. St. Rep. 777.

If several parts of grant are irreconcilable, the former prevails. *Novotny v. Danforth*, 9 S. D. 301, 68 N. W. 749.

Agreement to accept second-hand safe f. o. b. in part payment for new safe meant that second-hand safe was to be delivered free on board cars, although word cars was not mentioned. *Manganese Steel Safe Co. v. First State Bank*, 25 S. D. 119, 125 N. W. 572.

§ 5897. **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. [R. C. 1905, § 5341; Civ. C. 1877, § 928; R. C. 1899, § 3895.]

§ 5898. **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. [R. C. 1905, § 5342; Civ. C. 1877, § 929; R. C. 1899, § 3896.]

Court in determining intention of parties to contract must take into consideration language of contract, and intention must be ascertained from words alone. *Miller v. St. Paul F. & M. Ins. Co.*, 26 S. D. 454, 128 N. W. 609.

§ 5899. **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. [R. C. 1905, § 5343; Civ. C. 1877, § 930; R. C. 1899, § 3897.]

§ 5900. **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. [R. C. 1905, § 5344; Civ. C. 1877, § 931; R. C. 1899, § 3898.]

§ 5901. **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. [R. C. 1905, § 5345; Civ. C. 1877, § 932; R. C. 1899, § 3899.]

Words having certain meaning in one part, presumed to mean same whenever subsequently used. *Anderson v. Bank*, 4 N. D. 182, 59 N. W. 1029.

Intention of parties must govern their respective liabilities. *Frost v. Williams*, 2 S. D. 457, 50 N. W. 964.

Instrument conveying described premises with warranties as in warranty deed and also containing provision that first party would convey all lands which were same as those described as soon as patent was received for them, was absolute and executed transaction. *Ford v. Ford*, 24 S. D. 644, 124 N. W. 1108.

Agreement to sell safe for \$825 and purchaser's second-hand safe, and agreement by purchaser to pay \$1,200 for new safe was agreement to pay \$1,200 for safe with deduction of \$375 upon delivery of second-hand safe. *Manganese Steel Safe Co. v. First State Bank*, 25 S. D. 119, 125 N. W. 572.

**§ 5902. 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. [R. C. 1905, § 5346; Civ. C. 1877, § 933; R. C. 1899, § 3900.]

Section establishes rule of interpretation merely, and does not unite several contracts into one. *First Nat. Bank v. Flath*, 10 N. D. 281, 86 N. W. 867.

Several contracts to be interpreted as one. *Red River Valley Bank v. Barnes*, 8 N. D. 432, 79 N. W. 880; *D. M. Osborne & Co. v. Stringham*, 4 S. D. 593, 57 N. W. 776.

**§ 5903. 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. [R. C. 1905, § 5347; Civ. C. 1877, § 934; R. C. 1899, § 3901.]

**§ 5904. 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. [R. C. 1905, § 5348; Civ. C. 1877, § 935; R. C. 1899, § 3902.]

Evidence to explain words used in written contract. 122 Am. St. Rep. 545.

What conditions or defects are covered by provision in paving contract requiring contractor to keep pavement in repair. 9 L.R.A.(N.S.) 154.

Effect of promise to pay "as soon as promisor can." 27 L.R.A.(N.S.) 300.

What constitutes "satisfactory title" within requirement of land contract or other agreement relating to land. 18 L.R.A.(N.S.) 741.

Will real estate pass under the word "effects" in a written instrument. 12 L.R.A.(N.S.) 661.

Destruction by decay rendering premises untenable as within landlord's covenant to repair. 21 L.R.A.(N.S.) 130.

What constitutes damages "by the elements" within the meaning of contracts with stipulations referring thereto. 53 L.R.A. 673.

**§ 5905. 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. [R. C. 1905, § 5349; Civ. C. 1877, § 936; R. C. 1899, § 3903.]

**§ 5906. 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. [R. C. 1905, § 5350; Civ. C. 1877, § 937; R. C. 1899, § 3904.]

Contracts subject to *lex fori*, including statute of limitations. *Star Wagon Co. v. Matthiessen*, 3 D. 233, 14 N. W. 107.

Contract to ship goods into state interpreted under law where made. *Meuer v. C., M. & St. P. Ry. Co.*, 5 S. D. 568, 59 N. W. 945, 49 Am. St. Rep. 898, 25 L.R.A. 81.

Penal laws have no force beyond boundaries of state. *Jones v. Trust Co.*, 7 S. D. 122, 63 N. W. 553.

Presumed that *lex loci contractus* is same as *lex fori* unless contrary shown. *Thomas v. Pendleton*, 1 S. D. 150, 46 N. W. 180, 36 Am. St. Rep. 726; *Meuer v. C., M. & St. P. Ry. Co.*, 5 S. D. 568, 59 N. W. 945, 49 Am. St. Rep. 898, 25 L.R.A. 81; *Sandmeyer v. Ins. Co.*, 2 S. D. 346, 50 N. W. 353; *Commercial Bank v. Jackson*, 9 S. D. 605, 70 N. W. 846.

Negotiability of note payable in another state is to be determined by law of that state. *Barry v. Storer*, 20 S. D. 459, 129 Am. St. Rep. 941, 107 N. W. 672.

Where stipulated place for performance and the place where contract is made are identical, law of that place must be applied. *Cosgrave v. McAvay*, 24 N. D. 343, 139 N. W. 693.

**§ 5907. Explained by reference to circumstances.** A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates. [R. C. 1905, § 5351; Civ. C. 1877, § 938; R. C. 1899, § 3905.]

Evidence as to meaning of ambiguous contract is admissible. *Hazelton v. Gas Co.*, 4 N. D. 365, 61 N. W. 151.

Contract to be explained by reference to circumstances under which made. *Harris v. State*, 9 S. D. 453, 69 N. W. 825; *Pearson v. Post*, 2 D. 220, 9 N. W. 684; *Kennedy v. Falde*, 4 D. 319, 29 N. W. 667; *Frost v. Williams*, 2 S. D. 457, 50 N. W. 964.

Parol evidence admissible to explain ambiguities, latent or patent. *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 Elevator Co.*, 1 S. D. 71, 45 N. W. 200.

As to interpretation of contract. *Young v. Metcalf Land Co.*, 18 N. D. 441, 122 N. W. 1101.

Explanation of contract in action on promise to pay another's account. *Grimsrud Shoe Co. v. Jackson*, 22 S. D. 114, 115 N. W. 656.

Defendant may show as defense to action for price of drilling artesian well, that plaintiff knew purpose and that well was insufficient for that purpose. *DeRue v. McIntosh*, 26 S. D. 42, 127 N. W. 532.

Person who was ignorant of price of property sold and did not understand language, may show misrepresentations in relation to prices and to other terms of contract. *Sioux Remedy Co. v. Lindgren*, 27 S. D. 123, 130 N. W. 49.

Parol evidence admissible to show what intended by phrase "accepted mortgage" in land contract. *Smith v. Johnson*, 30 S. D. 200, 138 N. W. 18.

Clause in note given as part purchase price of land reading "less tax on land for 1906" amounted to agreement on part of vendor to pay taxes referred to. *Kimm v. Wolters*, 28 S. D. 255, 133 N. W. 277.

Oral stipulation may be shown (as to any matter on which written contract is silent and which is not inconsistent with its terms) if it appears written document was not intended to be complete. *Putnam v. Prouty*, 24 N. D. 517, 140 N. W. 93.

Parol evidence that parties to a written contract which merely names a class or species, contemplated a particular quality or kind. 9 L.R.A.(N.S.) 967.

Aiding the interpretation of building contracts by extrinsic documents or examples. 9 L.R.A.(N.S.) 1007.

Assignability of contract to supply such quantity of goods as purchaser may require in his business. 2 B. R. C. 444.

**§ 5908. 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. [R. C. 1905, § 5352; Civ. C. 1877, § 939; R. C. 1899, § 3906.]

Contracts to perform labor are on implied condition that employe shall live to perform. *McClellan v. Harris*, 7 S. D. 447, 64 N. W. 522.

**§ 5909. As promiser 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 understood it. [R. C. 1905, § 5353; Civ. C. 1877, § 940; R. C. 1899, § 3907.]

Interpretation according to promisee's understanding at the time. *Winn v. Sanborn*, 10 S. D. 642, 75 N. W. 201.

To be read in the light of surrounding circumstances. *Fletcher v. Arnett*, 4 S. D. 615, 57 N. W. 915; *Parlin v. Hall*, 2 N. D. 473, 52 N. W. 405; *Anderson v. Bank*, 4 N. D. 182, 59 N. W. 1029.

Rule that when terms of agreement have been intended in a different sense, that sense is to prevail, against either party, in which he had reason to suppose the other party understood it. 8 L.R.A.(N.S.) 1140.

**§ 5910. Clauses subordinate to general intent.** Particular clauses of a contract are subordinate to its general intent. [R. C. 1905, § 5354; Civ. C. 1877, § 941; R. C. 1899, § 3908.]

**§ 5911. Written and original control printed and copied.** When a contract is partly written and partly printed, or when part of it is written or printed under the special directions of the parties and with a special view to their intention and the remainder is copied from a form originally prepared without special reference to the particular parties and particular contract in question, the written 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 absolutely repugnant the latter must be so far disregarded. [R. C. 1905, § 5355; Civ. C. 1877, § 942; R. C. 1899, § 3909.]

**§ 5912. Repugnancies reconciled.** Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clause subordinate to the general intent and purposes of the whole contract. [R. C. 1905, § 5356; Civ. C. 1877, § 943; R. C. 1899, § 3910.]

Definite unambiguous promise in written obligation not to be ignored because inconsistent with prior contract by another. *Tolman & Co. v. Bowerman*, 5 S. D. 197, 58 N. W. 568.

Construction of repugnant clauses in contract. 60 Am. St. Rep. 93.

**§ 5913. Inconsistent words rejected.** Words in a contract which are wholly inconsistent with its nature or with the main intention of the parties are to be rejected. [R. C. 1905, § 5357; Civ. C. 1877, § 944; R. C. 1899, § 3911.]

**§ 5914. Uncertainty interpreted against party causing it. Presumption as to cause.** In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the 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. [R. C. 1905, § 5358; Civ. C. 1877, § 945; R. C. 1899, § 3912.]

As to similar provision in Cal. Civ. Code, § 1654, see *Cullen v. Sprigg*, 83 Cal. 56, 23 Pac. 222.

**§ 5915. 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. [R. C. 1905, § 5359; Civ. C. 1877, § 946; R. C. 1899, § 3913.]

Incidental stipulations necessary to carry contract into effect, or make it reasonable or conformable to usage, are implied. *Morrow v. Board of Education*, 7 S. D. 553, 64 N. W. 1126.

Stipulations implied when necessary to make a reasonable contract. *Stokes v. Green*, 10 S. D. 286, 73 N. W. 100.

When no time is set, reasonable time for performance is allowed. *Harvester Co. v. Artell*, 5 N. D. 315, 65 N. W. 680; *Braithwaite v. Power*, 1 N. D. 455, 48 N. W. 354.

As to interpretation of contract. *Young v. Metcalf Land Co.*, 18 N. D. 441, 122 N. W. 1101.

**§ 5916. 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. [R. C. 1905, § 5360; 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.

**§ 5917. 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. [R. C. 1905, § 5361; Civ. C. 1877, § 948; R. C. 1899, § 3915.]

Intention of parties to contract to adopt standard instead of sun time. 1 L.R.A.(N.S.) 364; 6 L.R.A.(N.S.) 1046.

Standard or solar time as the criterion in determining questions dependent upon time. 35 L.R.A.(N.S.) 611.

Construction and effect of provision for extension of time for removal of standing timber. 34 L.R.A.(N.S.) 615.

Duration of contract of hiring which fixes no term but specifies compensation at a certain amount per day, week, month or year. 25 L.R.A.(N.S.) 529.

Rent period as criterion of term implied by holding over after expiration of lease for a fixed term. 25 L.R.A.(N.S.) 855.

**§ 5918. When time of the essence.** Time is never considered as of the essence of a contract unless by its terms expressly so provided. [R. C. 1905, § 5362; Civ. C. 1877, § 949; R. C. 1899, § 3916.]

Time the essence of a contract not to be implied. *Strunk v. Smith*, 8 S. D. 407, 66 N. W. 926; *Washabaugh v. Hall*, 4 S. D. 168, 56 N. W. 82.

As to making time essence of contract by its terms. *Hanschka v. Vodopich*, 20 S. D. 551, 108 N. W. 28.

When time of the essence of contract in contracts for the sale of land. 104 Am. St. Rep. 265.

When stipulations show that time is made the essence of. 50 Am. Dec. 597.

Making time of the essence by demand or notice. 15 L.R.A. 737.

**§ 5919. 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. [R. C. 1905, § 5363; Civ. C. 1877, § 950; R. C. 1899, § 3917.]

Is a subscription contract joint or several. 22 L.R.A. 80.

**§ 5920. 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. [R. C. 1905, § 5364; Civ. C. 1877, § 951; R. C. 1899, § 3918.]

**§ 5921. Executed contract defined.** An executed contract is one, the object of which is fully performed. All others are executory. [R. C. 1905, § 5365; Civ. C. 1877, § 952; R. C. 1899, § 3919.]

Executed contract has qualities of a chose in action, but executory contract is nothing but a chose in action. *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181.

#### ARTICLE 8.—UNLAWFUL CONTRACTS.

**§ 5922. 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. [R. C. 1905, § 5366; Civ. C. 1877, § 953; R. C. 1899, § 3920.]

Failure of land owner to destroy noxious weeds upon his land is not an "unlawful" act. *Langer v. Goode*, 21 N. D. 462, 131 N. W. 258, Ann. Cas. 1913D, 429, 1 N. C. C. A. 772.

Contract whereby mining properties were bought and sold to corporation which paid such party his profit on resale in stock, is valid. *Chambers v. Mittnacht*, 23 S. D. 449, 122 N. W. 434.

Contract to sell property, with agreement to obtain title by foreclosing a mortgage, is void. *Peck v. Levinger*, 6 D. 54, 50 N. W. 481.

New promise as consideration when original promise was illegal. 53 L.R.A. 370.

Validity of new contract based on compromise of illegal contract. 9 L.R.A.(N.S.) 568.

Actions upon illegal contracts. 8 Am. Dec. 691.

Recovery of money paid under illegal contract. 12 Am. Dec. 385.

Rights of parties to illegal contracts. 67 Am. Dec. 153.

Ultra vires contracts of corporations. 70 Am. St. Rep. 156.

Effect of imposition of penalty on validity of contract. 16 L.R.A. 424.

Implication of invalidity of contract from penalty. 12 L.R.A.(N.S.) 586.

As to similar provision in Cal. Civ. Code, § 1667, see *Sharon v. Sharon*, 68 Cal. 29, 8 Pac. 614; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. 880; *Jones v. Hanna*, 81 Cal. 507, 22 Pac. 883; *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286; *Mitchell v. Cline*, 84 Cal. 409, 24 Pac. 164; *Benicia Agri. Works v. Estes*, 3 Cal. Unrep. 855, 32 Pac. 938; *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735; *Bernstein v. Downs*, 112 Cal. 197, 44 Pac. 557; *People v. Wilson*, 117 Cal. 242, 49 Pac. 135; *Dittrich v. Gobey*, 119 Cal. 599, 51 Pac. 962; *De Jarnatt v. Peake*, 123 Cal. 607, 56 Pac. 467; *Berka v. Woodward*, 125 Cal. 119, 45 L.R.A. 420, 73 Am. St. Rep. 81, 57 Pac. 777; *Demartini v. Anderson*, 127 Cal. 33, 59 Pac. 207; *Flinn v. Mowry*, 131 Cal. 481, 63 Pac. 724, 1006.

1. Limitation of time in action on insurance policy is void under statute. *Johnson v. D. F. & M. Ins. Co.*, 1 N. D. 167, 45 N. W. 799.

Threat of a lawful arrest of person guilty of criminal offense not such duress as will invalidate a deed or contract that has been executed for sufficient consideration. *Gregor v. Hyde*, 62 Fed. 107, 10 C. C. A. 290.

Payments made for Sunday labor not recoverable as void contract. *Calkins v. Mining Co.*, 5 S. D. 299, 58 N. W. 797.

Contract with teacher not having a certificate is void. *Hosmer v. School District*, 4 N. D. 197, 59 N. W. 1035, 50 Am. St. Rep. 639, 25 L.R.A. 383; *Goose River Bank v. Township*, 1 N. D. 26, 44 N. W. 1002, 26 Am. St. Rep. 605; *Hardy v. Purington*, 6 S. D. 382, 61 N. W. 158.

Statutes making illegal pre-existing contracts. 120 Am. St. Rep. 468.

Liability of municipality or other public corporation for benefits received under contract violative of statutory restrictions. 27 L.R.A.(N.S.) 1120.

Municipal liability for labor performed or services accepted by it under contract violating statutory or charter restrictions on power to contract. 27 L.R.A.(N.S.) 1127.

Conflict of laws as to Sunday contract. 34 L.R.A.(N.S.) 67.

Validity of sale partially made on Sunday and perfected on secular day. 4 L.R.A.(N.S.) 1151.

Delivery on week day pursuant to contract made on Sunday. 20 L.R.A.(N.S.) 86.

Signing or delivering replevin bond on Sunday as a defense. 29 L.R.A.(N.S.) 750.



- Procuring subscriptions on Sunday. 14 L.R.A. 194.  
 Effect of payment of debt on Sunday. 15 L.R.A.(N.S.) 243.  
 Effect, upon validity of contract, of ignorance of one party that it was executed by the other on Sunday. 18 L.R.A.(N.S.) 1176.  
 Remedy of party as to rescission of Sunday contract. 17 L.R.A. 779.  
 Return of consideration as condition of defense against contract made on Sunday. 5 L.R.A.(N.S.) 295.  
 Contract to do acts for the doing of which a penalty is imposed by law. 25 Am. Rep. 674.  
 Recovery of purchase price of property sold for unlawful purpose. 15 L.R.A. 834.  
 Note given on settlement of illegal business is valid. 30 Am. Rep. 106.  
 Effect of landlord's knowledge that tenant intends to use premises in violation of law. 19 L.R.A.(N.S.) 662; 39 L.R.A.(N.S.) 1104.  
 Validity of contract as to fees in violation of law. 12 L.R.A.(N.S.) 612.  
 Validity of contracts in business which it is a misdemeanor to transact. 12 L.R.A.(N.S.) 575.  
 Contract made in business carried on without license, where license is required. 16 L.R.A. 423; 1 L.R.A.(N.S.) 1159.  
 Effect of contract by unlicensed teacher. 42 L.R.A.(N.S.) 412.  
 Right of unlicensed person to recover for services rendered by licensed person. 2 L.R.A.(N.S.) 392; 21 L.R.A.(N.S.) 176.  
 3. Appointment to office as consideration renders void. *Waldron v. Evans*, 1 D. 10, 46 N. W. 607.  
 Compounding felony, as consideration, is void. *School Dist. v. Anderson*, 6 D. 145, 41 N. W. 466.  
 Money lost in gambling not recoverable; law leaves parties where it finds them. *Dows v. Glaspel*, 4 N. D. 251, 60 N. W. 60.  
 Contract to vote stock on promise to secure office in corporation is void. *Gage v. Fisher*, 5 N. D. 297, 65 N. W. 809, 31 L.R.A. 557.  
 Unlawful when contrary to law or good morals. *Uhlig v. Garrison*, 2 D. 71, 2 N. W. 253.  
 Assignment by public officer of salary before due is against public policy and void. *State v. Barnes*, 10 S. D. 306, 73 N. W. 80.  
 Agreement by husband to deed land in return for mutual settlement and bill is not collusive and void. *Burgess v. Burgess*, 17 S. D. 44, 95 N. W. 279.  
 Right to recover for household services rendered while parties were living in illicit relations. 29 L.R.A.(N.S.) 787.  
 Right to invoke aid of court to determine rights to property accumulated in common by parties living in illicit relations. 36 L.R.A.(N.S.) 838.  
 Right of alleged fraudulent grantee to show that judgment against grantor was based on an immoral consideration. 67 L.R.A. 602.  
 Validity of claim against state which is contrary to public policy. 42 L.R.A. 39.  
 What are unconscionable contracts and whether they may be held void. 33 Am. Rep. 182; 81 Am. St. Rep. 663.  
 Unconscionable contract with expectant heirs and others. 41 Am. Rep. 713.  
 What contracts of attorneys are void as against public policy. 13 Am. St. Rep. 297.  
 Contract with newspapers against public policy, when against. 93 Am. St. Rep. 905.  
 Validity of agreement to indemnify bail in a criminal case. 20 L.R.A.(N.S.) 58.  
 Validity of agreements to control the voting power of corporate stock. 16 L.R.A.(N.S.) 1136.  
 Wagers and their validity. 11 Am. Rep. 58; 37 Am. St. Rep. 697.  
 Actions founded upon wagers. 12 Am. Dec. 239.  
 When loan for purpose of gaming is not collectible. 1 Am. St. Rep. 302.  
 Defenses to notes and other obligations given for gambling debts. 119 Am. St. Rep. 172.  
 Contract to deal in futures or margins. 10 Am. St. Rep. 33.  
 Right of broker to recover commission or advance in furthering wagering contracts. 11 L.R.A.(N.S.) 575.  
 Inference as to character of transaction, arising from fact that it was on margin. 22 L.A.R.(N.S.) 174.  
 Effect of transfer of negotiable instruments to secure money for gambling purposes. 22 L.R.A.(N.S.) 627.  
 Validity of lobbying. 121 Am. St. Rep. 726.  
 Marriage brokerage contracts. 104 Am. St. Rep. 919.  
 Contract to pay attending physician percentage of damages recovered for personal injury. 33 L.R.A.(N.S.) 87.  
 Contract to furnish a patient medical services for life. 28 L.R.A.(N.S.) 1112.  
 Agreement to accept less than amount of appropriation, salary or fee. 36 L.R.A.(N.S.) 244.  
 Power of an officer to contract with the public body or municipality which he represents. 15 L.R.A. 520.  
 Validity of contract as affected by the fact that its performance may involve the necessity of procuring some action by public officials. 18 L.R.A.(N.S.) 1161.

Validity of agreement by which compensation is dependent on success in procuring contract with public officer or board. 39 L.R.A.(N.S.) 747.

Contract as to location of public buildings. 4 L.R.A.(N.S.) 589.

Municipal liability for labors performed or services accepted by it on contract invalid because made with officer of municipality. 27 L.R.A.(N.S.) 1127.

Obligation of public corporation to pay for services rendered under contract in which officer is personally interested. 34 L.R.A.(N.S.) 129.

Agreement made in consideration of withdrawal of candidacy for office. 37 L.R.A.(N.S.) 289.

Injunction against enforcing contract to obtain office. 48 L.R.A. 842.

Contract for services to procure legislation. 30 L.R.A. 737; 4 L.R.A.(N.S.) 213.

Contracts to procure testimony. 19 L.R.A. 371; 30 L.R.A.(N.S.) 278; 94 Am. Dec. 375; 37 Am. St. Rep. 145.

Validity of agreements concerning state's evidence. 40 Am. St. Rep. 767.

Validity of contract of railroad to establish and maintain station. 15 L.R.A.(N.S.) 594.

Validity, as affected by public policy, of contract by railroad company to maintain private sidings. 17 L.R.A.(N.S.) 130.

Contract by railroad company to maintain special rate to a particular locality. 38 L.R.A.(N.S.) 157.

Validity of contract made to influence location of railroad. 21 L.R.A.(N.S.) 800.

**§ 5923. 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. [R. C. 1905, § 5367; Civ. C. 1877, § 954; R. C. 1899, § 3921.]

Railroad company may contract with shipper to limit liability for loss. *Meuer v. C. M. & St. P. Ry. Co.*, 5 S. D. 568, 59 N. W. 945, 49 Am. St. Rep. 898, 35 L.R.A. 81.

Effect of agreement for forbearance to sue. 36 Am. St. Rep. 145.

Contract consideration for which is the stifling of a criminal prosecution. 31 Am. Dec. 600; 22 Am. Rep. 121; 49 Am. Rep. 48.

Contract consideration for which tends to obstruct the administration of justice. 37 Am. Rep. 203.

Contract exempting railroad company from liability for burning building upon its right of way. 44 L.R.A.(N.S.) 1127.

As to similar provision in Cal. Civ. Code, § 1668, see *Morrill v. Nightingale*, 93 Cal. 452, 27 Am. St. Rep. 207, 28 Pac. 1068.

**§ 5924. 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. [R. C. 1905, § 5368; Civ. C. 1877, § 955; R. C. 1899, § 3922.]

Stipulation for payment of attorney's fees is neither penalty nor forfeiture and will be enforced when not contrary to statute. *Danforth v. Charles*, 1 D. 273, 46 N. W. 576; *Farmers' Bank v. Rasmussen*, 1 D. 57, 46 N. W. 574.

Provision making whole amount due with twelve per cent interest on default in payment of installments, will not invalidate contract. *Russell v. Wright*, 23 S. D. 338, 121 N. W. 842.

What agreements provide for liquidated damages. 30 Am. Rep. 28.

Specific performance of land contract as affected by provision for liquidated damages. 2 L.R.A.(N.S.) 210.

Stipulation for damages in building contract as penalty or liquidated damages. 34 L.R.A.(N.S.) 588.

Provision for damages in land contract as penalty or stipulated damages. 34 L.R.A.(N.S.) 4.

Sum deposited to secure performance of a contract as a penalty or liquidated damages. 38 L.R.A.(N.S.) 847.

Amount stipulated to be paid in case of breach of contract for support as a penalty or liquidated damages. 31 L.R.A.(N.S.) 937.

**§ 5925. 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. [R. C. 1905, § 5369; Civ. C. 1877, § 956; R. C. 1899, § 3923.]

Contract for sale of land permitting grantor to retain all payments made, on failure of grantee to perform not void unless in nature of penalty or forfeiture. *Barnes v. Clement*, 8 S. D. 421, 66 N. W. 810; *Barnes v. Clement*, 12 S. D. 270, 81 N. W. 301.

Forfeiture for failure to complete building at time stipulated is void; measure of damages for delay being reasonable rental value during time. *Seim v. Krause*, 13 S. D. 530, 83 N. W. 583.

Specific performance of land contract as affected by provision for liquidated damages. 2 L.R.A.(N.S.) 210.

Effect of stipulation for liquidated damages in contract not to engage in business, upon equitable jurisdiction to enjoin breach thereof. 10 L.R.A.(N.S.) 204.

Stipulations exempting carrier from liability. 31 Am. Rep. 567.

Risks of negligence assumed by contract with carrier as including gross negligence. 1 L.R.A.(N.S.) 675.

Power of carriers to limit their liability and how may be exercised. 32 Am. Dec. 495. —to limit liability in the event of loss to a sum less than the injury suffered. 23 Am. St. Rep. 593.

—to limit amount of liability in case of negligence. 14 L.R.A. 433; 1 L.R.A.(N.S.) 985.

Valuation of property for purposes of transportation as affecting carrier's liability where it is converted or embezzled while in its possession. 31 L.R.A.(N.S.) 309.

Stipulation in pass limiting carrier's liability. 37 L.R.A.(N.S.) 235.

Limitation of carrier's liability for passenger's luggage. 8 L.R.A.(N.S.) 199; 19 L.R.A.(N.S.) 1006, 34 L.R.A.(N.S.) 818.

Limitation of carrier's undertaking to its own line. 31 L.R.A.(N.S.) 52.

Validity of limitation of liability of telegraph company for unrepeatd messages. 11 L.R.A.(N.S.) 561; 30 L.R.A.(N.S.) 409.

Validity of contract exonerating master in advance from liability for negligent injuries to servant. 7 L.R.A.(N.S.) 537.

Constitutionality of statutes forbidding avoidance of liability to employe or reduction of his damages by relief or indemnity contract. 33 L.R.A.(N.S.) 706; 38 L.R.A.(N.S.) 867.

As to similar provision in Cal. Civ. Code, § 1670, see *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 Pac. 890; *Eva v. McMahon*, 77 Cal. 467, 19 Pac. 872; *Greenleaf v. Stockton Combined Harvester & Agri. Works*, 78 Cal. 606, 21 Pac. 369; *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36; *Wilmington Transp. Co. v. O'Neil*, 98 Cal. 1, 32 Pac. 705; *Easton v. Cressey*, 100 Cal. 75, 34 Pac. 622; *Glock v. Howard & W. Colony Co.*, 123 Cal. 1, 43 L.R.A. 199, 69 Am. St. Rep. 17, 55 Pac. 713; *Jack v. Sinsheimer*, 125 Cal. 563, 58 Pac. 130; *Long Beach City School Dist. v. Dodge*, 135 Cal. 401, 67 Pac. 499; *Escondido Oil & Development Co. v. Glaser*, 144 Cal. 494, 77 Pac. 1040.

**§ 5926. 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. [R. C. 1905, § 5370; Civ. C. 1877, § 957; R. C. 1899, § 3924.]

Parties to agreement to purchase mining claims may agree on damages that breach would occasion. *Smith v. Detroit & D. Gold Min. Co.*, 17 S. D. 413, 97 N. W. 17.

Upon countermanding order for machinery given to plaintiff agent subject to approval, before approval transaction was terminated and no damages were recoverable. *Thomas Mfg. Co. v. Lyons*, 29 S. D. 600, 137 N. W. 340.

Applicability of provision for stipulated damages or penalty for delay in completion of a contract where the entire contract is abandoned or repudiated. 20 L.R.A.(N.S.) 350.

As to similar provision in Cal. Civ. Code, § 1671, see *Muldoon v. Lynch*, 66 Cal. 536, 6 Pac. 417; *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 Pac. 890; *Eva v. McMahon*, 77 Cal. 467, 19 Pac. 872; *Greenleaf v. Stockton Combined Harvester & Agri. Works*, 78 Cal. 606, 21 Pac. 369; *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749; *Rayner v. Jones*, 90 Cal. 78, 27 Pac. 24; *Wilmington Transp. Co. v. O'Neil*, 98 Cal. 1, 32 Pac. 705; *Easton v. Cressey*, 100 Cal. 75, 34 Pac. 622; *Potter v. Ahrens*, 110 Cal. 674, 43 Pac. 388; *Glock v. Howard & W. Colony Co.*, 123 Cal. 1, 43 L.R.A. 199, 69 Am. St. Rep. 17, 55 Pac. 713; *Jack v. Sinsheimer*, 125 Cal. 563, 58 Pac. 130; *Long Beach City School Dist. v. Dodge*, 135 Cal. 401, 67 Pac. 499; *Escondido Oil & Development Co. v. Glaser*, 144 Cal. 494, 77 Pac. 1040.

**§ 5927. 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. [R. C. 1905, § 5371; Civ. C. 1877, § 958; R. C. 1899, § 3925.]

Limitation of liability in contract of common carrier. *Kirby v. W. U. Tel. Co.*, 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L.R.A. 621, 624.

Limitation of time to bring action on insurance policy, void. *Johnson v. Dakota Fire & Marine Ins. Co.*, 1 N. D. 167, 49 N. W. 799.

Building contract may provide for determination by architect of cost of alterations. *Seim v. Krause*, 13 S. D. 530, 83 N. W. 583.

Insurance provision requiring action on policy within twelve months after five, is void. *Vesey v. Commercial Union Assur. Co.*, 18 S. D. 632, 101 N. W. 1074; *Phenix Ins. Co. v. Perkins*, 19 S. D. 59, 101 N. W. 1110.

State auditor not authorized to insert stipulations in insurance policy in conflict with existing law. *Vesey v. Commercial Union Assur. Co.*, 18 S. D. 632, 101 N. W. 1074.

Validity of agreement to abide by decision of tribunal of associations or corporations. 49 L.R.A. 372.

Effect on running of limitations of agreement not to plead the statute. 16 L.R.A. (N.S.) 645.

Applicability to existing contracts of statute avoiding contractual stipulations limiting time for action. 38 L.R.A. (N.S.) 1016.

Contract requiring servant to elect between acceptance of benefits out of a relief fund and a prosecution of his claim in an action for damages. 11 L.R.A. (N.S.) 182.

Validity of provision in contract of railroad relief department for forfeiture of benefits in case of suit against company for damages. 10 L.R.A. (N.S.) 198.

Reasonableness of the time fixed in a contract of shipment of live stock for presentation of claim for damages. 7 L.R.A. (N.S.) 1041.

Validity of stipulation in carrier's contract requiring notice of loss within a specified time, as applied to loss due to carrier's negligence. 17 L.R.A. (N.S.) 628.

Validity of contract limiting time for bringing action, or for presentation of claims, for damages, where statute or constitution prohibits carrier from limiting its common-law liability. 13 L.R.A. (N.S.) 753.

Conflict of laws as to contract fixing period for bringing action against carrier. 18 L.R.A. (N.S.) 883.

**§ 5928. 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. [R. C. 1905, § 5372; Civ. C. 1877, § 959; R. C. 1899, § 3926.]

Sale of good will of firm must be with authority or ratification of all members. *Griffing v. Dunn*, 23 S. D. 141, 120 N. W. 890.

As to what constitutes breach of contract to refrain from certain business on sale of good will. *Brown v. Edsall*, 23 S. D. 610, 122 N. W. 658.

Agreement not to engage in certain business made by former partner some time after dissolution, without sale of good will, void. *Prescott v. Bidwell*, 18 S. D. 64, 99 N. W. 93.

Agreement to refrain from doing business without sale of good will is void. *Mapes v. Metcalf*, 10 N. D. 601, 88 N. W. 713.

As to what constitutes breach of contract and sale of good will made on dissolution of partnership. *Siegel v. Marcus*, 18 N. D. 214, 20 L.R.A. (N.S.) 769, 119 N. W. 358.

Contracts in restraint of trade. 7 Am. Dec. 743; 92 Am. Dec. 751; 35 Am. Rep. 269; 74 Am. St. Rep. 235.

Validity of contracts in restraint of trade without limitation of place. 22 L.R.A. 673.

Contract by selling shareholder not to engage in business in competition with corporation. 23 L.R.A. (N.S.) 506.

Validity of contract giving one an exclusive right to handle goods in a given locality. 9 L.R.A. (N.S.) 501.

Validity of agreement to patronize particular concern exclusively. 42 L.R.A. (N.S.) 843.

Validity of stipulation to discontinue, or not to engage in, a particular business, when not ancillary to a lawful contract. 6 L.R.A. (N.S.) 847.

Effect of incorporation of business by persons contracting not to engage in certain business. 9 L.R.A. (N.S.) 979.

Validity and effect of agreement among banks to prevent competition for deposits of public money. 14 L.R.A. (N.S.) 1052.

Validity of contract to employ union labor only. 2 L.R.A. (N.S.) 292.

Validity of agreement by employe not to engage in business in competition with employer. 6 L.R.A. (N.S.) 892.

Validity of contract restraining practice of one's profession after expiration of term of service with another. 26 L.R.A. (N.S.) 961.

Validity of agreement in restraint of trade or profession as affected by its territorial scope. 24 L.R.A. (N.S.) 913.

As to similar provision in Cal. Civ. Code, § 1673, see *Prior v. Diggs*, 3 Cal. Unrep. 565, 31 Pac. 155; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581; *Brown v. Kling*, 101 Cal. 295, 35 Pac. 995; *City Carpet Beating Works v. Jones*, 102 Cal. 506, 36 Pac. 841; *Gregory v. Spieker*, 110 Cal. 150, 52 Am. St. Rep. 70, 42 Pac. 576; *Smith v. San Francisco & N. P. R. Co.*, 115 Cal. 584, 35 L.R.A. 309, 56 Am. St. Rep. 119, 47 Pac. 582; *Mevers v. Merillion*, 118 Cal. 352, 50 Pac. 662; *Merchants' Ad. Sign Co. v. Sterling*, 124 Cal. 429, 46 L.R.A. 142, 71 Am. St. Rep. 94, 57 Pac. 468; *Franz v. Bieler*, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466; *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879.

**§ 5929. 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. [R. C. 1905, § 5373; Civ. C. 1877, § 960; R. C. 1899, § 3927.]

As to similar provision in Cal. Civ. Code, § 1674, see *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581; *Brown v. Kling*, 101 Cal. 295, 35 Pac. 995; *City Carpet Beating, etc., Works v. Jones*, 102 Cal. 506, 36 Pac. 841; *Ragsdale v. Nagle*, 106 Cal. 332, 39 Pac. 628; *Gregory v. Spieker*, 110 Cal. 150, 52 Am. St. Rep. 70, 42 Pac. 576; *Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 662; *Merchants' Ad-Sign Co. v. Sterling*, 124 Cal. 429, 46 L.R.A. 142, 71 Am. St. Rep. 94, 57 Pac. 468; *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879.

**§ 5930. 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. [R. C. 1905, § 5374; Civ. C. 1877, § 961; R. C. 1899, § 3928.]

As to similar provision in Cal. Civ. Code, § 1675, see *City Carpet Beating, etc., Works v. Jones*, 102 Cal. 506, 36 Pac. 841; *Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 662.

**§ 5931. In restraint of marriage void.** Every contract in restraint of the marriage of any person, other than a minor, is void. [R. C. 1905, § 5375; Civ. C. 1877, § 962; R. C. 1899, § 3929.]

Contracts in restraint of marriage. 49 L.R.A. (N.S.) 633.

#### ARTICLE 9.—RESCISSION OF CONTRACTS.

**§ 5932. How extinguished.** A contract may be extinguished in like manner with any other obligation and also in the manner prescribed by this article. [R. C. 1905, § 5376; 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.

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.

As to similar provision in Cal. Civ. Code, § 1682, see *Griswold v. Pieratt*, 110 Cal. 259, 42 Pac. 820.

**§ 5933. Extinguished by rescission.** A contract is extinguished by its rescission. [R. C. 1905, § 5377; Civ. C. 1877, § 964; R. C. 1899, § 3931.]

Rescission of contracts and cancellation of deed is left to court of equity. *Thompson v. Hardy*, 19 S. D. 91, 102 N. W. 299.

As to similar provision in Cal. Civ. Code, § 1688, see *Schroeder v. Wittram*, 66 Cal. 636, 6 Pac. 737; *Wilcox v. Lattin*, 93 Cal. 588, 29 Pac. 226.

**§ 5934. 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. [R. C. 1905, § 5378; Civ. C. 1877, § 965; R. C. 1899, § 3932.]

As to when party may rescind contract by his own act. *Miller v. Shelburn*, 15 N. D. 182, 107 N. W. 51.

Written lease is rescinded by lessee's written notice and lessor's acceptance of its termination. *Stott v. Chamberlain*, 21 S. D. 520, 114 N. W. 683.

Action to rescind may be brought at any time when offer to rescind has been made with reasonable promptness. *Hilton v. Advance Thresher Co.*, 8 S. D. 412, 66 N. W. 816.

Rescission of contract for erection of building by owner; contractor's remedy for. *Davis v. Bronson*, 2 N. D. 300, 50 N. W. 836, 33 Am. St. Rep. 783, 16 L.R.A. 655.

Buyer repudiating without cause a contract of purchase before delivery is liable for full contract price, if goods are offered. *Dowaglac Mfg. Co. v. Higinbotham*, 15 S. D. 547, 91 N. W. 330.

Right of rescission of contract which is void because made on Sunday. 17 L.R.A. 779.  
Rescinding in equity where there is no actual fraud, accident or mistake. 15 Am. Dec. 572.

When, how and by whom may rescission be made. 50 Am. Dec. 673; 74 Am. Dec. 657.  
As to similar provision in Cal. Civ. Code, § 1689, see *Hallidie v. Sutter Street R. Co.*, 63 Cal. 575; *Schroeder v. Wittram*, 66 Cal. 636, 6 Pac. 737; *Burkle v. Levy*, 70 Cal. 250, 11 Pac. 643; *Fish v. Benson*, 71 Cal. 428, 12 Pac. 454; *Lawrence v. Gayetty*, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382, 17 Mor. Min. Rep. 169; *Colton v. Stanford*, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16; *Wilcox v. Lattin*, 93 Cal. 588, 29 Pac. 226; *Loaiza v. Superior Ct.*, 85 Cal. 11, 9 L.R.A. 376, 20 Am. St. Rep. 197, 24 Pac. 707; *Joshua Hendy Mach. Works v. American Steam Boiler Ins. Co.*, 86 Cal. 248, 21 Am. St. Rep. 33, 24 Pac. 1018; *Dobinson v. McDonald*, 92 Cal. 33, 27 Pac. 1098; *Steinhart v. National Bank*, 94 Cal. 362, 28 Am. St. Rep. 132, 29 Pac. 717; *Dolliver v. Dolliver*, 94 Cal. 642, 30 Pac. 4; *Toby v. Oregon P. R. Co.*, 98 Cal. 490, 33 Pac. 550; *Jurgens v. New York L. Ins. Co.*, 114 Cal. 161, 45 Pac. 1054, 46 Pac. 386; *Westerfeld v. New York L. Ins. Co.*, 129 Cal. 68, 58 Pac. 92, 61 Pac. 667; *Richter v. Union Land & Stock Co.*, 129 Cal. 367, 62 Pac. 39; *Schweikert v. Seavey*, 6 Cal. Unrep. 554, 62 Pac. 600; *Owen v. Pomona Land & Water Co.*, 131 Cal. 530, 63 Pac. 850, 64 Pac. 253; *Smith v. Blandin*, 133 Cal. 441, 65 Pac. 894; *Wingarter v. San Francisco*, 134 Cal. 547, 86 Am. St. Rep. 294, 66 Pac. 730; *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428; *Latimer v. Capay Valley Land Co.*, 137 Cal. 286, 70 Pac. 82.

1. Fraudulent representations to stranger not ground for rescission, unless brought to knowledge of party seeking to rescind. *Tootle v. Petrie*, 8 S. D. 19, 65 N. W. 43.

One receiving policy of hail insurance, after retaining it for full season covered by its terms, cannot rescind for fraud. *N. W. Hal Ins. Co. v. Fleming*, 12 S. D. 36, 80 N. W. 147.

Rescission of contract for sale of land on ground of fraud. *Rasmussen v. Reedy*, 14 S. D. 15, 84 N. W. 205.

Vendor fraudulently representing property to be his when he knows it belongs to stranger may rescind. *Hull v. Caldwell*, 3 S. D. 451, 54 N. W. 100.

Party may rescind contract procured from him by fraud. *Nat. Bank v. Taylor*, 5 S. D. 99, 58 N. W. 297.

Widow may rescind agreement made under mistake to take less portion of husband's estate than she had right to. *Griffing v. Gilason*, 21 S. D. 56, 109 N. W. 646.

Reformation or rescission of contract because of mistake of law as to its effect. 28 L.R.A.(N.S.) 900.

Rescission for fraud of compromise of void, invalid or unfounded claim. 25 L.R.A.(N.S.) 308.

Ignorance or carelessness as affecting the right to equitable relief from a contract by which one had been overreached. 5 L.R.A.(N.S.) 799.

Relief in equity against contract procured by threat to prosecute relative. 26 L.R.A. 52; 20 L.R.A.(N.S.) 489; 37 L.R.A.(N.S.) 539.

Jurisdiction of equity to relieve from fraud affecting real property in another state or country. 69 L.R.A. 686.

Relief in equity against bona fide holder of note obtained by fraud. 36 L.R.A. 465.

False statements as to use to which property is to be put as ground for rescission of deed. 32 L.R.A.(N.S.) 127.

Right, as against subsequent bona fide purchaser, to avoid deed because of false impression, induced by fraud, as to contents or character of paper signed. 36 L.R.A.(N.S.) 537.

Expression of opinion as ground for rescission. 35 L.R.A. 434.

Rescission for fraud and misrepresentation in procuring subscription to stock. 33 L.R.A. 721.

Fraud as a ground of relief from subscription to stock after insolvency of corporation. 31 L.R.A.(N.S.) 900.

Right of seller to reclaim goods as against assignee for creditors or trustee in bankruptcy of buyer, who procured them by false representations. 17 L.R.A.(N.S.) 1032.

What misrepresentations will afford ground for rescinding a sale of books. 22 L.R.A.(N.S.) 1210.

2. Breach of warranty as entitling buyer to rescind agreement for sale. *Poirier Mfg. Co. v. Kitts*, 18 N. D. 556, 120 N. W. 558.

Vendee rescinding for breach of warranty may sue for amount of unpaid negotiable note given for purchase price. *Canham v. Plano Mfg. Co.*, 3 N. D. 229, 55 N. W. 583.

Right to rescind or abandon contract because of default or inability of other party to perform. 30 L.R.A. 33.

Conditions precedent to rescission of contract for other party's default. 30 L.R.A. 36.

Right to rescind for failure or inability of other party to perform within time designated, where time is not of the essence of the contract. 21 L.R.A.(N.S.) 691.

Right to rescind contract because of anticipated inability of other party to complete the same within the time limit. 41 L.R.A.(N.S.) 60.

Right of purchaser to reject goods for breach of warranty. 27 L.R.A.(N.S.) 914.

Right of purchaser of goods deliverable in installments to rescind the contract for breach of warranty as to quality. 38 L.R.A.(N.S.) 539.

Acceptance of portion of installment, as affecting right to rescind continuing contract for failure to deliver whole. 21 L.R.A.(N.S.) 864.

Waiver by use of right to rescind for breach of warranty or noncompliance with contract. 36 L.R.A.(N.S.) 468.

3. Total failure of consideration as entitling party to rescind contract. Block v. Donovan, 13 N. D. 1, 99 N. W. 72.

Right to rescind the taking of worthless paper. 10 L.R.A.(N.S.) 552.

4. Rescission may be had on failure of material part of consideration. Fletcher v. Arnett, 4 S. D. 615, 57 N. W. 915.

Failure of consideration as a defense. 13 Am. Dec. 378.

Implied power of agent to assent to rescission of contract. 37 L.R.A.(N.S.) 91.

**§ 5935. 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. [R. C. 1905, § 5379; Civ. C. 1877, § 966; R. C. 1899, § 3933.]

**§ 5936. 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 disability and is aware of his right to rescind; and,

2. He must restore to the other party everything 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. [R. C. 1905, § 5380; Civ. C. 1877, § 967; R. C. 1899, § 3934.]

Retention of note given by administrator to claimant against estate of decedent does not operate as waiver of rights under decree of distribution awarding claimant amount of note. *Sjoli v. Hogenson*, 19 N. D. 82, 122 N. W. 1008.

Payments made prior to discovery of fraud do not prevent rescission. *Grewing v. Minn. Machine Co.*, 12 S. D. 127, 80 N. W. 176.

Upon rescission before commencement of performance, other party can only sue for damages; cannot complete contract and sue for whole amount. *Davis v. Bronson*, 2 N. D. 300, 50 N. W. 836, 33 Am. St. Rep. 783, 16 L.R.A. 655.

Purchaser must fully perform before recovery on rescission; payment of note not necessary when in hands of innocent purchaser. *Fahey v. Esterly Co.*, 3 N. D. 220, 55 N. W. 580, 44 Am. St. Rep. 554.

Rescission of purchase of bank stock for fraudulent representation at time of purchase. *Nat. Bank v. Taylor*, 5 S. D. 99, 58 N. W. 297.

Fraud must not only have been believed, but acted upon, to rescind. *Sioux Bank v. Kendall*, 6 S. D. 543, 62 N. W. 377.

Affirmance in part on discovery of deceit as validating entire contract. *Beare v. Wright*, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 8 A. & E. Ann. Cas. 1057.

As to similar provision in Cal. Civ. Code, § 1691, see *Marston v. Simpson*, 54 Cal. 189, 13 Mor. Min. Rep. 36; *Burkle v. Levy*, 70 Cal. 250, 11 Pac. 643; *Wilson v. Sturgis*, 71 Cal. 226, 16 Pac. 772; *Bailey v. Fox*, 78 Cal. 389, 20 Pac. 868; *Loaiza v. Superior Ct.*, 85 Cal. 11, 9 L.R.A. 376, 20 Am. St. Rep. 197, 24 Pac. 707; *More v. Calkins*, 85 Cal. 177, 24 Pac. 729; *Hammond v. Wallace*, 85 Cal. 522, 20 Am. St. Rep. 239, 24 Pac. 837; *Stratton v. California Land & Timber Co.*, 86 Cal. 353, 24 Pac. 1065; *Benson v. Shotwell*, 87 Cal. 49, 25 Pac. 249; *Dobinson v. McDonald*, 92 Cal. 33, 27 Pac. 1098; *Delano v. Jacoby*, 96 Cal. 275, 31 Am. St. Rep. 201, 31 Pac. 290; *Toby v. Oregon P. R. Co.*, 98 Cal. 490, 33 Pac. 550; *Gamble v. Tripp*, 99 Cal. 223, 33 Pac. 851; *Marten v. Paul O. Burns Water Co.*, 99 Cal. 358, 33 Pac. 1107; *Merrill v. Merrill*, 103 Cal. 287, 35 Pac. 768, 37 Pac. 392; *Maddock v. Russell*, 109 Cal. 417, 42 Pac. 139; *Bancroft v. Bancroft*, 110 Cal. 374, 42 Pac. 896; *Rohrbacher v. Kleebauer*, 119 Cal. 260, 51 Pac. 341; *Wilder v. Beede*, 119 Cal. 646, 51 Pac. 1083; *Glock v. Howard & W. Colony Co.*, 123 Cal. 1, 43 L.R.A. 199, 69 Am. St. Rep. 17, 55 Pac. 713; *Whyte v. Rosencrantz*, 123 Cal. 634, 69 Am. St. Rep. 90, 56 Pac. 436; *Wolfe v. Titus*, 124 Cal. 264, 56 Pac. 1042; *Harrington v. Paterson*, 124 Cal. 542, 57 Pac. 476; *Westerfeld v. New York L. Ins. Co.*, 129 Cal. 68, 58 Pac. 92, 61 Pac. 667; *Schweikert v. Seavey*, 6 Cal. Unrep. 554, 62 Pac.

600; *Phillips v. Sanger Lumber Co.*, 130 Cal. 431, 62 Pac. 749; *Southern P. R. Co. v. Choate*, 132 Cal. 278, 64 Pac. 292; *Wills v. Porter*, 132 Cal. 516, 64 Pac. 896.

1. Necessity of contract being rescinded "promptly." *Raymond v. Edelbrock*, 15 N. D. 231, 107 N. W. 194.

Right to rescind waived by inexcusable failure to act for fifteen months. *Smith v. Detroit & D. Gold Min. Co.*, 17 S. D. 413, 97 N. W. 7.

2. Offer to return property before rescission. *McMahon v. Plummer*, 6 D. 42, 50 N. W. 480.

Must restore, or offer to restore, everything of value received. *Johnson v. Burnside*, 3 S. D. 230, 52 N. W. 1057; *Stackpole v. Dakota Loan & Trust Co.*, 10 S. D. 389, 73 N. W. 258; *Lovell v. McCaughey*, 8 S. D. 471, 66 N. W. 1085.

Necessity of restoring benefits received under sale contract on rescission thereof. *Moline Plow Co. v. Bostwick*, 15 N. D. 658, 109 N. W. 923.

Party rescinding must offer to other party any proceeds or fruits of transaction in his possession. *Anderson v. Bank*, 4 N. D. 182, 59 N. W. 1029; *N. W. Hail Ins. Co. v. Fleming*, 12 S. D. 36, 80 N. W. 147.

If vendor's consent to contract was obtained through fraud, he could rescind only by restoring to purchaser everything he received under contract. *Sullivan v. Bromley*, 26 S. D. 147, 128 N. W. 586.

Complaint alleging purchase by plaintiff of stock through false representations made by defendant, and that plaintiff tendered back the stock and demanded consideration, but that defendant refused to return same, and tendering back stock, states cause of action. *Sweeney v. United Underwriters Co.*, 25 S. D. 1, 124 N. W. 1107.

Maker can defend against note without rescinding or offering to return worthless property for which note was given. *National Bank v. Sherman*, 23 S. D. 8, 119 N. W. 1010.

Duty to place other party in statu quo. 30 L.R.A. 44.

—on rescission of contract for sale of land. 30 L.R.A. 66.

Necessity for returning consideration in order to disaffirm infant's contract. 26 L.R.A. 177.

Duty to restore or tender back what has been received. 1 L.R.A.(N.S.) 379.

Return or tender of consideration for release of claim for personal injuries set aside on ground of fraud. 35 L.R.A.(N.S.) 660.

Return of consideration as condition of defending against contract because made on Sunday. 5 L.R.A.(N.S.) 295.

Necessity of returning in specie all or part of, product received from land under a contract in relation thereto as a condition of rescinding contract. 25 L.R.A.(N.S.) 1302.

Effect of inability to restore to statu quo on right to rescind stock subscription for fraud. 33 L.R.A. 725.

#### ARTICLE 10.—ALTERATION AND CANCELLATION OF CONTRACTS.

**§ 5937. 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. [R. C. 1905, § 5381; Civ. C. 1877, § 968; R. C. 1899, § 3935.]

**§ 5938. 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. [R. C. 1905, § 5382; Civ. C. 1877, § 969; R. C. 1899, § 3936.]

On right to modify contract in writing by subsequent contract. *Manganese Steel Safe Co. v. First State Bank*, 28 S. D. 426, 134 N. W. 886.

Modification of contract in writing for sale of land is not deemed binding unless modification is also in writing. *Minder & J. Land Co. v. Brustuen*, 24 S. D. 537, 124 N. W. 723.

Does not prevent admission of oral evidence to show that contract is invalid because of usury. *Fellows v. Christensen*, 28 S. D. 353, 133 N. W. 814.

Oral modification of written contract employing broker to sell land is not executed so as to be binding until payment has been made under oral modification. *Share v. Coats*, 29 S. D. 603, 137 N. W. 402.

Evidence of oral conversations between parties relative to defective condition of plaintiff's title was inadmissible for purpose of showing modification of written contract to sell land. *McCulloch v. Bauer*, 24 N. D. 109, 139 N. W. 318.

In action on written contract, action by defendant for directed verdict on ground that modification of agreement relied on by plaintiff was not in writing, was insufficient to preserve objection under this section. *Woods v. Stacy*, 28 S. D. 214, 132 N. W. 1007.

Written agreement may be abrogated by subsequent oral agreement fully executed. *Fletcher v. Nelson*, 6 N. D. 94, 69 N. W. 53.

Time of payment in written agreement may be enlarged or suspended by executed oral contract, but not by one entirely promissory. *Foster v. Furlong*, 8 N. D. 282, 79 N. W. 986.



Contract is executed when object is performed. *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181.

Where note given to bank cashier and transferred to bank is renewed by makers in name of bank, such renewal note is subject to any defense against original note. *Black Hills Nat. Bank v. Kellogg*, 4 S. D. 312, 56 N. W. 1071.

Unexecuted agreement to take mortgage as security for identical debt will not defeat mechanic's lien. *Barnard & Leas Mfg. Co. v. Galloway*, 5 S. D. 205, 58 N. W. 565.

Parol modification of written contract must be clear and satisfactory. *Buttz v. Colton*, 6 D. 306, 43 N. W. 717.

As to when oral proof of modified contract is admissible in action to recover purchase price. *Reeves v. Bruening*, 13 N. D. 157.

Written lease is rescinded by lessee's written notice and lessor's acceptance of its termination. *Stott v. Chamberlain*, 21 S. D. 520, 114 N. W. 683.

Written contract for sale of real estate cannot be modified by unexecuted oral agreement as to performance. *Cughan v. Larson*, 13 N. D. 373, 100 N. W. 1088.

As to written contract being altered by executed parol agreement. *Beuash v. Travelers' Ins. Co.*, 14 N. D. 39, 103 N. W. 405.

Necessity of oral modification of written contract being executed. *Annis v. Burnham*, 15 N. D. 577, 108 N. W. 549.

Executed oral agreement by mortgagee to take other chattels in place of mortgaged chattels prevents conversion on refusal to deliver on demand. *Catlett v. Stokes*, 21 S. D. 108, 110 N. W. 84.

Note given in part purchase price of land, containing clause reading "less tax on land for 1906" was binding upon vendor as modification of land contract, when he accepted it, and bound him to pay taxes. *Kimm v. Wolters*, 28 S. D. 255, 133 N. W. 277.

As to similar provision in Cal. Civ. Code, § 1698, see *Erenberg v. Peters*, 66 Cal. 114, 4 Pac. 1091; *Taylor v. Soldati*, 68 Cal. 27, 8 Pac. 518; *Tapia v. Demartini*, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641; *Smith v. Taylor*, 82 Cal. 533, 23 Pac. 217; *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786; *Benson v. Shotwell*, 103 Cal. 163, 37 Pac. 147; *Thompson v. Gorner*, 104 Cal. 168, 43 Am. St. Rep. 81, 37 Pac. 900; *Heim v. Butin*, 5 Cal. Unrep. 19, 40 Pac. 39; *Dunn v. Price*, 112 Cal. 46, 44 Pac. 354; *Platt v. Butcher*, 112 Cal. 634, 44 Pac. 1060; *Bradford Invest. Co. v. Joost*, 117 Cal. 204, 48 Pac. 1083; *Anderson v. Johnston*, 120 Cal. 657, 53 Pac. 264; *Stockton Combined Harvester & Agri. Works v. Glens Falls Ins. Co.*, 121 Cal. 167, 53 Pac. 565; *Hochstein v. Berghauser*, 123 Cal. 681, 56 Pac. 547; *Mackenzie v. Hodgkin*, 126 Cal. 591, 77 Am. St. Rep. 209, 59 Pac. 36; *Henehan v. Hart*, 127 Cal. 656, 60 Pac. 426; *Main Street & Agri. Park R. Co. v. Los Angeles Traction Co.*, 129 Cal. 301, 61 Pac. 937; *Harloe v. Lambie*, 132 Cal. 133, 64 Pac. 88.

**§ 5939. 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. [R. C. 1905, § 5383; Civ. C. 1877, § 970; R. C. 1899, § 3937.]

As to similar provision in Cal. Civ. Code, § 1699, see *Brock v. Pearson*, 87 Cal. 581, 25 Pac. 963.

**§ 5940. 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. [R. C. 1905, § 5384; Civ. C. 1877, § 971; R. C. 1899, § 3938.]

Burden is on party claiming alteration in instrument to show that it is material and subsequent to execution and delivery. *Foly-Wadsworth Co. v. Solomon*, 9 S. D. 511, 70 N. W. 639.

Note fraudulently altered after delivery, null and void as to maker. *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473.

Insertion of place of payment by clerk not a void note. *Port Huron Engine Co. v. Sherman*, 14 S. D. 461, 85 N. W. 1008.

Adding \$60 to a \$1,000 note is a material alteration. *Wyckoff v. Johnson*, 2 S. D. 91, 48 N. W. 837.

Alteration made by stranger without consent of holder. *Landauer v. Sioux Falls Imp. Co.*, 10 S. D. 205, 72 N. W. 467.

Unauthorized change in note of place of payment by payee's clerk subsequently erased not prevent recovery. *Acme Harv. Co. v. Butterfield*, 12 S. D. 91, 80 N. W. 170.

**§ 5941. 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. [R. C. 1905, § 5385; Civ. C. 1877, § 972; R. C. 1899, § 3939.]

## CHAPTER 56.

## OBLIGATIONS IMPOSED BY LAW.

**§ 5942. 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. [R. C. 1905, § 5386; Civ. C. 1877, § 973; R. C. 1899, § 3940.]

As to debt and obligation not being synonymous. *Sonnesyn v. Akin*, 12 N. D. 227, 97 N. W. 557.

**§ 5943. 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. [R. C. 1905, § 5387; Civ. C. 1877, § 974; R. C. 1899, § 3941.]

Vendor liable for willful deception in sale of county warrant. *Parker v. Ausland*, 13 S. D. 169, 82 N. W. 402.

School officer fraudulently issuing school warrant liable to an innocent purchaser. *Whitbeck v. Sees*, 10 S. D. 417, 73 N. W. 915.

As to measure of damages for deceit. *Beare v. Wright*, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 8 A. & E. Ann. Cas. 1057.

Fraud must not only have been believed, but have been acted upon to entitle recovery of damages. *First Nat. Bank v. North*, 2 S. D. 480, 51 N. W. 96; *Sioux Bank v. Kendall*, 6 S. D. 543, 62 N. W. 377.

Actions for false representations. 20 Am. Dec. 626, 18 Am. St. Rep. 555.

Recovery for injuries suffered from acting upon false representations. 88 Am. Dec. 442.

False representations in the sale of real estate. 2 Am. Dec. 77.

Measure of damages for misrepresentations in the sale of real property. 123 Am. St. Rep. 776.

Right to interest on damages for fraud and deceit. 28 L.R.A.(N.S.) 50.

Right to interest on damages from fraud in sale of personalty. 28 L.R.A.(N.S.) 49.

Damages recoverable for fraud and deceit in selling diseased animals. 34 L.R.A.(N.S.) 697.

Measure of damages for false representations in sale of real estate. 8 L.R.A.(N.S.) 804; 16 L.R.A.(N.S.) 818.

Measure of damages for fraud in the exchange of property. 38 L.R.A.(N.S.) 465.

As to similar provision in Cal. Civ. Code, § 1709, see *Daley v. Quick*, 99 Cal. 179, 33 Pac. 859.

**§ 5944. 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. [R. C. 1905, § 5388; Civ. C. 1877, § 975; R. C. 1899, § 3942.]

1. False statement as to cost, selling or market price of property, or as to offers therefor as fraud. 35 L.R.A.(N.S.) 175.

2. Statements made without knowledge of falsity as ground for action for fraud. 18 L.R.A.(N.S.) 379.

Misstatement as to title to real property as fraud. 28 L.R.A.(N.S.) 202; 39 L.R.A.(N.S.) 1142.

Expression of opinion as fraud. 35 L.R.A. 417.

3. Landlord's concealment of defects in premises as fraud. 34 L.R.A. 827.

Concealment of defects in title to real property. 28 L.R.A.(N.S.) 207.

Obligee's concealment of facts on obtaining guaranty or surety. 21 L.R.A. 411.

Concealment of facts by insured in case of Lloyd's policies. 55 L.R.A. 202.

4. Whether lack of reasonable expectation of being able to pay is equivalent, as a matter of law, to an intention not to pay. 6 L.R.A.(N.S.) 556.

**§ 5945. When intent to defraud every one misled presumed.** One who practices a deceit with intent to defraud the public or a particular class of per-

sons is deemed to have intended to defraud every individual in that class who is actually misled by the deceit. [R. C. 1905, § 5389; Civ. C. 1877, § 976; R. C. 1899, § 3943.]

§ 5946. **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. [R. C. 1905, § 5390; Civ. C. 1877, § 977; R. C. 1899, § 3944.]

§ 5947. **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. [R. C. 1905, § 5391; Civ. C. 1877, § 978; R. C. 1899, § 3945.]

§ 5948. **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 110 on compensatory relief. [R. C. 1905, § 5392; Civ. C. 1877, § 979; R. C. 1899, § 3946.]

Negligence a question for both court and jury. *Alt v. Ry. Co.*, 5 S. D. 20, 57 N. W. 1126.

Question of negligence for jury when reasonable men might draw different conclusions from facts. *Heckman v. Evenson*, 7 N. D. 173, 73 N. W. 427.

Presumptive negligence under statute. *Johnson v. Ry. Co.*, 1 N. D. 354, 48 N. W. 227; *Kelsey v. Ry. Co.*, 1 S. D. 80, 45 N. W. 204.

Statutory presumption as to negligence of trainmen; when overcome. *Keilbach v. Ry. Co.*, 11 S. D. 468, 78 N. W. 951.

Presumptive negligence, when overcome, warrants direction of verdict. *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.

Measure of damages for loss by negligence. *Johnson v. Ry. Co.*, 1 N. D. 354, 48 N. W. 227.

Recovery of money paid by mistake, diligence must be shown. *Fegan v. Great Nor. Ry. Co.*, 9 N. D. 30, 81 N. W. 39.

Negligence in employment of counsel; default will not be set aside and new trial granted. *Minnehaha Nat. Bank v. Hurley*, 13 S. D. 18, 82 N. W. 87.

Owner of building failing to exercise proper care in ascertaining condition responsible for injury caused by its fall. *Patterson v. Schlitz Brewing Co.*, 16 S. D. 33, 91 N. W. 336; *Waterhouse v. Brewing Co.*, 12 S. D. 397, 81 N. W. 725, 48 L.R.A. 157.

Loss by fire, proximate or remote cause. *Gram v. Ry. Co.*, 1 N. D. 252, 46 N. W. 972; *Pielke v. Ry. Co.*, 5 D. 444, 41 N. W. 669; *Johnson v. Ry. Co.*, 1 N. D. 354, 48 N. W. 227.

Spreading of fire set on one's own land to land of another not evidence of negligence. *Mattoon v. Ry. Co.*, 6 S. D. 196, 60 N. W. 740.

Rule that negligence is presumed from fact that engine sets a fire is a rule of evidence and unaffected by allegations in complaints. *Mathews v. Gt. Nor. Ry. Co.*, 7 N. D. 81, 72 N. W. 1085.

Contributory negligence not imputed to one damaged by prairie fire merely because person familiar with locality might have escaped damage. *McTavish v. Great Nor. Ry. Co.*, 8 N. D. 333, 79 N. W. 443.

Suit to recover for grain destroyed by fire in elevator,—burden on elevator company to show that the grain was in elevator at time of loss. *Marshall v. Andrews*, 8 N. D. 364, 79 N. W. 851.

City liable for negligent construction of sewers and drains. *Dell Rapids Mer. Co. v. Cy. of Dell Rapids*, 11 S. D. 116, 75 N. W. 898, 74 Am. St. Rep. 783.

Negligence of city in repair of sidewalks. *Chacey v. City of Fargo*, 5 N. D. 173, 64 N. W. 932.

City liable for negligence of officers in failing to repair sidewalks. *Coleman v. City of Fargo*, 8 N. D. 69, 76 N. W. 1051.

City liable for negligence of officers in allowing snow and ice to accumulate upon sidewalks. *Trost v. City of Casselton*, 8 N. D. 534, 79 N. W. 1071.

Excavation near highway; injury to trespasser. *Sanders v. Reister*, 1 D. 151, 46 N. W. 680.

Negligence of third person driving horse not imputable to plaintiff. *Ouverson v. City*, 5 N. D. 281, 65 N. W. 676.

Cattle at large on owner's responsibility. *Williams v. Ry. Co.*, 3 D. 168, 14 N. W. 97.

Negligence of bank or collector in making collection. *Plymouth Co. Bank v. Gilman*, 3 S. D. 170, 52 N. W. 869, 44 Am. St. Rep. 782.

Father purchasing gun for son, with knowledge of son's recklessness is liable for damage caused thereby. *Johnson v. Glidden*, 11 S. D. 237, 76 N. W. 933, 74 Am. St. Rep. 795.

Injury by railway to passenger. *Saunders v. Ry. Co.*, 6 S. D. 40, 60 N. W. 148.

Railroad company liable for death of intoxicated passenger, carried by his station to the next, where he was put off and left out in the cold. *Haug v. Great Northern Ry. Co.*, 8 N. D. 23, 77 N. W. 97, 73 Am. St. Rep. 727, 42 L.R.A. 664.

Ejection of passenger from train; right to ride by certain route. *Church v. Ry. Co.*, 6 S. D. 235, 60 N. W. 854, 26 L.R.A. 616.

Contributory negligence of shipper riding in car with his property. *Heumphreus v. Ry. Co.*, 8 S. D. 103, 65 N. W. 466.

Railway company responsible for negligence on its tracks regardless of title to right of way. *Gram v. Ry. Co.*, 1 N. D. 252, 46 N. W. 972.

Railway train to use care in approaching crossing. *Bishop v. Ry. Co.*, 4 N. D. 536, 62 N. W. 605.

Contributory negligence to turn horse loose beside railway track without fence, short time before regular train time. *Sinkling v. Ill. Cent. Ry. Co.*, 10 S. D. 560, 74 N. W. 1029.

Employers must furnish employes with reasonably safe and adequate machinery. *Cameron v. Great Nor. Ry. Co.*, 8 N. D. 124, 77 N. W. 1016; *Olson v. Ry. Co.*, 12 S. D. 326, 81 N. W. 634.

Injury to switchman; question for jury. *Bennett v. N. P. Ry. Co.*, 2 N. D. 112, 49 N. W. 408, 13 L.R.A. 465; *Boss v. N. P. Ry. Co.*, 2 N. D. 128, 49 N. W. 655, 33 Am. St. Rep. 756; *Bennett v. Ry. Co.*, 3 N. D. 91, 54 N. W. 314.

Master not liable for injury which servant could have avoided by reasonable care. *Carlson v. Water Co.*, 8 S. D. 47, 65 N. W. 419.

Conductor receiving a train in an improper condition, known to him, is guilty of contributory negligence. *Cameron v. Great Nor. Ry. Co.*, 8 N. D. 618, 80 N. W. 885.

Negligence of fellow servants. *Ell v. Ry. Co.*, 1 N. D. 336, 48 N. W. 222, 12 L.R.A. 97, 26 Am. St. Rep. 621.

Negligence in manufacture and storage of gunpowder, nitro-glycerin, dynamite and other explosives. 29 L.R.A. 718.

Violation of statute or ordinance relating to explosives as negligence per se giving right of private action. 48 L.R.A.(N.S.) 879.

Liability of manufacturer, packer or vendor to persons not in privity of contract, for injury from defects in article sold. 19 L.R.A.(N.S.) 923; 48 L.R.A.(N.S.) 213.

—for injury caused by escape of dangerous substances stored on one's premises. 15 L.R.A.(N.S.) 535.

—for dangerous condition of private grounds lying open beside highway or frequented path. 26 L.R.A. 687.

—for killing or injuring trespassers by means of spring guns, traps and other dangerous instruments. 29 L.R.A. 154; 24 L.R.A.(N.S.) 369.

Duty of property owner to trespassing child. 32 L.R.A.(N.S.) 559.

Doctrine of attractive nuisances. 19 L.R.A.(N.S.) 1094.

Liability of owner for trespass of cattle. 22 L.R.A. 55.

—for injury done by animals feræ naturæ. 11 L.R.A.(N.S.) 758; 16 L.R.A.(N.S.) 445.

—for injuries done by bees. 62 L.R.A. 132.

—for injuries inflicted by domestic animals other than dogs. 2 L.R.A.(N.S.) 1188.

—of keeper of animal known to be dangerous as affected by absence of negligence on his part. 6 L.R.A.(N.S.) 1164; 2 B. R. C. 14.

—of one maintaining place of amusement for injury by animals. 42 L.R.A.(N.S.) 1072.

Scienter as condition of liability for damages by a trespassing dog. 25 L.R.A.(N.S.) 691.

What scienter is necessary to charge owner with liability for injury inflicted by dog to person or property of another. 24 L.R.A.(N.S.) 458.

Measure of damages for personal injury by dog. 37 L.R.A.(N.S.) 865.

Liability for setting fires which spread to property of others. 21 L.R.A. 255; 36 L.R.A.(N.S.) 194.

Duty of one not responsible for kindling of fire to prevent its spread from his premises. 6 L.R.A.(N.S.) 882.

Negligence with respect to spark arresters on threshing machine or similar stationary engines. 1 L.R.A.(N.S.) 530.

Liability of municipal corporation for fire set by sparks from steam roller engaged in repairing a street. 6 L.R.A.(N.S.) 1094; 20 L.R.A.(N.S.) 654.

Negligence as to electric wires on or in buildings. 32 L.R.A. 400.

Duty of company maintaining electric wire over or across private property. 34 L.R.A.(N.S.) 1089.

Duty of electric light company with respect to wiring or fixtures installed in private property. 13 L.R.A.(N.S.) 226; 20 L.R.A. 816.

Liability for death of, or injury to traveler coming in contact with electric wire in highway. 31 L.R.A. 566; 22 L.R.A.(N.S.) 1169.

Knowledge as element of master's liability for injury to employe. 41 L.R.A. 33.

Injury to servant received in obeying a direct command. 48 L.R.A. 753.

Master's liability for injury by defect in common tools. 13 L.R.A.(N.S.) 668; 40 L.R.A.(N.S.) 832.

Master's duty of active inspection of instrumentalities when first used. 41 L.R.A. 70.

Servant's assumption of risk of master's breach of statutory duty. 6 L.R.A.(N.S.) 981; 19 L.R.A.(N.S.) 646; 22 L.R.A.(N.S.) 634; 33 L.R.A.(N.S.) 647.

Employe's right of action for employer's violation of statute not expressly conferring right. 9 L.R.A.(N.S.) 376.

As to similar provision in Cal. Civ. Code, § 1714, see *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529.

**§ 5949. Other obligations.** Other obligations are prescribed by the first forty-three chapters of this code. [R. C. 1905, § 5393; Civ. C. 1877, § 980; R. C. 1899, § 3947.]

This section is R. C. 1905, § 5393, without change. But the interpolation of new chapters in the present compilation requires that the words "first forty-three chapters" must now be read, "chapters 1-4, inclusive; 6-12, inclusive; 14, 17, 18 and 20; 22-24, inclusive; 26-28, inclusive; 31; 33-53, inclusive."

## CHAPTER 57.

### SALE.

- ARTICLE 1. GENERAL PROVISIONS, §§ 5950, 5951.  
 2. AGREEMENTS FOR SALE, §§ 5952-5960.  
 3. FORM OF THE CONTRACT, §§ 5961-5964.  
 4. RIGHTS AND OBLIGATIONS OF THE SELLER. RIGHTS AND DUTIES BEFORE DELIVERING, §§ 5965, 5966.  
 5. DELIVERY OF PERSONAL PROPERTY, §§ 5967-5972.  
 6. WARRANTY OF PERSONAL PROPERTY, §§ 5973-5988.  
 7. RIGHTS AND OBLIGATIONS OF THE BUYER, §§ 5989-5994.  
 8. SALE BY AUCTION, §§ 5995-6001.  
 9. WAIVER OF CAUSE OF ACTION, § 6002.

#### ARTICLE 1.—GENERAL PROVISIONS.

**§ 5950. Sale defined.** Sale is a contract by which for a pecuniary consideration called a price one transfers to another an interest in property. [R. C. 1905, § 5394; Civ. C. 1877, § 981; R. C. 1899, § 3948.]

Party has no right to rescind executed sale. *Hull v. Caldwell*, 3 S. D. 451, 54 N. W. 100.

Corporate club exchanging liquor with its member for checks bought of club is chargeable with selling liquor without license. *State v. Mudie*, 22 S. D. 41, 115 N. W. 107.

Purchaser of school land, receiving contract of sale on making first payment, has interest therein subject to sale on execution. *Brooke v. Eastman*, 17 S. D. 339, 96 N. W. 699.

Bill of sale to son without consideration, for purpose of paying father's creditors, is not a sale. *Hall v. Feeney*, 32 S. D. 541, 21 L.R.A.(N.S.) 513, 18 N. W. 1038.

A contract whereby machinery is "ordered, purchased and sold," and guaranteed, with title and right to possession retained by vendor, is agreement for sale. *Baskerville v. Johnson*, 20 S. D. 88, 104 N. W. 913.

What constitutes a sale. 94 Am. St. Rep. 209.

Differences between sales and bailments. 2 Am. St. Rep. 711.

What constitutes a sale of intoxicating liquors. 8 L.R.A.(N.S.) 937; 11 L.R.A.(N.S.) 872; 21 L.R.A.(N.S.) 1008; 22 L.R.A.(N.S.) 560; 24 L.R.A.(N.S.) 268; 25 L.R.A.(N.S.) 943; 28 L.R.A.(N.S.) 334; 31 L.R.A.(N.S.) 417.

What amounts to retail sale of liquor as distinguished from wholesale. 32 L.R.A.(N.S.) 622.

As to similar provision in Cal. Civ. Code, § 1721, see *Borland v. Nevada Bank*, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737.

**§ 5951. Subject of sale.** The subject of sale must be property the title to which can be immediately transferred from the seller to the buyer. [R. C. 1905, § 5395; Civ. C. 1877, § 982; R. C. 1899, § 3949.]

Sale of property not in existence. 4 Am. Dec. 560; 81 Am. St. Rep. 42.

—of chattels by sample. 7 Am. Dec. 125.

When title to vessel or article to be built or manufactured passes by sale. 62 Am. Dec. 65.

When title of articles to be manufactured does not pass though payment has been made. 40 Am. Rep. 173.

As to similar provision in Cal. Civ. Code, § 1722, see *Woolley v. Wickerd*, 97 Cal. 70, 31 Pac. 733.

#### ARTICLE 2.—AGREEMENTS FOR SALE.

**§ 5952. 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. [R. C. 1905, § 5396; Civ. C. 1877, § 983; R. C. 1899, § 3950.]

A contract whereby machinery is "ordered, purchased and sold," and guaranteed, with title and right to possession retained by vendor, is agreement for sale. *Baskerville v. Johnson*, 20 S. D. 88, 104 N. W. 913.

**§ 5953. 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. [R. C. 1905, § 5397; Civ. C. 1877, § 984; R. C. 1899, § 3951.]

As to similar provision in Cal. Civ. Code, § 1727, see *Hanson v. Slaven*, 98 Cal. 377, 33 Pac. 266.

**§ 5954. 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. [R. C. 1905, § 5398; Civ. C. 1877, § 985; R. C. 1899, § 3952.]

**§ 5955. 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. [R. C. 1905, § 5399; Civ. C. 1877, § 986; R. C. 1899, § 3953.]

As to similar provision in Cal. Civ. Code, § 1729, see *Berry v. Kowalsky*, 95 Cal. 134, 29 Am. St. Rep. 101, 30 Pac. 202.

**§ 5956. 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. [R. C. 1905, § 5400; Civ. C. 1877, § 987; R. C. 1899, § 3954.]

**§ 5957. 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. [R. C. 1905, § 5401; Civ. C. 1877, § 988; R. C. 1899, § 3955.]

Tender of deed from third party, owner of land agreed to be conveyed, is not compliance with contract calling for deed from vendor. *McVeety v. Harvey Mercantile Co.*, 24 N. D. 245, 139 N. W. 586.

As to similar provision in Cal. Civ. Code, § 1731, see *Royal v. Dennison*, 109 Cal. 558, 42 Pac. 39.

**§ 5958. 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. [R. C. 1905, § 5402; Civ. C. 1877, § 989; R. C. 1899, § 3956.]

**§ 5959. 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. [R. C. 1905, § 5403; 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.

**§ 5960. Highways, railways, right of ways.** No covenants of warranty shall be considered as broken by the existence of a highway or railway, or a right of way for either, upon the land conveyed by any instrument of conveyance, unless otherwise particularly specified in the deed, and whenever in any instrument of conveyance delivered, filed and recorded prior to the first day of January, 1896, the grantor has conveyed real property in this state, but has reserved or sought to reserve a right of way over or across the same for the future construction of any railroad or highway without specifically locating or describing therein by metes and bounds such right of way, or proposed right of way, or by reference to permanent marks or monuments, such reservation shall be void in all things, and such conveyance shall have the same effect as if no such reservation had been made or attempted to have been made therein, unless at the time of the taking effect of this act the grantor or his or its successor in interest shall be in actual possession of, or shall have located and permanently marked said right of way, or shall have filed or caused to be filed within one year after the taking effect of this act, in the office of the register of deeds of the county wherein the land is situated, a plat describing such selection and such right of way, properly acknowledged so as to entitle the same to be recorded, and so as to readily distinguish and designate such right of way from the entire premises described in the conveyance from which it was attempted to be reserved, or shall have begun within one year after the taking effect of this act, an action in a court of competent jurisdiction for the purpose of definitely determining and locating such right of way, and establishing his or its right thereto, and in such case shall have filed and recorded a proper notice of his pends in the office of the register of deeds of the county in which such land is located. [1907, ch. 251; R. C. 1905, § 5404; 1901, ch. 64.]

### ARTICLE 3.—FORM OF THE CONTRACT.

**§ 5961. 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. [R. C. 1905, § 5405; Civ. C. 1877, § 991; R. C. 1899, § 3958.]

When contracts for sales of goods are within statute of frauds. 9 Am. Dec. 188.

Contract to transfer personal property in consideration of services, as affected by statute of frauds relating to contracts for the sale of goods, etc. 16 L.R.A.(N.S.) 381.

As to similar provision in Cal. Civ. Code, § 1739, see *Jamison v. Simon*, 68 Cal. 17, 8 Pac. 502; *Terney v. Doten*, 70 Cal. 399, 11 Pac. 743; *Flynn v. Dougherty*, 91 Cal. 669, 14 L.R.A. 230, 27 Pac. 1080.

2. Oral agreement to purchase goods for more than \$50 not valid until voluntary receipt and acceptance of goods by buyer. *Dinnie v. Johnson*, 8 N. D. 153, 77 N. W. 612.

Delivery of part of property to buyer at time of contract to sell renders contract valid. *Talbot v. Boyd*, 11 N. D. 81, 88 N. W. 1026.

Symbolic delivery by sample to satisfy statute of frauds. 70 L.R.A. 321.

Acceptance and delivery of goods to satisfy statute of frauds. 49 Am. Dec. 325, 37 Am. Rep. 16; 96 Am. St. Rep. 215; 10 L.R.A.(N.S.) 638.

Receipt and acceptance to satisfy the statute of frauds when goods are in possession of purchaser at time of agreement. 11 L.R.A.(N.S.) 1186; 20 L.R.A.(N.S.) 498.

3. Work in fitting up for delivery as payment of price to take the contract out of the statute of frauds. 15 L.R.A.(N.S.) 654.

**§ 5962. 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. [R. C. 1905, § 5406; Civ. C. 1877, § 992; R. C. 1899, § 3959.]

That trees had to be dug and packed before delivery by seller did not bring sale within this section. *Jones v. Pettigrew*, 25 S. D. 432, 127 N. W. 538.

Distinction between sales and contracts for work and labor. 14 L.R.A. 230, 30 L.R.A.(N.S.) 319.

As to similar provision in Cal. Civ. Code, § 1740, see *Flynn v. Dougherty*, 91 Cal. 669, 14 L.R.A. 230, 27 Pac. 1080.

**§ 5963. 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. [R. C. 1905, § 5407; Civ. C. 1877, § 993; R. C. 1899, § 3960.]

Unexecuted verbal agreement for conveyance of land is invalid. *Cleveland v. Evans*, 5 S. D. 53, 58 N. W. 8.

Employment of agent to find purchaser for realty need not be in writing. *McLaughlin v. Wheeler*, 1 S. D. 497, 47 N. W. 816.

Agreement to purchase real estate and share in profits need not be written. *Davenport v. Buchanan*, 6 S. D. 376, 61 N. W. 47.

Agent's authority to sell land established by letters and telegrams. *Farrell v. Edwards*, 8 S. D. 425, 66 N. W. 812.

Note or memorandum may be made subsequent to agreement, and may be contained in more than one paper. *Townsend v. Kennedy*, 6 S. D. 47, 60 N. W. 164.

Agreement as to assignment of sheriff's certificate of sale need not be written. *Whiffen v. Hollister*, 12 S. D. 68, 80 N. W. 156.

Contract of agent for sale of realty void unless authorized in writing. *Ballou v. Bergvdsen*, 9 N. D. 285, 83 N. W. 10.

As to when contract is not within statute of frauds. *Schmidt v. Beiseker*, 14 N. D. 587, 5 L.R.A.(N.S.) 123, 116 Am. St. Rep. 706, 105 N. W. 1102.

Agent's authority to execute contract for sale of real property must be in writing. *Brandrup v. Britten*, 11 N. D. 376, 92 N. W. 453; *Lichty v. Daggett*, 23 S. D. 380, 121 N. W. 862.

Inapplicable to oral advancement of purchase price by one taking title. *Phillips v. Swenson*, 16 S. D. 357, 92 N. W. 1065.

Specific performance of oral contract to convey land will be decreed where shade trees have been set out and earnest money paid. *Stewart v. Tomlinson*, 21 S. D. 337, 112 N. W. 849.

Oral agreement entered into as result of written correspondence relied on as contract, is inadmissible. *Phelan v. Neary*, 22 S. D. 265, 117 N. W. 142.

Validity of written contract for sale of real property. *Hughes v. Payne*, 22 S. D. 293, 117 N. W. 363.

Oral lease to vendor for less than year does not constitute part performance by vendee under oral contract for purchase of land to take it out of statute. *Muir v. Chandler*, 16 N. D. 551, 113 N. W. 1038.

Oral contract for sale of land accompanied by part performance is enforceable. *Stenson v. Elfman*, 26 S. D. 134, 128 N. W. 588; *Stensland v. Noel*, 28 S. D. 522, 134 N. W. 207.

Contract for sale of land may be specifically enforced although requirements of statute of frauds are not complied with where vendee is placed in possession and makes improvements. *Mitchell v. Knudtson Land Co.*, 19 N. D. 736, 124 N. W. 946.

No writing is admissible, for purpose of evidencing contract for sale of land, unless it conforms to statute. *Shumway v. Kitzman*, 28 S. D. 577, 134 N. W. 355.

Under oral contract to build canal and give specified amount of water as consideration for deed to strip of land across plaintiff's farm, delivery of deed, construction of canal and change of possession to defendant and conveyance of water therein, was such part performance as to justify specific performance of contract to furnish water. *Dorsett v. Black Hills Traction Co.*, 30 S. D. 420, 138 N. W. 808.

What amount to contracts for the sale of land within meaning of statute of frauds. 102 Am. St. Rep. 230.

Agreement to hold land purchased on execution for defendant. 40 Am. Dec. 207.



Parol agreement to take title to real property, sell the same and divide the proceeds, as affected by the statute of frauds. 8 L.R.A.(N.S.) 1137; 20 L.R.A.(N.S.) 298; 42 L.R.A.(N.S.) 1160.

Right of a purchaser of real estate to rely on the statute of frauds against contract by his vendor with a third person. 40 L.R.A.(N.S.) 883.

Purchase of standing timber as a purchase of realty. 13 L.R.A.(N.S.) 278.

Parol agreement to construct private way across railroad. 17 L.R.A.(N.S.) 702; 24 L.R.A.(N.S.) 375.

Agreement to share real property in payment for services. 41 L.R.A.(N.S.) 184.

Insurable interest of tenant in leased property under parol agreement. 42 L.R.A.(N.S.) 135.

Parol assignment of lease. 15 L.R.A. 754.

Effect of performance to take parol assignment of lease out of statute of frauds. 42 L.R.A.(N.S.) 162.

Entry under parol agreement for a lease as part performance. 20 L.R.A. 36.

Effect of making improvements under oral lease for term beyond that permitted by statute, to entitle lessee to hold during term. 3 L.R.A.(N.S.) 852.

Taking possession of real property as part performance to satisfy statute of frauds. 3 L.R.A.(N.S.) 790.

As to similar provision in Cal. Civ. Code, § 1741, see *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179; *Benson v. Shotwell*, 87 Cal. 49, 25 Pac. 249; *Byers v. Locke*, 93 Cal. 493, 27 Am. St. Rep. 212, 29 Pac. 119.

§ 5964. **Form of transfer.** The form of a transfer of real property is described by the chapter on such transfers. [R. C. 1905, § 5408; Civ. C. 1877, § 994; R. C. 1899, § 3961.]

#### ARTICLE 4.— RIGHTS AND OBLIGATIONS OF THE SELLER. RIGHTS AND DUTIES BEFORE DELIVERING.

§ 5965. **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. [R. C. 1905, § 5409; Civ. C. 1877, § 995; R. C. 1899, § 3962.]

§ 5966. **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 99 on liens. [R. C. 1905, § 5410; Civ. C. 1877, § 996; R. C. 1899, § 3963.]

Rescission by vendor for fraud in obtaining credit. 14 L.R.A. 264.

Election of remedy in case of fraudulent purchase. 15 L.R.A. 89.

Lack of reasonable expectation of ability to pay as equivalent to intention not to pay. 6 L.R.A.(N.S.) 556.

Necessity of returning amount paid on fraudulent purchase in action of replevin. 21 L.R.A. 206; 1 L.R.A.(N.S.) 474.

As to similar provision in Cal. Civ. Code, § 1749, see *Rayfield v. Van Meter*, 120 Cal. 416, 52 Pac. 666.

#### ARTICLE 5.— DELIVERY OF PERSONAL PROPERTY.

§ 5967. **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. [R. C. 1905, § 5411; Civ. C. 1877, § 997; R. C. 1899, § 3964.]

Effect of acceptance of goods as a waiver of damages for delay in delivery. 54 L.R.A. 718; 7 L.R.A.(N.S.) 1114.

Admissibility of extrinsic evidence as to time for delivery of goods where none is specified in written contract. 31 L.R.A.(N.S.) 619.

§ 5968. **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. [R. C. 1905, § 5412; Civ. C. 1877, § 998; R. C. 1899, § 3965.]

As to sale contemplating delivery at place where goods are located. *P. J. Bowlin Liquor Co. v. Beaudoin*, 15 N. D. 557, 108 N. W. 545.

§ 5969. **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. [R. C. 1905, § 5413; Civ. C. 1877, § 999; R. C. 1899, § 3966.]

Who must bear loss during transit. 26 Am. St. Rep. 451.

When consignment of property for sale vests title. 45 Am. St. Rep. 203.

§ 5970. **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. [R. C. 1905, § 5414; Civ. C. 1877, § 1000; R. C. 1899, § 3967.]

§ 5971. **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. [R. C. 1905, § 5415; Civ. C. 1877, § 1001; R. C. 1899, § 3968.]

Delivery to carrier as passing title to buyer of goods. *P. J. Bowlin Liquor Co. v. Beaudoin*, 15 N. D. 557, 108 N. W. 545.

§ 5972. **Delivery within reasonable hours.** The delivery of a thing sold can be offered or demanded only within reasonable hours of the day. [R. C. 1905, § 5416; Civ. C. 1877, § 1002; R. C. 1899, § 3969.]

#### ARTICLE 6.—WARRANTY OF PERSONAL PROPERTY.

§ 5973. **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. [R. C. 1905, § 5417; Civ. C. 1877, § 1003; R. C. 1899, § 3970.]

Law governing warranty in contract of sale. 64 L.R.A. 825.

Does warranty extend to obvious defects in animal or slave. 12 L.R.A.(N.S.) 82.

Distinction between warranty of identity and warranty of quality. 35 L.R.A.(N.S.) 265.

Effect of representing things sold to be "good." 15 L.R.A. 795.

What amounts to a breach of warranty of soundness of a horse. 32 L.R.A.(N.S.) 182.

May words in an executory contract, from which the law implies a warranty as to quality, be relied on as an express warranty. 25 L.R.A.(N.S.) 160.

What amounts to warranty of quality. 1 Am. Dec. 84.

What defects constitute breaches of warranty of soundness. 53 Am. Dec. 173.

Remedies of vendee for breach of warranty of quality. 54 Am. Dec. 146.

Failure of vendee to inspect or test goods as waiver of express warranty. 24 L.R.A.(N.S.) 235.

§ 5974. **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. [R. C. 1905, § 5418; Civ. C. 1877, § 1004; R. C. 1899, § 3971.]

Implied warranty; proof of breach. *Davis v. Iverson*, 5 S. D. 295, 58 N. W. 796.

Warranty of quality of things sold—*not implied.* *McCormick Harv. Mach. Co. v. Watson*, 5 S. D. 9, 57 N. W. 945.

Mere contract of sale does not imply warranty except as prescribed by statute.

*Christiernson v. Hendrie & B. Mfg. & Supply Co.*, 26 S. D. 519, 128 N. W. 603.

Implied warranties on a sale of chattels. 6 Am. Dec. 113; 24 Am. Rep. 181.

When warranty of quality is implied. 2 Am. Dec. 220.

Implied warranty of quality in sales by description. 14 L.R.A. 492.

Express warranty as to quality excluding implied warranty. 33 L.R.A.(N.S.) 502.

Implied warranty of fitness of property bought for special purpose. 22 L.R.A. 187; 15 L.R.A.(N.S.) 868; 31 L.R.A.(N.S.) 783; 34 L.R.A.(N.S.) 737.

§ 5975. **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. [R. C. 1905, § 5419; Civ. C. 1877, § 1005; R. C. 1899, § 3972.]

Warranty of title implied on the sale of personal property. 62 Am. Dec. 460.

Does implied covenant of title on sale of chattels protect against outstanding liens or incumbrances. 16 L.R.A.(N.S.) 410.

As to similar provision in Cal. Civ. Code, § 1765, see *Jeffers v. Easton E. & Co.*, 113 Cal. 345, 45 Pac. 680.

**§ 5976. Bulk equal to sample.** One who sells or agrees to sell goods by sample thereby warrants the bulk to be equal to the sample. [R. C. 1905, § 5420; Civ. C. 1877, § 1006; R. C. 1899, § 3973.]

Sale by sample—damages for breach of warranty. *James v. Bekkedal*, 10 N. D. 120, 86 N. W. 226.

Warranty on sale of goods by sample. 70 L.R.A. 653.

Does sale by sample exclude implied warranty other than that goods shall conform to sample. 29 L.R.A.(N.S.) 139.

**§ 5977. 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. [R. C. 1905, § 5421; Civ. C. 1877, § 1007; R. C. 1899, § 3974.]

Statement by seller of horse that "For all I know, she is just as sound as the other" does not constitute warranty, although "other" horse referred to was sound. *Stockman v. Keim*, 19 N. D. 317, 124 N. W. 64.

**§ 5978. 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. [R. C. 1905, § 5422; Civ. C. 1877, § 1008; R. C. 1899, § 3975.]

Does express warranty as to quality exclude implied warranty in case of articles to be manufactured. 33 L.R.A.(N.S.) 508.

As to similar provision in Cal. Civ. Code, § 1768, see *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 9 Am. St. Rep. 199, 18 Pac. 248; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62.

**§ 5979. 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. [R. C. 1905, § 5423; Civ. C. 1877, § 1009; R. C. 1899, § 3976.]

Implied warranties under statute operate solely by operation of law. *Hooven & A. Co. v. Wirtz*, 15 N. D. 477, 107 N. W. 1078.

Warranty implied upon sale of an article by the manufacturer. 24 Am. Rep. 104.

When warranty of soundness is implied. 43 Am. Dec. 680.

Warranty on sale by manufacturer of goods by sample. 70 L.R.A. 665.

Express warranty as to quality of article to be manufactured as excluding implied warranty. 33 L.R.A.(N.S.) 508.

Sale of manufactures by sample as excluding implied warranty other than that goods shall conform to sample. 29 L.R.A.(N.S.) 139.

Latent defects in both sample and bulk of goods sold by manufacturer. 70 L.R.A. 665.

Right of purchaser to reject goods for breach of warranty relating to goods to be manufactured. 27 L.R.A.(N.S.) 924.

As to similar provision in Cal. Civ. Code, § 1769, see *Hoult v. Baldwin*, 67 Cal. 610, 8 Pac. 440.

**§ 5980. 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. [R. C. 1905, § 5424; Civ. C. 1877, § 1010; R. C. 1899, § 3977.]

Implied warranty of fitness of property bought for special purpose. 22 L.R.A. 187; 15 L.R.A.(N.S.) 868; 31 L.R.A.(N.S.) 783; 34 L.R.A.(N.S.) 737.

—articles purchased from manufacturer. 22 L.R.A. 189; 15 L.R.A.(N.S.) 855.

—by manufacturer of machinery or apparatus not in itself defective, of fitness for use under existing conditions. 6 L.R.A.(N.S.) 180.

Effect of inspection on implied warranty of fitness of property bought for special purpose. 22 L.R.A. 194.

As to similar provision in Cal. Civ. Code, § 1770, see *Hallidie v. Sutter Street R. Co.*, 63 Cal. 575; *Correio v. Lynch*, 65 Cal. 273, 3 Pac. 889; *Hoult v. Baldwin*, 67 Cal. 610, 8 Pac. 440; *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 9 Am. St. Rep. 199, 18 Pac. 248; *Bancroft v. San Francisco Tool Co.*, 120 Cal. 228, 52 Pac. 496.

**§ 5981. 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. [R. C. 1905, § 5425; Civ. C. 1877, § 1011; R. C. 1899, § 3978.]

Implied warranties under statute operate solely by operation of law. *Hooven & A. Co. v. Wirtz*, 15 N. D. 477, 107 N. W. 1078.

As to similar provision in Cal. Civ. Code, § 1771, see *Correio v. Lynch*, 65 Cal. 273, 3 Pac. 889; *Browning v. McNear*, 145 Cal. 272, 78 Pac. 722.

**§ 5982. 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. [R. C. 1905, § 5426; Civ. C. 1877, § 1012; R. C. 1899, § 3979.]

**§ 5983. 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. [R. C. 1905, § 5427; Civ. C. 1877, § 1013; R. C. 1899, § 3980.]

Manufacturer selling binding twine to which it attached tag reciting "every ball guaranteed of superior quality" warrants it fit for purpose indicated. *Standard Rope & Twine Co. v. Olmen*, 13 S. D. 296, 83 N. W. 271.

Implied warranty of quality in sales by description. 14 L.R.A. 492.

**§ 5984. 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. [R. C. 1905, § 5428; Civ. C. 1877, § 1014; R. C. 1899, § 3981.]

Warranty of seller under this section is not warranty of indorser, but warranty to vendee merely, which does not run with paper. *McAdam v. Grand Forks Mercantile Co.*, 24 N. D. 645, 47 L.R.A.(N.S.) 246, 140 N. W. 725.

Implied warranty on sale of corporate stock. 53 L.R.A. 153.

Implied warranty of genuineness upon sale of negotiable paper. 36 L.R.A. 92; 10 L.R.A.(N.S.) 542.

Guaranty by surety of other signatures to bill or note. 49 L.R.A. 315.

As to similar provision in Cal. Civ. Code, § 1774, see *James v. Yaeger*, 86 Cal. 184, 24 Pac. 1005; *Sutro v. Rhodes*, 92 Cal. 117, 28 Pac. 98; *Harvey v. Dale*, 96 Cal. 160, 31 Pac. 14; *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564, 63 L.R.A. 245, 96 Am. St. Rep. 169, 73 Pac. 456.

**§ 5985. 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. [R. C. 1905, § 5429; Civ. C. 1877, § 1015; R. C. 1899, § 3982.]

**§ 5986. 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. [R. C. 1905, § 5430; Civ. C. 1877, § 1016; R. C. 1899, § 3983.]

Contract to refrain from certain business implies sale of good will. *Mapes v. Metcalf*, 10 N. D. 601, 88 N. W. 713.

Sale of good will as a limitation upon vendor's right to engage in competing business. 19 L.R.A.(N.S.) 762.

Effect on right of individual partners of sale by firm of good will of business with or without an agreement not to engage in the same business. 19 L.R.A.(N.S.) 769.

As to similar provision in Cal. Civ. Code, § 1776, see *Snow v. Holmes*, 71 Cal. 142, 11 Pac. 856.

**§ 5987. 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. [R. C. 1905, § 5431; Civ. C. 1877, § 1017; R. C. 1899, § 3984.]

**§ 5988. 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. [R. C. 1905, § 5432; Civ. C. 1877, § 1018; R. C. 1899, § 3985.]

## ARTICLE 7.—RIGHTS AND OBLIGATIONS OF THE BUYER.

§ 5989. **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. [R. C. 1905, § 5433; Civ. C. 1877, § 1019; R. C. 1899, § 3986.]

As to similar provision in Cal. Civ. Code, § 1784, see *Schurtz v. Romer*, 82 Cal. 474, 23 Pac. 118.

§ 5990. **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. [R. C. 1905, § 5434; Civ. C. 1877, § 1020; R. C. 1899, § 3987.]

Effect of delivery of goods f. o. b. on place of inspection. 62 L.R.A. 804.

§ 5991. **Written warranty. Reasonable time to discover defects or breaches.** Any person, firm or corporation purchasing personal property under a written warranty shall have a reasonable time after such purchase and the delivery thereof in which to ascertain whether or not the property so sold complies with the warranty, and whether or not there are any defects or breaches of warranty, and the question of what is a reasonable time shall in all cases be a question of fact for the jury. [1913, ch. 218, § 1.]

§ 5992. **Notice of breach of warranty, how and to whom given.** Notice of any breach of warranty or defects in personal property, sold as aforesaid, for any breach of warranty in connection with said personal property, may be given either in writing or orally to the person, firm or corporation or to their agent in this state, who negotiated the sale or who made the delivery of such personal property or his successor. [1913, ch. 218, § 2.]

§ 5993. **Provisions contrary to preceding sections void.** Any provisions in any written order or contract of sale or other contract, which is contrary to any of the provisions of this act [sections 5991-5993] shall be void. [1913, ch. 218, § 3.]

§ 5994. **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. [R. C. 1905, § 5435; Civ. C. 1877, § 1021; R. C. 1899, § 3988.]

Under contract of sale by terms of which title to property does not pass, buyer of machinery may rescind contract for breach of warranty. *Westby v. J. I. Case Threshing Mach. Co.*, 21 N. D. 575, 132 N. W. 137.

On refusal to sign notes for threshing machine as agreed, title does not pass. *J. I. Case Thresh. Mach. Co. v. Eichinger*, 15 S. D. 530, 91 N. W. 82.

A contract whereby machinery is "ordered, purchased and sold and guaranteed, with title and right to possession retained by vendor, is agreement for sale. *Baskerville v. Johnson*, 20 S. D. 88, 104 N. W. 913.

Vendee on executed sale of personalty, in absence of fraud, cannot rescind such sale for breach of implied warranty of title. *Hull v. Caldwell*, 3 S. D. 451, 54 N. W. 100.

Right of rescission on breach of warranty by vendor of seeds. 37 L.R.A.(N.S.) 85.

Construction of provisions for return of property, in event of rescission for breach of warranty. 32 L.R.A.(N.S.) 212.

Right of purchaser to reject goods for breach of warranty. 27 L.R.A.(N.S.) 914.

Right of purchaser of goods deliverable in installments to rescind the contract or refuse further deliveries for breach as to quality. 38 L.R.A.(N.S.) 539.

Purchaser's right to reject goods for breach of warranty on inspection where no opportunity for inspection was given until after delivery. 27 L.R.A.(N.S.) 315.

Use as waiver of right to rescind for breach of warranty. 36 L.R.A.(N.S.) 467.

## ARTICLE 8.—SALE BY AUCTION.

§ 5995. **Defined.** A sale by auction is a sale by public outcry to the highest bidder on the spot. [R. C. 1905, § 5436; Civ. C. 1877, § 1022; R. C. 1899, § 3989.]

Sales at auction and their effect. 96 Am. Dec. 264.

Relief from purchase at auction on ground of mistake. 34 L.R.A.(N.S.) 927.

Effect of preventing or checking bids upon the validity of sales at auction. 20 L.R.A. 545.

Suppression of competition at judicial sale. 42 L.R.A.(N.S.) 1198.

Validity of agreement to purchase property at judicial sale for joint benefit. 38 L.R.A.(N.S.) 719.

**§ 5996. 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. [R. C. 1905, § 5437; Civ. C. 1877, § 1023; R. C. 1899, § 3990.]

**§ 5997. 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. [R. C. 1905, § 5438; Civ. C. 1877, § 1024; R. C. 1899, § 3991.]

**§ 5998. 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. [R. C. 1905, § 5439; Civ. C. 1877, § 1025; R. C. 1899, § 2992.]

Binding effect of conditions announced by auctioneer. 24 L.R.A.(N.S.) 488.

**§ 5999. 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. [R. C. 1905, § 5440; Civ. C. 1877, § 1026; R. C. 1899, § 3993.]

Right to resell property after it has been struck off to a bidder. 36 L.R.A.(N.S.) 927.

Right to withdraw property from an auction sale after it has been offered. 57 L.R.A. 784; 20 L.R.A.(N.S.) 1133.

**§ 6000. 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. [R. C. 1905, § 5441; Civ. C. 1877, § 1027; R. C. 1899, § 3994.]

Right of auctioneer or officer conducting a sale to make bids. 20 L.R.A. 503.

**§ 6001. 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. [R. C. 1905, § 5442; Civ. C. 1877, § 1028; R. C. 1899, § 3995.]

#### ARTICLE 9.—WAIVER OF CAUSE OF ACTION.

**§ 6002. Waiver of respective right of action invalid.** A cause of action or a right of action arising out of the sale of personal property cannot be waived, released or barred before such cause of action has actually accrued, any terms or provisions of any contract or other written instrument to the contrary notwithstanding. [1913, ch. 219.]

### CHAPTER 58.

#### EXCHANGE.

**§ 6003. 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. [R. C. 1905, § 5443; Civ. C. 1877, § 1029; R. C. 1899, § 3996.]

Difference between exchange of property and a sale. 94 Am. St. Rep. 227.

Measure of damages for fraud in exchange of property. 38 L.R.A.(N.S.) 465.

Power to sell personal property in agent's possession as implying power to exchange. 10 L.R.A.(N.S.) 1118.

As to similar provision in Cal. Civ. Code, § 1804, see *Gilbert v. Sleeper*, 71 Cal. 290, 12 Pac. 172.

**§ 6004. Governed by section 5961.** The provisions of section 5961 apply to all exchanges in which the value of the thing to be given by either party

is fifty dollars or more. [R. C. 1905, § 5444; Civ. C. 1877, § 1030; R. C. 1899, § 3997.]

Statute of frauds rules apply to contracts for exchange same as contracts to sell personal property. *Talbot v. Boyd*, 11 N. D. 81, 88 N. W. 1026.

Effect of taking possession on exchange of lands without writing to satisfy statute of frauds. 3 L.R.A.(N.S.) 804.

**§ 6005. 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. [R. C. 1905, § 5445; Civ. C. 1877, § 1031; R. C. 1899, § 3998.]

As to who are buyer and seller on exchange of personal property. *Talbot v. Boyd*, 11 N. D. 81, 88 N. W. 1026.

As to right to rescission not existing under executed sales for breach of warranty. *Simonson v. Jenson*, 14 N. D. 417, 104 N. W. 513.

As to similar provision in Cal. Civ. Code, § 1806, see *Gilbert v. Sleeper*, 71 Cal. 290, 12 Pac. 172.

**§ 6006. Money warranted genuine.** On an exchange of money each party thereby warrants the genuineness of the money given by him. [R. C. 1905, § 5446; Civ. C. 1877, § 1032; R. C. 1899, § 3999.]

## CHAPTER 59.

### DEPOSIT

- ARTICLE 1. DEPOSIT IN GENERAL, §§ 6007-6012.**  
**2. OBLIGATIONS OF THE DEPOSITARY, §§ 6013-6018.**  
**3. DEPOSIT FOR KEEPING, §§ 6019-6026.**  
**4. GRATUITOUS DEPOSIT, §§ 6027-6030.**  
**5. STORAGE, §§ 6031-6035.**  
**6. INNKEEPER, §§ 6036-6039.**  
**7. FINDING, §§ 6040-6048.**  
**8. DEPOSIT FOR EXCHANGE, § 6049.**

#### ARTICLE 1.—DEPOSIT IN GENERAL.

**§ 6007. Deposit classified.** A deposit may be voluntary or involuntary; and for safe keeping or for exchange. [R. C. 1905, § 5447; Civ. C. 1877, § 1033; R. C. 1899, § 4000.]

**§ 6008. 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. [R. C. 1905, § 5448; Civ. C. 1877, § 1034; R. C. 1899, § 4001.]

A general deposit subject to check by county treasurer of county funds, not a loan. *Allibone v. Ames*, 9 S. D. 74, 68 N. W. 165, 33 L.R.A. 585.

This section is general and covers all kinds of deposits. *Hawkins v. Hubbard*, 2 S. D. 631, 51 N. W. 774.

Public officer depositing funds in bank which fails as bailee. 36 L.R.A.(N.S.) 290.

**§ 6009. 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. [R. C. 1905, § 5449; Civ. C. 1877, § 1035; R. C. 1899, § 4002.]

**§ 6010. 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. [R. C. 1905, § 5450; Civ. C. 1877, § 1036; R. C. 1899, § 4003.]

**§ 6011. For keeping.** A deposit for keeping is one in which the depositary is bound to return the identical things deposited. [R. C. 1905, § 5451; Civ. C. 1877, § 1037; R. C. 1899, § 4004.]

**§ 6012. 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. [R. C. 1905, § 5452; Civ. C. 1877, § 1038; R. C. 1899, § 4005.]

#### ARTICLE 2.—OBLIGATIONS OF THE DEPOSITARY.

**§ 6013. 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 6016. [R. C. 1905, § 5453; 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.

Liability of safety deposit companies. 72 Am. St. Rep. 206.

Duty of bank as to payment of money held as bailee. 21 L.R.A.(N.S.) 816.

Right of bailee to assert against his bailor the hostile, adverse, paramount title of a third person. 33 L.R.A.(N.S.) 681.

Conversion of coin by bailee, payment for in coin. 29 L.R.A. 522.

Duty of carrier to recognize demands of stranger on property delivered to it for transportation. 12 L.R.A.(N.S.) 254.

**§ 6014. 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. [R. C. 1905, § 5454; Civ. C. 1877, § 1040; R. C. 1899, § 4007.]

**§ 6015. Place of delivery.** A depositary must deliver the thing deposited at his residence or place of business as may be most convenient for him. [R. C. 1905, § 5455; Civ. C. 1877, § 1041; R. C. 1899, § 4008.]

**§ 6016. 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. [R. C. 1905, § 5456; Civ. C. 1877, § 1042; R. C. 1899, § 4009.]

**§ 6017. 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. [R. C. 1905, § 5457; Civ. C. 1877, § 1043; R. C. 1899, § 4010.]

**§ 6018. 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. [R. C. 1905, § 5458; Civ. C. 1877, § 1044; R. C. 1899, § 4011.]

#### ARTICLE 3.—DEPOSIT FOR KEEPING.

**§ 6019. 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. [R. C. 1905, § 5459; Civ. C. 1877, § 1045; R. C. 1899, § 4012.]



1. Duty to inform bailee as to character of horse. 12 L.R.A. 397.

Liability to servants of bailee for injuries caused by condition of thing bailed. 46 L.R.A. 115.

Responsibility of lender of chattel for injuries to the borrower or a third person due to its unsafe condition. 12 L.R.A.(N.S.) 632.

Imputing bailee's negligence to bailor in action by latter against third person for destruction of property. 17 L.R.A.(N.S.) 925; 27 L.R.A.(N.S.) 690.

Person in charge of a vehicle under a contract purporting to be a bailment or lease, as a servant of the owner as to third persons injured by the vehicle. 6 L.R.A.(N.S.) 544.

2. Improvement of personal property at request of bailee as creating liability against the bailor or the property. 38 L.R.A.(N.S.) 97.

**§ 6020. Care of animals.** A depositary of living animals must provide them with suitable food and shelter and treat them kindly. [R. C. 1905, § 5460; Civ. C. 1877, § 1046; R. C. 1899, § 4013.]

Care required of keeper of boarding stable. 23 L.R.A.(N.S.) 188.

Presumption and burden of proof as to negligence of agister in case of loss or injury. 43 L.R.A.(N.S.) 1186.

**§ 6021. 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. [R. C. 1905, § 5461; Civ. C. 1877, § 1047; R. C. 1899, § 4014.]

A pledgee cannot use pledged property either as compensation for its keeping or otherwise, unless with pledgor's consent. *Hawkins v. Hubbard*, 2 S. D. 631, 51 N. W. 774.

Liability of bailee for misuser. 12 Am. Dec. 619.

**§ 6022. 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. [R. C. 1905, § 5462; Civ. C. 1877, § 1048; R. C. 1899, § 4015.]

**§ 6023. 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. [R. C. 1905, § 5463; Civ. C. 1877, § 1049; R. C. 1899, § 4016.]

**§ 6024. 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. [R. C. 1905, § 5464; Civ. C. 1877, § 1050; R. C. 1899, § 4017.]

As to similar provision in Cal. Civ. Code, § 1838, see *Wilson v. Southern P. R. Co.*, 53 Cal. 735.

**§ 6025. 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 62, 63 and 64. [R. C. 1905, § 5465; Civ. C. 1877, § 1051; R. C. 1899, § 4018.]

**§ 6026. 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. [R. C. 1905, § 5466; Civ. C. 1877, § 1052; R. C. 1899, § 4019.]

Liability of bailee for interest. 28 L.R.A.(N.S.) 6.

Liability of a bailee under a contract requiring him to return or pay for the subject of the bailment, in case of its loss or destruction without fault on his part. 14 L.R.A.(N.S.) 1090.

Liability of bailee of bicycle. 47 L.R.A. 305.

Liability of bailee for wrongful appropriation by his servant of thing bailed. 29 L.R.A. 92.

Liability of infant bailee for negligence or wilful injury. 57 L.R.A. 680.

As to similar provision in Cal. Civ. Code, § 1840, see *Cussen v. Southern California Sav. Bank*, 133 Cal. 534, 85 Am. St. Rep. 221, 65 Pac. 1099.

## ARTICLE 4.—GRATUITOUS DEPOSIT.

§ 6027. **Defined.** Gratuitous deposit is a deposit for which the depositary receives no consideration beyond the mere possession of the thing deposited. [R. C. 1905, § 5467; Civ. C. 1877, § 1053; R. C. 1899, § 4020.]

§ 6028. **Involuntary, gratuitous.** An involuntary deposit is gratuitous, the depositary being entitled to no reward. [R. C. 1905, § 5468; Civ. C. 1877, § 1054; R. C. 1899, § 4021.]

§ 6029. **Use slight care.** A gratuitous depositary must use at least slight care for the preservation of the thing deposited. [R. C. 1905, § 5469; Civ. C. 1877, § 1055; R. C. 1899, § 4022.]

Liability of gratuitous bailees. 38 Am. St. Rep. 779.

—for nonfeasance. 23 Am. Dec. 322.

Right of action for negligent breach of gratuitous undertaking. 12 L.R.A.(N.S.) 929, 931.

Liability of storekeeper for property stolen from customer. 10 L.R.A.(N.S.) 314.

§ 6030. **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 6009 cannot give such notice until the emergency that gave rise to the deposit is passed. [R. C. 1905, § 5470; Civ. C. 1877, § 1056; R. C. 1899, § 4023.]

As to what constitutes ordinary care in care of live stock. *McBride v. Wallace*, 17 N. D. 495, 117 N. W. 857.

## ARTICLE 5.—STORAGE.

§ 6031. **Defined.** A deposit not gratuitous is called storage. The depositary in such case is called a depositary for hire. [R. C. 1905, § 5471; Civ. C. 1877, § 1057; R. C. 1899, § 4024.]

§ 6032. **Must use ordinary care.** A depositary for hire must use at least ordinary care for the preservation of the thing deposited. [R. C. 1905, § 5472; Civ. C. 1877, § 1058; R. C. 1899, § 4025.]

Liability of bailee for damages to goods received for cold storage. 52 L.R.A. 106; 38 L.R.A.(N.S.) 994.

—of carrier for lost property in check room. 29 L.R.A.(N.S.) 834.

—of livery stable keeper for loss of property of patron. 3 L.R.A.(N.S.) 348.

—of keeper of bath house for loss of guest's valuables. 6 L.R.A.(N.S.) 828.

§ 6033. **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. [R. C. 1905, § 5473; Civ. C. 1877, § 1059; R. C. 1899, § 4026.]

§ 6034. **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. [R. C. 1905, § 5474; Civ. C. 1877, § 1060; R. C. 1899, § 4027.]

§ 6036. **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. [R. C. 1905, § 5475; Civ. C. 1877, § 1061; R. C. 1899, § 4028.]

## ARTICLE 6.—INNKEEPER.

§ 6036. **Liability for the loss of property. Special arrangements.** No innkeeper or hotel keeper, whether individual, partnership or corporation, who constantly has in his inn or hotel a metal safe or suitable vault in good order and fit for the custody of money, bank notes, jewelry, articles of gold and silver manufacture, precious stones, personal ornaments, railroad mile-

age books or tickets, negotiable or valuable papers and bullion, and who keeps on the doors of the sleeping rooms used by guests suitable locks or bolts, and on the transoms and windows of said rooms suitable fastenings, and who keeps a copy of this section printed in distinct type constantly posted in not less than ten conspicuous places in all in said hotel or inn, shall be liable for the loss or injury suffered by any guest, unless such guest has offered to deliver the same to such innkeeper or hotel keeper for custody in such metal safe or vault, and such innkeeper or hotel keeper has omitted or refused to take it and deposit it in such safe or vault for custody and to give such guest a receipt therefor. Provided, however, that the keeper of any inn or hotel shall not be obliged to receive from any one guest for deposit in such safe or vault any property hereinbefore described exceeding the total value of three hundred dollars and shall not be liable for any excess for such property, whether received or not. [1913, ch. 183, § 1; R. C. 1905, § 5477; Civ. C. 1887, § 1063; R. C. 1899, § 4030.]

This is section 1 of *Laws 1913, ch. 183, which, in section 11 thereof, expressly repeals R. C. 1905, §§ 5476, 5477.*

*Liability of innkeeper, and lien on baggage of guest. McClain v. Williams, 11 S. D. 227, 76 N. W. 930, 49 L.R.A. 610, 74 Am. St. Rep. 791.*

*Landlord liable for injury to goods in sample room resulting from want of ordinary care. Scheffer v. Corson, 5 S. D. 233, 58 N. W. 555.*

*Liability of innkeeper for goods of their guests. 18 Am. Rep. 130; 99 Am. St. Rep. 577.*

*For what goods of guests liable. 69 Am. Dec. 221.*

*Effect of statute limiting innkeeper's liability for goods not delivered into his custody. 22 L.R.A.(N.S.) 577.*

*Presumption of negligence of innkeeper from injury to property of guest. 20 L.R.A.(N.S.) 1027.*

*Liability for loss or destruction of commercial traveler's samples. 35 L.R.A.(N.S.) 350.*

*Duty of innkeeper as to effects of one who has left without intention of returning as guest. 28 L.R.A.(N.S.) 495.*

*Effect of guest's noncompliance with regulations. 6 L.R.A. 486.*

*When contributory negligence of guests relieves from liability. 41 Am. Rep. 777.*

**§ 6037. Special arrangements.** But such innkeeper or hotel keeper may by special arrangement with a guest receive for deposit in such safe or vault any property upon such terms as they may agree to in writing, but every innkeeper or hotel keeper shall be liable for any loss of the above enumerated articles of a guest in his inn or hotel after said articles have been accepted for deposit if caused by the theft or negligence of the innkeeper, hotel keeper or any of his servants. [1913, ch. 183, § 2.]

**§ 6038. Duties of guests and innkeepers.** It shall be the duty of every guest and of every one intending to be a guest of any hotel in this state, upon delivering to the proprietor of such hotel, or to his servants, any baggage or other articles of property of such guest for safe keeping (elsewhere than to the room assigned to such guest), demand, and of such hotel proprietor to give, a check or receipt therefor in such case, to evidence the fact of such delivery; and no hotel proprietor shall be liable for the loss of or injury to such baggage or other article of property of this guest, unless the same shall have been actually delivered by such guest to such hotel proprietor or to his servants for safe keeping, or unless such loss or injury shall have occurred through the negligence of such hotel proprietor or by his servants or employes in such hotel. [1913, ch. 183, § 3.]

**§ 6039. Character of liability as to such property; limitations.** The liability of the keeper of any inn or hotel, whether individual, partnership or corporation, for the loss of or injury to personal property placed by his guests under his care, other than that described in the preceding sections, shall be that of a depository for hire, except in case of such loss or injury is caused by fire not intentionally produced by the innkeeper, or his servants, such innkeeper shall not be liable. Provided, however, that in no case shall such liability exceed the sum of one hundred and fifty dollars for each trunk

and its contents, and ten dollars for each box, bundle or package and contents so placed under his care, and all other miscellaneous effects, including wearing apparel and personal belongings, fifty dollars, unless he shall have consented in writing with such guest to assume a greater liability.

And provided, further, whenever any person shall suffer his baggage or property to remain in any inn or hotel, after leaving the same as a guest, and after the relation of innkeeper and guest between such guest and the proprietors of such inn or hotel has ceased, or shall forward the same to such inn or hotel, before becoming a guest thereof, and the same shall be received into such inn or hotel, such innkeeper may, at his option, hold such baggage or property at the risk of such owner. [1913, ch. 183, § 4; R. C. 1905, § 5476; Civ. C. 1877, § 1062; R. C. 1895, § 4029.]

See note to section 6036.

#### ARTICLE 7.—FINDING.

**§ 6040. 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. [R. C. 1905, § 5478; Civ. C. 1877, § 1064; R. C. 1899, § 4031.]

Rights and liabilities of finder of property. 37 L.R.A. 116; 1 L.R.A.(N.S.) 477; 8 L.R.A.(N.S.) 95; 35 L.R.A.(N.S.) 979.

Rights inter se of joint finders of lost property. 19 L.R.A.(N.S.) 1201.

Trover in favor of finder. 18 Am. Dec. 55.

What constitutes finding and the remedies of the finder against third persons. 30 Am. Rep. 180.

**§ 6041. 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. [R. C. 1905, § 5479; Civ. C. 1877, § 1065; R. C. 1899, § 4032.]

**§ 6042. 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. [R. C. 1905, § 5480; Civ. C. 1877, § 1066; R. C. 1899, § 4033.]

**§ 6043. 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. [R. C. 1905, § 5481; Civ. C. 1877, § 1067; R. C. 1899, § 4034.]

**§ 6044. 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. [R. C. 1905, § 5482; Civ. C. 1877, § 1068; R. C. 1899, § 4035.]

**§ 6045. 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. [R. C. 1905, § 5483; Civ. C. 1877, § 1069; R. C. 1899, § 4036.]

**§ 6046. 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. [R. C. 1905, § 5484; Civ. C. 1877, § 1070; R. C. 1899, § 4037.]

**§ 6047. 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. [R. C. 1905, § 5485; Civ. C. 1877, § 1071; R. C. 1899, § 4038.]

§ 6048. **No application to things abandoned.** The provisions of this article have no application to things which have been intentionally abandoned by their owners. [R. C. 1905, § 5486; Civ. C. 1877, § 1072; R. C. 1899, § 4039.]

#### ARTICLE 8.—DEPOSIT FOR EXCHANGE.

§ 6049. **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. [R. C. 1905, § 5487; Civ. C. 1877, § 1073; R. C. 1899, § 4040.]

Every general deposit not a loan. *Allibone v. Ames*, 9 S. D. 74, 68 N. W. 165, 33 L.R.A. 585.

### CHAPTER 60.

#### LOANS.

- ARTICLE 1. LOAN FOR USE, §§ 6050-6061.  
 2. LOAN FOR EXCHANGE, §§ 6062-6066.  
 3. LOAN OF MONEY, §§ 6067-6078.

#### ARTICLE 1.—LOAN FOR USE.

§ 6050. **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. [R. C. 1905, § 5488; Civ. C. 1877, § 1074; R. C. 1899, § 4041.]

Loan of intoxicating liquors as a sale. 8 L.R.A.(N.S.) 937; 31 L.R.A.(N.S.) 517.  
 Husband's liability for money loaned wife to purchase necessities. 65 L.R.A. 550.

§ 6051. **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. [R. C. 1905, § 5489; Civ. C. 1877, § 1075; R. C. 1899, § 4042.]

Right of one loaning his property to another to claim title against the latter's vendees or creditors. 25 L.R.A.(N.S.) 778.

§ 6052. **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. [R. C. 1905, § 5490; Civ. C. 1877, § 1076; R. C. 1895, § 4043.]

§ 6053. **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. [R. C. 1905, § 5491; Civ. C. 1877, § 1077; R. C. 1899, § 4044.]

§ 6054. **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. [R. C. 1905, § 5492; Civ. C. 1877, § 1078; R. C. 1899, § 4045.]

§ 6055. **Repair injuries.** A borrower for use must repair all deteriorations or injuries to the thing lent which are occasioned by his negligence however slight. [R. C. 1905, § 5493; Civ. C. 1877, § 1079; R. C. 1899, § 4046.]

§ 6056. **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. 1905, § 5494; R. C. 1877, § 1080; R. C. 1899, § 4047.]

§ 6057. **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. [R. C. 1905, § 5495; Civ. C. 1877, § 1081; R. C. 1899, § 4048.]

§ 6058. **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. [R. C. 1905, § 5496; Civ. C. 1877, § 1082; R. C. 1899, § 4049.]

§ 6059. **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. [R. C. 1905, § 5497; Civ. C. 1877, § 1083; R. C. 1899, § 4050.]

§ 6060. **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. [R. C. 1905, § 5498; Civ. C. 1877, § 1084; R. C. 1899, § 4051.]

§ 6061. **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. [R. C. 1905, § 5499; Civ. C. 1877, §§ 1085, 1086; R. C. 1899, § 4052.]

#### ARTICLE 2.—LOAN FOR EXCHANGE.

§ 6062. **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. [R. C. 1905, § 5500; Civ. C. 1877, § 1087; R. C. 1899, § 4053.]

§ 6063. **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. [R. C. 1905, § 5501; Civ. C. 1877, § 1088; R. C. 1899, § 4054.]

§ 6064. **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. [R. C. 1905, § 5502; Civ. C. 1877, § 1089; R. C. 1899, § 4055.]

§ 6065. **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. [R. C. 1905, § 5503; Civ. C. 1877, § 1090; R. C. 1899, § 4056.]

§ 6066. **Sections applicable.** Sections 6058 and 6060 apply to a loan for exchange. [R. C. 1905, § 5504; Civ. C. 1877, § 1091; R. C. 1899, § 4057.]

#### ARTICLE 3.—LOAN OF MONEY.

§ 6067. **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. [R. C. 1905, § 5505; Civ. C. 1877, § 1092; R. C. 1899, § 4058.]

Bank deposit not a loan. *Allibone v. Ames*, 9 S. D. 74, 68 N. W. 165, 33 L.R.A. 585.

Loan of public money to citizens. 14 L.R.A. 475.

Damages recoverable for breach of contract to lend money. 37 L.R.A. 233; 29 L.R.A. (N.S.) 194.

Right of one loaning money for purchase price of property to be subrogated to vendor's lien. 37 L.R.A. (N.S.) 1203.

Is money loaned to improve land part of the purchase price within the rule that a purchase money lien takes priority over homestead rights. 41 L.R.A. (N.S.) 89.

Liability of corporation directors for loss by making loans. 55 L.R.A. 762.

Liability of bank directors in case of bad loans. 55 L.R.A. 751; 39 L.R.A. (N.S.) 173.

Creation of partnership by sharing in profits of making loans. 18 L.R.A. (N.S.) 1055.

Admissibility of books of account to prove loan. 53 L.R.A. 703.

Validity of loan when made in violation of law. 13 L.R.A. (N.S.) 603.

**§ 6068. 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. [R. C. 1905, § 5506; Civ. C. 1877, § 1093; R. C. 1899, § 4059.]

**§ 6069. 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. [R. C. 1905, § 5507; Civ. C. 1877, § 1094; R. C. 1899, § 4060.]

**§ 6070. Interest defined.** Interest is the compensation allowed for the use, or forbearance, or detention of money, or its equivalent. [R. C. 1905, § 5508; Civ. C. 1877, § 1095; R. C. 1899, § 4061.]

Special assessments bear interest at 7 per cent per annum from time of delinquency.

Hackney v. Elliott, 23 N. D. 373, 137 N. W. 433.

As to similar provision in Cal. Civ. Code, § 1915, see People ex rel. Warfield v. Sutter Street R. Co., 129 Cal. 545, 79 Am. St. Rep. 137, 62 Pac. 104; Savings & L. Soc. v. San Francisco, 131 Cal. 356, 63 Pac. 665.

**§ 6071. 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. [R. C. 1905, § 5509; Civ. C. 1877, § 1096; R. C. 1899, § 4062.]

As to similar provision in Cal. Civ. Code, § 1916, see Rogers v. Jones, 92 Cal. 80, 28 Pac. 97.

**§ 6072. 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. [R. C. 1905, § 5510; 1890, ch. 184, § 1; 1893, ch. 131, § 1; R. C. 1899, § 4063.]

As to mortgage given for usurious rate of interest not being void. Grove v. Great Northern Loan Co., 17 N. D. 352, 116 N. W. 345.

As to similar provision in Cal. Civ. Code, § 1917, see Marshall v. Levy, 66 Cal. 236, 5 Pac. 155; Gafney v. San Francisco, 72 Cal. 146, 13 Pac. 467; Heald v. Hendy, 89 Cal. 632, 27 Pac. 67; Los Angeles v. City Bank, 100 Cal. 18, 34 Pac. 510; Sawyer v. Colgan, 102 Cal. 283, 36 Pac. 580, 834; Hopkins v. Contra Costa County, 106 Cal. 566, 39 Pac. 933; Molineux v. State, 109 Cal. 378, 50 Am. St. Rep. 49, 42 Pac. 34; Easterbrook v. Farquharson, 110 Cal. 311, 42 Pac. 811; Yndart v. Den, 116 Cal. 533, 58 Am. St. Rep. 200, 48 Pac. 618; Savings & L. Soc. v. San Francisco, 131 Cal. 356, 63 Pac. 665; National Bank v. Greenlaw, 134 Cal. 673, 66 Pac. 963.

**§ 6073. Usury defined.** No person, firm, company or corporation shall directly or indirectly take, or receive, or agree to take or receive 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. [R. C. 1905, § 5511; 1890, ch. 184, § 2; 1893, ch. 131, § 2; R. C. 1899, § 4064.]

Action to recover usury. Hanson v. Bank, 6 N. D. 212, 69 N. W. 202.

Counterclaim cannot be maintained to recover whole interest. Wood v. Cuthbertson, 3 D. 328, 21 N. W. 3.

Usurious contract; compensation for procuring loan. Vermont Loan & Trust Co. v. Whitehed, 2 N. D. 82, 49 N. W. 318.

Effect of a new statute upon acts performed under a former statute. *Folsom v. Kilbourne*, 5 N. D. 402, 67 N. W. 291; *Nat. Bank v. Lemke*, 3 N. D. 154, 54 N. W. 919.

Applies only to unliquidated claims, and not to interest on accounts stated monthly and assented to by debtor. *McCuish v. Smail*, 13 S. D. 397, 83 N. W. 426.

City warrants draw interest after presentation and refusal of payment for want of funds. *Freeman v. City of Huron*, 10 S. D. 368, 73 N. W. 260.

Contract to pay more than 7 per cent must be in writing signed by parties or their duly authorized agent. *Tucker v. Randall*, 10 S. D. 581, 74 N. W. 1036.

Notes bearing 6 per cent interest continue to bear such interest after maturity where after due rate is not mentioned. *Hinrichs v. Brady*, 23 S. D. 250, 121 N. W. 777.

Usury in exacting payment of interest for full term upon payment of debt before maturity. 28 L.R.A.(N.S.) 113.

Usury as affected by question whether transaction is purchase or discount of note or bill. 16 L.R.A. 224.

Issuance of corporate bonds at less than par as usury. 35 L.R.A.(N.S.) 1106.

Applicability of usury law to loans other than of money. 29 L.R.A.(N.S.) 620.

Computation of interest on the basis of thirty days for a month, or three hundred and sixty days for a year, as usury. 5 L.R.A.(N.S.) 592.

Commissions charged borrower by lender's agent as usury. 19 L.R.A.(N.S.) 391.

Usury by fixed premium of association. 35 L.R.A. 244.

Fines in building and loan associations. 35 L.R.A. 215.

Agreement for interest after maturity. 49 L.R.A. 550.

Usury in deferred payments of purchase money. 27 L.R.A. 565; 28 L.R.A.(N.S.) 102.

Right, in case of renewal of loan, to compute interest on basis of including accumulated interest as part of principal of renewal. 6 L.R.A.(N.S.) 612.

Validity of agreement, made before interest becomes due, to pay interest on interest. 33 L.R.A.(N.S.) 296.

**§ 6074. Legalizing interest over seven per cent on written evidence of indebtedness.** All notes and other written evidences of indebtedness made prior to the taking effect of this act, and providing for interest at a rate not exceeding twelve per cent per annum are hereby declared to be legal and valid for all purposes in so far as the rate of interest is concerned. [1911, ch. 311, § 1.]

**§ 6075. 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. [R. C. 1905, § 5512; Civ. C. 1877, § 1099; R. C. 1895, § 4065.]

Lawfulness of taking interest in advance. 29 L.R.A. 761.

**§ 6076. Penalty for usury.** The taking, receiving, reserving or charging a rate of interest greater than is allowed by sections 6073 and 6075 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. [1913, ch. 311, § 2; R. C. 1905, § 5513; Civ. C. 1877, § 1100; 1887, ch. 207, § 1; 1893, ch. 131, § 3; R. C. 1895, § 4066.]

Sale of land under mortgage foreclosure cannot be set aside because contract was usurious. *Robinson v. McKinney*, 4 D. 290, 29 N. W. 658.

Does not apply to payments of legal interest made more than three years, prior to commencement of action on principal debt. *Wilson v. Selby*, 7 S. D. 494, 64 N. W. 537.

When contract is usurious. *Hogdon v. Davis*, 6 D. 21, 50 N. W. 478.

Plea of usury cannot be urged in foreclosure proceeding by one who buys merely equity of redemption. *Hill v. Building Co.*, 6 S. D. 160, 60 N. W. 752, 55 Am. St. Rep. 819.

Repeal of usury statute does not affect prior transactions. *Nat. Bank v. Lemke*, 3 N. D. 154, 54 N. W. 919.

Recovery of usurious interest. *Wood v. Cuthbertson*, 3 D. 328, 21 N. W. 3.

None but party to usurious contract or his heirs, devisees or personal representatives, can avoid it. *Cahn v. Bank*, 1 S. D. 237, 46 N. W. 185; *Lealos v. Bank*, 9 N. D. 60, 81 N. W. 56.

Commission for making loan; effect as recovery for usury. *Vermont L. & T. Co. v. Whitehed*, 2 N. D. 82, 49 N. W. 318.



That rate of interest in mortgage is not separately stated will not make usury. *Folsom v. Kilbourne*, 5 N. D. 402, 67 N. W. 291.

No recovery unless interest has been paid. *Davey v. Bank*, 8 S. D. 214, 66 N. W. 122.

National banks may charge rates allowed by state. *Guild v. Bank*, 4 S. D. 566, 57 N. W. 499.

Interest upon interest is not usury. *Hovey v. Edmison*, 3 D. 449, 22 N. W. 594.

Without specific plea of usury, mortgagor must pay agreed bonus in addition to principal and interest. *Yankton Building Ass. v. Dowling*, 10 S. D. 535, 74 N. W. 436.

Foreclosure proceedings cannot be attacked for usury. *N. W. Trust Co. v. Bradley*, 9 S. D. 495, 70 N. W. 648.

Double amount of all usurious interest payments made may be recovered. *Waldmer v. Bowden State Bank*, 13 N. D. 604, 102 N. W. 169, 3 A. & E. Ann. Cas. 847.

Judgment non obstante veredicto in favor of defendant should be entered where plaintiff on cross-examination admits facts establishing defense. *Miller v. Bank of Harvey*, 22 N. D. 538, 134 N. W. 745.

Usury by national bank. 56 L.R.A. 673.

Penalty against national bank for taking illegal interest. 56 L.R.A. 673.

Recovery of penalty for usury on transfer of property in satisfaction of usurious debt. 36 L.R.A.(N.S.) 135.

Right of bank acquiring paper void for usury as between prior parties, under statute prescribing special and exclusive penalties against bank which takes usury. 16 L.R.A.(N.S.) 626.

Usury as affecting receipt of commercial paper as payment. 35 L.R.A.(N.S.) 72.

Effect as between the parties of transfer of property in satisfaction of usurious debt. 36 L.R.A.(N.S.) 134.

Suit to set aside judgment for usury; who may maintain. 54 L.R.A. 765.

Usury as ground for injunction against judgment. 31 L.R.A. 761.

By confession. 30 L.R.A. 239.

Enforceability of judgment containing usury. 3 L.R.A.(N.S.) 715.

Right of alleged fraudulent grantee to show that judgment against grantor was based on usurious transaction. 67 L.R.A. 601.

Right to open judgment to let in defense of usury. 12 L.R.A.(N.S.) 659.

Defense of usury as against holder of negotiable paper transferred after maturity. 46 L.R.A. 767.

Usury in renewal contract as affecting original agreement. 33 L.R.A. 633.

Injunction against sale under power in mortgage because of usury. 35 L.R.A.(N.S.) 911.

Conclusiveness of stated or settled account containing usurious interest. 23 L.R.A.(N.S.) 790.

Effect of usury on right of accommodation party who has been obliged to pay bill or note to recover from accommodated party. 37 L.R.A.(N.S.) 784.

Effect of payment of usury. 53 L.R.A. 316.

Right of transferee of mortgaged property to set up usury in the mortgage. 10 L.R.A.(N.S.) 857.

The right of a vendee of real estate which is subject to a lien, to raise the question of usury. 8 L.R.A.(N.S.) 814.

Set-off as to usury on foreclosure. 21 L.R.A. 323.

**§ 6077. Judgments bear seven per cent.** Interest is payable on judgments recovered in the courts 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. [R. C. 1905, § 5514; Civ. C. 1877, § 1101; R. C. 1899, § 4067.]

As to similar provision in Cal. Civ. Code, § 1920, see *People ex rel. Warfield v. Sutter Street R. Co.*, 129 Cal. 545, 79 Am. St. Rep. 137, 62 Pac. 104; *Columbia Sav. Bank v. Los Angeles County*, 137 Cal. 467, 70 Pac. 308.

**§ 6078. Same rate before and after breach.** Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation. [R. C. 1905, § 5515; Civ. C. 1877, § 1102; R. C. 1899, § 4068.]

As to note bearing same rate after as before maturity. *Colonial & U. S. Mortg. Co. v. Flemington*, 14 N. D. 181, 116 Am. St. Rep. 670, 103 N. W. 929.

As to interest on annual instalments of interest being 7 per cent. *Hinrichs v. Brady*, 23 S. D. 250, 121 N. W. 777.

## CHAPTER 61.

## HIRING.

- ARTICLE 1. HIRING IN GENERAL, §§ 6079-6089.**  
 2. **HIRING OF REAL PROPERTY, §§ 6090-6099.**  
 3. **HIRING OF PERSONAL PROPERTY, §§ 6100-6104.**

## ARTICLE 1.—HIRING IN GENERAL.

**§ 6079. 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. [R. C. 1905, § 5516; Civ. C. 1877, § 1103; R. C. 1899, § 4069.]

Contract to farm land on shares not one of hire, but nature of adventure. *Bowers v. Graves & Vinton Co.*, 8 S. D. 385, 66 N. W. 931.

Contract for use of horses and for their return to owner is one of hiring and not for transportation. *Schlösser v. Great Northern R. Co.*, 20 N. D. 406, 127 N. W. 502.

**§ 6080. Products belong to hirer.** The products of a thing hired during the hiring belong to the hirer. [R. C. 1905, § 5517; Civ. C. 1877, § 1104; R. C. 1899, § 4070.]

**§ 6081. 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. [R. C. 1905, § 5518; Civ. C. 1877, § 1105; R. C. 1899, § 4071.]

As to similar provision in Cal. Civ. Code, § 1927, see *Dwyer v. Carroll*, 86 Cal. 298, 24 Pac. 1015; *McDowell v. Hyman*, 117 Cal. 67, 48 Pac. 984.

**§ 6082. Ordinary care.** The hirer of a thing must use ordinary care for its preservation in safety and in good condition. [R. C. 1905, § 5519; Civ. C. 1877, § 1106; R. C. 1899, § 4072.]

**§ 6083. Repair injuries.** The hirer of a thing must repair all deteriorations or injuries thereto occasioned by his ordinary negligence. [R. C. 1905, § 5520; Civ. C. 1877, § 1107; R. C. 1899, § 4073.]

**§ 6084. Use only for purpose let.** When a thing is let for a particular purpose the hirer must 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 contract as thereby rescinded. [R. C. 1905, § 5521; Civ. C. 1877, § 1108; R. C. 1899, § 4074.]

Liability of hirer for driving team to place where it was not hired to go. 26 L.R.A. 366.

Liability of hirer for injury to horse while being used for a purpose other than that for which it was hired. 28 L.R.A. (N.S.) 1106.

**§ 6085. 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 agreement 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. [R. C. 1905, § 5522; Civ. C. 1877, § 1109; R. C. 1899, § 4075.]

**§ 6086. 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 possession of the thing hired, 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. [R. C. 1905, § 5523; Civ. C. 1877, § 1110; R. C. 1899, § 4076.]

Failure of landlord to furnish heat for building according to contract, will be regarded as constructive eviction of tenant. *Russell v. Olson*, 22 N. D. 410, 37 L.R.A.(N.S.) 1217, 133 N. W. 1030.

**§ 6087. 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. [R. C. 1905, § 5524; Civ. C. 1877, § 1111; R. C. 1899, § 4077.]

As to similar provision in Cal. Civ. Code, § 1933, see *McKissick v. Ashby*, 98 Cal. 422, 33 Pac. 729.

**§ 6088. 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. [R. C. 1905, § 5525; Civ. C. 1877, § 1112; R. C. 1899, § 4078.]

**§ 6089. 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. [R. C. 1905, § 5526; Civ. C. 1877, § 1113; R. C. 1899, § 4079.]

#### ARTICLE 2.—HIRING OF REAL PROPERTY.

**§ 6090. 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. [R. C. 1905, § 5527; Civ. C. 1877, § 1114; R. C. 1899, § 4080.]

Cellar and first story of business block not a building intended for occupation of "human beings." *Edmison v. Aleson*, 4 D. 145, 27 N. W. 82.

As to counterclaiming damages in action for rent. *Torreson v. Walla*, 11 N. D. 481, 92 N. W. 834.

Parol proof admissible to prove notice to owner of condition of building. *Prior v. Sanborn Co.*, 12 S. D. 86, 80 N. W. 169.

Liability of lessor of place of amusement for safety of patrons. 14 L.R.A.(N.S.) 284; 32 L.R.A.(N.S.) 715; 42 L.R.A.(N.S.) 1073.

Tenant's duty to leave premises in good condition. 64 L.R.A. 649.

Duty of landlord to keep plumbing in proper repair for tenant's use. 36 L.R.A.(N.S.) 907.

Duty and liability of landlord as to premises upon which has existed a contagious disease. 6 L.R.A.(N.S.) 977.

Duty and liability of landlord of apartments as to heating. 37 L.R.A.(N.S.) 1213.

Liability of landlord for condition of premises in possession of tenant. 26 L.R.A. 197.

—for defective and dangerous premises. 28 Am. Rep. 32; 66 Am. St. Rep. 785.

—as to part of premises not controlled by tenant. 23 L.R.A. 155; 48 L.R.A.(N.S.) 920.

—for loss of tenant's property by fire. 42 L.R.A.(N.S.) 363.

—for injury to tenant by escape of water. 15 L.R.A.(N.S.) 545.

—for injury to tenant by defects in premises. 34 L.R.A. 824; 34 L.R.A.(N.S.) 798; 48 L.R.A.(N.S.) 917.

—for injury to tenant's guests and servants from defects in premises. 34 L.R.A. 609; 17 L.R.A.(N.S.) 1161.

—for damages to tenant in consequence of acts of third persons affecting the leased property. 42 L.R.A.(N.S.) 774.

—for work of independent contractor which is dangerous to tenants. 65 L.R.A. 855.

—for injuries to third persons. 59 Am. Dec. 733; 92 Am. St. Rep. 499.

—to servants of third person visiting premises on business. 46 L.R.A. 93.

—for injury to adjoining property from cause arising during tenancy. 5 L.R.A.(N.S.) 316.

As to similar provision in Cal. Civ. Code, § 1941, see *Van Every v. Ogg*, 59 Cal. 563; *Sieber v. Blanc*, 76 Cal. 173, 18 Pac. 260; *Willson v. Treadwell*, 81 Cal. 58, 22 Pac. 304; *Tatum v. Thompson*, 86 Cal. 203, 24 Pac. 1009; *Dwyer v. Carroll*, 86 Cal. 298, 24 Pac. 1015; *Green v. Redding*, 92 Cal. 548, 28 Pac. 599; *Angevine v. Knox-Goodrich*, 3

Cal. Unrep. 648, 31 Pac. 529; Callahan v. Loughran, 102 Cal. 476, 36 Pac. 835; Gately v. Campbell, 124 Cal. 520, 57 Pac. 567.

**§ 6091. 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. [R. C. 1905, § 5528; Civ. C. 1877, § 1115; R. C. 1899, § 4081.]

Sewer connection not included in "repairs," "dilapidation" or "deterioration" on original improvement. *Torreson 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.

Landlord's breach of covenant to repair or make improvements as defense to action for rent. 34 L.R.A.(N.S.) 977.

Right to reduction in rent of farm because part of it is not tillable. 36 L.R.A.(N.S.) 555.

Mechanics' liens on buildings erected by lessees upon lessor's land. 62 L.R.A. 375.

Power of lessee to subject owner's interest to mechanics' lien. 23 L.R.A.(N.S.) 601.

As to similar provision in Cal. Civ. Code, § 1942, see *Moroney v. Hellings*, 110 Cal. 219, 42 Pac. 560.

**§ 6092. 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. [R. C. 1905, § 5529; Civ. C. 1877, § 1116; R. C. 1899, § 4082.]

**§ 6093. 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. [R. C. 1905, § 5530; Civ. C. 1877, § 1117; R. C. 1899, § 4083.]

**§ 6094. 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. [R. C. 1905, § 5531; Civ. C. 1877, § 1118; R. C. 1899, § 4084.]

Tenant holding over is liable for rent. *Hunter v. Karcher*, 8 S. D. 554, 67 N. W. 621.

Inapplicable to lessee holding over on three year lease with two year option. *Heffron v. Treber*, 21 S. D. 194, 130 Am. St. Rep. 711, 110 N. W. 781.

Demanding rent does not renew lease after service of notice to vacate. *Banbury v. Sherin*, 4 S. D. 88, 55 N. W. 723.

Acceptance of rent after term expires renews lease. *Field v. Mott*, 9 N. D. 621, 84 N. W. 555.

Lease is extended upon same terms for another year where landlord furnished seed and tenant planted crops after expiration of lease. *Wadsworth v. Owens*, 21 N. D. 255, 130 N. W. 932.

Implied renewal and continuance of leases and terms for which deemed renewed. 91 Am. Dec. 563.

As to similar provision in Cal. Civ. Code, § 1945, see *Corson v. Berson*, 86 Cal. 433, 25 Pac. 7.

**§ 6095. 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. [R. C. 1905, § 5532; Civ. C. 1877, § 1119; R. C. 1899, § 4085.]

**§ 6096. 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. [R. C. 1905, § 5533; Civ. C. 1877, § 1120; R. C. 1899, § 4086.]

**§ 6097. 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. [R. C. 1905, § 5534; Civ. C. 1877, § 1121; R. C. 1899, § 4087.]

Attornment by lessee, to avoid eviction, to stranger entitled to immediate possession, as defense in an action for rent. 18 L.R.A.(N.S.) 396.

**§ 6098. 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. [R. C. 1905, § 5535; Civ. C. 1877, § 1122; R. C. 1899, § 4088.]

**§ 6099. 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. [R. C. 1905, § 5536; 1903, ch. 118.]

### ARTICLE 3.—HIRING OF PERSONAL PROPERTY.

**§ 6100. 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. [R. C. 1905, § 5537; Civ. C. 1877, § 1123; R. C. 1899, § 4089.]

Implied warranty of horse or vehicle. 19 L.R.A. 283.

Duty of livery stable keeper as to character of horse. 25 L.R.A.(N.S.) 372.

Liability of owner for negligence of borrower or hirer of automobile. 33 L.R.A.(N.S.) 81.

Who is responsible for acts of driver furnished with a hired vehicle. 13 L.R.A.(N.S.) 1122; 16 L.R.A.(N.S.) 816; 25 L.R.A.(N.S.) 33; 38 L.R.A.(N.S.) 973.

**§ 6101. 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. [R. C. 1905, § 5538; Civ. C. 1877, § 1124; R. C. 1899, § 4090.]

**§ 6102. Rights when section 6100 not complied with.** If a letter fails to fulfill his obligations as prescribed by section 6100, 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. [R. C. 1905, § 5539; Civ. C. 1877, § 1125; R. C. 1899, § 4091.]

**§ 6103. 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. [R. C. 1905, § 5540; Civ. C. 1877, § 1126; R. C. 1899, § 4092.]

Contract for use of horses and for their return to owner is one of hiring and not for transportation. *Schlosser v. Great Northern R. Co.*, 20 N. D. 406, 127 N. W. 502.

§ 6104. **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. [R. C. 1905, § 5541; Civ. C. 1877, § 1127; R. C. 1899, § 4093.]

## CHAPTER 62.

### SERVICE.

- ARTICLE 1. DEFINITION OF EMPLOYMENT, § 6105.  
 2. OBLIGATIONS OF THE EMPLOYER, §§ 6106-6108.  
 3. OBLIGATIONS OF THE EMPLOYEE, §§ 6109-6126.  
 4. TERMINATION OF EMPLOYMENT, §§ 6127-6133.

#### ARTICLE 1.— DEFINITION OF EMPLOYMENT.

§ 6105. **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. [R. C. 1905, § 5542; Civ. C. 1877, § 1128; R. C. 1899, § 4094.]

Injunction restraining employe from performance will excuse him. *Burkhardt v. Georgia School Twp.*, 9 S. D. 315, 69 N. W. 16.

When relation of master and servant exists. 22 Am. St. Rep. 459.

Payment of wages as test of existence of master and servant. 37 L.R.A. 38.

Which of two or more persons is the master of a third. 37 L.R.A. 33.

#### ARTICLE 2.— OBLIGATIONS OF THE EMPLOYER.

§ 6106. **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. [R. C. 1905, § 5543; Civ. C. 1877, § 1129; R. C. 1899, § 4095.]

§ 6107. **Ordinary risks. Coemployes.** 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. [R. C. 1905, § 5544; Civ. C. 1877, § 1130; R. C. 1899, § 4096.]

Conductor and brakeman are fellow servants. *N. P. Railway Co. v. Hogan*, 63 Fed. 102, 11 C. C. A. 51.

The conductor of a train and a section foreman are coemployes. *Elliott v. Ry. Co.*, 6 D. 523, 41 N. W. 753, 3 L.R.A. 363.

Employe cannot recover for loss from ordinary risk of business. *McKeever v. Homestake Min. Co.*, 10 S. D. 599, 74 N. W. 1053.

Master must not only provide safe and proper machinery, but must place it in control of competent servants. *Gates v. C. M. & St. P. Ry. Co.*, 2 S. D. 422, 50 N. W. 907; *Gates v. C. M. & St. P. Ry. Co.*, 4 S. D. 433, 57 N. W. 200; *N. P. Ry. Co v. Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 S. Ct. R. 590.

Servant risks ordinary dangers of employment. *Herbert v. C. M. & St. P. Ry. Co.*, 3 D. 38, 13 N. W. 349.

Relation of fellow servants depends not upon relative ranks, but character of work. *Ell v. N. P. Ry. Co.*, 1 N. D. 336, 48 N. W. 222, 12 L.R.A. 97, 26 Am. St. Rep. 621.

Day laborer working on culvert under boss is fellow servant with engineer and conductor operating passenger train. *N. P. Ry. Co. v. Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 S. Ct. R. 983.

Employer having knowledge of latent hazard which servant does not know of, must notify servant. *Carlson v. Sioux Falls Water Co.*, 8 S. D. 47, 65 N. W. 419.

Duty of master to servant. 75 Am. St. Rep. 591.

Knowledge as element of employer's liability. 41 L.R.A. 33.

Different forms of statement of the general rule with respect to the master's duty as to places and appliances furnished to servant. 6 L.R.A.(N.S.) 602.

Duty of master to furnish safe means and appliances with which to work. 92 Am. Dec. 213; 21 Am. Rep. 579.

Applicability of rule as to safe place where the conditions of work are changing. 19 L.R.A.(N.S.) 340; 28 L.R.A.(N.S.) 1267.

Master's liability for injuries due to failure to make repairs. 59 Am. Rep. 75.

Liability for injuries to servant by defective machinery. 77 Am. Dec. 218; 34 Am. Rep. 621; 98 Am. St. Rep. 289.

Common practice as the measure of master's duty to guard machinery. 16 L.R.A.(N.S.) 140.

Duty to protect servant whose work requires exposure to cold. 70 L.R.A. 924.

Risks assumed by servant. 52 Am. Rep. 737.

Right of recovery by employes accepting extrahazardous duties. 97 Am. St. Rep. 884.  
Injuries to servant in performance of duties outside scope of original employment. 48 L.R.A. 796.

Injuries received by servant in obeying a direct command. 48 L.R.A. 806.

Servant's assumption of risk in using unsafe horse or mule. 18 L.R.A.(N.S.) 695.

Volenti non fit injuria as a defense to actions by injured servants. 47 L.R.A. 162.

Continuing work on master's promise to remove a specific cause of danger; promise to repair. 40 L. R. A. 782.

Master's duty with respect to selection, employment and retention of fellow servants. 48 L.R.A. 369.

Duty of master to provide sufficient help. 48 L.R.A. 392; 17 L.R.A.(N.S.) 773; 40 L.R.A.(N.S.) 913.

Who are fellow servants. 67 Am. Dec. 588; 16 Am. Rep. 495; 53 Am. Rep. 45.

Liability of master for injuries caused by incompetency of fellow servant. 25 L.R.A. 710.

— for injuries due to the negligence or misconduct of a fellow servant. 36 Am. Dec. 279.

— for coservant's negligence in respect to defective machinery. 54 L.R.A. 172, 177.

Master's constructive knowledge as to capacity of servants as element of liability to injured servant. 41 L.R.A. 46, 53.

As to similar provision in Cal. Civ. Code, § 1970, see *McLean v. Blue Point Gravel Min. Co.*, 51 Cal. 255, 10 Mor. Min. Rep. 22; *Beeson v. Green Mountain Gold Min. Co.*, 57 Cal. 20, 13 Am. Neg. Cas. 461; *McKune v. California Southern R. Co.*, 66 Cal. 302, 5 Pac. 482, 13 Am. Neg. Cas. 364; *Kevern v. Providence Gold & S. Min. Co.*, 70 Cal. 392, 11 Pac. 740; *Stephens v. Doe*, 73 Cal. 26, 14 Pac. 378; *Congrave v. Southern P. R. Co.*, 88 Cal. 360, 26 Pac. 175, 13 Am. Neg. Cas. 316; *Daves v. Southern P. Co.*, 98 Cal. 19, 35 Am. St. Rep. 133, 32 Pac. 708, 13 Am. Neg. Cas. 367; *Livingston v. Kodiak Packing Co.*, 103 Cal. 258, 37 Pac. 149; *Gier v. Los Angeles Consol. Electric R. Co.*, 108 Cal. 129, 41 Pac. 22; *Donovan v. Ferris*, 128 Cal. 48, 79 Am. St. Rep. 25, 60 Pac. 519, 7 Am. Neg. Rep. 390.

**§ 6108. Employer's negligence.** An employer must in all cases indemnify his employe for losses caused by the former's want of ordinary care. [R. C. 1905, § 5545; Civ. C. 1877, § 1131; R. C. 1899, § 4097.]

As to care required of master to keep appliances in repair. *Meehan v. Great Northern R. Co.*, 13 N. D. 432, 101 N. W. 183.

May servant assume the risk of dangers created by the master's negligence. 4 L.R.A.(N.S.) 848; 28 L.R.A.(N.S.) 1215.

Servant's assumption of risk of master's breach of statutory duty. 6 L.R.A.(N.S.) 981; 19 L.R.A.(N.S.) 646; 22 L.R.A.(N.S.) 634; 33 L.R.A.(N.S.) 647.

Employe's right of action for employer's violation of statute not expressly conferring right. 9 L.R.A.(N.S.) 376.

As to similar provision in Cal. Civ. Code, § 1971, see *Gier v. Los Angeles Consol. Electric R. Co.*, 108 Cal. 129, 41 Pac. 22; *Matthews v. Bull*, 5 Cal. Unrep. 592, 47 Pac. 773.

### ARTICLE 3.—OBLIGATIONS OF THE EMPLOYE.

**§ 6109. 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. [R. C. 1905, § 5546; Civ. C. 1877, § 1132; R. C. 1899, § 4098.]

Undertaking employment without contract for compensation. *Harris v. State*, 9 S. D. 453, 69 N. W. 825.

§ 6110. **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. [R. C. 1905, § 5547; Civ. C. 1877, § 1133; R. C. 1899, § 4099.]

§ 6111. **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. [R. C. 1905, § 5548; Civ. C. 1877, § 1134; R. C. 1899, § 4100.]

§ 6112. **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. [R. C. 1905, § 5549; Civ. C. 1877, § 1135; R. C. 1899, § 4101.]

Employe bound to use ordinary care and skill. *Morris v. Bank*, 13 S. D. 329, 83 N. W. 252, 50 L.R.A. 182.

§ 6113. **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. [R. C. 1905, § 5550; Civ. C. 1877, § 1136; R. C. 1899, § 4102.]

§ 6114. **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. [R. C. 1905, § 5551; Civ. C. 1877, § 1137; R. C. 1899, § 4103.]

As to similar provision in Cal. Civ. Code, § 1980, see *Stone v. Bancroft*, 139 Cal. 78, 70 Pac. 1017, 72 Pac. 717.

§ 6115. **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 non-compliance 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. [R. C. 1905, § 5552; Civ. C. 1877, § 1138; R. C. 1899, § 4104.]

Duty of servant to obey his master's orders. 24 L.R.A.(N.S.) 814.

§ 6116. **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. [R. C. 1905, § 5553; Civ. C. 1877, § 1139; R. C. 1899, § 4105.]

§ 6117. **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. [R. C. 1905, § 5554; Civ. C. 1877, § 1140; R. C. 1899, § 4106.]

Bank bound to exercise reasonable degree of skill only in protesting note left for collection. *Morris v. Bank*, 13 S. D. 329, 83 N. W. 252, 50 L.R.A. 182.

Servant's liability for his own negligence or nonfeasance. 28 L.R.A. 433; 25 L.R.A.(N.S.) 343.



**§ 6118. 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. [R. C. 1905, § 5555; Civ. C. 1877, § 1141; R. C. 1899, § 4107.]

**§ 6119. 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. [R. C. 1905, § 5556; Civ. C. 1877, § 1142; R. C. 1899, § 4108.]

Agent employed by principal to effect purchase of land at owner's lowest price for commission of certain sum per acre may not act in employment of owner, and receive compensation therefor. *McGinty v. Reynolds*, 28 S. D. 248, 133 N. W. 281.

Respective rights of master and servant in intellectual work. 51 L.R.A. 359.

—in respect to the results of literary or artistic work performed by the employe. 5 L.R.A.(N.S.) 1187; 1 B. R. C. 324.

—with respect to things produced by the labor of the employe. 5 L.R.A.(N.S.) 1154.

—as to inventions by servant. 52 Am. St. Rep. 820.

**§ 6120. 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. [R. C. 1905, § 5557; Civ. C. 1877, § 1143; R. C. 1899, § 4109.]

**§ 6121. 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. [R. C. 1905, § 5558; Civ. C. 1877, § 1144; R. C. 1899, § 4110.]

**§ 6122. 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 intrusted 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. [R. C. 1905, § 5559; Civ. C. 1877, § 1145; R. C. 1899, § 4111.]

Agent for collection of claim bound to give such collection preference over his personal claim against debtor. *Commercial Bank v. Bank*, 8 N. D. 382, 79 N. W. 859.

**§ 6123. 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. [R. C. 1905, § 5560; Civ. C. 1877, § 1146; R. C. 1899, § 4112.]

**§ 6124. 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. [R. C. 1905, § 5561; Civ. C. 1877, § 1147; R. C. 1899, § 4113.]

Personal liability of servant for injury to fellow servant. 28 L.R.A. 440.

**§ 6125. 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. [R. C. 1905, § 5562; Civ. C. 1877, § 1148; R. C. 1899, § 4114.]

**§ 6126. Confidential employments.** The obligations peculiar to confidential employments are defined in chapters 70 and 71. [R. C. 1905, § 5563; Civ. C. 1877, § 1149; R. C. 1899, § 4115.]

## ARTICLE 4.—TERMINATION OF EMPLOYMENT.

**§ 6127. 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. [R. C. 1905, § 5564; Civ. C. 1877, § 1150; R. C. 1899, § 4116.]

Termination of contract of employment by the death of one of the parties. 23 L.R.A. 712; 5 L.R.A.(N.S.) 1002; 21 L.R.A.(N.S.) 914; 39 L.R.A.(N.S.) 1187.

Termination of contracts of employment which contain stipulations permitting rescission by the employer if the work is not satisfactorily performed. 12 L.R.A.(N.S.) 403; 23 L.R.A.(N.S.) 1003.

**§ 6128. 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. [R. C. 1905, § 5565; Civ. C. 1877, § 1151; R. C. 1899, § 4117.]

**§ 6129. 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. [R. C. 1905, § 5566; Civ. C. 1877, § 1152; R. C. 1899, § 4118.]

**§ 6130. 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. [R. C. 1905, § 5567; Civ. C. 1877, § 1153; R. C. 1899, § 4119.]

Breach of duty by servant as good cause for his discharge. 5 L.R.A.(N.S.) 1176.

Disobedience of regulations as. 37 L.R.A.(N.S.) 950.

Intoxication as justification for discharge. 38 L.R.A.(N.S.) 339.

Condonation of servant's breach of duty. 8 L.R.A.(N.S.) 1004.

**§ 6131. 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. [R. C. 1905, § 5568; Civ. C. 1877, § 1154; R. C. 1899, § 4120.]

**§ 6132. 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. [R. C. 1905, § 5569; Civ. C. 1877, § 1155; R. C. 1899, § 4121.]

Rights and remedies of servant discharged for good cause. 5 L.R.A.(N.S.) 524.

Servant's right to compensation in case of incomplete performance of his contract or dismissal by master because of physical disability. 28 L.R.A.(N.S.) 318.

**§ 6133. 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. [R. C. 1905, § 5570; Civ. C. 1877, § 1156; R. C. 1899, § 4122.]

Servant may recover value of services rendered, though term not completed. *Bedow v. Tonkin*, 5 S. D. 432, 59 N. W. 222; *McClellan v. Harris*, 7 S. D. 447, 64 N. W. 522.

Upon employer's termination of special contract, employe can recover value of work and material. *Caldwell v. Myers*, 2 S. D. 506. 51 N. W. 210.

Injunction restraining performance of contract with school board for removal of schoolhouse will excuse from performance. *Burkhardt v. Georgia School Twp.*, 9 S. D. 315, 69 N. W. 16.

Remedies of servant wrongfully discharged. 43 Am. Dec. 205; 58 Am. Rep. 828; 51 Am. St. Rep. 515.

Remedy of wrongfully discharged servant with respect to services actually rendered. 5 L.R.A.(N.S.) 579.

Right of wrongfully discharged servant to recover wages for contract period subsequent to discharge. 5 L.R.A.(N.S.) 439; 28 L.R.A.(N.S.) 577.

Remedy of wrongfully discharged servant by action for damages for breach of contract. 6 L.R.A.(N.S.) 50.

## CHAPTER 63.

### PARTICULAR EMPLOYMENTS.

#### ARTICLE 1. MASTER AND SERVANT, §§ 6134-6140.

2. AGENTS, §§ 6141-6144.

3. FACTORS, §§ 6145-6149.

4. SHIPMASTERS, §§ 6150-6160.

5. MATES AND SEAMEN, §§ 6161-6179.

6. SHIP'S MANAGERS, §§ 6180-6182.

#### ARTICLE 1.— MASTER AND SERVANT.

**§ 6134. 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. [R. C. 1905, § 5571; Civ. C. 1877, § 1157; R. C. 1899, § 4123.]

On distinction between servants and independent contractors. *Cochran v. Rice*, 26 S. D. 393, 128 N. W. 583, Ann. Cas. 1913B, 570.

Liability of master for servant's tort. *Curtis v. Dineen*, 4 D. 245, 30 N. W. 148.

Allegation of complaint as to manner of employment not denied by answer stands admitted. *Calkins v. Min. Co.*, 5 S. D. 299, 58 N. W. 797.

As to similar provision in Cal. Civ. Code, § 2009, see *White v. Alameda*, 124 Cal. 95, 56 Pac. 795; *Hedge v. Williams*, 131 Cal. 455, 82 Am. St. Rep. 366, 63 Pac. 721, 64 Pac. 106.

**§ 6135. Hiring presumed to be for wage-term.** A servant is presumed to be hired for such length of time as the parties shall agree upon. A hiring at a monthly rate is to be presumed to be for one month or such number of months as may be agreed upon. A hiring for the season shall be presumed to be from the date of such hiring to November first of the year of such hiring. A hiring at a yearly rate is presumed to be for one year. A hiring at a daily rate shall be presumed to be an entire contract for as many days as the parties agree upon, and such contract shall not be presumed to be for one day. A hiring by piece work, for no specified time. [1907, ch. 173; R. C. 1905, § 5572; Civ. C. 1877, § 1158; R. C. 1899, § 4124.]

**§ 6136. 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. [R. C. 1905, § 5573; Civ. C. 1877, § 1159; R. C. 1899, § 4125.]

As to similar provision in Cal. Civ. Code, § 2011, see *White v. Alameda*, 124 Cal. 95, 56 Pac. 795.

**§ 6137. 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. [R. C. 1905, § 5574; Civ. C. 1877, § 1160; R. C. 1899, § 4126.]

**§ 6138. 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. [R. C. 1905, § 5575; Civ. C. 1877, § 1161; R. C. 1899, § 4127.]

Servant's duty to obey master's orders as to hours of labor. 24 L.R.A.(N.S.) 831.

Constitutionality of statute limiting hours of labor. 19 L.R.A. 141; 21 L.R.A. 796; 65 L.R.A. 38; 12 L.R.A.(N.S.) 1130; 26 L.R.A.(N.S.) 242; 35 L.R.A.(N.S.) 628; 40 L.R.A.(N.S.) 893.

**§ 6139. 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. [R. C. 1905, § 5576; Civ. C. 1877, § 1162; R. C. 1899, § 4128.]

**§ 6140. 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. [R. C. 1905, § 5577; Civ. C. 1877, § 1163; R. C. 1899, § 4129.]

Intoxication as justification for discharge of servant. 38 L.R.A.(N.S.) 339.

Discharge because of absence without leave. 55 Am. Rep. 717.

#### ARTICLE 2.—AGENTS.

**§ 6141. Must not exceed authority.** An agent must not exceed the limits of his actual authority as defined by the chapters on agency. [R. C. 1905, § 5578; Civ. C. 1877, § 1164; R. C. 1899, § 4130.]

**§ 6142. Keep principal informed.** An agent must use ordinary diligence to keep his principal informed of his acts in the course of the agency. [R. C. 1905, § 5579; Civ. C. 1877, § 1165; R. C. 1899, § 4131.]

**§ 6143. 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. [R. C. 1905, § 5580; Civ. C. 1877, § 1166; R. C. 1899, § 4132.]

**§ 6144. Responsibility of subagent.** A mere agent of an agent is not responsible as such to the principal of the latter. [R. C. 1905, § 5581; Civ. C. 1877, § 1167; R. C. 1899, § 4133.]

Subagents and their relation to the principal and to the agent appointing them. 50 Am. St. Rep. 110.

#### ARTICLE 3.—FACTORS.

**§ 6145. 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. [R. C. 1905, § 5582; Civ. C. 1877, § 1168; R. C. 1899, § 4134.]

Factor may buy and sell in his own name as well as in name of principal. *Turner v. Crumpton*, 21 N. D. 294, 130 N. W. 937.

Definition and distinctive features of factors. 58 Am. Dec. 158.

When title of goods vested in factor. 45 Am. St. Rep. 203.

Who must bear loss where merchandise broker receives purchase price and fails to pay over same to seller. 8 L.R.A.(N.S.) 474.

Consignments by foreign corporation to factors as doing business within state. 18 L.R.A.(N.S.) 138.

Right of factor to whom goods are consigned to maintain action against carrier. 26 L.R.A.(N.S.) 437; 36 L.R.A.(N.S.) 72.

As to similar provision in Cal. Civ. Code, § 2026, see *Wisp v. Hazard*, 66 Cal. 459, 6 Pac. 91.

§ 6146. **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. [R. C. 1905, § 5583; Civ. C. 1877, § 1169; R. C. 1899, § 4135.]

§ 6147. **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. [R. C. 1905, § 5584; Civ. C. 1877, § 1170; R. C. 1899, § 4136.]

To what extent advances by a factor create a debt against the principal. 5 L.R.A.(N.S.) 1147.

§ 6148. **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. [R. C. 1905, § 5585; Civ. C. 1877, § 1171; R. C. 1899, § 4137.]

§ 6149. **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. [R. C. 1905, § 5586; Civ. C. 1877, § 1172; R. C. 1899, § 4138.]

#### ARTICLE 4.—SHIPMASTERS.

§ 6150. **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. [R. C. 1905, § 5587; Civ. C. 1877, § 1173; R. C. 1899, § 4139.]

§ 6151. **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. [R. C. 1905, § 5588; Civ. C. 1877, § 1174; R. C. 1899, § 4140.]

§ 6152. **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. [R. C. 1905, § 5589; Civ. C. 1877, § 1175; R. C. 1899, § 4141.]

Liability of pilot to owner of vessel hiring him, for damage caused by his fault. 14 L.R.A.(N.S.) 1114.

§ 6153. **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. [R. C. 1905, § 5590; Civ. C. 1877, § 1176; R. C. 1899, § 4142.]

Seaman's duty of obedience to master. 24 L.R.A.(N.S.) 821.

§ 6154. **Power over passengers.** The master of a ship may confine any person on board during a voyage for willful disobedience to his lawful command. [R. C. 1905, § 5591; Civ. C. 1877, § 1177; R. C. 1899, § 4143.]

§ 6155. **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 pay-

ment of their value or giving security therefor. [R. C. 1905, § 5592; Civ. C. 1877, § 1178; R. C. 1899, § 4144.]

§ 6156. **When may abandon ship.** The master of a ship must not abandon it during the voyage without the advice of the other officers. [R. C. 1905, § 5593; Civ. C. 1877, § 1179; R. C. 1899, § 4145.]

§ 6157. **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. [R. C. 1905, § 5594; Civ. C. 1877, § 1180; R. C. 1899, § 4146.]

§ 6158. **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. [R. C. 1905, § 5595; Civ. C. 1877, § 1181; R. C. 1899, § 4147.]

§ 6159. **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. [R. C. 1905, § 5596; Civ. C. 1877, § 1182; R. C. 1899, § 4148.]

§ 6160. **Chapter 73 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 73. [R. C. 1905, § 5597; Civ. C. 1877, § 1183; R. C. 1899, § 4149.]

#### ARTICLE 5.—MATES AND SEAMEN.

§ 6161. **Mate defined.** The mate of a ship is the officer next in command to the master. [R. C. 1905, § 5598; Civ. C. 1877, § 1184; R. C. 1899, § 4150.]

§ 6162. **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. [R. C. 1905, § 5599; Civ. C. 1877, § 1185; R. C. 1899, § 4151.]

§ 6163. **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. [R. C. 1905, § 5600; Civ. C. 1877, § 1186; R. C. 1899, § 4152.]

§ 6164. **Unseaworthy vessel.** A mate or seaman 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. [R. C. 1905, § 5601; Civ. C. 1877, § 1187; R. C. 1899, § 4153.]

§ 6165. **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. [R. C. 1905, § 5602; Civ. C. 1877, § 1188; R. C. 1899, § 4154.]

Maritime lien for wages. 70 L.R.A. 364.

Compensation in nature of salvage. 64 L.R.A. 200.

§ 6166. **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. [R. C. 1905, § 5603; Civ. C. 1877, § 1189; R. C. 1899, § 4155.]

§ 6167. **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. [R. C. 1905, § 5604; Civ. C. 1877, § 1190; R. C. 1899, § 4156.]

**§ 6168. 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. [R. C. 1905, § 5605; Civ. C. 1877, § 1191; R. C. 1899, § 4157.]

**§ 6169. Wages when voyage broken up.** When a voyage is broken up before departure of the ship, the seamen must be paid for the time they have served and may retain for their indemnity such advances as they have received. [R. C. 1905, § 5606; Civ. C. 1877, § 1192; R. C. 1899, § 4158.]

**§ 6170. 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. [R. C. 1905, § 5607; Civ. C. 1877, § 1193; R. C. 1899, § 4159.]

**§ 6171. 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. [R. C. 1905, § 5608; Civ. C. 1877, § 1194; 1899, § 4160.]

**§ 6172. 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. [R. C. 1905, § 5609; Civ. C. 1877, § 1195; R. C. 1899, § 4161.]

**§ 6173. 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. [R. C. 1905, § 5610; Civ. C. 1877, § 1196; R. C. 1899, § 4162.]

**§ 6174. 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. [R. C. 1905, § 5611; Civ. C. 1877, § 1197; R. C. 1899, § 4163.]

Duty to furnish medical aid to sick or injured seamen. 28 L.R.A.(N.S.) 49.

Duty and obligation of vessel on inland lake or river in respect of sick or injured member of crew. 35 L.R.A.(N.S.) 199.

**§ 6175. 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. [R. C. 1905, § 5612; Civ. C. 1877, § 1198; R. C. 1899, § 4164.]

**§ 6176. 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. [R. C. 1905, § 5613; Civ. C. 1877, § 1199; R. C. 1899, § 4165.]

**§ 6177. Cannot ship goods.** A mate or seaman may not under any pretext ship goods on his own account without permission from the master. [R. C. 1905, § 5614; Civ. C. 1877, § 1200; R. C. 1899, § 4166.]

**§ 6178. 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. [R. C. 1905, § 5615; Civ. C. 1877, § 1201; R. C. 1899, § 4167.]

§ 6179. **Further regulations.** The shipment of officers and seamen and their rights and duties are further regulated by law. [R. C. 1905, § 5616; Civ. C. 1877, § 1202; R. C. 1899, § 4168.]

#### ARTICLE 6.—SHIP'S MANAGERS.

§ 6180. **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. [R. C. 1905, § 5617; Civ. C. 1877, § 1203; R. C. 1899, § 4169.]

§ 6181. **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. [R. C. 1905, § 5618; Civ. C. 1877, § 1204; R. C. 1899, § 4170.]

§ 6182. **Managing owner.** A managing owner is presumed to have no right to compensation for his own services. [R. C. 1905, § 5619; Civ. C. 1877, § 1205; R. C. 1899, § 4171.]

### CHAPTER 64.

#### SERVICE WITHOUT EMPLOYMENT.

§ 6183. **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. [R. C. 1905, § 5620; Civ. C. 1877, § 1206; R. C. 1899, § 4172.]

§ 6184. **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 86 and 99. [R. C. 1905, § 5621; Civ. C. 1877, § 1207; R. C. 1899, § 4173.]

Rights of seamen as salvors. 64 L.R.A. 193.  
Maritime lien for salvage. 70 L.R.A. 368, 376.

### CHAPTER 65.

#### CARRIAGE IN GENERAL.

§ 6185. **Contract for defined.** The contract of carriage is a contract for the conveyance of property, persons or messages from one place to another. [R. C. 1905, § 5622; Civ. C. 1877, § 1208; R. C. 1899, § 4174.]

§ 6186. **Classified.** Carriage is either:

1. Inland; or,

2. Marine. [R. C. 1905, § 5623; Civ. C. 1877, § 1209; R. C. 1899, § 4175.]

§ 6187. **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. [R. C. 1905, § 5624; Civ. C. 1877, § 1210; R. C. 1899, § 4176.]

§ 6188. **Carriers by sea.** Rights and duties peculiar to carriers by sea are defined by acts of congress. [R. C. 1905, § 5625; Civ. C. 1877, § 1211; R. C. 1899, § 4177.]



§ 6189. **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. [R. C. 1905, § 5626; Civ. C. 1877, § 1212; R. C. 1899, § 4178.]

§ 6190. **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. [R. C. 1905, § 5627; Civ. C. 1877, § 1213; R. C. 1899, § 4179.]

## CHAPTER 66.

## CARRIAGE OF PERSONS.

- ARTICLE 1. GRATUITOUS CARRIAGE OF PERSONS, § 6191.  
2. CARRIAGE FOR REWARD, §§ 6192-6196.

## ARTICLE 1.—GRATUITOUS CARRIAGE OF PERSONS.

§ 6191. **Must use ordinary care.** A carrier of persons without reward must use ordinary care and diligence for their safe carriage. [R. C. 1905, § 5628; Civ. C. 1877, § 1214; R. C. 1899, § 4180.]

## ARTICLE 2.—CARRIAGE FOR REWARD.

§ 6192. **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. [R. C. 1905, § 5629; Civ. C. 1877, § 1215; R. C. 1899, § 4181.]

Care and skill which carriers of passengers must exercise with respect to their roads. 37 Am. Rep. 749.

Duty and liability of proprietor of public hack or cab to passengers. 5 L.R.A.(N.S.) 1069.

Liability of proprietor of private railroad for injuries sustained by one other than an employe while being carried thereon. 12 L.R.A.(N.S.) 131; 22 L.R.A.(N.S.) 190.

Liability for injury to passenger by negligent operation of automobile. 21 L.R.A.(N.S.) 81; 35 L.R.A.(N.S.) 658.

Liability of sleeping car company for personal injuries to passengers. 21 L.R.A. 296; 26 Am. St. Rep. 331.

Liability of sleeping-cars, for theft of property of passengers. 56 Am. Rep. 850.

Liability of carrier for personal injury to passenger struck by sparks or cinders escaping from locomotive. 18 L.R.A.(N.S.) 241.

Presumption of negligence from injury to passenger by collision. 13 L.R.A.(N.S.) 608; 29 L.R.A.(N.S.) 812.

As to similar provision in Cal. Civ. Code, § 2100, see *MacDougall v. Central R. Co.*, 63 Cal. 431, 2 Am. Neg. Cas. 173; *Fisher v. Southern P. R. Co.*, 89 Cal. 399, 26 Pac. 894, 9 Am. Neg. Cas. 104; *Osgood v. Los Angeles Traction Co.*, 137 Cal. 280, 92 Am. St. Rep. 171, 70 Pac. 169.

§ 6193. **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. [R. C. 1905, § 5630; Civ. C. 1877, § 1216; R. C. 1899, § 4182.]

Liability for injuries to passengers resulting from defects in vehicles and other appliances. 64 Am. Dec. 521.

Duty of railroad carrier in respect to furnishing proper cars for passengers. 31 L.R.A. 313.

Liability for injury to passenger by latent defect in car. 15 L.R.A.(N.S.) 790.

Liability to passenger on account of unsanitary condition of car. 26 L.R.A.(N.S.) 263.

Liability to postal clerk for failure to keep car in proper condition. 3 L.R.A.(N.S.) 218; 26 L.R.A.(N.S.) 1058.

Duty to keep steps of cars free from snow and ice. 15 L.R.A.(N.S.) 523; 35 L.R.A.(N.S.) 592.

Injury to passenger from door of vehicle. 39 L.R.A.(N.S.) 878.

Duty to heat cars. 42 L.R.A. 110.

Duty to protect passenger from cold. 11 L.R.A.(N.S.) 1142.

Duty of steamship company to passengers as to condition of decks. 33 L.R.A.(N.S.) 532.

As to similar provision in Cal. Civ. Code, § 2101, see *Fisher v. Southern P. R. Co.*, 89 Cal. 399, 26 Pac. 894, 9 Am. Neg. Cas. 104.

**§ 6194. Must not overload.** A carrier of persons for reward must not overcrowd or overload his vehicles. [R. C. 1905, § 5631; Civ. C. 1877, § 1217; R. C. 1899, § 4183.]

Right of passenger to seat. 22 L.R.A. 259; 136 Am. St. Rep. 312.

Liability of steamship company for failure to supply berth. 5 L.R.A.(N.S.) 1012.

Injuries received on crowded railroad trains. 24 L.R.A. 710.

Injuries on crowded street cars. 24 L.R.A. 712.

Duty to passenger on overcrowded street car. 4 L.R.A.(N.S.) 399.

**§ 6195. 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. [R. C. 1905, § 5632; Civ. C. 1877, § 1218; R. C. 1899, § 4184.]

Assault on passenger. 28 Am. Rep. 112; 32 Am. St. Rep. 90.

—by employes. 32 L.R.A.(N.S.) 1201; 42 Am. Rep. 36.

Liability for insults, threats and obscene language of employes towards passengers. 14 L.R.A. 739.

—for mental suffering of passenger from mere verbal abuse unaccompanied by other breach of duty. 13 L.R.A.(N.S.) 159.

—for willful torts of servants to passengers. 40 L.R.A.(N.S.) 999.

—for acts of special police officer appointed by public authority. 23 L.R.A.(N.S.) 289; 30 L.R.A.(N.S.) 481; 39 L.R.A.(N.S.) 122.

How far carrier's liability affected by misconduct of passenger. Antecedent violence of passenger. 40 L.R.A.(N.S.) 1070.

Liability of for personal injuries inflicted on passengers by third persons. 6 Am. St. Rep. 734.

Liability of steamship for malicious acts of servants towards passengers. 4 L.R.A.(N.S.) 494.

**§ 6196. 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. [R. C. 1905, § 5633; Civ. C. 1877, § 1219; R. C. 1899, § 4185.]

## CHAPTER 67.

### CARRIAGE OF PROPERTY.

- ARTICLE 1. GENERAL DEFINITIONS, § 6197.  
 2. OBLIGATIONS OF THE CARRIER, §§ 6198-6208.  
 3. BILL OF LADING, §§ 6209-6215.  
 4. FREIGHTAGE, §§ 6216-6224.  
 5. GENERAL AVERAGE, §§ 6225-6234.

#### ARTICLE 1.—GENERAL DEFINITIONS.

**§ 6197. 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. [R. C. 1905, § 5634; Civ. C. 1877, § 1220; R. C. 1899, § 4186.]

#### ARTICLE 2.—OBLIGATIONS OF THE CARRIER.

**§ 6198. 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. [R. C. 1905, § 5635; Civ. C. 1877, § 1221; R. C. 1899, § 4187.]

**§ 6199. 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. [R. C. 1905, § 5636; Civ. C. 1877, § 1222; R. C. 1899, § 4188.]

**§ 6200. 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. [R. C. 1905, § 5637; Civ. C. 1877, § 1223; R. C. 1899, § 4189.]

**§ 6201. 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. [R. C. 1905, § 5638; Civ. C. 1877, § 1224; R. C. 1899, § 4190.]

Effect of deviation upon rights and liabilities of carriers. 2 B. R. C. 587.

Effect of deviation on carrier's right to avail itself of provisions of special contract of affreightment. 35 L.R.A.(N.S.) 1046.

**§ 6202. 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. [R. C. 1905, § 5639; Civ. C. 1877, § 1225; R. C. 1899, § 4191.]

Liability of railroad company for malicious refusal of freight agent to deliver freight. 7 L.R.A.(N.S.) 926.

Liability of connecting carrier for detaining freight on account of mistake as to amount due. 32 L.R.A.(N.S.) 189.

Payment or tender of freight charges as a condition precedent to an action of trover against carrier. 21 L.R.A. 117.

Duty of on adverse claim being made to goods. 34 Am. St. Rep. 731.

When delivery of goods excused by their seizure under process. 34 Am. St. Rep. 735.

**§ 6203. 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. [R. C. 1905, § 5640; Civ. C. 1877, § 1226; R. C. 1899, § 4192.]

Right of shipper to demand a redelivery of property at intermediate point. 15 L.R.A.(N.S.) 756.

Duty of carrier to deliver car at consignee's place of business. 41 L.R.A.(N.S.) 678.

To whom delivery of goods by, may be made, and liability for delivery to wrong person. 9 Am. St. Rep. 511.

As to similar provision in Cal. Civ. Code, § 2119, see *Hirshfield v. Central P. R. Co.*, 56 Cal. 484; *Wilson v. California C. R. Co.*, 94 Cal. 166, 17 L.R.A. 685, 29 Pac. 861.

**§ 6204. 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. [R. C. 1905, § 5641; Civ. C. 1877, § 1227; R. C. 1899, § 4193.]

Duty of express company with respect to property awaiting delivery at destination. 14 L.R.A.(N.S.) 393.

Necessity of notice of arrival of goods to reduce liability of carrier to that of warehouseman. 18 L.R.A.(N.S.) 427.

Absence of consignee, lack of address or other similar circumstances as excusing performance of carrier's duty to give notice of arrival. 26 L.R.A.(N.S.) 572.

As to similar provision in Cal. Civ. Code, § 2120, see *Hirshfield v. Central P. R. Co.*, 56 Cal. 484; *Wilson v. California C. R. Co.*, 94 Cal. 166, 17 L.R.A. 685, 29 Pac. 861; *Cavallaro v. Texas & P. R. Co.*, 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918.

**§ 6205. 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. [R. C. 1905, § 5642; Civ. C. 1877, § 1228; R. C. 1899, § 4194.]

When liability of carrier terminates. 7 Am. Rep. 591.

When liability of carrier reduced to that of warehouseman. 97 Am. St. Rep. 84.

What is a reasonable time for removal of goods by consignee, after which the liability of the carrier as such terminates. 8 L.R.A.(N.S.) 240; 16 L.R.A.(N.S.) 935; 25 L.R.A.(N.S.) 938.

Termination of carrier's liability as such as affected by its fault preventing removal of goods. 8 L.R.A.(N.S.) 235.

Liability of shipper for demurrage. 30 Am. St. Rep. 635.

**§ 6206. 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 days' 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. [R. C. 1905, § 5643; 1879, ch. 51, § 1; R. C. 1899, § 4195.]

Duty of carrier to give notice before selling goods or otherwise disposing of them contrary to shipping directions. 45 L.R.A.(N.S.) 18

**§ 6207. 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. [R. C. 1905, § 5644; 1879, ch. 51, § 2; R. C. 1899, § 4196.]

**§ 6208. Applies to hotel keepers.** The provisions of the last two sections shall apply to hotel keepers and warehousemen. [R. C. 1905, § 5645; 1879, ch. 51, § 3; R. C. 1899, § 4197.]

#### ARTICLE 3.—BILL OF LADING.

**§ 6209. 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. [R. C. 1905, § 5646; Civ. C. 1877, § 1229; R. C. 1899, § 4198.]

As to similar provision in Cal. Civ. Code, § 2126, see *Dodge v. Meyer*, 61 Cal. 405.

**§ 6210. 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. [R. C. 1905, § 5647; Civ. C. 1877, § 1230; R. C. 1899, § 4199.]

Possession of an indorsed 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.

**§ 6211. 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. [R. C. 1905, § 5648; Civ. C. 1877, § 1231; R. C. 1899, § 4200.]

As to similar provision in Cal. Civ. Code, § 2128, see *Dodge v. Meyer*, 61 Cal. 405; *Cavallaro v. Texas & P. R. Co.*, 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918.

**§ 6212. 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. [R. C. 1905, § 5649; Civ. C. 1877, § 1232; R. C. 1899, § 4201.]

**§ 6213. 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. [R. C. 1905, § 5650; Civ. C. 1877, § 1233; R. C. 1899, § 4202.]

**§ 6214. 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. [R. C. 1905, § 5651; Civ. C. 1877, § 1234; R. C. 1899, § 4203.]

To whom delivery may be made under bill of lading. 38 L.R.A. 358.

Effect of bill of lading on delivery to impostor by carrier. 37 L.R.A. 178.

Liability of carrier to bona fide holder upon bill of lading issued by negligence or mistake of agents without delivery of any goods to carrier. 41 L.R.A.(N.S.) 500.

As to similar provision in Cal. Civ. Code, § 2131, see *Dodge v. Meyer*, 61 Cal. 405; *Cavallaro v. Texas & P. R. Co.*, 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918.

**§ 6215. 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. [R. C. 1905, § 5652; Civ. C. 1877, § 1235; R. C. 1899, § 4204.]

#### ARTICLE 4.—FREIGHTAGE.

**§ 6216. 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. [R. C. 1905, § 5653; Civ. C. 1877, § 1236; R. C. 1899, § 4205.]

When right to freight becomes complete. 60 Am. Dec. 149.

Discrimination by requiring prepayment of freight charges. 21 L.R.A.(N.S.) 982.

Payment or tender of freight charges as condition precedent to action of trover against carrier. 21 L.R.A. 117.

When tender of freight money not condition of conversion by carrier's refusal to surrender goods. 6 L.R.A.(N.S.) 1058.

Liability of connecting carrier for detaining freight on account of mistake as to the amount due. 6 L.R.A.(N.S.) 1054; 32 L.R.A.(N.S.) 189.

**§ 6217. 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. [R. C. 1905, § 5654; Civ. C. 1877, § 1237; R. C. 1899, § 4206.]

**§ 6218. 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. [R. C. 1905, § 5655; Civ. C. 1877, § 1238; R. C. 1899, § 4207.]

§ 6219. **No freightage on increase.** No freightage can be charged upon the natural increase of freight. [R. C. 1905, § 5656; Civ. C. 1877, § 1239; R. C. 1899, § 4208.]

§ 6220. **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. [R. C. 1905, § 5657; Civ. C. 1877, § 1240; R. C. 1899, § 4209.]

§ 6221. **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. [R. C. 1905, § 5658; Civ. C. 1877, § 1241; R. C. 1899, § 4210.]

§ 6222. **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. [R. C. 1905, § 5659; Civ. C. 1877, § 1242; R. C. 1899, § 4211.]

Part performance of contract for carriage will not entitle carrier to pro rata pay, unless incomplete performance is voluntarily accepted. *Braithwaite v. Power*, 1 N. D. 445, 48 N. W. 354.

§ 6223. **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 demand of the consignee at the place and time of its arrival. [R. C. 1905, § 5660; Civ. C. 1877, § 1243; R. C. 1899, § 4212.]

Effect of deviation on carrier's right to freight. 2 B. R. C. 611.

§ 6224. **Lien for freightage.** A carrier has a lien for freightage which is regulated by chapters 86, 98 and 99 of this code. [R. C. 1905, § 5661; Civ. C. 1877, § 1244; R. C. 1899, § 4213.]

#### ARTICLE 5.—GENERAL AVERAGE.

§ 6225. **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. [R. C. 1905, § 5662; Civ. C. 1877, § 1245; R. C. 1899, § 4214.]

General average. 2 Am. Dec. 207.

—voluntary sacrifice essential to. 14 Am. Dec. 613.

§ 6226. **Jettison begins with most bulky freight.** A jettison must begin with the most bulky and least valuable articles so far as possible. [R. C. 1905, § 5663; Civ. C. 1877, § 1246; R. C. 1899, § 4215.]

§ 6227. **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. [R. C. 1905, § 5664; Civ. C. 1877, § 1247; R. C. 1899, § 4216.]

§ 6228. **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. [R. C. 1905, § 5665; Civ. C. 1877, § 1248; R. C. 1899, § 4217.]

§ 6229. **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. [R. C. 1905, § 5666; Civ. C. 1877, § 1249; R. C. 1899, § 4218.]

§ 6230. **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. [R. C. 1905, § 5667; Civ. C. 1877, § 1250; R. C. 1899, § 4219.]

§ 6231. **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. [R. C. 1905, § 5668; Civ. C. 1877, § 1251; R. C. 1899, § 4220.]

§ 6232. **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. [R. C. 1905, § 5669; Civ. C. 1877, § 1252; R. C. 1899, § 4221.]

## CHAPTER 68.

### CARRIAGE OF MESSAGES.

§ 6233. **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. [R. C. 1905, § 5670; Civ. C. 1877, § 1253; R. C. 1899, § 4222.]

As to similar provision in Cal. Civ. Code, § 2161, see *Hart v. Western U. Teleg. Co.*, 66 Cal. 579, 56 Am. Rep. 119, 6 Pac. 637; *Pacific Pine Lumber Co. v. Western U. Teleg. Co.*, 123 Cal. 428, 56 Pac. 103.

§ 6234. **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. [R. C. 1905, § 5671; Civ. C. 1877, § 1254; R. C. 1899, § 4223.]

Criminal liability for agent's failure to transmit telegram. 41 L.R.A. 660.

Duty of telegraph company to deliver message by telephone. 29 L.R.A.(N.S.) 836.

Duty of telegraph company to find person addressed. 15 L.R.A. 129; 27 Am. St. Rep. 923.

Telegraph company's duty as to discovering unknown sender. 22 L.R.A.(N.S.) 761.

Duty of telegraph company to notify sender of message if it cannot be promptly transmitted or delivered. 67 L.R.A. 153; 16 L.R.A.(N.S.) 870.

Duty and liability for conduct of telegraph messengers furnished. 2 L.R.A.(N.S.) 1091.

Liability of telegraph company for delay in transmitting or delivering message, due to strike of its employes. 22 L.R.A.(N.S.) 1214.

As to similar provision in Cal. Civ. Code, § 2162, see *Hart v. Western U. Teleg. Co.*, 66 Cal. 579, 56 Am. Rep. 119, 6 Pac. 637; *Pacific Pine Lumber Co. v. Western U. Teleg. Co.*, 123 Cal. 428, 56 Pac. 103; *Coit v. Western U. Teleg. Co.*, 130 Cal. 657, 53 L.R.A. 678, 80 Am. St. Rep. 153, 63 Pac. 83.

## CHAPTER 69.

## COMMON CARRIERS.

- ARTICLE 1. COMMON CARRIERS IN GENERAL, §§ 6235-6242.  
 2. COMMON CARRIERS OF PERSONS, §§ 6243-6252.  
 3. COMMON CARRIERS OF PROPERTY, §§ 6253-6261.  
 4. SHIPMENT OF LIVE STOCK, § 6262.  
 5. COMMON CARRIERS OF MESSAGES, §§ 6263-6270.

## ARTICLE 1.—COMMON CARRIERS IN GENERAL.

§ 6235. **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. [R. C. 1905, § 5672; Civ. C. 1877, § 1255; R. C. 1899, § 4224.]

What constitutes a common carrier. *Meuer v. C. M. & St. P. Ry. Co.*, 5 S. D. 568, 59 N. W. 945, 49 Am. St. Rep. 898, 25 L.R.A. 81.

Telegraph company is a common carrier. *Kirby v. W. U. Tel. Co.*, 7 S. D. 623, 65 N. W. 37, 30 L.R.A. 621; *Kirby v. W. U. Tel. Co.*, 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L.R.A. 621, 624.

Common carrier, baggage transfer company as. 34 L.R.A. 137; 21 L.R.A.(N.S.) 188.

—sleeping car company as. 21 L.R.A. 291.

—ferryman as. 68 L.R.A. 153.

—person maintaining elevator as. 2 L.R.A.(N.S.) 745.

—cartman, etc., as. 21 L.R.A.(N.S.) 188.

Railroad companies as private carriers in drawing special trains or special cars. 30 L.R.A. 161.

Character as common carriers of persons or corporations other than express companies that neither own nor operate transportation routes, but undertake to transport goods. 42 L.R.A.(N.S.) 902.

Is an interurban railroad company controlled by general railroad law in regard to the operation of railroads as carriers of passengers? 67 L.R.A. 637.

Effect of special arrangement with respect to particular class of business upon character of railroad company as. 5 L.R.A.(N.S.) 458.

As to similar provision in Cal. Civ. Code, § 2168, see *Hart v. Western U. Teleg. Co.*, 66 Cal. 579, 56 Am. Rep. 119, 6 Pac. 637.

§ 6236. **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. [R. C. 1905, § 5673; Civ. C. 1877, § 1256; R. C. 1899, § 4225.]

Effect of strike on carrier's duty to accept freight. 35 L.R.A. 623.

Right to refuse to receive in afternoon valuables to go on morning train. 15 L.R.A.(N.S.) 558.

—to refuse to transport dangerous articles. 36 L.R.A. 649.

—to discontinue receipt of freight at place other than regular station. 38 L.R.A.(N.S.) 932.

Duty to accept freight originating and terminating within city limits. 33 L.R.A.(N.S.) 443.

—to accept liquor for transportation to points where its sale is prohibited or restricted. 40 L.R.A.(N.S.) 798; 45 L.R.A.(N.S.) 120.

Liability for failure to provide train for crowd. 24 L.R.A. 711.

Duty to give regular train service on Sunday. 30 L.R.A.(N.S.) 401.

—to hold train for passenger seen approaching station. 31 L.R.A.(N.S.) 442.

—to accept as a passenger one physically or mentally disabled. 26 L.R.A.(N.S.) 171.

Right to eject persons having contagious disease. 4 L.R.A.(N.S.) 103.

Compulsory service in case of telephone. 15 L.R.A. 321.

Liability of telephone company for failure to make connections for subscriber. 21 L.R.A.(N.S.) 115; 28 L.R.A.(N.S.) 554; 39 L.R.A.(N.S.) 402.

As to similar provision in Cal. Civ. Code, § 2169, see *Pfister v. Central P. R. Co.*, 70 Cal. 169, 59 Am. Rep. 404, 11 Pac. 686; *Barrett v. Market Street R. Co.*, 81 Cal. 296, 6 L.R.A. 336, 15 Am. St. Rep. 61, 22 Pac. 859.

§ 6237. **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. [R. C. 1905, § 5674; Civ. C. 1877, § 1258; R. C. 1899, § 4226.]



**§ 6238. 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. [R. C. 1905, § 5675; Civ. C. 1877, § 1259; R. C. 1899, § 4227.]

Liability to passenger for default or delay in running railroad train. 49 L.R.A.(N.S.) 429.

As to similar provision in Cal. Civ. Code, § 2170, see *Pfister v. Central P. R. Co.*, 70 Cal. 169, 59 Am. Rep. 404, 11 Pac. 686.

**§ 6239. 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. [R. C. 1905, § 5676; Civ. C. 1877, § 1260; R. C. 1899, § 4228.]

Payment in advance. *Kirby v. W. U. Tel. Co.*, 4 S. D. 463, 57 N. W. 202; *Kirby v. W. U. Tel. Co.*, 7 S. D. 623, 65 N. W. 37, 30 L.R.A. 621.

Discrimination by requiring prepayment of freight charges. 21 L.R.A.(N.S.) 982.

**§ 6240. 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. [R. C. 1905, § 5677; Civ. C. 1877, § 1261; R. C. 1899, § 4229.]

As limiting common carriers' liability. *Hanson v. Great Northern R. Co.*, 18 N. D. 324, 121 N. W. 78.

Right to exact special contracts from shippers. 46 Am. St. Rep. 777.

Effect of deviation on rights and obligations arising from special contract limiting carrier's liability. 2 B. R. C. 612.

Effect of limitation in time tables on liability for default or delay in running train. 32 L.R.A. 544.

Limitation of liability by notices or tickets, baggage checks, bills of lading, etc. 15 Am. Rep. 457; 29 Am. Rep. 166; 5 Am. St. Rep. 719.

Limitation of carrier's liability for passenger's luggage. 19 L.R.A.(N.S.) 1006; 34 L.R.A.(N.S.) 818.

Application to hand baggage of limitation of liability for loss of baggage. 5 L.R.A.(N.S.) 650.

Limitation of liability for baggage after reaching destination of passenger. 36 L.R.A. 787.

Validity of stipulation limiting carrier's liability to agreed valuation as affected by the Hepburn act. 28 L.R.A.(N.S.) 293.

Valuation of property for purposes of transportation as affecting carrier's liability where it is converted or embezzled while in its possession. 31 L.R.A.(N.S.) 309.

Limitation of common carrier's duty and liability in case of dangerous articles. 36 L.R.A. 648.

As to similar provision in Cal. Civ. Code, § 2174, see *Pierce v. Southern P. Co.*, 120 Cal. 156, 40 L.R.A. 350, 47 Pac. 874, 52 Pac. 302, 1 Am. Neg. Rep. 211.

**§ 6241. Exoneration by agreement limited.** A common carrier cannot be exonerated by any agreement made in anticipation thereof from liability for the negligence, fraud or other wrongful act of himself or his servants. [1907, ch. 57; R. C. 1905, § 5678; Civ. C. 1877, § 1262; R. C. 1899, § 4230.]

Common carrier may limit liability by contract signed by parties. *Meuer v. C. M. & St. P. Ry. Co.*, 5 S. D. 568, 59 N. W. 945, 49 Am. St. Rep. 898, 25 L.R.A. 81; *Kirby v. W. U. Tel. Co.*, 7 S. D. 623, 65 N. W. 37, 30 L.R.A. 621.

Bill of lading not special contract unless signed by consignor or consignee. *Hartwell v. Express Co.*, 5 D. 463, 41 N. W. 732, 3 L.R.A. 342.

Carrier may contract that shipper must give notice in writing of any claim for damages before property is removed from place of destination. *Cooke v. Northern P. R. Co.*, 22 N. D. 266, 133 N. W. 303.

Carrier cannot be exonerated by any agreement, made in anticipation thereof, for gross negligence. *Berry v. Chicago, M. & St. P. R. Co.*, 24 S. D. 611, 124 N. W. 859.

Telegraph company cannot, by agreement in anticipation thereof, exonerate itself from liability for gross negligence, fraud or willful wrong. *Lothian v. Western U. Teleg. Co.*, 25 S. D. 319, 126 N. W. 621.

When stipulations exempting from liability are void. 31 Am. Rep. 567.

Power of carrier to limit liability and how it may be exercised. 32 Am. Dec. 495.

—to limit liability in the event of a loss to a sum less than the injury suffered. 23 Am. St. Rep. 593.

—to limit amount of carrier's liability in cases of negligence. 14 L.R.A. 433.

Limiting valuation of property as affecting amount of recovery for loss by negligence. 1 L.R.A.(N.S.) 985.

Validity of provision imposing responsibility of inspecting and selecting cars on shipper. 36 L.R.A.(N.S.) 412.

Right of passenger carrier to stipulate against liability in consideration of reduced fare. 4 L.R.A.(N.S.) 1081.

Validity of stipulation in pass limiting carrier's liability. 37 L.R.A.(N.S.) 235.

Risks of negligence assumed by contract with carrier as including gross negligence. 1 L.R.A.(N.S.) 675.

Contract exempting railroad company from liability for negligent injury to sleeping car employes or others sustaining a similar relation to the company. 11 L.R.A.(N.S.) 482.

Does stipulation exempting carrier from liability for passenger's baggage, or limiting amount thereof, cover losses due to negligence. 8 L.R.A.(N.S.) 199; 34 L.R.A.(N.S.) 826.

As to similar provision in Cal. Civ. Code, § 2175, see *Michalitschke Bros. v. Wells, F. & Co.*, 118 Cal. 683, 50 Pac. 847; *Pierce v. Southern P. Co.*, 120 Cal. 156, 40 L.R.A. 350, 47 Pac. 874, 52 Pac. 302, 1 Am. Neg. Rep. 211; *Merrill v. Pacific Transfer Co.*, 131 Cal. 582, 63 Pac. 915.

**§ 6242. 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. [R. C. 1905, § 5679; Civ. C. 1877, § 1263; R. C. 1899, § 4231.]

Effect of shipping contract limiting carrier's common-law liability, signed under compulsion. 28 L.R.A.(N.S.) 637.

Effect of limitation of carrier's liability in receipt prepared by shipper. 23 L.R.A.(N.S.) 645.

As to similar provision in Cal. Civ. Code, § 2176, see *Schroeder v. Schweizer, Lloyd Transport Versicherung's Gesellschaft*, 66 Cal. 294, 44 Am. Rep. 61, 5 Pac. 478; *Palmer v. Atchison, T. & S. F. R. Co.*, 101 Cal. 187, 35 Pac. 630; *California Powder Works v. Atlantic & P. R. Co.*, 113 Cal. 329, 36 L.R.A. 648, 45 Pac. 691; *Michalitschke Bros. v. Wells, F. & Co.*, 118 Cal. 683, 50 Pac. 847; *Merrill v. Pacific Transfer Co.*, 131 Cal. 582, 63 Pac. 915.

## ARTICLE 2.—COMMON CARRIERS OF PERSONS.

**§ 6243. 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. [R. C. 1905, § 5680; Civ. C. 1877, § 1264; R. C. 1899, § 4232.]

Duty to transport baggage on same train with passenger. 17 L.R.A.(N.S.) 1091.

Right of passenger to carry baggage or packages in street car. 30 L.R.A.(N.S.) 889.

Liability of carrier for injury to passenger from baggage or parcel in aisle of car. 13 L.R.A.(N.S.) 481.

Implied exceptions in statute as to free transportation of baggage. 25 L.R.A. 569.

Rights of one going to station to deposit baggage. 28 L.R.A.(N.S.) 311.

As to similar provision in Cal. Civ. Code, § 2180, see *Pfister v. Central P. R. Co.*, 70 Cal. 169, 59 Am. Rep. 404, 11 Pac. 686.

**§ 6244. 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. [R. C. 1905, § 5681; 1897, ch. 117; R. C. 1899, § 4233.]

What is baggage and liability therefor. 71 Am. Dec. 159; 8 Am. Rep. 302; 99 Am. St. Rep. 343.

Books and manuscript as baggage. 41 L.R.A.(N.S.) 371.

Household goods or supplies as baggage. 39 L.R.A.(N.S.) 634.

Articles intended for gifts as baggage for which carrier is responsible. 21 L.R.A.(N.S.) 850.

**§ 6245. 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. [R. C. 1905, § 5682; Civ. C. 1877, § 1266; R. C. 1899, § 4234.]

Liability for baggage not accompanied by a passenger. 55 L.R.A. 650; 43 L.R.A. (N.S.) 806.

Liability of carrier for loss of drummer's baggage. 4 L.R.A. (N.S.) 1035.

Liability of passenger carrier transporting merchandise intrusted to it by passenger. 14 L.R.A. 515.

Recovery by parent for loss of personal effects of infant that pays no fare. 1 L.R.A. (N.S.) 353.

Liability of carrier for loss of property in a check room. 18 L.R.A. (N.S.) 295; 29 L.R.A. (N.S.) 834.

Right of owner of baggage to testify as to its value in action for its loss. 37 L.R.A. (N.S.) 588.

Liability for baggage after reaching destination of passenger. 36 L.R.A. 781; 35 L.R.A. (N.S.) 383.

Duty of sleeping car company as to baggage or personal effects of passengers. 21 L.R.A. 289; 9 L.R.A. (N.S.) 407; 41 L.R.A. (N.S.) 799.

Delivery of baggage check to carrier as delivery of baggage. 14 L.R.A. (N.S.) 859.

How far is carrier bound by act of baggageman in receiving articles as baggage. 10 L.R.A. (N.S.) 1119.

Duty to check baggage to destination. 25 L.R.A. (N.S.) 537.

**§ 6246. 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. [R. C. 1905, § 5683; Civ. C. 1877, § 1267; R. C. 1899, § 4235.]

Railroad company bound to take all applying for passage and their baggage. *Waldron v. C. & N. W. Ry. Co.*, 1 D. 336, 46 N. W. 456.

Continuation of relation of passenger while looking after baggage after reaching destination. 2 L.R.A. (N.S.) 876.

Carrier's liability for assault by employe while attending to baggage. 17 L.R.A. (N.S.) 765.

As to similar provision in Cal. Civ. Code, § 2183, see *Pfister v. Central P. R. Co.*, 70 Cal. 169, 59 Am. Rep. 404, 11 Pac. 686.

**§ 6247. 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. [R. C. 1905, § 5684; Civ. C. 1877, § 1268; R. C. 1899, § 4236.]

Injuries received on crowded railroad trains. 24 L.R.A. 710.

**§ 6248. 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. [R. C. 1905, § 5685; Civ. C. 1877, § 1269; R. C. 1899, § 4237.]

Right of passenger to seat. 22 L.R.A. 259; 136 Am. St. Rep. 312.

Liability of street railway company for injury to person waiting for car in consequence of carrying passengers on platform or running board. 45 L.R.A. (N.S.) 269.

**§ 6249. 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. [R. C. 1905, § 5686; Civ. C. 1877, § 1270; 1899, § 4238.]

Carrier's regulations as to admission of passenger to train house. 16 L.R.A. 449.

—as affecting passenger's right to stop over. 28 L.R.A. 776.

Passengers riding in baggage or express car in violation of rules as contributory negligence. 16 L.R.A. 631.

As to similar provision in Cal. Civ. Code, § 2186, see *Nye v. Marysville & Y. C. Street R. Co.*, 97 Cal. 461, 32 Pac. 530.

**§ 6250. When fare demandable.** A common carrier may demand the fare of passengers either at starting or at any subsequent time. [R. C. 1905, § 5687; Civ. C. 1877, § 1271; R. C. 1899, § 4239.]

Validity of extra charge for passenger fare when paid upon train. 20 L.R.A. 483.

Right to require passenger to pay second fare on passing from one car to another on same line. 13 L.R.A. (N.S.) 445.

Duty of passenger to pay fare wrongfully demanded in order to avoid expulsion and lessen damages. 43 L.R.A. 706; 34 L.R.A. (N.S.) 282.

Validity of regulation requiring passenger to pay fare in case of dispute. 2 L.R.A.(N.S.) 695.

Requiring passenger to put coin in box or automatic registering device. 32 L.R.A.(N.S.) 695.

§ 6251. **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. [R. C. 1905, § 5688; Civ. C. 1877, §§ 1272, 1273; R. C. 1899, § 4240.]

Passenger not entitled to choice of routes when two routes to destination. Church v. Ry. Co., 6 S. D. 235, 60 N. W. 854, 26 L.R.A. 616.

In absence of special regulations legal payment of fare may be made either to conductor personally or to agent of company. Melody v. Great Northern R. Co., 25 S. D. 606, 30 L.R.A.(N.S.) 568, 127 N. W. 543, Ann. Cas. 1912C, 727.

Character or condition of coin or currency that may be tendered in payment of fare. 35 L.R.A.(N.S.) 1030.

Tender of a sum in excess of that due, with demand for change. 13 L.R.A.(N.S.) 624.

What is a reasonable sum out of which a carrier may be required to take fare and return change. 35 L.R.A. 489; 9 L.R.A.(N.S.) 579; 21 L.R.A.(N.S.) 868.

Carrier's liability for wrongful ejection from train by employe. 27 L.R.A. 170.

—where employe acts in violation of instruction. 18 L.R.A.(N.S.) 416.

—for negligence in ejecting trespasser from moving train. 13 L.R.A.(N.S.) 364.

—for turning one other than passenger out of depot. 42 L.R.A.(N.S.) 373.

—for ejecting passenger through mistake as to identity. 2 L.R.A.(N.S.) 472.

Exposure of drunken passenger to danger by ejection from car. 19 L.R.A. 327.

Express authority to certain train employes to eject trespassers as negating implied authority of other employes. 32 L.R.A.(N.S.) 1164.

Right to defend expulsion of passenger upon ground other than that relied upon at the time. 14 L.R.A.(N.S.) 368.

Payment of back fare for distance already ridden as condition of being carried further. 16 L.R.A. 55.

Right of passenger to pay fare after train begins to stop for purpose of ejecting him. 16 L.R.A. 53.

Ejection of custodian for nonpayment of child's fare. 38 L.R.A. 140.

Duty of passenger to pay fare wrongfully demanded in order to avoid expulsion. 43 L.R.A. 706; 34 L.R.A.(N.S.) 282.

Sufficiency of tender of fare to prevent ejection. 31 L.R.A.(N.S.) 992.

Right of passenger to forcibly resist unlawful ejection. 125 Am. St. Rep. 727.

As to similar provision in Cal. Civ. Code, § 2188, see Barrett v. Market Street R. Co., 81 Cal. 296, 6 L.R.A. 336, 15 Am. St. Rep. 61, 22 Pac. 859; Nye v. Marysville & Y. C. Street R. Co., 97 Cal. 461, 32 Pac. 530; Ames v. Southern P. Co., 141 Cal. 728, 99 Am. St. Rep. 98, 75 Pac. 310, 15 Am. Neg. Rep. 484; Elliott v. Southern P. Co., 145 Cal. 441, 68 L.R.A. 393, 79 Pac. 420.

§ 6252. **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. [R. C. 1905, § 5689; Civ. C. 1877, § 1274; R. C. 1899, § 4241.]

#### ARTICLE 3.—COMMON CARRIERS OF PROPERTY.

§ 6253. **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 6202 to 6205, 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. [R. C. 1905, § 5690; Civ. C. 1877, § 1275; 1897, ch. 118; R. C. 1899, § 4242.]

Railway company not liable for goods delivered and receipted for, though left in warehouse by consent of baggageman. Mulligan v. N. P. Ry. Co., 4 D. 315, 29 N. W. 659.

**Limitation of liability by notice.** *Hartwell v. Express Co.*, 5 D. 463, 41 N. W. 732, 3 L.R.A. 342.

Liability of carrier where cattle consigned to T., care of P., order of S., are delivered to P. without order of S. *Stone v. Railway Co.*, 8 S. D. 1, 65 N. W. 29.

On proof of delivery to carrier in sound condition, and of failure of carrier to redeliver them, prima facie case for recovery for loss is made. *Taughner v. Northern P. R. Co.*, 21 N. D. 111, 129 N. W. 717.

As to similar provision in Cal. Civ. Code, § 2194, see *Palmer v. Atchison, T. & S. F. R. Co.*, 101 Cal. 187, 35 Pac. 630.

**§ 6254. 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. [R. C. 1905, § 5691; Civ. C. 1877, § 1276; R. C. 1899, § 4243.]

**§ 6255. When liable for delay.** A common carrier is liable for delay only when it is caused by his want of ordinary care and diligence. [R. C. 1905, § 5692; Civ. C. 1877, § 1277; R. C. 1899, § 4244.]

Liability of railroad for delay in transportation of freight, due to inadequate facilities. 10 L.R.A.(N.S.) 432; 34 L.R.A.(N.S.) 637.

Liability for delay due to initial carrier's own negligence or breach of contract. 31 L.R.A.(N.S.) 82.

Effect of deviation on rights and obligations arising from stipulation against liability for delay. 8 B. R. C. 616.

Action of public authorities under police power as defense to carrier for delay of freight. 21 L.R.A.(N.S.) 731; 28 L.R.A.(N.S.) 139.

Legislative requirements as defense to carrier for delay in transportation. 31 L.R.A.(N.S.) 1184.

Duty of carrier to take precautions to prevent loss from delay. 39 L.R.A.(N.S.) 640, 642, 644.

Effect of strike on carrier's liability for delay in transportation. 35 L.R.A. 624.

Delay of carrier in transportation of corpse. 38 L.R.A.(N.S.) 433.

Right to interest on damages for delay. 28 L.R.A.(N.S.) 20.

Right of shipper or consignee, as against carrier, to refuse to accept goods delayed while in its hands. 42 L.R.A.(N.S.) 782.

**§ 6256. 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. [R. C. 1905, § 5693; Civ. C. 1877, §§ 1278, 1279; R. C. 1899, § 4245.]

**§ 6257. 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. [R. C. 1905, § 5694; Civ. C. 1877, § 1280; R. C. 1899, § 4246.]

"Perils of the sea." 41 Am. Dec. 281.

As to similar provision in Cal. Civ. Code, § 2199, see *Miller v. California Ins. Co.*, 76 Cal. 145, 9 Am. St. Rep. 184, 18 Pac. 155.

**§ 6258. 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. [R. C. 1905, § 5695; Civ. C. 1877, § 1281; R. C. 1899, § 4247.]

As to similar provision in Cal. Civ. Code, § 2200, see *Scammon v. Wells, F. & Co.*, 84 Cal. 311, 24 Pac. 284.

**§ 6259. 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. [R. C. 1905, § 5696; Civ. C. 1877, § 1282; R. C. 1899, § 4248.]

Station agent cannot contract for transportation of freight beyond company's line. Page v. St. P. Ry. Co., 7 S. D. 297, 64 N. W. 137; Sutton v. Railway Co., 14 S. D. 111, 84 N. W. 396; Coates v. Railway Co., 8 S. D. 173, 65 N. W. 1067.

Liability of the receiving carrier beyond his own line. 2 Am. Rep. 141; 42 Am. Rep. 664.

Burden of proof as between connecting carriers to show who is at fault for loss or injury. 101 Am. St. Rep. 392.

Limitation of carrier's liability to its own line. 31 L.R.A.(N.S.) 52.

Effect of deviation on rights and obligations arising from stipulation limiting responsibility to carrier's own line. 2 B. R. C. 616.

As to similar provision in Cal. Civ. Code, § 2201, see *Dresbach v. California P. R. Co.*, 57 Cal. 462; *Colfax Mountain Fruit Co. v. Southern P. Co.*, 5 Cal. Unrep. 527, 46 Pac. 668; *Palmer v. Atchison, T. & S. F. R. Co.*, 101 Cal. 187, 35 Pac. 630; *Colfax Mountain Fruit Co. v. Southern P. Co.*, 118 Cal. 648, 40 L.R.A. 78, 50 Pac. 775.

**§ 6260. 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. [R. C. 1905, § 5697; Civ. C. 1877, § 1283; R. C. 1899, § 4249.]

**§ 6261. 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. [R. C. 1905, § 5698; Civ. C. 1877, § 1284; R. C. 1899, § 4250.]

#### ARTICLE 4.—SHIPMENT OF LIVE STOCK.

**§ 6262. Agreement requiring notice of loss within thirty days void.** Any provision, stipulation or condition in any shipping contract, bill of lading or other agreement hereafter made or entered into by or between any common carrier and the owner or shipper of any shipment of live stock, providing that written or verbal notice of loss, injury or damage thereto or of claim therefor, shall be made or given to any common carrier or to any agent or officer of any common carrier or to any other person within any period less than thirty days from the date of the occurrence of any such loss, injury or damage, shall be void and of no effect. [1911, ch. 237.]

Reasonableness of time fixed in a contract for shipment of live stock for presentation of claim for damages. 7 L.R.A.(N.S.) 1041.

Removal of live stock from carrier's premises before notice of claim for damages, where such notice is given in time for examination. 24 L.R.A.(N.S.) 866.

#### ARTICLE 5.—COMMON CARRIERS OF MESSAGES.

**§ 6263. 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. [R. C. 1905, § 5699; Civ. C. 1877, § 1285; R. C. 1899, § 4251.]

Unreasonable delay in delivery of telegram casts upon company burden of showing exculpatory facts. *Lothian v. Western U. Teleg. Co.*, 25 S. D. 319, 126 N. W. 621.

Mandamus to compel performance of duties of telegraph company. 38 Am. Rep. 587; 44 Am. Rep. 241.

Right to refuse telegraph message because of its character. 17 L.R.A.(N.S.) 836.

Criminal liability for agent's failure to transmit telegram. 41 L.R.A. 660.

Liability for transmission or delivery of forged message. 65 L.R.A. 806.

Duty of telegraph company to find person addressed. 15 L.R.A. 129.

—to discover unknown sendee. 22 L.R.A.(N.S.) 761.

When telegraph company charged with notice of importance of commercial message. 41 L.R.A.(N.S.) 1188.

**§ 6264. Carrier must maintain sufficient equipment.** All persons, corporations and companies doing a public telegraph business within the state shall maintain sufficient wires and equipment to give prompt service and dispatch. All messages received in any telegraph office within the state must be delivered promptly if it is within the power of a telegraph company to locate the party to whom the message is addressed. [1907, ch. 246, § 1.]

**§ 6265. Messages transmitted promptly.** All messages left at the office of any telegraph office or the office of any railroad station where public service is maintained, must be transmitted promptly, providing said message is prepaid by the sender. In no case must a message remain at the telegraph office or station unsent more than thirty minutes, except in case of accident to the lines, such as broken wire or during severe storms. [1907, ch. 246, § 2.]

Duty of telegraph company to notify sender of message if it cannot be promptly transmitted or delivered. 67 L.R.A. 153; 16 L.R.A.(N.S.) 870.

Liability of telegraph company sending message to office after closing hour. 53 L.R.A. 732; 24 L.R.A.(N.S.) 1286.

Right of addressee of telegram to sue for delay in delivery. 30 L.R.A.(N.S.) 1116.

**§ 6266. Blanks used to conform to act.** All blanks and forms used for the sending of telegrams within the state must comply with the requirements of this act [sections 6264-6266a] and it shall be the duty of any companies doing a telegraph business for a compensation within the state to conduct their business and offices in such a manner that this act [sections 6264-6266a] be not violated. [1907, ch. 246, § 3.]

**§ 6266a. Penalty.** Any person, company or corporation or any agent of the same who shall violate any of the provisions of this act [sections 6264-6266a] shall be subject to a fine of not less than one hundred dollars nor more than five hundred dollars for each offense, and shall also be liable to the sender or receiver of the message on which violation was made, for all damages resulting from such delay and the criminal procedure is hereby made applicable for collecting fines under [sections 6264-6266a] this act. [1907, ch. 246, § 4.]

What are proper elements of damages in actions for failure to deliver messages. 10 Am. St. Rep. 778; 117 Am. St. Rep. 286.

Right to recover against telegraph company for loss sustained upon a commercial transaction entered into in consequence of a breach of its duty. 4 L.R.A.(N.S.) 262.

Loss of opportunity to respond to a call for professional services as a ground for action against telegraph company. 14 L.R.A.(N.S.) 533.

Damages for nondelivery or mistake in telegram preventing one from being met at railroad station. 35 L.R.A.(N.S.) 930.

—for breach of company's duty as to message asking for, or transmitting, funds. 2 L.R.A.(N.S.) 1073.

—for nondelivery of telegram sent after office hours. 53 L.R.A. 738.

Loss of profits as element of damages for breach of contract to transmit telegram. 53 L.R.A. 91; 27 L.R.A.(N.S.) 639; 49 L.R.A.(N.S.) 927.

Damages recoverable in action by addressee of telegram for delay in delivery. 30 L.R.A.(N.S.) 1133.

**§ 6267. Transfer of messages.** Every telegraph company, firm or corporation engaged in the business of transmitting messages by telegraph, in this state, or partly within and partly without this state, shall upon receipt of a message within this state to a point not on its own lines, transmit and deliver such message to another telegraph company on whose line such point may be reached, at the intersecting point where both such companies maintain an office for the transmission of messages which will, when the rate of both such companies are combined, make the cheapest route to the destination of such message; provided, however, that nothing in this act shall prohibit the transfer of such message at convenient or central points where both such telegraph companies may be better equipped, but in no

case shall this rate exceed the combined rate of both companies at the nearest intersecting point, nor the transmission of such message partly by telephone; provided, it is cheaper or more expedient and agreeable to sender, when copy is delivered within reasonable time to addressee, if required. [1913, ch. 282, § 1.]

**§ 6268. Penalty.** Every telegraph company, firm or corporation violating the provisions of this act [sections 6267, 6268] shall be fined not less than ten dollars nor more than fifty dollars for each offense, and it shall be the duty of the state's attorney upon order from the state board of railroad commissioners or upon the complaint of any citizen, to commence and prosecute all actions necessary for the enforcement of [sections 6267, 6268] this act. [1913, ch. 282, § 2.]

**§ 6269. 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. [R. C. 1905, § 5700; Civ. C. 1877, § 1286; R. C. 1899, § 4252.]

**§ 6270. Damages for postponing, refusing or delaying messages.** Every person whose message is refused, postponed or delayed, contrary to the provisions of this chapter, is entitled to recover from the carrier his actual damages and additional damages for mental distress and anguish caused by said refusal, delay or postponement. [1913, ch. 283; R. C. 1905, § 5701; Civ. C. 1877, § 1287; R. C. 1899, § 4253.]

Requirement that messages shall be written on company's blanks. Kirby v. W. U. Tel. Co., 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L.R.A. 621, 624; Kirby v. W. U. Tel. Co., 7 S. D. 623, 65 N. W. 37, 30 L.R.A. 621.

Penal statute must be strictly construed. Kirby v. W. U. Tel. Co., 4 S. D. 463, 57 N. W. 202.

Detriment proximately resulting and which must be presumed to have been contemplated by parties cannot be held measure of damages for delay in delivering telegram. Lothian v. Western U. Teleg. Co., 25 S. D. 319, 126 N. W. 621.

Penalty for delay in delivery of telegram. 53 L.R.A. 738.

State statutes imposing penalties on telegraph companies for not transmitting and delivering messages properly. 31 L.R.A. 807.

Liability under statutes imposing penalty for delay of telegraph company sending message to office after closing hour. 53 L.R.A. 738.

Recovery of damages for mental anguish in case of default or delay in delivery of telegraph message. 49 L.R.A.(N.S.) 206, 296, 300, 305, 308, 327, 343.

Constitutionality of statutes permitting recovery for mental anguish in telegraph cases. 49 L.R.A.(N.S.) 337.

## CHAPTER 70.

### TRUSTS IN GENERAL.

- ARTICLE 1. NATURE AND CREATION OF A TRUST, §§ 6271-6280.  
 2. OBLIGATIONS OF TRUSTEES, §§ 6281-6292.  
 3. OBLIGATIONS OF THIRD PERSONS, §§ 6293, 6294.

#### ARTICLE 1.—NATURE AND CREATION OF A TRUST.

**§ 6271. Classified.** A trust is either:

1. Voluntary; or,
2. Involuntary. [R. C. 1905, § 5702; Civ. C. 1877, § 1288; R. C. 1899, § 4254.]

Agent taking title to property in fraud of principal holds such title in trust. Fidler v. Norton, 4 D. 258, 30 N. W. 128.

Person who assumes trust must account as trustee. Wright v. Jones, 23 N. D. 191, 135 N. W. 1120.

As to similar provision in Cal. Civ. Code, § 2215, see *Hinckley's Estate*, 58 Cal. 457; *Barker v. Hurley*, 132 Cal. 21, 63 Pac. 1071.



**§ 6272. Voluntary.** A voluntary trust is an obligation arising out of personal confidence reposed in and voluntarily accepted by one for the benefit of another. [R. C. 1905, § 5703; Civ. C. 1877, § 1289; R. C. 1899, § 4255.]

Sufficiency of declaration to establish voluntary trust where legal title is retained by settler. 12 L.R.A.(N.S.) 547.

Establishment and enforcement of voluntary trusts in equity. 34 Am. St. Rep. 194. As to similar provision in Cal. Civ. Code, § 2216, see *Roach v. Caraffa*, 85 Cal. 436, 25 Pac. 22; *Kopp v. Gunther*, 95 Cal. 63, 30 Pac. 301.

**§ 6273. Involuntary.** An involuntary trust is one which is created by operation of law. [R. C. 1905, § 5704; Civ. C. 1877, § 1290; R. C. 1899, § 4256.]

Two causes of action may be united against one who became involuntary trustee by taking mortgage from insolvent as preference. *Bowler v. First Nat. Bank*, 21 S. D. 449, 130 Am. St. Rep. 725, 113 N. W. 618.

City taxes collected by county are held under implied, and not an express, trust. *Centerville v. Turner County*, 25 S. D. 300, 126 N. W. 605.

As to similar provision in Cal. Civ. Code, § 2217, see *Barr v. O'Donnell*, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 429; *Fulton v. Jansen*, 99 Cal. 587, 34 Pac. 331.

**§ 6274. 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. [R. C. 1905, § 5705; Civ. C. 1877, § 1291; R. C. 1899, § 4257.]

**§ 6275. 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 confidence obtains any control. [R. C. 1905, § 5706; Civ. C. 1877, § 1292; R. C. 1899, § 4258.]

Bank receiving deposit becomes trustee of express trust. *McLaughlin v. Bank*, 6 D. 406, 43 N. W. 715.

Purchase of property from agent with knowledge that it is trust property holds it in trust for principal. *Luscombe v. Grigsby*, 11 S. D. 408, 78 N. W. 357.

Trust funds in hands of insolvent bank at time of failure. *Kimmel v. Dickson*, 5 S. D. 221, 58 N. W. 561, 49 Am. St. Rep. 869, 25 L.R.A. 309; *Nat. Bank v. Johnson*, 6 N. D. 180, 69 N. W. 49; *Plano Mfg. Co. v. Auld*, 14 S. D. 512, 86 N. W. 21.

Agent to loan money and collect interest must act with highest good faith. *Bush v. Froelick*, 14 S. D. 62, 84 N. W. 230.

Partners are trustees for each other. *State v. Reddick*, 2 S. D. 124, 48 N. W. 846.

Agent, purchasing property for himself at slightly greater price than instructed to pay by principal, becomes trustee. *Brookings Land & Trust Co. v. Bertness*, 17 S. D. 293, 96 N. W. 97.

Trust implied to effectuate purpose of contract when its terms cannot be given effect. 58 L.R.A. 115.

Does donor's expectation that the donee will allow him to share in the benefit of the property raise an implied trust to that effect. 24 L.R.A.(N.S.) 1043.

Constructive trust in deed of homestead by husband to wife, with proviso attempting to derogate from her right of survivorship. 1 L.R.A.(N.S.) 312.

Does assignee of mortgage as collateral security, who forecloses the same and purchases the property, hold the title subject to a trust in favor of the assignor. 7 L.R.A.(N.S.) 1094.

Implied trust in property of religious society in case of schism or division. 24 L.R.A.(N.S.) 703.

Grantee's oral promise to grantor to hold in trust as giving rise to constructive trust. 39 L.R.A.(N.S.) 906.

Resulting trust in partnership lands. 27 L.R.A. 468; 37 L.R.A.(N.S.) 899.

As to similar provision in Cal. Civ. Code, § 2219, see *Connor v. Stanley*, 72 Cal. 556, 1 Am. St. Rep. 84, 14 Pac. 306; *Colton v. Stanford*, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16; *Roach v. Caraffa*, 85 Cal. 436, 25 Pac. 22; *White v. Warren*, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723; *Ruhl v. Mott*, 120 Cal. 668, 53 Pac. 304; *Montgomery v. Rauer*, 125 Cal. 227, 57 Pac. 894; *Dow v. Swain*, 125 Cal. 674, 58 Pac. 271; *Odell v. Moss*, 130 Cal. 352, 62 Pac. 555; *More v. More*, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76; *Donnelly v. Rees*, 141 Cal. 56, 74 Pac. 433; *Bell v. Solomons*, 142 Cal. 59, 75 Pac. 649; *White v. Warren*, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723.

**§ 6276. For what purpose created.** A trust may be created for any purpose for which a contract may lawfully be made, except as otherwise pre-

scribed by the chapters on uses and trusts and on transfers. [R. C. 1905, § 5707; Civ. C. 1877, § 1293; R. C. 1899, § 4259.]

As to similar provision in Cal. Civ. Code, § 2220, see *Hinckley's Estate*, 58 Cal. 457; *Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659; *Duff v. Duff*, 71 Cal. 513, 12 Pac. 570; *Re Walkerly*, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772; *Toland v. Toland*, 123 Cal. 140, 55 Pac. 681.

**§ 6277. How created as to trustor and beneficiary.** Subject to the provisions of section 5364 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. [R. C. 1905, § 5708; Civ. C. 1877, § 1294; R. C. 1899, § 4260.]

These sections in no way qualify statutes providing for creation of trusts in land. *Murphey v. Cook*, 11 S. D. 47, 75 N. W. 387.

Trust as to property fraudulently gained. *Sussenbach v. Bank*, 5 D. 477, 41 N. W. 662; *Farmers' Bank v. Kimball Milling Co.*, 1 S. D. 388, 47 N. W. 402, 36 Am. St. Rep. 739; *Jasper v. Hazen*, 1 N. D. 75, 44 N. W. 1018.

An involuntary trustee. *Van Dyke v. Grigsby*, 11 S. D. 30, 75 N. W. 274.

Agent to foreclose mortgage, who buys in property in his own name, is an involuntary trustee. *Luascombe v. Grigsby*, 11 S. D. 408, 78 N. W. 357.

General rule not changed that trustee wrongfully disposing of trust property is liable to beneficiary for value. *Prondzinski v. Garbutt*, 10 N. D. 300, 86 N. W. 969.

Holder of sheriff's certificate of sale of realty, by preventing owner by fraud from redeeming until after sheriff's deed is taken, becomes involuntary trustee. *Prondzinski v. Garbutt*, 8 N. D. 191, 77 N. W. 1012.

One receiving deed as security with intent to defraud becomes an involuntary trustee. *Jasper v. Hazen*, 1 N. D. 75, 44 N. W. 1018.

Voluntary trusts arising from the declaration of the trustor. 34 Am. St. Rep. 189.

Voluntary parol trust in personal property. 51 Am. St. Rep. 389.

Upholding instrument otherwise ineffective as a conveyance of real property as a covenant to stand seized to uses. 38 L.R.A.(N.S.) 937.

Necessity of beneficiary's knowledge of trust. 10 L.R.A.(N.S.) 616.

Necessity of word "heirs" in deed or devise in trust to pass fee to trustee. 2 L.R.A.(N.S.) 172.

Effect of executor's promise as to payment of legacy upon trust relations with legatee. 9 L.R.A.(N.S.) 214.

Effect of specifying use of real estate in devise to religious society as creating a trust. 11 L.R.A.(N.S.) 512, 520.

Creation of trust by use of words "upon condition," in will or conveyance of real property. 9 L.R.A.(N.S.) 758.

Character of estate created by grant, lease or devise of property to person so long as he shall desire to live upon it, or devote it to a particular use. 21 L.R.A.(N.S.) 575.

Creation of trust by precatory words in a will. 37 L.R.A.(N.S.) 646.

Trust for charity or religion. 14 L.R.A.(N.S.) 77; 37 L.R.A.(N.S.) 999.

Effect of creation of testamentary trust for payment of debts. 5 L.R.A.(N.S.) 355.

Bequest to one to divide as he thinks best. 37 L.R.A.(N.S.) 401.

As to similar provision in Cal. Civ. Code, § 2221, see *Hinckley's Estate*, 58 Cal. 457; *Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659; *Goldtree v. Thompson*, 79 Cal. 613, 22 Pac. 50; *Tyler v. Mayre*, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196; *Re Walkerly*, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772; *Lynch v. Rooney*, 112 Cal. 279, 44 Pac. 565; *Booth v. Oakland Bank*, 122 Cal. 19, 54 Pac. 370; *Wittfield v. Forster*, 124 Cal. 418, 57 Pac. 219; *Sheehan v. Sullivan*, 126 Cal. 189, 58 Pac. 543; *McCloud v. Hewlett*, 135 Cal. 361, 67 Pac. 333; *Faylor v. Faylor*, 136 Cal. 92, 68 Pac. 482; *Re Reith*, 144 Cal. 314, 77 Pac. 942; *Bedell v. Scoggins*, 5 Cal. Unrep. 66, 40 Pac. 954.

**§ 6278. How as to trustee.** Subject to the provisions of section 5364, 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. [R. C. 1905, § 5709; Civ. C. 1877, § 1295; R. C. 1899, § 4261.]

As to similar provision in Cal. Civ. Code, § 2222, see *Broder v. Conklin*, 77 Cal. 330, 19 Pac. 513; *Goldtree v. Thompson*, 79 Cal. 613, 22 Pac. 50; *Roach v. Caraffa*, 85 Cal. 436, 25 Pac. 22; *Tyler v. Mayre*, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196; *Bedell v. Scoggins*, 5 Cal. Unrep. 66, 40 Pac. 954; *Re Walkerly*, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772; *Booth v. Oakland Bank*, 122 Cal. 19, 54 Pac. 370; *Barker v. Hurley*,

132 Cal. 21, 63 Pac. 1071; McCloud v. Hewlett, 135 Cal. 361, 67 Pac. 333; Keogh v. Noble, 136 Cal. 153, 68 Pac. 579; Elizalde v. Elizalde, 137 Cal. 634, 66 Pac. 379, 70 Pac. 861.

**§ 6279. Trustee by wrongful detention.** One who wrongfully detains a thing is an involuntary trustee thereof for the benefit of the owner. [R. C. 1905, § 5710; Civ. C. 1877, § 1296; R. C. 1899, § 4262.]

As to whether one in possession of crops severed from land which he occupied under land contract upon which he has defaulted, is involuntary trustee for benefit of owner where he wrongfully retains crops. Golden Valley Land & Cattle Co. v. Johnstone, 21 N. D. 101, 128 N. W. 691, Ann. Cas. 1913B, 631.

Two causes of action may be united against one who became involuntary trustee by taking mortgage from insolvent as preference. Bowler v. First Nat. Bank, 21 S. D. 449, 130 Am. St. Rep. 725, 113 N. W. 618.

As to similar provision in Cal. Civ. Code, § 2223, see Greiner v. Greiner, 58 Cal. 115; Roach v. Caraffa, 85 Cal. 436, 25 Pac. 22; Heydenfeldt v. Jacobs, 107 Cal. 373, 40 Pac. 492; Nougues v. Newlands, 118 Cal. 102, 50 Pac. 386.

**§ 6280. 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. [R. C. 1905, § 5711; Civ. C. 1877, § 1297; R. C. 1899, § 4263.]

Agent purchasing property for himself at slightly greater price than instructed to pay by principal becomes trustee. Brookings Land & Trust Co. v. Bertness, 17 S. D. 293, 96 N. W. 97.

Bank receiving money under false pretenses becomes trustee ex maleficio of such funds. Widman v. Kellogg, 22 N. D. 396, 39 L.R.A.(N.S.) 563, 133 N. W. 1020.

When devisees, heirs and legatees hold as trustees ex maleficio. 106 Am. St. Rep. 94.

May a constructive trust be based upon an undertaking to hold for the benefit of another property received through devise or inheritance where no actual testamentary intention has been frustrated. 33 L.R.A.(N.S.) 996.

When a purchaser of property for less than value without fraudulent intent will be regarded as a trustee for creditors. 5 L.R.A.(N.S.) 395.

Impressing share of heir, devisee or legatee with constructive trust because of his fraud in frustrating decedent's intention to give the property to a third person. 8 L.R.A.(N.S.) 698; 31 L.R.A.(N.S.) 176.

As to similar provision in Cal. Civ. Code, § 2224, see Harpending v. Meyer, 55 Cal. 555; Greiner v. Greiner, 58 Cal. 115; Somers v. Overhulser, 67 Cal. 237, 7 Pac. 645; Wingerter v. Wingerter, 71 Cal. 105, 11 Pac. 853; Barr v. O'Donnell, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 429; Broder v. Conklin, 77 Cal. 330, 19 Pac. 513; Loaiza v. Superior Ct., 85 Cal. 11, 9 L.R.A. 376, 20 Am. St. Rep. 197, 24 Pac. 707; Roach v. Caraffa, 85 Cal. 436, 25 Pac. 22; Buckley v. Howe, 86 Cal. 596, 25 Pac. 132; McDaniel v. Pattison, 98 Cal. 86, 27 Pac. 651, 32 Pac. 805; Heydenfeldt v. Jacobs, 107 Cal. 373, 40 Pac. 492; Lynch v. Rooney, 112 Cal. 279, 44 Pac. 565; Nougues v. Newlands, 118 Cal. 102, 50 Pac. 386; Sheehan v. Sullivan, 126 Cal. 189, 58 Pac. 543; Mulcahey v. Dow, 131 Cal. 73, 63 Pac. 158; Crosby v. Clark, 132 Cal. 1, 63 Pac. 1022; Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433; Bell v. Solomons, 142 Cal. 59, 75 Pac. 649.

## ARTICLE 2.—OBLIGATIONS OF TRUSTEES.

**§ 6281. 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. [R. C. 1905, § 5712; Civ. C. 1877, § 1298; R. C. 1899, § 4264.]

Sale of bank's assets by receiver to another bank in which he is interested will not be vacated, where bank permitted it or was not thereby injured. Jackson v. First State Bank, 21 S. D. 484, 113 N. W. 876.

Attorney must not permit private interests to conflict with those of his client. Re Ramsey, 24 S. D. 266, 123 N. W. 726.

Fiduciary relation of trustee and beneficiary. 16 Am. Dec. 616.

Fiduciary relations as affecting reliance on fraudulent statement. 37 L.R.A. 613.

Independent advice as condition of valid gift inter vivos between trustee and cestui que trust. 16 L.R.A.(N.S.) 1087.

Control of discretion of trustee by courts of equity. 6 Am. St. Rep. 885.

When beneficiaries bound by acts of trustees in contravention of their trusts. 63 Am. St. Rep. 467.

Compensation of trustees. 17 Am. Dec. 266.

Sales and conveyances by trustees. 64 Am. Dec. 199; 19 Am. St. Rep. 266.

When power of sale vests in trustee by implication. 87 Am. Dec. 209.

Sales under powers in trust deeds to secure money. 92 Am. St. Rep. 573.

As to similar provision in Cal. Civ. Code, § 2228, see *Colton v. Stanford*, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16; *San Francisco Water Co. v. Pattee*, 86 Cal. 623, 25 Pac. 135; *Dolliver v. Dolliver*, 94 Cal. 642, 30 Pac. 4; *Re Nichols*, 5 Cal. Unrep. 856, 50 Pac. 1072; *Richards v. Fraser*, 136 Cal. 460, 69 Pac. 83; *Calmon v. Sarraille*, 142 Cal. 638, 76 Pac. 486; *Schnittger v. Old Home Consol. Min. Co.*, 144 Cal. 603, 78 Pac. 9.

**§ 6282. 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. [R. C. 1905, § 5713; Civ. C. 1877, § 1299; R. C. 1899, § 4265.]

Partner using partnership property for his own profit may be required to account for such profits. *Lay v. Emery*, 8 N. D. 515, 79 N. W. 1053.

Former administrator can recover only amount paid by him for mortgage against estate. *Bidwell v. Smith*, 23 S. D. 120, 120 N. W. 880.

Right to pursue and recover trust funds. 32 Am. St. Rep. 125; 46 Am. St. Rep. 608.

As to similar provision in Cal. Civ. Code, § 2229, see *Colton v. Stanford*, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16; *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788; *Allin v. Williams*, 97 Cal. 403, 32 Pac. 441; *Millet v. Bradbury*, 109 Cal. 170, 41 Pac. 865; *San Diego, O. T. & P. B. R. Co. v. Pacific Beach R. Co.*, 112 Cal. 53, 33 L.R.A. 788; 44 Pac. 333; *Birmingham v. Wilcox*, 120 Cal. 467, 52 Pac. 822; *Lower Kings River Reclamation Dist. v. McCullah*, 124 Cal. 175, 56 Pac. 887; *State Loan & T. Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600; *Sims v. Petaluma Gaslight Co.*, 131 Cal. 656, 63 Pac. 1011; *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550.

**§ 6283. 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. [R. C. 1905, § 5714; Civ. C. 1877, § 1300; R. C. 1899, § 4266.]

Resolution allowing accounts and increasing salary of managing director, passed by votes of such director and his wife, is void. *Ritchie v. People's Teleph. Co.*, 22 S. D. 598, 119 N. W. 990.

As to similar provision in Cal. Civ. Code, § 2230, see *Chamberlain v. Pacific Wool-Growing Co.*, 54 Cal. 103; *Graves v. Mono Lake Hydraulic Min. Co.*, 81 Cal. 303, 22 Pac. 665; *San Francisco Water Co. v. Pattee*, 86 Cal. 623, 25 Pac. 135; *Burke v. Bours*, 98 Cal. 171, 32 Pac. 980; *San Diego, O. T. & P. B. R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 33 L.R.A. 788, 44 Pac. 333; *Blood v. La Serena Land & Water Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; *Broder v. Conklin*, 121 Cal. 282, 53 Pac. 699; *State Loan & T. Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600; *Phillips v. Sanger Lumber Co.*, 130 Cal. 431, 62 Pac. 749; *Sims v. Petaluma Gaslight Co.*, 131 Cal. 656, 63 Pac. 1011; *Re Healy*, 6 Cal. Unrep. 780, 66 Pac. 175; *McCabe v. Healy*, 138 Cal. 81, 70 Pac. 1008; *Schnittger v. Old Home Consol. Min. Co.*, 144 Cal. 603, 78 Pac. 9; *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550.

**§ 6284. Use of influence for advantage prohibited.** A trustee may not use the influence which his position gives to obtain any advantage from his beneficiary. [R. C. 1905, § 5715; Civ. C. 1877, § 1301; R. C. 1899, § 4267.]

As to similar provision in Cal. Civ. Code, § 2231, see *Jackson v. Jackson*, 94 Cal. 446, 29 Pac. 957; *Dimond v. Sanderson*, 103 Cal. 97, 37 Pac. 189; *Blood v. La Serena Land & Water Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; *McCabe v. Healy*, 138 Cal. 81, 70 Pac. 1008; *Bell v. Solomons*, 142 Cal. 59, 75 Pac. 649; *Calmon v. Sarraille*, 142 Cal. 638, 76 Pac. 486.

**§ 6285. 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. [R. C. 1905, § 5716; Civ. C. 1877, § 1302; R. C. 1899, § 4268.]

**§ 6286. 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. [R. C. 1905, § 5717; Civ. C. 1877, § 1303; R. C. 1899, § 4269.]

As to similar provision in Cal. Civ. Code, § 2232, see *Blood v. La Serena Land & Water Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; *Re Watkins*, 121 Cal. 327, 53 Pac. 702; *Re Healy*, 6 Cal. Unrep. 780, 66 Pac. 175; *McCabe v. Healy*, 138 Cal. 81, 70 Pac. 1008; *Calmon v. Sarraille*, 142 Cal. 638, 76 Pac. 486.

**§ 6287. 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. [R. C. 1905, § 5718; Civ. C. 1877, § 1304; R. C. 1899, § 4270.]

As to similar provision in Cal. Civ. Code, § 2234, see *Statt's Estate*, 52 Cal. 403; *Graves v. Mono Lake Hydraulic Min. Co.*, 81 Cal. 303, 22 Pac. 665; *San Francisco Water Co. v. Pattee*, 86 Cal. 623, 25 Pac. 135; *Jackson v. Jackson*, 94 Cal. 446, 29 Pac. 957; *Allin v. Williams*, 97 Cal. 403, 32 Pac. 441; *Dimond v. Sanderson*, 103 Cal. 97, 37 Pac. 189; *Blood v. La Serena Land & Water Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; *Re Watkins*, 121 Cal. 327, 53 Pac. 702; *Phillips v. Sanger Lumber Co.*, 130 Cal. 431, 62 Pac. 749; *Mulcahey v. Dow*, 131 Cal. 73, 63 Pac. 158; *Re Healy*, 6 Cal. Unrep. 780, 66 Pac. 175; *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550.

**§ 6288. 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. [R. C. 1905, § 5719; Civ. C. 1877, § 1305; R. C. 1899, § 4271.]

As to similar provision in Cal. Civ. Code, § 2235, see *Connor v. Stanley*, 72 Cal. 556, 1 Am. St. Rep. 84, 14 Pac. 306; *Golson v. Dunlap*, 73 Cal. 157, 14 Pac. 576; *Brisson v. Brisson*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; *Colton v. Stanford*, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16; *Jackson v. Jackson*, 94 Cal. 446, 29 Pac. 957; *Dimond v. Sanderson*, 103 Cal. 97, 37 Pac. 189; *White v. Warren*, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723; *Odell v. Moss*, 130 Cal. 352, 62 Pac. 555; *Re Healy*, 6 Cal. Unrep. 780, 66 Pac. 175; *Stiles v. Cain*, 134 Cal. 170, 66 Pac. 231; *Richards v. Fraser*, 136 Cal. 460, 69 Pac. 83; *Farmers' & M. Bank v. De Shorb*, 137 Cal. 685, 70 Pac. 771; *Bell v. Solomons*, 142 Cal. 59, 75 Pac. 649; *Calmon v. Sarraille*, 142 Cal. 638, 76 Pac. 486.

**§ 6289. 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. [R. C. 1905, § 5720; Civ. C. 1877, § 1306; R. C. 1899, § 4272.]

As to similar provision in Cal. Civ. Code, § 2236, see *Re Arguello*, 97 Cal. 196, 31 Pac. 937; *Re Bane*, 120 Cal. 533, 65 Am. St. Rep. 197, 52 Pac. 852; *Calmon v. Sarraille*, 142 Cal. 638, 76 Pac. 486.

**§ 6290. Liability for unlawful use.** A trustee who uses or disposes of the trust property contrary to section 6282 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 thereof, to replace it with its fruits or to account for its proceeds with interest. [R. C. 1905, § 5721; Civ. C. 1877, § 1307; R. C. 1899, § 4273.]

As to award for value of use of land being proper where trustee has conveyed to innocent purchaser. *Berry v. Evendon*, 14 N. D. 1, 103 N. W. 748.

Right of vendee to elect between value of use and occupation or net profits where vendor has used land after conveyance. *Cotton v. Butterfield*, 14 N. D. 465, 105 N. W. 236.

Sale of bank's assets by receiver to another bank in which he is interested will not be vacated, where bank permitted it or was not thereby injured. *Jackson v. First State Bank*, 21 S. D. 484, 113 N. W. 876.

As to similar provision in Cal. Civ. Code, § 2237, see *Harpending v. Meyer*, 55 Cal. 555; *Birmingham v. Wilcox*, 120 Cal. 467, 52 Pac. 822; *Calmon v. Sarraille*, 142 Cal. 638, 76 Pac. 486.

§ 6291. **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. [R. C. 1905, § 5722; Civ. C. 1877, § 1308; R. C. 1899, § 4274.]

Personal liability of trustee for losses to trust estate from investments. 44 L.R.A.(N.S.) 873.

Investments which trustees may make without becoming liable for loss. 40 Am. Dec. 506.

Investments a trustee may not make without incurring liability in case of loss. 132 Am. St. Rep. 372.

As to similar provision in Cal. Civ. Code, § 2238, see *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77; *Calmon v. Sarraille*, 142 Cal. 638, 76 Pac. 486.

§ 6292. **Liability for cotrustees consenting.** A trustee is responsible for the wrongful acts of a cotrustee to which he consented or which by his negligence he enabled the latter to commit but for no others. [R. C. 1905, § 5723; Civ. C. 1877, § 1309; R. C. 1899, § 4275.]

Liability of one cotrustee for the acts and defaults of another. 42 Am. Dec. 288.

Liability of inactive trustee for defalcation of cotrustee. 38 L.R.A.(N.S.) 1029.

When majority of trustees may act. 11 Am. Dec. 674.

As to similar provision in Cal. Civ. Code, § 2239, see *Re Osborn*, 87 Cal. 1, 11 L.R.A. 264, 25 Pac. 157; *Birmingham v. Wilcox*, 120 Cal. 467, 52 Pac. 822; *Calmon v. Sarraille*, 142 Cal. 638, 76 Pac. 486.

#### ARTICLE 3.—OBLIGATIONS OF THIRD PERSONS.

§ 6293. **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. [R. C. 1905, § 5724; Civ. C. 1877, § 1310; R. C. 1899, § 4276.]

Addition of "trustee" to name of grantee in deed does not create trust. *Rua v. Watson*, 13 S. D. 453, 83 N. W. 572.

Purchaser of property from agent, with knowledge that it is trust property, holds it for principal. *Luscombe v. Grigsby*, 11 S. D. 408, 78 N. W. 357.

As to similar provision in Cal. Civ. Code, § 2243, see *Warnock v. Harlow*, 96 Cal. 298, 31 Am. St. Rep. 209, 31 Pac. 166; *Gray v. Farmers' Exch. Bank*, 105 Cal. 60, 38 Pac. 519; *Chapman v. Hughes*, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982.

§ 6294. **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. [R. C. 1905, § 5725; Civ. C. 1877, § 1311; R. C. 1899, § 4277.]

As to similar provision in Cal. Civ. Code, § 2244, see *Nougues v. Newlands*, 118 Cal. 102, 50 Pac. 386.

### CHAPTER 71.

#### TRUSTS FOR THE BENEFIT OF THIRD PERSONS.

- ARTICLE 1. NATURE AND CREATION OF THE TRUST, §§ 6295-6299.
2. OBLIGATIONS OF TRUSTEES, §§ 6300-6304A.
  3. POWERS OF TRUSTEES, §§ 6305-6307.
  4. RIGHTS OF TRUSTEES, §§ 6308-6310.
  5. TERMINATION OF THE TRUST, §§ 6311-6315.
  6. SUCCESSION OR APPOINTMENT OF NEW TRUSTEES, §§ 6316-6318.

#### ARTICLE 1.—NATURE AND CREATION OF THE TRUST.

§ 6295. **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. [R. C. 1905, § 5726; Civ. C. 1877, § 1312; R. C. 1899, § 4278.]

As to similar provision in Cal. Civ. Code, § 2250, see *Elizalde v. Elizalde*, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861.

§ 6296. **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. [R. C. 1905, § 5727; Civ. C. 1877, § 1313; R. C. 1899, § 4279.]

As to similar provision in Cal. Civ. Code, § 2251, see *Bettis v. Townsend*, 61 Cal. 333; *Dyer v. Leach*, 91 Cal. 191, 25 Am. St. Rep. 171, 27 Pac. 598; *Tyler v. Mayre*, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196; *Robertson v. Burrell*, 110 Cal. 568, 42 Pac. 1086; *Booth v. Oakland Bank*, 122 Cal. 19, 54 Pac. 370.

§ 6297. **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. [R. C. 1905, § 5728; Civ. C. 1877, § 1314; R. C. 1899, § 4280.]

As to similar provision in Cal. Civ. Code, § 2252, see *Dyer v. Leach*, 91 Cal. 191, 25 Am. St. Rep. 171, 27 Pac. 598.

§ 6298. **Where object, etc., expressed.** The nature, extent and object of a trust are expressed in the declaration of trust. [R. C. 1905, § 5729; Civ. C. 1877, § 1315; R. C. 1899, § 4281.]

§ 6299. **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. [R. C. 1905, § 5730; Civ. C. 1877, § 1316; R. C. 1899, § 4282.]

#### ARTICLE 2.—OBLIGATIONS OF TRUSTEES.

§ 6300. **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. [R. C. 1905, § 5731; Civ. C. 1877, § 1317; R. C. 1899, § 4283.]

As to similar provision in Cal. Civ. Code, § 2258, see *Kennedy v. Dunn*, 58 Cal. 339.

§ 6301. **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. [R. C. 1905, § 5732; Civ. C. 1877, § 1318; R. C. 1899, § 4284.]

Liability of trustee for torts or negligence of servants. 63 L.R.A. 227.

As to similar provision in Cal. Civ. Code, § 2259, see *Re Nichols*, 5 Cal. Unrep. 856, 50 Pac. 1072.

§ 6302. **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. [R. C. 1905, § 5733; Civ. C. 1877, § 1319; R. C. 1899, § 4285.]

§ 6303. **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. [R. C. 1905, § 5734; Civ. C. 1877, § 1320; R. C. 1899, § 4286.]

Personal liability of trustee for losses to trust estate from investments. 44 L.R.A.(N.S.) 873.

Liability of bank directors in case of bad loans or investments. 53 L.R.A. 762; 39 L.R.A.(N.S.) 173.

As to similar provision in Cal. Civ. Code, § 2261, see *Elizalde v. Elizalde*, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861.

§ 6304. **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. [R. C. 1905, § 5735; Civ. C. 1877, § 1321; R. C. 1899, § 4287.]

As to similar provision in Cal. Civ. Code, § 2262, see *Birmingham v. Wilcox*, 120 Cal. 467, 52 Pac. 822; *Bemmerly v. Woodward*, 124 Cal. 568, 57 Pac. 561; *Elizalde v. Elizalde*, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861.

**§ 6304a. 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. [R. C. 1905, § 5736; Civ. C. 1877, § 1322; R. C. 1899, § 4288.]

Pledged bonds purchased by managing agent of corporation, inure to benefit thereof. *Fowler v. Iowa Land Co.*, 18 S. D. 131, 99 N. W. 1095.

As to similar provision in Cal. Civ. Code, § 2263, see *Carey v. Brown*, 62 Cal. 373.

#### ARTICLE 3.—POWERS OF TRUSTEES.

**§ 6305. 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. [R. C. 1905, § 5737; 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.

Implied power of trustee to sell real property. 32 L.R.A.(N.S.) 676.

Power of trustee to mortgage trust estate for purpose of making improvements so as to render it productive. 7 L.R.A.(N.S.) 263.

Right of trustee to execute lease to extend beyond termination of trust. 13 L.R.A.(N.S.) 496.

Power of testamentary trustee to carry on business in behalf of estate. 40 L.R.A.(N.S.) 204.

**§ 6306. All cotrustees must act.** When there are several cotrustees all must unite in any act to bind the trust property, unless the declaration of trust otherwise provides. [R. C. 1905, § 5738; Civ. C. 1877, § 1324; R. C. 1899, § 4290.]

**§ 6307. 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. [R. C. 1905, § 5739; Civ. C. 1877, § 1325; R. C. 1899, § 4291.]

As to similar provision in Cal. Civ. Code, § 2269, see *Hallinan v. Hearst*, 133 Cal. 645, 55 L.R.A. 216, 66 Pac. 17.

#### ARTICLE 4.—RIGHTS OF TRUSTEES.

**§ 6308. 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. [R. C. 1905, § 5740; Civ. C. 1877, § 1326; R. C. 1899, § 4292.]

**§ 6309. 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. [R. C. 1905, § 5741; Civ. C. 1877, § 1327; R. C. 1899, § 4293.]

Right of partner appointed trustee on liquidation to compensation. 17 L.R.A.(N.S.) 399.



Right of trustee to retain bonus or gratuity received from third person. 37 L.R.A.(N.S.) 923.

Right as between trustee and cestui que trust to compensation due for former's services as director. 1 B. R. C. 313.

As to similar provision in Cal. Civ. Code, § 2274, see *Menke v. Miller*, 56 Cal. 628.

§ 6310. **Involuntary trustee excluded.** An involuntary trustee, who becomes such through his own fault, has none of the rights mentioned in this article. [R. C. 1905, § 5742; Civ. C. 1877, § 1328; R. C. 1899, § 4294.]

#### ARTICLE 5.—TERMINATION OF THE TRUST.

§ 6311. **How trust extinguished.** A trust is extinguished by the entire fulfillment of its object or by such object becoming impossible or unlawful. [R. C. 1905, § 5743; Civ. C. 1877, § 1329; R. C. 1899, § 4295.]

As to similar provision in Cal. Civ. Code, § 2279, see *Schlessinger v. Mallard*, 70 Cal. 326, 11 Pac. 728; *Pico v. Warner*, 73 Cal. 17, 14 Pac. 377; *Scrivner v. Dietz*, 84 Cal. 295, 24 Pac. 171; *People ex rel. Ellert v. Cogswell*, 113 Cal. 129, 35 L.R.A. 269, 45 Pac. 270; *Wittfield v. Forster*, 124 Cal. 418, 57 Pac. 219.

§ 6312. **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. [R. C. 1905, § 5744; Civ. C. 1877, § 1330; R. C. 1899, § 4296.]

Power to revoke or set aside voluntary trust or settlement. 15 L.R.A. 75.

Mistake, fraud, undue influence, etc., as a ground for relief from a voluntary trust. 19 L.R.A. 767.

As to similar provision in Cal. Civ. Code, § 2280, see *Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659; *Nichols v. Emery*, 109 Cal. 323, 50 Am. St. Rep. 43, 41 Pac. 1089; *People ex rel. Ellert v. Cogswell*, 113 Cal. 129, 35 L.R.A. 269, 45 Pac. 270; *Booth v. Oakland Bank*, 122 Cal. 19, 54 Pac. 370; *Re Willey*, 128 Cal. 1, 56 Pac. 550, 60 Pac. 471.

§ 6313. **How office vacated.** The office of a trustee is vacated:

1. By his death; or,
2. By his discharge. [R. C. 1905, § 5745; Civ. C. 1877, § 1331; R. C. 1899, § 4297.]

§ 6314. **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 a 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. [R. C. 1905, § 5746; Civ. C. 1877, § 1332; R. C. 1899, § 4298.]

Power of court to dissolve trust. 18 L.R.A. 745.

Effect of lapse of time to extinguish express trust. 1 L.R.A. 328.

As to similar provision in Cal. Civ. Code, § 2282, see *Pico v. Warner*, 73 Cal. 17, 14 Pac. 377; *Re Fair*, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000.

§ 6315. **Removal by court.** The district court may remove any trustee who has violated or is unfit to execute the trust. [R. C. 1905, § 5747; Civ. C. 1877, § 1333; R. C. 1899, § 4299.]

As to similar provision in Cal. Civ. Code, § 2283, see *Fatjo v. Swasey*, 111 Cal. 628, 44 Pac. 225.

#### ARTICLE 6.—SUCCESSION OR APPOINTMENT OF NEW TRUSTEES.

§ 6316. **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. [R. C. 1905, § 5748; Civ. C. 1877, § 1334; R. C. 1899, § 4300.]

As to similar provision in Cal. Civ. Code, § 2287, see *Schlessinger v. Mallard*, 70 Cal. 326, 11 Pac. 728; *Dyer v. Leach*, 91 Cal. 191, 25 Am. St. Rep. 171, 27 Pac. 598.

§ 6317. **Trust survives to cotrustees.** On the death, renunciation or discharge of one of several cotrustees the trust survives to the others. [R. C. 1905, § 5749; Civ. C. 1877, § 1335; R. C. 1899, § 4301.]

As to similar provision in Cal. Civ. Code, § 2288, see *Schlessinger v. Mallard*, 70 Cal. 326, 11 Pac. 728; *Spence v. Widney*, 5 Cal. Unrep. 516, 46 Pac. 463.

§ 6318. **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. [R. C. 1905, § 5750; Civ. C. 1877, § 1336; R. C. 1899, § 4302.]

Charitable trust shall never fail for want of trustee. *Hagen v. Sacrison*, 19 N. D. 160, 26 L.R.A.(N.S.) 724, 123 N. W. 518.

Power of court to change number of trustees designated in trust instrument. 1 L.R.A.(N.S.) 802.

As to similar provision in Cal. Civ. Code, § 2289, see *Schlessinger v. Mallard*, 70 Cal. 326, 11 Pac. 728; *State Invest. & Ins. Co. v. Superior Ct.*, 101 Cal. 135, 35 Pac. 549; *Fatjo v. Swasey*, 111 Cal. 628, 44 Pac. 225; *Spence v. Widney*, 5 Cal. Unrep. 516, 46 Pac. 463; *Golden Cross Min. & Mill. Co. v. Spiers*, 115 Cal. 247, 47 Pac. 108; *Lloyd v. Davis*, 123 Cal. 348, 55 Pac. 1003; *Hallinan v. Hearst*, 133 Cal. 645, 55 L.R.A. 216, 66 Pac. 17.

## CHAPTER 72.

### AGENCY.

- ARTICLE 1. DEFINITION OF AGENCY, §§ 6319-6324.  
 2. AUTHORITY OF AGENTS, §§ 6325-6347.  
 3. MUTUAL OBLIGATIONS OF PRINCIPALS AND THIRD PERSONS, §§ 6348-6357.  
 4. OBLIGATIONS OF AGENTS TO THIRD PERSONS, §§ 6358-6360.  
 5. DELEGATION OF AGENCY, §§ 6361-6364.  
 6. TERMINATION OF AGENCY, §§ 6365, 6366.

#### ARTICLE 1.— DEFINITION OF AGENCY.

§ 6319. **Defined.** An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency. [R. C. 1905, § 5751; Civ. C. 1877, § 1337; R. C. 1899, § 4303.]

Agreement for lease by local manager of telegraph company presumed to be authorized. *Grigsby v. Telegraph Co.*, 5 S. D. 561, 59 N. W. 734.

Firemen as agents of owner of burning property. 39 L.R.A.(N.S.) 237.

Agency of clearing-house members. 25 L.R.A. 830.

Is medical examiner agent of insurer or of insured. 41 L.R.A.(N.S.) 505.

Proof of agency by evidence of similar acts by alleged agent. 17 L.R.A.(N.S.) 219.

Admissibility of books of account to prove agency. 52 L.R.A. 714.

§ 6320. **Who may appoint and who be agent.** Any person having capacity to contract may appoint an agent and any person may be an agent. [R. C. 1905, § 5752; Civ. C. 1877, § 1338; R. C. 1899, § 4304.]

Powers of president and vice-president of corporation as to employment of agents. 14 L.R.A. 358.

§ 6321. **Special and general agent defined.** An agent for a particular act or transaction is called a special agent. All others are general agents. [R. C. 1905, § 5753; Civ. C. 1877, § 1339; R. C. 1899, § 4305.]

§ 6322. **Agency classified.** An agency is either actual or ostensible. [R. C. 1905, § 5754; Civ. C. 1877, § 1340; R. C. 1899, § 4306.]

§ 6323. **Actual.** An agency is actual when the agent is really employed by the principal. [R. C. 1905, § 5755; Civ. C. 1877, § 1341; R. C. 1899, § 4307.]

As to existence of agency. *First Nat. Bank v. Minneapolis & N. Elevator Co.*, 11 N. D. 280, 91 N. W. 436.

**§ 6324. 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. [R. C. 1905, § 5756; Civ. C. 1877, § 1342; R. C. 1899, § 4308.]

Agency not established by statement or act of pretended agent. *Gordon v. Trust Co.*, 6 N. D. 454, 71 N. W. 556.

General agent of insurance company may employ soliciting agent whose waiver of condition will bind company. *Harding v. Fire Ins. Co.*, 10 S. D. 64, 71 N. W. 753; *Enos v. Ins. Co.*, 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796.

Ostensible authority is such as principal intentionally causes third person to believe exists. *Reid v. Kellogg*, 8 S. D. 596, 67 N. W. 687.

Insurance broker, when agent for insurer. *South Bend Toy Co. v. Ins. Co.*, 2 S. D. 17, 48 N. W. 310; *South Bend Toy Co. v. Ins. Co.*, 3 S. D. 205, 52 N. W. 866; *Fromherz v. Ins. Co.*, 7 S. D. 187, 63 N. W. 784.

As to existence of ostensible agency. *First Nat. Bank v. Minneapolis & N. Elevator Co.*, 11 N. D. 280, 91 N. W. 436.

#### ARTICLE 2.— AUTHORITY OF AGENTS.

**§ 6325. 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. [R. C. 1905, § 5757; Civ. C. 1877, § 1343; R. C. 1899, § 4309.]

**§ 6326. 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. [R. C. 1905, § 5758; Civ. C. 1877, § 1344; R. C. 1899, § 4310.]

**§ 6327. Agents' 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. [R. C. 1905, § 5759; Civ. C. 1877, § 1345; R. C. 1899, § 4311.]

Filling blank in mortgage with larger amount than authorized. *Ellis v. Wait*, 4 S. D. 31, 54 N. W. 925.

Liability of corporation transferring stock on books at request of agent of owner. 45 L.R.A.(N.S.) 1079.

**§ 6328. How agency created.** An agency may be created and an authority may be conferred by a precedent authorization or a subsequent ratification. [R. C. 1905, § 5760; Civ. C. 1877, § 1346; R. C. 1899, § 4312.]

**§ 6329. No consideration necessary.** A consideration is not necessary to make an authority, whether precedent or subsequent, binding upon the principal. [R. C. 1905, § 5761; Civ. C. 1877, § 1347; R. C. 1899, § 4313.]

**§ 6330. 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. [R. C. 1905, § 5762; Civ. C. 1877, § 1348; R. C. 1899, § 4314.]

Parol authority of agent to sell real estate. *McLaughlin v. Wheeler*, 1 S. D. 497, 47 N. W. 816.

Effect of statute of frauds upon parol contracts for employment of agent which may, but are not intended to, be performed within a year. 15 L.R.A.(N.S.) 324.

**§ 6331. 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. [R. C. 1905, § 5763; Civ. C. 1877, § 1349; R. C. 1899, § 4315.]

Ratification of principal by accepting benefits. *Jewell Nursery Co. v. State*, 5 S. D. 623, 59 N. W. 1025; *Anderson v. Bank*, 4 N. D. 182, 59 N. W. 1029; *Union Trust Co. v. Phillips*, 7 S. D. 225, 63 N. W. 903; *Townsend v. Kennedy*, 6 S. D. 47, 60 N. W. 164.

Principal cannot take benefits of and repudiate an unauthorized agency. *Wyckoff v. Johnson*, 2 S. D. 91, 48 N. W. 837; *Union Trust Co. v. Phillips*, 7 S. D. 225, 63 N. W. 903.

One holding another out as agent; how far bound by agent's acts. *Aldrich v. Wilmarth*, 3 S. D. 523, 54 N. W. 811.

Fraud of agent; liability of principal by accepting benefits. *Nichols v. Bruns*, 5 D. 28, 37 N. W. 752.

Unauthorized agent does not bind principal unless ratified. *Clendenning v. Hawk*, 8 N. D. 419, 79 N. W. 878; *Larpenteur v. Williams*, 12 S. D. 373, 81 N. W. 625.

Corporation bound by knowingly accepting benefit of contract made by its agents and promoters. *Kaeppler v. Creamery Co.*, 12 S. D. 483, 81 N. W. 907; *Chase v. Creamery Co.*, 12 S. D. 529, 81 N. W. 951.

Vendor ratifies agent's unauthorized parol contract of sale by suing purchaser for value of property. *Plano Mfg. Co. v. Millage*, 14 S. D. 331, 85 N. W. 594.

Ratification of unauthorized mortgage, to be valid, must be in writing. *Morris v. Ewing*, 8 N. D. 99, 76 N. W. 1047.

Passage of bill by one branch of legislature providing for payment, not ratification of unauthorized contract by board of regents. *Jewell Nursery Co. v. State*, 8 S. D. 531, 67 N. W. 629.

Ratification only by accepting and retaining benefits with notice. *Fargo v. Cravens*, 9 S. D. 646, 70 N. W. 1053.

What amounts to ratification of unauthorized execution of written instrument. 27 Am. Dec. 343.

What will constitute an implied ratification of an unauthorized loan effected by an agent. 6 L.R.A.(N.S.) 311.

Ratification of unauthorized loan by agent, by retention of benefit. 2 B. R. C. 743.

Mere passive acceptance of the benefit by the principal as a ratification of an agent's unauthorized use of a third person's money for purposes beneficial to principal. 15 L.R.A.(N.S.) 693.

Effect of principal's performance of part of contract in ignorance of unauthorized provisions inserted by his agent as ratification of latter. 29 L.R.A.(N.S.) 210.

Payment by principal of what he deems property or services worth as ratification of agent's unauthorized contract for same. 29 L.R.A.(N.S.) 400.

Effect of attempted ratification to confer right or impose liability upon one not contemplated by agent as his principal. 2 B. R. C. 260.

Ratification of agent's unauthorized contract for the purchase or sale of real property as affected by the statute of frauds. 38 L.R.A.(N.S.) 783.

Ratification of bank's cashier's sale or lease of property. 31 L.R.A.(N.S.) 738.

**§ 6332. Part ratified, all ratified.** Ratification of part of an indivisible transaction is a ratification of the whole. [R. C. 1905, § 5764; Civ. C. 1877, § 1350; R. C. 1899, § 4316.]

**§ 6333. 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. [R. C. 1905, § 5765; Civ. C. 1877, § 1351; R. C. 1899, § 4317.]

Ratification of lease executed by agent without written authority, by owner after parting with title, is ineffectual. *Dobbs v. Atlas Elevator Co.*, 22 S. D. 226, 117 N. W. 128.

Ratification of what contracts not possible. 59 Am. St. Rep. 638.

Power to ratify criminal act. 5 Am. St. Rep. 618.

**§ 6334. Retroactive ratification limited.** No unauthorized act can be made valid retroactively to the prejudice of third persons without their consent. [R. C. 1905, § 5766; Civ. C. 1877, § 1352; R. C. 1899, § 4318.]

Ratification will not affect prior contract with third persons. *Clendenning v. Hawk*, 10 N. D. 90, 86 N. W. 114.

Ratification after loss of unauthorized act of another in securing fire insurance. 42 L.R.A.(N.S.) 1025.

Power of principal to ratify unauthorized contract of agent so as to raise cause of action in his own favor against the adverse party. 4 L.R.A.(N.S.) 431.

May unauthorized contract by one apparently acting on his own behalf but with undisclosed intention to act for another be ratified by such other. 1 B. R. C. 397.

**§ 6335. 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. [R. C. 1905, § 5767; Civ. C. 1877, § 1353; R. C. 1899, § 4319.]

**§ 6336. Authority.** An agent has such authority as the principal actually or ostensibly confers upon him. [R. C. 1905, § 5768; Civ. C. 1877, § 1354; R. C. 1899, § 4320.]

Principal bound by acts within agent's apparent, though in excess of his actual, authority. *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 is question of fact to be determined. *Corey v. Hunter*, 10 N. D. 5, 84 N. W. 570; *Reid v. Kellogg*, 8 S. D. 596, 67 N. W. 687.

General rules respecting authority of agent. 16 Am. St. Rep. 493.

Power of agent to borrow money. 29 Am. St. Rep. 93.

Admissibility of books of account to prove authority of agent. 52 L.R.A. 714.

Liability of principal on negotiable paper executed by an agent. 21 L.J.R.A.(N.S.) 1046.

Implied or presumed authority of a superintendent of a department to contract as to matters relating to his department. 38 L.R.A.(N.S.) 1135.

Right to reward offered for arrest when arrest is made by agent of claimant. 7 L.R.A.(N.S.) 218.

Effect of agent's consent to taking of property on crime of larceny. 7 L.R.A.(N.S.) 1149.

Agent's implied power to assent to rescission of contract. 37 L.R.A.(N.S.) 91.

Right of agent to locate mining claim. 7 L.R.A.(N.S.) 817.

Power of lessee or vendee to subject owner's interest to mechanics' liens under statutes giving liens for improvements made by agent. 23 L.R.A.(N.S.) 608.

**§ 6337. 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. [R. C. 1905, § 5769; Civ. C. 1877, § 1355; R. C. 1899, § 4321.]

**§ 6338. 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. [R. C. 1905, § 5770; Civ. C. 1877, § 1356; R. C. 1899, § 4322.]

Payment by principal of previous drafts drawn upon him by his agent without authority, as implied authority to draw another. 34 L.R.A.(N.S.) 440.

Right of an innocent payee to recover on a note signed in blank and intrusted to a third person, who exceeds his authority in filling up the blanks before delivery to the payee. 13 L.R.A.(N.S.) 490.

Conclusiveness of judgment as between plaintiff and principal of one who voluntarily conducted the defense. 37 L.R.A.(N.S.) 963.

As to similar provision in Cal. Civ. Code, § 2317, see *Wisp v. Hazard*, 66 Cal. 459, 6 Pac. 91.

**§ 6339. 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. [R. C. 1905, § 5771; Civ. C. 1877, § 1357; R. C. 1899, § 4323]

Placing "trust" after grantee's name in a deed not notice of any kind. *Rua v. Watson*, 13 S. D. 453, 83 N. W. 572.

**§ 6340. 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. [R. C. 1905, § 5772; Civ. C. 1877, § 1358; R. C. 1899, § 4324.]

Agent cannot make oral agreement changing terms of prior written contract of sale. *Reeves & Co. v. Corrigan*, 3 N. D. 415, 57 N. W. 80.

Powers of agent; express and implied. *Rea v. Eclipse*, 4 D. 21<sup>a</sup>, 30 N. W. 159.

Special agent has no power to appoint subagent. *Fargo v. Cravens*, 9 S. D. 646, 70 N. W. 1053.

Authority of agent to bind principal for expenses in taking appeal. *Pilcher v. Trust Co.*, 12 S. D. 52, 80 N. W. 151.

General agent of insurance company may, without knowledge of principal, employ soliciting agent whose waiver of condition against incumbrances will bind company. *Harding v. Ins. Co.*, 10 S. D. 64, 71 N. W. 755.

Agent to make collections cannot accept account against himself. *Union School Fur. Co. v. Mason*, 3 S. D. 147, 52 N. W. 671.

Bank cashier cannot contract beyond duties as such. *North Star B. & S. Co. v. Stebbins*, 2 S. D. 74, 48 N. W. 833.

Authority of agent strictly confined to particular kind of business placed in his hands. *Jasper v. Hazen*, 2 N. D. 401, 51 N. W. 583.

Admissions, to bind principal, must be within scope of authority. *Plymouth Co. Bank v. Gilman*, 3 S. D. 170, 52 N. W. 869. 44 Am. St. Rep. 782; *First Nat. Bank v. North*, 6 D. 136, 41 N. W. 736; *Roberts v. Machine Co.*, 8 S. D. 579, 67 N. W. 607; *La Rue v. Elevator Co.*, 3 S. D. 637, 54 N. W. 806; *Wendt v. Ry. Co.*, 4 S. D. 476, 57 N. W. 226;

**Esty v. Birnbaum**, 9 S. D. 174, 68 N. W. 290; **Parlman v. Young**, 2 D. 175, 4 N. W. 711; **Short v. Elevator Co.**, 1 N. D. 159, 45 N. W. 706.

General attorney of foreign corporation may employ attorneys to make foreclosure of trust deed effective for corporation. **Fowler v. Iowa Land Co.**, 18 S. D. 131, 99 N. W. 1095.

Authority of agents of initial carrier to extend its undertaking beyond its own line. 31 L.R.A.(N.S.) 32.

Implied authority of claim agent to promise employment to induce settlement of claim. 38 L.R.A.(N.S.) 826.

Liability of principal to exemplary damages where attachment was sued out by agent for collection of debt only. 29 L.R.A.(N.S.) 279.

Authority of sales agent who is authorized to collect the whole or part of purchase price on making the sale to receive payments afterwards. 38 L.R.A.(N.S.) 700.

Power of bank officer to bind bank by agreement varying the liability of parties to commercial paper from that imported on its face. 28 L.R.A.(N.S.) 511.

Power of agents to indorse negotiable paper. 27 L.R.A. 401.

Remedy of payee of check against one who has taken it on indorsement of unauthorized agent. 13 L.R.A.(N.S.) 211.

Implied warranty of genuineness upon sale of negotiable paper by agent. 36 L.R.A. 95.

Dealing with agent as a circumstance putting purchaser of negotiable paper on inquiry. 29 L.R.A.(N.S.) 351.

Effect of transfer by agent, without indorsement, of worthless check or note of third person. 10 L.R.A.(N.S.) 550.

Purchase of money order from agent of indorsee. 3 L.R.A.(N.S.) 136.

Whether agency to make sales includes authority to receive payment and create liabilities. 47 Am. Rep. 518.

Extent of authority conferred on traveling salesmen. 18 L.R.A. 663.

Authority of traveling salesman to make advertising contracts. 41 L.R.A.(N.S.) 1019.

Agent's authority to employ medical services for employe or other third person. 20 L.R.A. 635.

Implied power of cashier of bank to sell or lease property. 31 L.R.A.(N.S.) 737.

As to similar provision in Cal. Civ. Code, § 2319, see **Hoakins v. Swain**, 61 Cal. 338; **Harris v. San Diego Flume Co.**, 87 Cal. 526, 25 Pac. 758; **Consolidated Nat. Bank v. Pacific Coast S. S. Co.**, 95 Cal. 1, 29 Am. St. Rep. 85, 30 Pac. 96.

**§ 6341. 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. [R. C. 1905, § 5773; Civ. C. 1877, § 1359; R. C. 1899, § 4325.]

Disregard of principal's orders, when justified by unexpected emergencies. 6 Am. St. Rep. 37.

**§ 6342. 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. [R. C. 1905, § 5774; Civ. C. 1877, § 1360; R. C. 1899, § 4326.]

**§ 6343. 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 70 of this code. [R. C. 1905, § 5775; Civ. C. 1877, § 1361; R. C. 1899, § 4327.]

If agent contracts in his own name he alone is liable. **Nat. German Bank v. Lang**, 2 N. D. 66, 49 N. W. 414.

Traveling agent not authorized to enter into secret agreement in his own name to sell for less than market price. **Tollerton & W. Co. v. Gilruth**, 21 S. D. 320, 112 N. W. 842.

Contract to be binding on party alleged to have ratified it must have been executed by agent in name of or on behalf of such party. **Minder & J. Land Co. v. Brustuen**, 24 S. D. 537, 124 N. W. 723.

Principal as bona fide holder of bill or note passing through agent's hands. 5 L.R.A.(N.S.) 628.

Admissibility of extrinsic evidence to show whether principal or agent liable on note. 20 L.R.A. 705.

Taking commercial paper by agent as payment. 35 L.R.A.(N.S.) 49.

Implied or apparent authority of agent to take note payable to himself. 28 L.R.A.(N.S.) 341.

Assumption of debt by agent as payment. 17 L.R.A.(N.S.) 607.

**§ 6344. 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. [R. C. 1905, § 5776; Civ. C. 1877, § 1362; R. C. 1899, § 4328.]

Principal who empowers auctioneer to sell goods is bound by warranty of quality made by him. *Cysewski v. Fried*, 24 N. D. 152, 139 N. W. 104.

Extent of a commercial traveler's implied or ostensible authority to warrant goods. 39 L.R.A.(N.S.) 1151.

**§ 6345. Give usual covenants of warranty.** An authority to sell and convey real property includes authority to give the usual covenants of warranty. [R. C. 1905, § 5777; Civ. C. 1877, § 1363; R. C. 1899, § 4329.]

**§ 6346. 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. [R. C. 1905, § 5778; Civ. C. 1877, § 1364; R. C. 1899, § 4330.]

**§ 6347. 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. [R. C. 1905, § 5779; Civ. C. 1877, § 1365; R. C. 1899, § 4331.]

Agent for sale of machinery on commission cannot employ attorney for principal. *Kirby v. Scraper Co.*, 9 S. D. 623, 70 N. W. 1052.

Agent for sale of farm machinery cannot bind principal to receive second hand machinery in payment for new. *Shull v. Birdsall Co.*, 15 S. D. 8, 86 N. W. 654.

### ARTICLE 3.— MUTUAL OBLIGATIONS OF PRINCIPALS AND THIRD PERSONS.

**§ 6348. 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. [R. C. 1905, § 5780; Civ. C. 1877, § 1366; R. C. 1899, § 4332.]

Right of principal to proceeds of insurance policy taken by agent in his own name. 13 L.R.A.(N.S.) 152.

Right of defendant in action by undisclosed principal to avail himself of defenses that would have been available in an action by the agent in his own right on the contract. 28 L.R.A.(N.S.) 227.

Character of contract as affecting right of undisclosed principal to sue thereon. 29 L.R.A.(N.S.) 472; 39 L.R.A.(N.S.) 324.

Liability of telegraph company to undisclosed principal of sendee. 4 L.R.A.(N.S.) 678; 24 L.R.A.(N. S.) 1045.

May statute of frauds relating to sales of real property be satisfied by a memorandum which discloses that one of the parties acted for an undisclosed principal. 8 L.R.A.(N.S.) 733.

Parol evidence that one of the persons who signed an instrument relating to real property was agent for an undisclosed principal. 24 L.R.A.(N.S.) 315.

As to similar provision in Cal. Civ. Code, § 2330, see *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417, 49 Pac. 559, 3 Am. Neg. Rep. 7.

**§ 6349. 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. [R. C. 1905, § 5781; Civ. C. 1877, § 1367; R. C. 1899, § 4333.]

**§ 6350. 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. [R. C. 1905, § 5782; Civ. C. 1877, § 1368; R. C. 1899, § 4334.]

Knowledge of agent before employment; effect on principal. *Gregg v. Baldwin*, 9 N. D. 515, 84 N. W. 373.

Knowledge of bank cashier as to infirmities of note made to him as individual and transferred to bank is bank's knowledge. *Black Hills Bank v. Kellogg*, 4 S. D. 312, 56 N. W. 1071.

Principal is chargeable with knowledge of agent who was present when note was executed to principal. *New Birdsall Co. v. Stordalen*, 21 S. D. 26, 109 N. W. 516.

One who makes bank his agent to collect check is chargeable with agent's knowledge of forgery. *Greenwald v. Ford*, 21 S. D. 28, 109 N. W. 516.

Bank is liable for acts of cashier in receiving funds illegally, by giving check upon

corporation of which such cashier is treasurer. *Emerald Farmers' Elevator Co. v. Farmers' Bank*, 20 N. D. 270, 29 L.R.A.(N.S.) 567, 127 N. W. 522.

Notice to principal as notice to agent. 24 Am. St. Rep. 228.

How far corporation charged with knowledge of managing officer engaged in illegal act. 2 L.R.A.(N.S.) 993.

Whose knowledge of defects is imputed to employer. 41 L.R.A. 132.

Imputing knowledge of officers or agents of defect in highway to municipality. 20 L.R.A.(N.S.) 697.

Imputing agent's knowledge of vicious character of dog to owner. 24 L.R.A.(N.S.) 463.

Imputing to principal notice to agent while acting in other capacity. 3 L.R.A.(N.S.) 444.

Knowledge by agent that his own act is in excess of authority as notice to principal. 29 L.R.A.(N.S.) 82.

Effect of notice to purchaser's agent of vendor's intent to defraud his creditors. 32 L.R.A. 62.

Notice to traveling salesman as notice to his employer. 25 L.R.A.(N.S.) 231.

Notice to trustee in mortgage or deed of trust as notice to bondholders. 16 L.R.A.(N.S.) 1013.

Imputation of knowledge of bank officers to bank, where officers are personally interested. 29 L.R.A.(N.S.) 558.

The effect of notice to a subagent. 21 L.R.A. 340.

**§ 6351. 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. [R. C. 1905, § 5783; Civ. C. 1877, § 1369; R. C. 1899, § 4335.]

Liability of principal for unauthorized acts of agent. 22 Am. St. Rep. 189; 88 Am. St. Rep. 779.

**§ 6352. 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. [R. C. 1905, § 5784; Civ. C. 1877, § 1370; R. C. 1899, § 4336.]

As to similar provision in Cal. Civ. Code, § 2334, see *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417, 49 Pac. 559, 3 Am. Neg. Rep. 7.

**§ 6353. 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. [R. C. 1905, § 5785; Civ. C. 1877, § 1371; R. C. 1899, § 4337.]

**§ 6354. 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. [R. C. 1905, § 5786; Civ. C. 1877, § 1372; R. C. 1899, § 4338.]

As to rights of party dealing with agent as principal. *Hogen v. Klabo*, 13 N. D. 319, 100 N. W. 847.

**§ 6355. 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. [R. C. 1905, § 5787; Civ. C. 1877, § 1373; R. C. 1899, § 4339.]

Partner signing written contract may bind other partners within scope of his authority. *Pearson v. Post*, 2 D. 220, 9 N. W. 684; *Post v. Pearson*, 108 U. S. 418, 27 L.ed. 774, 2 S. Ct. R. 799.

Deed signed and sealed "Patrick M., Atty. in fact for Amelia B." is deed of Amelia although words "he," "his," etc., are used in deed. *Donovan v. Welch*, 11 N. D. 113, 90 N. W. 262.

**§ 6356. 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. [R. C. 1905, § 5788; Civ. C. 1877, § 1374; R. C. 1899, § 4340.]

Partner is liable for fraudulent representations of every other partner in selling partnership property. *Brundage v. Mellon*, 5 N. D. 72, 63 N. W. 209.



Acceptance of benefits without knowledge will not create liability for fraudulent representations of unauthorized agent. *Nichols v. Bruns*, 5 D. 28, 37 N. W. 752.

Wife not responsible for assault committed by husband, although acting as her servant. *Curtis v. Dinneen*, 4 D. 245, 30 N. W. 148.

Criminal and penal liability for act of agent. 41 L.R.A. 650.

Liability of principal for misconduct of agent. 55 Am. Dec. 317.

As to similar provision in Cal. Civ. Code, § 2338, see *Brown v. La Societe Francaise*, 138 Cal. 475, 71 Pac. 516, 13 Am. Neg. Rep. 251.

**§ 6357. 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. [R. C. 1905, § 5789; Civ. C. 1877, § 1375; R. C. 1899, § 4341.]

#### ARTICLE 4.—OBLIGATIONS OF AGENTS TO THIRD PERSONS.

**§ 6358. 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. [R. C. 1905, § 5790; Civ. C. 1877, § 1376; R. C. 1899, § 4342.]

As to liability of one assuming to act as agent. *Kennedy v. Stonehouse*, 13 N. D. 232, 3 A. & E. Ann. Cas. 217, 100 N. W. 258.

**§ 6359. 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. [R. C. 1905, § 5791; Civ. C. 1877, § 1377; R. C. 1899, § 4343.]

Personal liability of agents to third persons. 54 Am. Rep. 233; 22 Am. St. Rep. 508. —on contract executed without authority. 50 Am. Dec. 793.

When contracts executed in the name of agents only do not bind them personally. 57 Am. Rep. 536.

Personal liability of one known to be an agent for an undisclosed principal. 47 L.R.A.(N.S.) 232.

Liability of auctioneer or clerk of auction for return of money. 35 L.R.A.(N.S.) 481.

Personal liability of one signing contract by adding to his signature, words indicating representative capacity. 42 L.R.A.(N.S.) 2.

Agent's liability toward his principal and a third person respectively for money or property received in course of agency. 2 L.R.A.(N.S.) 657.

Judgment between principal and third person as *res judicata* in action between latter and agent. 37 L.R.A.(N.S.) 37.

1. Contract signed by members of school board in individual names for school supplies binds them as individuals. *Western Pub. House v. Murdick*, 4 S. D. 207, 56 N. W. 120, 21 L.R.A. 671; *Western Pub. House v. Bachman*, 2 S. D. 512, 51 N. W. 214.

Members of unincorporated association may be liable as partners for its acts. *Winona Lumber Co. v. Church*, 6 S. D. 498, 62 N. W. 107.

Right to recover from agent money paid him for his principal where the agency is undisclosed. 23 L.R.A.(N.S.) 560.

2. Personal liability to other contracting party of one who, without authority, assumes to contract as agent for another. 34 L.R.A.(N.S.) 518.

3. One who takes money under agreement to procure insurance and unjustifiably fails to do so thereby assumes risk. *Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. 726.

Agent's liability for misfeasance is not based on agency but on ground that he is wrongdoer. *Schlosser v. Great Northern R. Co.*, 20 N. D. 406, 127 N. W. 502.

Personal liability of officer for act or transaction in excess of corporate powers or in violation of law. 6 L.R.A.(N.S.) 1003.

Liability of agent for conversion, trespass or other positive act of wrongdoing against third persons under orders of employer. 50 L.R.A. 644.

Liability of landlord's agent for conversion of tenant's goods by one put in possession of premises before the expiration of the tenancy. 24 L.R.A.(N.S.) 226.

Liability of corporate officer for misrepresentations which induce the sale or purchase of stock. 1 L.R.A.(N.S.) 258; 28 L.R.A.(N.S.) 359.

False statements in reports required by statute to be made to public officers as basis of action by individuals at common law for deceit against officers personally. 6 L.R.A.(N.S.) 872.

Liability of agent in case license tax is not paid by principal. 12 L.R.A.(N.S.) 946.  
Liability of agent where statutes regulating business of foreign insurance companies have not been complied with. 20 L.R.A. 407.

Jurisdiction of equity over suits by a corporation or its representative to hold the officers liable for losses occasioned by their fraud, bad faith or negligence. 8 L.R.A.(N.S.) 739.

**§ 6360. 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. [R. C. 1905, § 5792; Civ. C. 1877, § 1378; R. C. 1899, § 4344.]

#### ARTICLE 5.— DELEGATION OF AGENCY.

**§ 6361. This article subject to chapter 2.** The provisions of this article are subject to the provisions of chapter 2 of this code. [R. C. 1905, § 5793; Civ. C. 1877, § 1379; R. C. 1899, § 4345.]

**§ 6362. 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. [R. C. 1905, § 5794; Civ. C. 1877, § 1380; R. C. 1899, § 4346.]

Delegation of power by agent. *Picket v. Rugg*, 1 N. D. 230, 46 N. W. 446.

Employment of attorney in interests of principal. *Davis v. Matthews*, 8 S. D. 300, 66 N. W. 456; *Kirby v. Western Wheeled Scraper Co.*, 9 S. D. 623, 70 N. W. 1052.

Agent may have authority to bind principal for payment of costs on appeal. *Pilcher v. Trust Co.*, 12 S. D. 52, 80 N. W. 151.

Bank at which note is payable has no implied authority to employ a bank in other city to collect note so as to make a payment to such subagent a payment to owner of note. *Sherman v. Port Huron Engine Co.*, 8 S. D. 343, 66 N. W. 1077; *Sherman v. Port Huron Engine Co.*, 13 S. D. 95, 82 N. W. 413.

As to similar provision in Cal. Civ. Code, § 2349, see *Rice v. Trinity County*, 110 Cal. 247, 42 Pac. 809; *Dingley v. McDonald*, 124 Cal. 682, 57 Pac. 574.

**§ 6363. 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. [R. C. 1905, § 5795; Civ. C. 1877, § 1381; R. C. 1899, § 4347.]

**§ 6364. 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. [R. C. 1905, § 5796; Civ. C. 1877, § 1382; R. C. 1899, § 4348.]

Agent not responsible for negligence or want of skill of subagent, when latter's employment was necessary. *Kunhert v. Angell*, 10 N. D. 59, 84 N. W. 579.

#### ARTICLE 6.— TERMINATION OF AGENCY.

**§ 6365. 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. [R. C. 1905, § 5797; Civ. C. 1877, § 1383; R. C. 1899, § 4349.]

Written power to sell land exhausted by a sale and agent cannot cancel first sale and make a second binding on principal. *Luke v. Griggs*, 4 D. 287, 30 N. W. 170.

- Presumption of continuance of agency. 1 L.R.A.(N.S.) 891.  
 Intoxication as justification for discharge of agent. 38 L.R.A.(N.S.) 339.  
 Necessity and sufficiency, as between principal and third person, of notice of termination of agency by act of the parties. 41 L.R.A.(N.S.) 663.  
 Effect of revocation of authority on agent's right to receive payment where security is not in his possession. 23 L.R.A.(N.S.) 423.  
 3. Effect of death on contract of agency. 23 L.R.A. 709.  
 5. Dissolution of partnership authorized to act as agent, as termination of agency. 23 L.R.A.(N.S.) 849.

**§ 6366. 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. [R. C. 1905, § 5798; Civ. C. 1877, § 1384; R. C. 1899, § 4350.]

Termination of agency as affecting insurance agent's right to commissions on renewals. 35 L.R.A.(N.S.) 153.

As to similar provision in Cal. Civ. Code, § 2356, see *Flanagan v. Brown*, 70 Cal. 254, 11 Pac. 706; *Blumenthal v. Goodall*, 89 Cal. 251, 26 Pac. 906.

1. Necessity of notice to revoke power of attorney. 1 L.R.A.(N.S.) 577.  
 Right to discharge attorney employed for contingent fee. 38 L.R.A.(N.S.) 389.
2. Power of sale in real estate mortgage is a power coupled with an interest, and is not terminated by mortgagor's death. *Reilly v. Phillips*, 4 S. D. 604, 57 N. W. 780; *Grandin v. Emmons*, 10 N. D. 223, 86 N. W. 723.

As to power not coupled with interest terminating by death of author. *Brown v. Skotland*, 12 N. D. 445, 97 N. W. 543.

Effect of death on contract of agency. 23 L.R.A. 709.  
 Effect of principal's death on agent's right to indorse commercial paper. 23 L.R.A. 711.

Effect of death of party to revoke warrant of attorney to confess judgment. 13 L.R.A. 797.

Effect of provision in power of attorney that it shall not be revoked by death. 6 L.R.A.(N.S.) 855.

Validity of agent's acts after death of his principal. 39 Am. Dec. 81.

## CHAPTER 73.

### PARTICULAR AGENCIES.

- ARTICLE 1. AUCTIONEERS, §§ 6367, 6368.  
 2. FACTORS, §§ 6369-6371.  
 3. SHIPMASTERS AND PILOTS, §§ 6372-6383.  
 4. SHIP'S MANAGERS, §§ 6384, 6385.

#### ARTICLE 1.—AUCTIONEERS.

**§ 6367. 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 6344.
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. [R. C. 1905, § 5799; Civ. C. 1877, § 1385; R. C. 1899, § 4351.]

Principal is bound by warranty of quality of goods made by auctioneer. *Cysewski v. Fried*, 24 N. D. 152, 139 N. W. 104.

Right of auctioneer or officer conducting a sale to make bids. 20 L.R.A. 503.

Liability of auctioneer or clerk of auction for return of money. 35 L.R.A.(N.S.) 481.

**§ 6368. 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. [R. C. 1905, § 5800; Civ. C. 1877, § 1386; R. C. 1899, § 4352.]

#### ARTICLE 2.—FACTORS.

**§ 6369. 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 6145. [R. C. 1905, § 5801; Civ. C. 1877, § 1387; R. C. 1899, § 4353.]

Factor may buy as well as sell property the subject of the agency, and may buy and sell in his own name as well as in name of principal. *Turner v. Crumpton*, 21 N. D. 294, 130 N. W. 937.

Contract to ship goods and agreement to receive them and to sell them and that if they are not sold vendor may take them back, is contract of agency and not of sale. *Sioux Remedy Co. v. Lindgren*, 27 S. D. 123, 130 N. W. 49.

**§ 6370. 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. [R. C. 1905, § 5802; Civ. C. 1877, § 1388; R. C. 1899, § 4354.]

**§ 6371. 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. [R. C. 1905, § 5803; Civ. C. 1877, § 1389; R. C. 1899, § 4355.]

#### ARTICLE 3.—SHIPMASTERS AND PILOTS.

**§ 6372. General agent of owner.** The master of a ship is a general agent for its owner in all matters concerning the same. [R. C. 1905, § 5804; Civ. C. 1877, § 1390; R. C. 1899, § 4356.]

**§ 6373. 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. [R. C. 1905, § 5805; Civ. C. 1877, § 1391; R. C. 1899, § 4357.]

**§ 6374. 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. [R. C. 1905, § 5806; Civ. C. 1877, § 1392; R. C. 1899, § 4358.]

**§ 6375. 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. [R. C. 1905, § 5807; Civ. C. 1877, § 1393; R. C. 1899, § 4359.]

**§ 6376. 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. [R. C. 1905, § 5808; Civ. C. 1877, § 1394; R. C. 1899, § 4360.]

Master's power to sell vessel and to hypothecate it and the freight and cargo. 63 Am. Dec. 638.

§ 6377. **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. [R. C. 1905, § 5809; Civ. C. 1877, § 1395; R. C. 1899, § 4361.]

§ 6378. **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. [R. C. 1905, § 5810; Civ. C. 1877, § 1396; R. C. 1899, § 4362.]

§ 6379. **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. [R. C. 1905, § 5811; Civ. C. 1877, § 1397; R. C. 1899, § 4363.]

§ 6380. **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. [R. C. 1905, § 5812; Civ. C. 1877, § 1398; R. C. 1899, § 4364.]

§ 6381. **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. [R. C. 1905, § 5813; Civ. C. 1877, § 1399; R. C. 1899, § 4365.]

§ 6382. **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. [R. C. 1905, § 5814; Civ. C. 1877, § 1400; R. C. 1899, § 4366.]

§ 6383. **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. [R. C. 1905, § 5815; Civ. C. 1877, § 1401; R. C. 1899, § 4367.]

#### ARTICLE 4.—SHIP'S MANAGERS.

§ 6384. **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. [R. C. 1905, § 5816; Civ. C. 1877, § 1402; R. C. 1899, § 4368.]

§ 6385. **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. [R. C. 1905, § 5817; Civ. C. 1877, § 1403; R. C. 1899, § 4369.]

## CHAPTER 74.

## PARTNERSHIP IN GENERAL.

- ARTICLE 1. WHAT CONSTITUTES A PARTNERSHIP, §§ 6386-6388.  
 2. PARTNERSHIP PROPERTY, §§ 6389-6394.  
 3. MUTUAL OBLIGATIONS OF PARTNERS, §§ 6395-6398.  
 4. RENUNCIATION OF PARTNERSHIP, §§ 6399, 6400.

## ARTICLE 1.—WHAT CONSTITUTES A PARTNERSHIP.

§ 6386. **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. [R. C. 1905, § 5818; Civ. C. 1877, § 1404; R. C. 1899, § 4370.]

Division of profit between loan agent and his principal not indicative of partnership. *Grigsby v. Day*, 9 S. D. 585, 70 N. W. 881.

Owners of ships, operating them jointly, are partners as to third parties. *Braithwaite v. Aiken*, 1 N. D. 475, 48 N. W. 361.

Agreement by which one purchases property with other's money, both to share profits or loss, is partnership. *McPherson v. Swift*, 22 S. D. 165, 113 Am. St. Rep. 907, 116 N. W. 76.

Necessity of sharing in profits to constitute partnership. *Clements v. Miller*, 13 N. D. 176, 100 N. W. 239.

What constitutes a partnership. 115 Am. St. Rep. 400.

What agreements establish partnership. 43 Am. St. Rep. 229.

What constitutes a partnership to deal in real estate. 5 L.R.A.(N.S.) 503.

Creation of partnership by speculative purchase of real estate for sale. 18 L.R.A.(N.S.) 1089.

Creation of partnership by provision for taking profits as compensation for use of real estate. 18 L.R.A.(N.S.) 1042.

Effect of agreement to share profits to create a partnership. 18 L.R.A.(N.S.) 963; 49 Am. Rep. 255; 58 Am. Rep. 99; 30 Am. St. Rep. 828.

Partnership undertakings between initial and connecting carrier. 31 L.R.A.(N.S.) 44.

Whether croppers occupy relation of partners. 37 Am. Rep. 609.

Partnership in business between husband and wife. 31 Am. St. Rep. 935.

Whether married woman may be a partner. 31 Am. St. Rep. 934; 34 Am. St. Rep. 339.

Infants as partners. 18 Am. St. Rep. 601.

As to similar provision in Cal. Civ. Code, § 2395, see *Quackenbush v. Sawyer*, 54 Cal. 439; *Hendy v. March*, 75 Cal. 566, 17 Pac. 702; *Quinn v. Quinn*, 81 Cal. 14, 22 Pac. 264; *Chapin v. Brown*, 101 Cal. 500, 35 Pac. 1051; *Chapman v. Hughes*, 104 Cal. 302, 37 Pac. 1048, 38 Pac. 109; *Plass v. Plass*, 122 Cal. 3, 54 Pac. 372; *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689, 20 Mor. Min. Rep. 419; *Krasky v. Wollpert*, 134 Cal. 338, 66 Pac. 309; *Kennedy & S. Lumber Co. v. Taylor*, 3 Cal. Unrep. 697, 31 Pac. 1122.

§ 6387. **Ship owners not partners.** Part owners of a ship do not by simply using it in joint enterprise become partners as to the ship. [R. C. 1905, § 5819; Civ. C. 1877, § 1405; R. C. 1899, § 4371.]

As to similar provision in Cal. Civ. Code, § 2396, see *Hendy v. March*, 75 Cal. 566, 17 Pac. 702.

§ 6388. **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. [R. C. 1905, § 5820; Civ. C. 1877, § 1406; R. C. 1899, § 4372.]

## ARTICLE 2.—PARTNERSHIP PROPERTY.

§ 6389. **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. [R. C. 1905, § 5821; Civ. C. 1877, § 1407; R. C. 1899, § 4373.]

Interest of deceased partner passes to administrator from surviving partner, who holds in trust for liquidation. *McPherson v. Swift*, 22 S. D. 165, 113 Am. St. Rep. 907, 116 N. W. 76.

When real estate will be considered partnership property. 27 L.R.A. 449; 37 L.R.A.(N.S.) 889.

Good will of a partnership and the means of making it productive on the death of a member or the dissolution of the firm. 96 Am. St. Rep. 610.

Name of business establishment as part of good will on dissolution. 15 L.R.A. 463.

Mining partnership. 83 Am. Dec. 104; 28 Am. St. Rep. 488.

Whether lands may become partnership property without a writing. 98 Am. Dec. 197; 27 Am. Rep. 270.

Purchase by one of the partners of property of, at a forced sale. 39 Am. Rep. 461.

Deceased partner's interest in partnership. 27 Am. Dec. 454.

As to similar provision in Cal. Civ. Code, § 2401, see *Chapman v. Hughes*, 104 Cal. 302, 37 Pac. 1048, 38 Pac. 109.

**§ 6390. Extent of member's interest.** The interest of each member of a partnership extends to every portion of its property. [R. C. 1905, § 5822; Civ. C. 1877, § 1408; R. C. 1899, § 4374.]

Rights of partners inter se in partnership real estate. 28 L.R.A. 86.

As to similar provision in Cal. Civ. Code, § 2402, see *Chapman v. Hughes*, 104 Cal. 302, 37 Pac. 1048, 38 Pac. 109.

**§ 6391. 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. [R. C. 1905, § 5823; Civ. C. 1877, § 1409; R. C. 1899, § 4375.]

As to similar provision in Cal. Civ. Code, § 2403, see *Shorb v. Beaudry*, 56 Cal. 446; *Chapman v. Hughes*, 104 Cal. 302, 37 Pac. 1048, 38 Pac. 109.

**§ 6392. 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. [R. C. 1905, § 5824; Civ. C. 1877, § 1410; R. C. 1899, § 4376.]

As to similar provision in Cal. Civ. Code, § 2404, see *Quinn v. Quinn*, 81 Cal. 14, 22 Pac. 264; *Smith v. Schultz*, 89 Cal. 526, 26 Pac. 1087; *Plass v. Plass*, 122 Cal. 3, 54 Pac. 372.

**§ 6393. 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. [R. C. 1905, § 5825; Civ. C. 1877, § 1411; R. C. 1899, § 4377.]

Partner failing to have his judgment in decree of dissolution made a lien upon partnership assets loses that right. *Wishek v. Hammond*, 10 N. D. 72, 84 N. W. 587.

Partner cannot obtain homestead right in partnership property as against copartner. *Brady v. Kreuger*, 8 S. D. 464, 66 N. W. 1083, 59 Am. St. Rep. 771.

Partner has lien for balance due him after settlement of partnership debts. *Betts v. Letcher*, 1 S. D. 182, 46 N. W. 193.

Copartner has lien upon interest in property acquired by partner subsequently to discharge in bankruptcy in payment of partnership debt for one-half of amount of overdraft upon firm. *Hefner v. Hefner*, 26 S. D. 74, 127 N. W. 634.

Rights and position of creditors, purchasers and other third parties in partnership real estate. 28 L.R.A. 161.

As to similar provision in Cal. Civ. Code, § 2405, see *Sheehy v. Graves*, 58 Cal. 449; *Leedom v. Ham*, 5 Cal. Unrep. 633, 48 Pac. 222.

**§ 6394. What presumed partnership property.** Property, whether real or personal, acquired with partnership funds is presumed to be partnership property. [R. C. 1905, § 5826; Civ. C. 1877, § 1412; R. C. 1899, § 4378.]

#### ARTICLE 3.—MUTUAL OBLIGATIONS OF PARTNERS.

**§ 6395. Partners trustees.** The relations of partners are confidential. They are trustees for each other within the meaning of chapter 70 of this code. Their obligations as such trustees are defined by that chapter. [R. C. 1905, § 5827; Civ. C. 1877, § 1413; R. C. 1899, § 4379.]

Partnership relation requires 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.

Misappropriation of partnership funds not embezzlement. *State v. Reddick*, 2 S. D. 124, 48 N. W. 846.

Partner may rely upon copartner's statements, and one knowingly procuring money by deceit is responsible. *Davenport v. Buchanan*, 6 S. D. 376, 61 N. W. 47.

Interest of deceased partner passes to administrator from surviving partner who holds in trust for liquidation. *McPherson v. Swift*, 22 S. D. 165, 113 Am. St. Rep. 907, 116 N. W. 76.

Allowance of interest in favor of or against partner during continuance of firm. 35 L.R.A. (N.S.) 220, 45 Am. Dec. 518.

Misappropriation of property of, by one of the partners. 8 Am. Dec. 297.

Misapplication of property by partner to the payment of his personal debt. 7 Am. St. Rep. 377.

As to similar provision in Cal. Civ. Code, § 2410, see *Wiester v. Wiester*, 5 Cal. Unrep. 686, 48 Pac. 1086.

**§ 6396. Highest good faith required.** In all proceedings connected with the formation, conduct, dissolution and liquidation of the partnership 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. [R. C. 1905, § 5828; Civ. C. 1877, § 1414; R. C. 1899, § 4380.]

As to similar provision in Cal. Civ. Code, § 2411, see *Wiester v. Wiester*, 5 Cal. Unrep. 686, 48 Pac. 1086; *Richards v. Fraser*, 112 Cal. 456, 55 Pac. 246; s. c., 136 Cal. 460, 69 Pac. 83.

**§ 6397. Each member must account to partnership.** Each member of a partnership must account to it for everything 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. [R. C. 1905, § 5829; Civ. C. 1877, § 1415; R. C. 1899, § 4381.]

Jurisdiction of court of equity over suit for a partnership accounting in respect of land in another jurisdiction. 23 L.R.A. (N.S.) 924.

Failure to account to partnership for partnership funds as theft, larceny or embezzlement. 31 L.R.A. (N.S.) 822.

Power of court to require accounting between members of partnership which is illegal or void, or which has been engaged in illegal business. 23 L.R.A. (N.S.) 478.

Liability of one party to an arrangement to share profits from gambling for money lost by a third person to the other party. 23 L.R.A. (N.S.) 522.

Right of one indorsing note for accommodation of firm to recover from firm after payment of note. 37 L.R.A. (N.S.) 784.

Right to subrogation of partner who pays firm debt. 54 L.R.A. 614.

Subrogation of retiring partner to rights of creditor where debts have been assumed on dissolution of partnership. 9 L.R.A. (N.S.) 117.

When accounting between members of partnership for illegal purpose compellable. 99 Am. St. Rep. 326.

As to similar provision in Cal. Civ. Code, § 2412, see *Sears v. Starbird*, 78 Cal. 225, 20 Pac. 547.

**§ 6398. No compensation.** A partner is not entitled to any compensation for services rendered by him to the partnership. [R. C. 1905, § 5830; Civ. C. 1877, § 1416; R. C. 1899, § 4382.]

Right of partner to compensation for services rendered to partnership. *Wisner v. Field*, 11 N. D. 257, 91 N. W. 67.

Right of partner to compensation for services rendered to the partnership. 17 L.R.A. (N.S.) 385.

Rights of estate of law partner in compensation for business unfinished at time of his death. 66 L.R.A. 821.

Right of surviving member of law partnership to compensation for services. 17 L.R.A. (N.S.) 402.

Surviving partner's right to compensation. 112 Am. St. Rep. 843.

As to similar provision in Cal. Civ. Code, § 2413, see *Osment v. McElrath*, 68 Cal. 466, 58 Am. Rep. 17, 9 Pac. 731; *Nevills v. Moore Min. Co.*, 135 Cal. 561, 67 Pac. 1054.

#### ARTICLE 4.—RENUNCIATION OF PARTNERSHIP.

**§ 6399. 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. [R. C. 1905, § 5831; Civ. C. 1877, § 1417; R. C. 1899, § 4383.]

§ 6400. **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. [R. C. 1905, § 5832; Civ. C. 1877, § 1418; R. C. 1899, § 4384.]

## CHAPTER 75.

### GENERAL PARTNERSHIP.

- ARTICLE 1. WHAT IS A GENERAL PARTNERSHIP, § 6401.  
 2. POWERS AND AUTHORITY OF PARTNERS, §§ 6402-6405.  
 3. MUTUAL OBLIGATIONS OF PARTNERS, §§ 6406-6409.  
 4. LIABILITY OF PARTNERS, §§ 6410-6413.  
 5. TERMINATION OF PARTNERSHIP, §§ 6414-6419.  
 6. LIQUIDATION, §§ 6420-6425.  
 7. OF THE USE OF FICTITIOUS NAMES, §§ 6426-6432.

#### ARTICLE 1.—WHAT IS A GENERAL PARTNERSHIP.

§ 6401. **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. [R. C. 1905, § 5833; Civ. C. 1877, § 1419; R. C. 1899, § 4385.]

#### ARTICLE 2.—POWERS AND AUTHORITY OF PARTNERS.

§ 6402. **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. [R. C. 1905, § 5834; Civ. C. 1877, § 1420; R. C. 1899, § 4386.]

§ 6403. **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. [R. C. 1905, § 5835; Civ. C. 1877, § 1421; R. C. 1899, § 4387.]

Authority conferred upon partnership may be exercised by any partner. *McLaughlin v. Wheeler*, 1 S. D. 497, 47 N. W. 816; *Pearson v. Post*, 2 D. 220, 9 N. W. 684.

Fraud of one binds all. *Brundage v. Mellon*, 5 N. D. 72, 63 N. W. 209.

Partner had authority to authorize clerk to execute note in firm name to obtain money for use in firm business. *Inman v. Brookman*, 28 S. D. 361, 133 N. W. 810.

Power over real estate of partners in firm formed to deal in real estate. 28 L.R.A. 106. Power of one partner to bind firm by a promissory note or bill of exchange under seal. 17 L.R.A. (N.S.) 969.

Power of one partner to give note affecting partnership real estate. 28 L.R.A. 97.

Power of one partner to limit the authority of another. 88 Am. St. Rep. 322.

As to similar provision in Cal. Civ. Code, § 2429, see *Myers v. Moulton*, 71 Cal. 498, 12 Pac. 505; *Smith v. Schultz*, 89 Cal. 526, 26 Pac. 1087.

§ 6404. **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. [R. C. 1905, § 5836; Civ. C. 1877, § 1422; R. C. 1899, § 4388.]

Draft made by partnership bank to one of the partners who signs it as cashier not conclusively void. *Noyes v. Crandall*, 6 S. D. 460, 61 N. W. 806.

Levy on assets of partnership under a writ against one partner only. 57 Am. St. Rep. 436.

Judgment against partnership on service of process on one member only. 44 Am. Dec. 570.

As to similar provision in Cal. Civ. Code, § 2430, see *Bernheim v. Porter*, 2 Cal. Unrep. 349, 4 Pac. 446; *Crites v. Wilkinson*, 66 Cal. 559, 4 Pac. 567; *Myers v. Moulton*, 71 Cal. 498, 12 Pac. 505; *Perkins v. Brock*, 80 Cal. 320, 22 Pac. 194; *Quinn v. Quinn*, 81 Cal. 14, 22 Pac. 264.

1. Power of one partner to assign partnership real estate for benefit of creditors. 28 L.R.A. 97.

Assignments for creditors executed by one partner only. 48 Am. Rep. 359.

2. Sale of good will of firm must be with authority or ratification of all members. *Griffing v. Dunn*, 23 S. D. 141, 120 N. W. 890.

One partner not empowered to dispose of good will of partnership. *Kelly v. Pierce*, 16 N. D. 234, 12 L.R.A. (N.S.) 80, 112 N. W. 995.

Power of one partner to sell all the goods of the firm. 30 Am. Dec. 290.

7. Bank cashier cannot purchase stock of boots and shoes in bank's name, although he is a partner. *North Star B. & S. Co. v. Stebbins*, 2 S. D. 74, 48 N. W. 833.

Power of one partner to bind partnership as a surety or indorser. 13 Am. Dec. 115.

— to obtain loan on credit of the firm. 48 Am. St. Rep. 438.

— to authorize an appearance for the firm. 13 Am. Dec. 726.

— to bind the firm by accommodation paper. 31 Am. St. Rep. 754.

— to dissolve partnership for definite period. 77 Am. St. Rep. 319.

Circumstances sufficient to put a purchaser of partnership paper on inquiry. 29 L.R.A. (N.S.) 356.

**§ 6405. 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. [R. C. 1905, § 5837; Civ. C. 1877, § 1423; R. C. 1899, § 4389.]

As to similar provision in Cal. Civ. Code, § 2431, see *Gibson v. Henley*, 131 Cal. 6, 63 Pac. 61.

#### ARTICLE 3.— MUTUAL OBLIGATIONS OF PARTNERS.

**§ 6406. 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. [R. C. 1905, § 5838; Civ. C. 1877, § 1424; R. C. 1899, § 4390.]

**§ 6407. 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. [R. C. 1905, § 5839; Civ. C. 1877, § 1425; R. C. 1899, § 4391.]

As to similar provision in Cal. Civ. Code, § 2436, see *Bremner v. Leavitt*, 109 Cal. 130, 41 Pac. 859.

**§ 6408. May engage in separate business.** A partner may engage in any separate business, except as otherwise provided by the last two sections. [R. C. 1905, § 5840; Civ. C. 1877, § 1426; R. C. 1899, § 4392.]

As to similar provision in Cal. Civ. Code, § 2437, see *Bremner v. Leavitt*, 109 Cal. 130, 41 Pac. 859.

**§ 6409. 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. [R. C. 1905, § 5841; Civ. C. 1877, § 1427; R. C. 1899, § 4393.]

As to similar provision in Cal. Civ. Code, § 2438, see *Bremner v. Leavitt*, 109 Cal. 130, 41 Pac. 859.

#### ARTICLE 4.— LIABILITY OF PARTNERS.

**§ 6410. Liable to third persons.** Every general partner is liable to third persons for all the obligations of the partnership jointly with his copartners. [R. C. 1905, § 5842; Civ. C. 1877, § 1428; R. C. 1899, § 4394.]

Necessity of sharing in profits to constitute partnership. *Clements v. Miller*, 13 N. D. 176, 100 N. W. 239.

Right of one accepting negotiable paper for accommodation of firm to recover from firm after payment of paper. 37 L.R.A.(N.S.) 785.

Availability to maker of defense that commercial paper was partnership paper as against transferee after maturity. 46 L.R.A. 771.

Effect of judgment against some of partners to release liability of others. 43 L.R.A. 161.

Effect on right of individual partners of sale by firm of good will of business with or without an agreement not to re-engage in the same business. 19 L.R.A.(N.S.) 769.

Preferences as between partnership creditors and creditors of the individual partners. 35 Am. Rep. 306.

Separate property of partners, liability of for partnership debts. 18 Am. Dec. 280.

Assignment for benefit of creditors by partnership. 57 Am. Dec. 505; 58 Am. St. Rep. 90; 48 Am. Rep. 359.

Rights and remedies of creditors of partnership. 43 Am. St. Rep. 364.

As to similar provision in Cal. Civ. Code, § 2442, see *Northern Ins. Co. v. Potter*, 63 Cal. 157; *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456; *Stuart v. Adams*, 89 Cal. 367, 26 Pac. 970; *Smith v. Schultz*, 89 Cal. 526, 26 Pac. 1087.

**§ 6411. Liability defined by chapter 72.** The liability of general partners for each other's acts is defined by chapter 72 of this code. [R. C. 1905, § 5843; Civ. C. 1877, § 1429; R. C. 1899, § 4395.]

Partner liable for fraud committed by copartner in course of their business. *Brundage v. Mellon*, 5 N. D. 72, 63 N. W. 209.

Liability of one partner for the tortious acts of another. 67 Am. St. Rep. 32.

Criminal and penal liability for act of partner. 41 L.R.A. 650.

— for sale of intoxicating liquor by partner. 16 L.R.A.(N.S.) 786; 20 L.R.A.(N.S.) 321; 33 L.R.A.(N.S.) 419.

Liability of partner to action for false imprisonment for act of copartner. 3 L.R.A.(N.S.) 221.

Suspension or disbarment of attorney for partner's misconduct in withholding client's money or property. 19 L.R.A.(N.S.) 418.

Liability of partner for libel published without his consent. 26 L.R.A. 779.

Liability of one party to an arrangement to share profits from gambling for money lost by a third person to the other party. 23 L.R.A.(N.S.) 522.

Attachment of individual property of one partner for fraud of another. 25 L.R.A. 645.

Liability of physician or surgeon for acts of partner. 42 L.R.A.(N.S.) 786.

Assumption by partnership of individual debts of partners. 29 L.R.A. 681.

Liability of partnership for torts. 51 L.R.A. 463.

As to similar provision in Cal. Civ. Code, § 2443, see *Smith v. Schultz*, 89 Cal. 526, 26 Pac. 1087; *Lane v. Turner*, 114 Cal. 396, 46 Pac. 290; *Gibson v. Henley*, 131 Cal. 6, 63 Pac. 61.

**§ 6412. 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. [R. C. 1905, § 5844; Civ. C. 1877, § 1430; R. C. 1899, § 4396.]

Proof of partnership by general reputation. 38 Am. Dec. 481.

Liability of one held out as a partner. 22 Am. St. Rep. 757.

As to similar provision in Cal. Civ. Code, § 2444, see *Nofsinger v. Goldman*, 122 Cal. 609, 55 Pac. 425.

**§ 6413. 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. [R. C. 1905, § 5845; Civ. C. 1877, § 1431; R. C. 1899, § 4397.]

Dormant partners, who are and their powers and liabilities. 56 Am. Dec. 147.

As to similar provision in Cal. Civ. Code, § 2445, see *Nofsinger v. Goldman*, 122 Cal. 609, 55 Pac. 425.

#### ARTICLE 5.—TERMINATION OF PARTNERSHIP.

**§ 6414. 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. [R. C. 1905, § 5846; Civ. C. 1877, § 1432; R. C. 1899, § 4398.]

**§ 6415. Causes dissolving.** A general partnership is dissolved as to all the partners:

1. By lapse of 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. [R. C. 1905, § 5847; 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.

Causes sufficient for dissolution of partnership. 69 Am. St. Rep. 410.

Physical or mental incapacity of partner as dissolution, or a ground for dissolution, of a partnership. 47 L.R.A.(N.S.) 839.

Dissolution of partnership by reason of formation of corporation. 31 L.R.A.(N.S.) 471.

As to similar provision in Cal. Civ. Code, § 2450, see *Louis v. Elfelt*, 89 Cal. 547, 26 Pac. 1095; *Chapman v. Hughes*, 104 Cal. 302, 37 Pac. 1048, 38 Pac. 109.

3. Continuation of partnership owning real estate after death of partner. 28 L.R.A. 106.

Name of business establishment as part of good will on dissolution by death. 15 L.R.A. 463.

Dissolution by death, of partnership authorized to act as agent, as termination of agency. 23 L.R.A.(N.S.) 850.

Termination of contract of employment by death of member of employing firm. 21 L.R.A.(N.S.) 919.

Effect of death of one member. 77 Am. Dec. 114; 86 Am. Dec. 600; 79 Am. St. Rep. 709.

Carrying on of partnership business by representative of deceased partner. 86 Am. Dec. 600; 79 Am. St. Rep. 709.

Continuance of partnership for benefit of heirs of deceased partner. 56 Am. Dec. 517, 79 Am. St. Rep. 709.

6. Dissolution of partnership by a decree. 98 Am. Dec. 260.

**§ 6416. 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. [R. C. 1905, § 5848; Civ. C. 1877, § 1434; R. C. 1899, § 4400.]

Duty of partnership toward employes as to changes of personnel of partnership. 6 L.R.A. 807.

**§ 6417. 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. [R. C. 1905, § 5849; Civ. C. 1877, § 1435; R. C. 1899, § 4401.]

**§ 6418. 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. [R. C. 1905, § 5850; Civ. C. 1877, § 1436; R. C. 1899, § 4402.]

Making two deposits in one year during existence of a banking firm is a dealing within this section. *Tobin v. McKinney*, 14 S. D. 52, 84 N. W. 228.

Liability of partner continues after dissolution until notice, as to parties doing business with partnership. *Cornwall v. McKinney*, 12 S. D. 118, 30 N. W. 171.

Dissolution; effect of settlement; setting aside contract. *Little v. Little*, 2 N. D. 175, 49 N. W. 736.

When notice of dissolution of partnership required and what sufficient. 26 Am. Dec. 290.

Liability under continuing guaranty running to partnership for goods sold or credits extended after a change in the firm. 14 L.R.A. (N.S.) 1231.

Liability of retiring member of mining partnership for debts subsequently incurred. 22 L.R.A. (N.S.) 851.

Liability of corporation formed by firm for debts of old concern in absence of express assumption or fraud. 29 L.R.A. (N.S.) 589.

Assumption of debts on dissolution of partnership. 25 L.R.A. 274; 9 L.R.A. (N.S.) 49.

Acceptance of note of partner assuming debts on dissolution of firm as release of other partner. 9 L.R.A. (N.S.) 92.

Dissolution of partnership authorized to act as agent as termination of agency. 23 L.R.A. (N.S.) 849.

Necessity for notice of dissolution to prevent continuing partner from reviving barred debt. 15 L.R.A. 659.

Necessity of actual notice of retirement of member of firm to relieve retiring member from liability on obligation renewed after his retirement. 4 L.R.A. (N.S.) 800.

As to similar provision in Cal. Civ. Code, § 2453, see *Dellapiazza v. Foley*, 112 Cal. 380, 44 Pac. 727.

**§ 6419. 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. [R. C. 1905, § 5851; Civ. C. 1877, § 1437; R. C. 1899, § 4403.]

#### ARTICLE 6.—LIQUIDATION.

**§ 6420. 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. [R. C. 1905, § 5852; Civ. C. 1877, § 1438; R. C. 1899, § 4404.]

Powers, rights, remedies and liabilities of partners after dissolution. 40 Am. St. Rep. 561.

As to similar provision in Cal. Civ. Code, § 2458, see *Louis v. Elfelt*, 89 Cal. 547, 26 Pac. 1095.

**§ 6421. 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. [R. C. 1905, § 5853; Civ. C. 1877, § 1439; R. C. 1899, § 4405.]

When should receivers be appointed for partnership. 72 Am. St. Rep. 80.

As to similar provision in Cal. Civ. Code, § 2459, see *Hawn v. Seventy-Six Land & Water Co.*, 74 Cal. 418, 16 Pac. 196; *Quinn v. Quinn*, 81 Cal. 14, 22 Pac. 264; *Louis v. Elfelt*, 89 Cal. 547, 26 Pac. 1095.

**§ 6422. 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. [R. C. 1905, § 5854; Civ. C. 1877, § 1440; R. C. 1899, § 4406.]

**§ 6423. 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. [R. C. 1905, § 5855; Civ. C. 1877, § 1441; R. C. 1899, § 4407.]

As to similar provision in Cal. Civ. Code, § 2461, see *Hawn v. Seventy-Six Land & Water Co.*, 74 Cal. 418, 16 Pac. 196; *Quinn v. Quinn*, 81 Cal. 14, 22 Pac. 264; *Berson v. Ewing*, 84 Cal. 89, 23 Pac. 1112; *Louis v. Elfelt*, 89 Cal. 547, 26 Pac. 1095.

**§ 6424 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. [R. C. 1905, § 5856; Civ. C. 1877, § 1442; R. C. 1899, § 4408.]

As to foreclosure by advertisement with sheriff's deed not being subject to attack on ground in invalidity because of usury in mortgage. *Grove v. Great Northern Loan Co.*, 17 N. D. 352, 116 N. W. 345.

Interest of deceased partner passes to administrator from surviving partner who holds in trust for liquidation. *McPherson v. Swift*, 22 S. D. 165, 113 Am. St. Rep. 907, 116 N. W. 76.

Winding up of firm owning real estate. 28 L.R.A. 107.

Power of continuing partner over partnership real estate. 28 L.R.A. 98.

Right of partner to compensation for services in winding up firm business. 17 L.R.A.(N.S.) 396.

Commercial paper after dissolution of partnership as payment of firm debt 35 L.R.A (N.S) 55.

Power of member of dissolved firm to bind other members by a note given in payment of a firm debt 32 L.R.A.(N.S) 255.

Revival of partnership debt after dissolution by one partner giving note. 15 L.R.A. 660.

As to similar provision in Cal. Civ. Code. § 2462, see *Louis v. Elfelt*. 89 Cal. 547, 26 Pac 1095.

**§ 6425. 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 [R. C. 1905, § 5857; Civ. C. 1877, § 1442; R. C. 1899, § 4409.]

Powers and duties of surviving partners. 65 Am. Dec. 295.

Admissibility in evidence of entries in books of account by surviving partner. 52 L.R.A 846

Position and powers of surviving partner in partnership real estate. 28 L.R.A 129.

Deceased partner's interest in realty held by partnership 27 Am Dec. 454.

Rights in partnership real estate as between surviving partner and heirs of deceased partner. 27 L.R.A. 350

Right of subrogation of partner who pays firm debt after death of copartner. 54 L.R.A. 621.

Surviving partner as creditor of firm 28 L.R.A 132.

Surviving partner's right to compensation. 17 L.R.A.(N.S.) 399; 112 Am St. Rep. 843

Note by surviving partner as payment of firm indebtedness. 35 L.R.A (N.S) 54.

#### ARTICLE 7.— OF THE USE OF FICTITIOUS NAMES.

**§ 6426. 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 successive 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. [R. C. 1905, § 5858; Civ. C. 1877, § 1443; R. C. 1899, § 4410.]

Objection that certificate of partnership has not been filed can only be taken by pleading the same. *Heegaard v. Dakota L. & T. Co.*, 3 S. D. 569, 54 N. W. 656.

Owners of several ships operating them jointly are liable as partners. *Braithwaite v. Aiken*, 1 N. D. 475, 48 N. W. 361.

Inapplicable to firm name showing only surnames of parties. *Walker v. Stimmel*, 15 N. D. 484, 107 N. W. 1081.

Failure of partnership to file certificate containing their full names will not invalidate their transaction. *Borce v. De Jong*, 22 S. D. 163, 116 N. W. 83.

Failure of partnership to publish and file certificate disclosing names of partners must be taken advantage of by answer amounting to plea in abatement. *Drake v. Great Northern R. Co.*, 24 S. D. 19, 123 N. W. 82.

As to similar provision in Cal. Civ. Code, § 2466, see *Fabian & Co v. Callahan*, 56 Cal. 159; *Byers v. Bourret*, 64 Cal. 73, 28 Pac. 61; *Sweeny v. Stanford*, — Cal. . ., 6 Pac. 688; *Sweeny v. Stanford*, 67 Cal. 635, 8 Pac. 444; *Wing Co. v. Baldwin*, 70 Cal. 194, 11 Pac. 565; *Lee v. Orr*, 70 Cal. 398, 11 Pac. 745; *Phillips v. Goldtree*, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451; *Goldtree v. Swinford*, 74 Cal. 586, 16 Pac. 493; *Pendleton v. Cline*, 85 Cal. 142, 24 Pac. 659; *Carlock v. Cagnaacci*, 88 Cal. 600, 26 Pac. 597; *McLean v. Crow*, 88 Cal. 644, 26 Pac. 596; *Re Dennery*, 89 Cal. 101, 26 Pac. 639; *Meads v. Lasar*, 92 Cal. 221, 28 Pac. 935; *Cook v. Fowler*, 101 Cal. 89, 35 Pac. 431; *Gray v. Wells*,

118 Cal. 11, 50 Pac. 23; *Quan Wye v. Chin Lin Hee*, 123 Cal. 185, 55 Pac. 783; *North v. Moore*, 135 Cal. 621, 67 Pac. 1037.

**§ 6427. 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 fictitious or does not show the names of the persons interested as partners in such business. [R. C. 1905, § 5859; Civ. C. 1877, § 1444; R. C. 1899, § 4411.]

As to similar provision in Cal. Civ. Code, § 2467, see *Sweeny v. Stanford*, 67 Cal. 635, 8 Pac. 444.

**§ 6428. How certificates executed.** The certificate filed with the clerk of the district court, provided in section 6426, must be signed by the partners and acknowledged before some officer authorized to take acknowledgments of conveyances of real property. [R. C. 1905, § 5860; Civ. C. 1877, § 1445; 1881, ch. 30, § 1; R. C. 1899, § 4412.]

Inapplicable to firm name showing only surnames of parties. *Walker v. Stimmel*, 15 N. D. 484, 107 N. W. 1081.

Failure of partnership to file certificate containing their full names will not invalidate their transaction. *Borce v. De Long*, 22 S. D. 163, 116 N. W. 83.

As to similar provision in Cal. Civ. Code, § 2468, see *Philip Fabian & Co. v. Callahan*, 56 Cal. 159; *Ralph v. Lockwood*, 61 Cal. 155; *Byers v. Beurret*, 64 Cal. 73, 28 Pac. 61; *Cheney v. Newberry & Co.*, 67 Cal. 126, 7 Pac. 445; *Sweeny v. Stanford*, — Cal. —, 6 Pac. 638; *Sweeny v. Stanford*, 67 Cal. 635, 8 Pac. 444; *Lee v. Orr*, 70 Cal. 398, 11 Pac. 745; *Phillips v. Goldtree*, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451; *Goldtree v. Swinford*, 74 Cal. 536, 16 Pac. 493; *Re Dennerly*, 89 Cal. 101, 26 Pac. 639; *Cook v. Fowler*, 101 Cal. 89, 35 Pac. 431; *Gray v. Wells*, 118 Cal. 11, 50 Pac. 23; *Quan Wye v. Chin Lin Hee*, 123 Cal. 185, 55 Pac. 783; *North v. Moore*, 135 Cal. 621, 67 Pac. 1037.

**§ 6429. 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 transactions 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. [R. C. 1905, § 5861; Civ. C. 1877, § 1445; 1881, ch. 30, § 1; R. C. 1899, § 4412.]

**§ 6430. 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 6427, 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. [R. C. 1905, § 5862; Civ. C. 1877, § 1446; R. C. 1899, § 4413.]

As to similar provision in Cal. Civ. Code, § 2469, see *Mortimer v. Marder*, 93 Cal. 172, 28 Pac. 814.

**§ 6431. 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. [R. C. 1905, § 5863; Civ. C. 1877, § 1447; R. C. 1899, § 4414.]

As to similar provision in Cal. Civ. Code, § 2470, see *Mortimer v. Marder*, 93 Cal. 172, 28 Pac. 814.

**§ 6432. 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 7913 of the code of civil procedure are presumptive evidence of the facts therein stated. [R. C. 1905, § 5864; Civ. C. 1877, § 1448; R. C. 1895, § 4415.]

As to similar provision in Cal. Civ. Code, § 2471, see *Mortimer v. Marder*, 93 Cal. 172, 28 Pac. 814.

## CHAPTER 76.

## SPECIAL PARTNERSHIP.

- ARTICLE 1. FORMATION OF THE PARTNERSHIP, §§ 6433-6440.**  
**2. POWERS, RIGHTS AND DUTIES OF THE PARTNERS, §§ 6441-6450.**  
**3. LIABILITY OF PARTNERS, §§ 6451-6454.**  
**4. ALTERATION AND DISSOLUTION, §§ 6455-6457.**

## ARTICLE 1.—FORMATION OF THE PARTNERSHIP.

**§ 6433. 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. [R. C. 1905, § 5865; Civ. C. 1877, § 1449; R. C. 1899, § 4416.]

As to similar provision in Cal. Civ. Code, § 2477, see *Hawn v. Seventy-Six Land & Water Co.*, 74 Cal. 418, 16 Pac. 196; *Prince v. Lamb*, 128 Cal. 130, 60 Pac. 689, 20 Mor. Min. Rep. 419.

**§ 6434. How constituted.** A special partnership may consist of one or more persons called general partners and one or more persons called special partners. [R. C. 1905, § 5866; Civ. C. 1877, § 1450; R. C. 1899, § 4417.]

As to similar provision in Cal. Civ. Code, § 2478, see *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689, 20 Mor. Min. Rep. 419.

**§ 6435. 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. [R. C. 1905, § 5867; Civ. C. 1877, § 1451; R. C. 1899, § 4418.]

**§ 6436. 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. [R. C. 1905, § 5868; Civ. C. 1877, § 1452; R. C. 1899, § 4419.]

**§ 6437. 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. [R. C. 1905, § 5869; Civ. C. 1877, § 1453; R. C. 1899, § 4420.]

**§ 6438. Compliance necessary to formation.** No special partnership is formed until the provisions of the last five sections are complied with. [R. C. 1905, § 5870; Civ. C. 1877, § 1454; R. C. 1899, § 4421.]

**§ 6439. 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. [R. C. 1905, § 5871; Civ. C. 1877, § 1455; R. C. 1899, § 4422.]

§ 6440. **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. [R. C. 1905, § 5872; Civ. C. 1877, § 1456; R. C. 1899, § 4425.]

#### ARTICLE 2.— POWERS, RIGHTS AND DUTIES OF THE PARTNERS.

§ 6441. **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. [R. C. 1905, § 5873; Civ. C. 1877, § 1457; R. C. 1899, § 4424.]

As to similar provision in Cal. Civ. Code, § 2485, see *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689, 20 Mor. Min. Rep. 419.

§ 6442. **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. [R. C. 1905, § 5874; Civ. C. 1877, § 1458; R. C. 1899, § 4425.]

§ 6443. **Only general partners have authority.** The general partners only have authority to transact the business of a special partnership. [R. C. 1905, § 5875; Civ. C. 1877, § 1459; R. C. 1899, § 4426.]

§ 6444. **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. [R. C. 1905, § 5876; Civ. C. 1877, § 1460; R. C. 1899, § 4427.]

§ 6445. **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. [R. C. 1905, § 5877; Civ. C. 1877, § 1461; R. C. 1899, § 4428.]

§ 6446. **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. [R. C. 1905, § 5878; Civ. C. 1877, § 1462; R. C. 1899, § 4429.]

§ 6447. **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. [R. C. 1905, § 5879; Civ. C. 1877, § 1463; R. C. 1899, § 4430.]

§ 6448. **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. [R. C. 1905, § 5880; Civ. C. 1877, § 1464; R. C. 1899, § 4431.]

§ 6449. **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. [R. C. 1905, § 5881; Civ. C. 1877, § 1465; R. C. 1899, § 4432.]

**§ 6450. 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. [R. C. 1905, § 5882; Civ. C. 1877, § 1466; R. C. 1899, § 4436.]

#### ARTICLE 3.—LIABILITY OF PARTNERS.

**§ 6451. Of general partner.** The general partners in a special partnership are liable to the same extent as partners in a general partnership. [R. C. 1905, § 5883; Civ. C. 1877, § 1467; R. C. 1899, § 4434.]

**§ 6452. 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. [R. C. 1905, § 5884; Civ. C. 1877, § 1468; R. C. 1899, § 4435.]

**§ 6453. 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. [R. C. 1905, § 5885; Civ. C. 1877, § 1469; R. C. 1899, § 4436.]

**§ 6454. 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. [R. C. 1905, § 5886; Civ. C. 1877, § 1470; R. C. 1899, § 4437.]

#### ARTICLE 4.—ALTERATION AND DISSOLUTION.

**§ 6455. 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 of 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. [R. C. 1905, § 5887; Civ. C. 1877, § 1471; R. C. 1899, § 4438.]

**§ 6456. 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. [R. C. 1905, § 5888; Civ. C. 1877, § 1472; R. C. 1899, § 4439.]

**§ 6457. 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. [R. C. 1905, § 5889; Civ. C. 1877, § 1473; R. C. 1899, § 4440.]

## CHAPTER 77.

## INSURANCE IN GENERAL.

- ARTICLE 1. DEFINITION OF INSURANCE, § 6458.  
 2. WHAT MAY BE INSURED, §§ 6459, 6460A.  
 3. PARTIES TO THE CONTRACT, §§ 6461-6465.  
 4. INSURABLE INTEREST, §§ 6466-6479.  
 5. CONCEALMENT AND REPRESENTATION, §§ 6480-6502.  
 6. THE POLICY, §§ 6503-6518.  
 7. WARRANTIES, §§ 6519-6528.  
 8. PREMIUM, §§ 6529-6536.  
 9. LOSS, §§ 6537-6540.  
 10. NOTICE OF LOSS, §§ 6541-6546.  
 11. DOUBLE INSURANCE, §§ 6547, 654E.  
 12. REINSURANCE, §§ 6549-6552.

## ARTICLE 1.— DEFINITION OF INSURANCE.

**§ 6458. Defined.** Insurance is a contract whereby one undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event. [R. C. 1905, § 5890; Civ. C. 1877, § 1474; R. C. 1899, § 4441.]

Corporation undertaking to guarantee fixed revenue per acre for farm lands is an insurance company within statute. *State v. Hogan*, 8 N. D. 301, 78 N. W. 1051, 73 A. S. R. 759, 45 L.R.A. 166.

Insurer is entitled to such interpretation of clause making policy void because of increase of hazard occasioned by insured as will include mortgage placed upon property insured. *Lawver v. Globe Mut. Ins. Co.*, 25 S. D. 549, 127 N. W. 615.

What constitutes insurance. 47 L.R.A.(N.S.) 290.

## ARTICLE 2.— WHAT MAY BE INSURED.

**§ 6459. 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. [R. C. 1905, § 5891; Civ. C. 1877, § 1475; R. C. 1899, § 4442.]

**§ 6460. 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. [R. C. 1905, § 5892; Civ. C. 1877, § 1476; R. C. 1899, § 4443.]

**§ 6460a. All kinds subject to chapter.** All kinds of insurance are subject to the provisions of this chapter. [R. C. 1905, § 5893; Civ. C. 1877, § 1477; R. C. 1899, § 4444.]

Mutual fire insurance company is as effectively bound by section 1849 [6515 herein] as an insurance company organized on any other basis. *Peever Mercantile Co. v. State Mut. F. Ins. Co.*, 25 S. D. 406, 127 N. W. 559.

## ARTICLE 3.—PARTIES TO THE CONTRACT.

§ 6461. **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. [R. C. 1905, § 5894; Civ. C. 1877, § 1478; R. C. 1899, § 4445.]

§ 6462. **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. [R. C. 1905, § 5895; Civ. C. 1877, § 1479; R. C. 1899, § 4446.]

§ 6463. **Who may be insured.** Any one except a public enemy may be insured. [R. C. 1905, § 5896; Civ. C. 1877, § 1480; R. C. 1899, § 4447.]

§ 6464. **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. [R. C. 1905, § 5897; Civ. C. 1877, § 1481; R. C. 1895, § 4448.]

Failure to give notice under mortgage clause agreement of material changes in property will avoid policy. *Ormsby v. Ins. Co.*, 5 S. D. 72, 58 N. W. 301.

Liability of mortgagee for premium. *St. Paul Ins. Co. v. Upton*, 2 N. D. 229, 50 N. W. 702.

Mortgagee to whom policy is made payable may sue alone where his claims exceed amount of insurance. *Travelers' Ins. Co. v. Ins. Co.*, 1 N. D. 151, 45 N. W. 703.

Application of proceeds of insurance on mortgaged premises. 118 Am. St. Rep. 968.

Forfeiture of insurance as against mortgagees for breaches of condition. 58 Am. St. Rep. 667.

Rights of mortgagee under an insurance on the mortgaged property. 54 Am. Dec. 693.

§ 6465. **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. [R. C. 1905, § 5898; Civ. C. 1877, § 1482; R. C. 1899, § 4449.]

## ARTICLE 4.—INSURABLE INTEREST.

§ 6466. **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. [R. C. 1905, § 5899; Civ. C. 1877, § 1483; R. C. 1899, § 4450.]

What is insurable interest in property. 7 Am. Dec. 42; 20 Am. Dec. 510.

Insurable interest in unfinished building during its construction by a contractor. 43 L.R.A. 664.

—of sole and absolute owner of building and land not belonging to him. 38 L.R.A.(N.S.) 429.

—of one secondarily liable on an obligation, in property primarily charged with the same. 9 L.R.A.(N.S.) 490.

—of tenant in leased property. 42 L.R.A.(N.S.) 135.

—of husband in wife's property, or that in which she is interested. 66 L.R.A. 658.

§ 6467. **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. [R. C. 1905, § 5900; Civ. C. 1877, § 1484; R. C. 1899, § 4451.]

§ 6468. **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. [R. C. 1905, § 5901; Civ. C. 1877, § 1485; R. C. 1899, § 4452.]

§ 6469. **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. [R. C. 1905, § 5902; Civ. C. 1877, § 1486; R. C. 1899, § 4453.]

§ 6470. **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. [R. C. 1905, § 5903; Civ. C. 1877, § 1487; R. C. 1899, § 4454.]

§ 6471. **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. [R. C. 1905, § 5904; Civ. C. 1877, § 1488; R. C. 1899, § 4455.]

Insurable interest in the life of another, and necessity of. 57 Am. Dec. 93; 46 Am. Rep. 189; 52 Am. Rep. 135; 58 Am. Rep. 852; 128 Am. St. Rep. 302.

When life insurance regarded as wagering contract because of the small insurable interest. 60 Am. Rep. 729.

Insurance "for whom it may concern." 16 Am. Dec. 323.

§ 6472. **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. R. C. 1905, § 5905; Civ. C. 1877, § 1489; R. C. 1899, § 4456.]

Company not liable if insured had no interest in insured property at time of loss. Tierney v. Ins. Co., 4 N. D. 565, 62 N. W. 642; Ormsby v. Ins. Co., 5 S. D. 72, 58 N. W. 301.

Immaterial variance as to incumbrance, value or size of property will not vitiate policy. McNamara v. Ins. Co., 1 S. D. 342, 47 N. W. 288.

When insurable interest must exist under fire policies. 52 L.R.A. 330.

§ 6473. **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. [R. C. 1905, § 5906; Civ. C. 1877, § 1490; R. C. 1899, § 4457.]

When sale or alienation of property avoids insurance. 28 Am. Dec. 154.

§ 6474. **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. [R. C. 1905, § 5907; Civ. C. 1877, § 1491; R. C. 1899, § 4458.]

§ 6475. **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. [R. C. 1905, § 5908; Civ. C. 1877, § 1492; R. C. 1895, § 4459.]

§ 6476. **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. 1905, § 5909; R. C. 1895, § 4460.]

Policy covering building and personal property, having separate amounts on each, must be treated as two separate policies. First Nat. Bank v. German American Ins. Co., 23 N. D. 139, 38 L.R.A. (N.S.) 213, 134 N. W. 873.

Mortgage as terminating insurable interest in property. 38 L.R.A. 562.

§ 6477. **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. [R. C. 1905, § 5910; Civ. C. 1877, § 1493; R. C. 1899, § 4461.]

§ 6478. **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. [R. C. 1905, § 5911; Civ. C. 1877, § 1494; R. C. 1899, § 4462.]

Whether sale by one partner to another, whether amounts to change of title. 49 Am. Rep. 22; 52 Am. Rep. 442.

**§ 6479. 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. [R. C. 1905, § 5912; Civ. C. 1877, § 1494; R. C. 1899, § 4463.]

#### ARTICLE 5.— CONCEALMENT AND REPRESENTATION.

**§ 6480. Concealment defined.** A neglect to communicate that which a party knows and ought to communicate is called a concealment. [R. C. 1905, § 5913; Civ. C. 1877, § 1495; R. C. 1899, § 4464.]

Concealment of facts by insured in case of Lloyds policies. 55 L.R.A. 201.

Duty to notify insurer of facts which develop after submission of application, but before delivery of policy or certificate. 39 L.R.A. (N.S.) 951.

**§ 6481. Rescission on account of.** A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance. [R. C. 1905, § 5914; Civ. C. 1877, § 1496; R. C. 1899, § 4465.]

When concealment or misrepresentations avoid insurance. 35 Am. Rep. 629.

**§ 6482. 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. [R. C. 1905, § 5915; Civ. C. 1877, § 1497; R. C. 1899, § 4466.]

**§ 6483. 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. [R. C. 1905, § 5916; Civ. C. 1877, § 1498; R. C. 1899, § 4467.]

**§ 6484. 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. [R. C. 1905, § 5917; Civ. C. 1877, § 1499; R. C. 1899, § 4468.]

Materiality of representation. *Waterbury v. Ins. Co.*, 6 D. 468, 43 N. W. 697.

**§ 6485. 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. [R. C. 1905, § 5918; Civ. C. 1877, § 1500; R. C. 1899, § 4469.]

**§ 6486. 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. [R. C. 1905, § 5919; Civ. C. 1877, § 1501; R. C. 1899, § 4470.]

Life insurance agents accepting insurance when they know answers in the application are false. 7 Am. Rep. 128.

**§ 6487. 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 6504. [R. C. 1905, § 5920; Civ. C. 1877, § 1502; R. C. 1899, § 4471.]

Clause avoiding policy in case property is incumbered not waived by insurer's neglect to make inquiry if such incumbrance is a chattel mortgage. *Harding v. Ins. Co.*, 10 S. D. 64, 71 N. W. 755.

How far an undivided interest in property is a complete or full ownership for the purposes of insurance. 18 L.R.A. 481.

Vendee under executory contract as owner, where vendor holds legal title. 20 L.R.A.(N.S.) 775.

Retention of policy as waiver of mistake or fraud as to state of title. 67 L.R.A. 731.

Effect of insurance broker's knowledge as to title. 38 L.R.A.(N.S.) 637.

Conclusiveness of statements as to ownership, etc., in proof of loss. 44 L.R.A. 859.

**§ 6488. 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. [R. C. 1905, § 5921; Civ. C. 1877, § 1503; R. C. 1899, § 4472.]

**§ 6489. 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. [R. C. 1905, § 5922; Civ. C. 1877, § 1504; R. C. 1899, § 4473.]

**§ 6490. Form of representation.** A representation may be oral or written. [R. C. 1905, § 5923; Civ. C. 1877, § 1505; R. C. 1899, § 4474.]

**§ 6491. When may be made.** A representation may be made at the same time with issuing the policy or before it. [R. C. 1905, § 5924; Civ. C. 1877, § 1506; R. C. 1899, § 4475.]

**§ 6492. Rules of interpretation.** The language of a representation is to be interpreted by the same rules as the language of contracts in general. [R. C. 1905, § 5925; Civ. C. 1877, § 1507; R. C. 1899, § 4476.]

Failure to build a chimney as promised will not avoid policy. *Waterbury v. Ins. Co.*, 6 D. 468, 43 N. W. 697.

Warranties and representations and their effect. 16 Am. Dec. 462; 59 Am. Rep. 616.

**§ 6493. 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. [R. C. 1905, § 5926; Civ. C. 1877, § 1508; R. C. 1899, § 4477.]

**§ 6494. 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. [R. C. 1905, § 5927; Civ. C. 1877, § 1509; R. C. 1899, § 4478.]

**§ 6495. When may be withdrawn.** A representation may be altered or withdrawn before the insurance is effected, but not afterwards. [R. C. 1905, § 5928; Civ. C. 1877, § 1510; R. C. 1899, § 4479.]

**§ 6496. Time to which refers.** The completion of the contract of insurance is the time to which a representation must be presumed to refer. [R. C. 1905, § 5929; Civ. C. 1877, § 1511; R. C. 1899, § 4480.]

**§ 6497. 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. [R. C. 1905, § 5930; Civ. C. 1877, § 1512; R. C. 1899, § 4481.]

**§ 6498. When deemed false.** A representation is to be deemed false when the facts fail to correspond with its assertions or stipulations. [R. C. 1905, § 5931; Civ. C. 1877, § 1513; R. C. 1899, § 4482.]

**§ 6499. 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. [R. C. 1905, § 5932; Civ. C. 1877, § 1514; R. C. 1899, § 4483.]

Life insurance agents accepting insurance when they know answers in the application are false. 7 Am. Rep. 128.

Right of insured to return of premium where policy is void or voidable because of misrepresentations on his part. 32 L.R.A.(N.S.) 298.

**§ 6500. How materiality determined.** The materiality of a representation is determined by the same rule as the materiality of a concealment. [R. C. 1905, § 5933; Civ. C. 1877, § 1515; R. C. 1899, § 4484.]

**§ 6501. 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. 1905, § 5934; R. C. 1895, § 4485.]

Misrepresentation referred to in statute includes statements in applications for insurance, called warranties, by law of insurance. *Soules v. Brotherhood of American Yeomen*, 19 N. D. 23, 120 N. W. 760.

**§ 6502. 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. [R. C. 1905, § 5935; Civ. C. 1877, § 1516; R. C. 1899, § 4486.]

#### ARTICLE 6.—THE POLICY.

**§ 6503. Defined.** The written instrument in which a contract of insurance is set forth is called a policy of insurance. [R. C. 1905, § 5936; Civ. C. 1877, § 1517; R. C. 1899, § 4487.]

**§ 6504. 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. [R. C. 1905, § 5937; Civ. C. 1877, § 1518; R. C. 1899, § 4488.]

As to similar provision in Cal. Civ. Code, § 2587, see *Davis v. Phoenix Ins. Co.*, 111 Cal. 409, 43 Pac. 1115.

4. Effect of bond for title to defeat unconditional and sole ownership. 2 L.R.A.(N.S.) 512.

Vendor's lien as affecting sole and unconditional ownership. 7 L.R.A.(N.S.) 627.

Failure to record conveyance to insured as affecting his "sole and unconditional ownership." 22 L.R.A.(N.S.) 732.

Title, for purpose of insurance, of house on government land under homestead entry, as within sole and unconditional ownership clause in insurance policy. 8 L.R.A.(N.S.) 903.

Want of title to land where insured is sole and absolute owner of building. 38 L.R.A.(N.S.) 427.

**§ 6505. 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. [R. C. 1905, § 5938; Civ. C. 1877, § 1519; R. C. 1899, § 4489.]

**§ 6506. 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. [R. C. 1905, § 5939; Civ. C. 1877, § 1520; R. C. 1899, § 4490.]

**§ 6507. 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. [R. C. 1905, § 5940; Civ. C. 1877, § 1521; R. C. 1899, § 4491.]

**§ 6508. 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. [R. C. 1905, § 5941; Civ. C. 1877, § 1522; R. C. 1899, § 4492.]

Insuring under an assumed name. *Pollard v. Ins. Co.*, 1 S. D. 570, 47 N. W. 1060.

Condition rendering policy void on procuring additional insurance without consent of company cannot be waived by agent whose agency has expired. *Smith v. Ins. Co.*, 6 D. 433, 43 N. W. 810.

Representations in application signed by agent disregarded. *South Bend Toy Co. v. Ins. Co.*, 2 S. D. 17, 48 N. W. 310.

Knowledge of facts by agent may be a waiver. *Lyon v. Ins. Co.*, 6 D. 67, 50 N. W. 483.

Devesture of title by sheriff's deed being proved it is error to allow plaintiff to show deed to be void. *Tierney v. Ins. Co.*, 4 N. D. 565, 62 N. W. 642.

Failure of mortgagee to notify company of changes in condition of property. *Ormsby v. Ins. Co.*, 5 S. D. 72, 58 N. W. 301.

False statements in application and medical examination for life insurance constitute breach of warranty. *Knudson v. Legion of Honor*, 7 S. D. 214, 63 N. W. 911.

**§ 6509. 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. [R. C. 1905, § 5942; Civ. C. 1877, § 1523; R. C. 1899, § 4493.]

**§ 6510. 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. [R. C. 1905, § 5943; Civ. C. 1877, § 1524; R. C. 1899, § 4494.]

**§ 6511. Classified.** A policy is either open or valued. [R. C. 1905, § 5944; Civ. C. 1877, § 1525; R. C. 1899, § 4495.]

**§ 6512. 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. [R. C. 1905, § 5945; Civ. C. 1877, § 1526; R. C. 1899, § 4496.]

**§ 6513. Valued.** A valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum. [R. C. 1905, § 5946; Civ. C. 1877, § 1527; R. C. 1899, § 4497.]

Under standard policy, value of real property on total loss is conclusively fixed by total of all insurance written therein which is amount of policy and concurrent insurance. *Lawver v. Globe Mut. Ins. Co.*, 25 S. D. 549, 127 N. W. 615.

**§ 6514. 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. [R. C. 1905, § 5947; Civ. C. 1877, § 1528; R. C. 1899, § 4498.]

**§ 6515. 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. [R. C. 1905, § 5948; Civ. C. 1877, § 1529; R. C. 1899, § 4499.]

Is not unconstitutional because it declares that receipt of premium acknowledged in policy is conclusive evidence of payment. *Peever Mercantile Co. v. State Mut. F. Ins. Co.*, 25 S. D. 406, 127 N. W. 559.

Insurance company acknowledging receipt of premium in renewal policy cannot deny same in action on policy. *Peever Mercantile Co. v. State Mut. F. Asso.*, 23 S. D. 1, 119 N. W. 1008.

Insurance company cannot be permitted to show that actual date of issuance of policy was of later date than date recited in policy, where policy acknowledges receipt of premium. *Harrington v. Mutual L. Ins. Co.*, 21 N. D. 447, 34 L.R.A.(N.S.) 373, 131 N. W. 246.

Policy becomes binding on its delivery to insured, though it contains condition that policy shall not take effect until actual payment of first premium. *Chasse v. Bankers' Reserve Fund L. Ins. Co.*, 27 S. D. 70, 129 N. W. 568.

Waiver of conditions requiring payment of premium before delivery of policy. 57 Am. Rep. 514.

As to similar provision in Cal. Civ. Code, § 2598, see *Palmer v. Continental Ins. Co.*, 132 Cal. 68, 64 Pac. 97.

**§ 6516. 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. [R. C. 1905, § 5949; Civ. C. 1877, § 1530; R. C. 1899, § 4500.]

**§ 6517. 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. [R. C. 1905, § 5950; 1887, ch. 69, § 1; R. C. 1899, § 4501.]

**§ 6518. 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. [R. C. 1905, § 5951; 1887, ch. 69, § 2; R. C. 1899, § 4502.]

Notice to insured that premium note falls due on certain day not sufficient to forfeit policy for nonpayment of premium. *Epiphany Catholic Church v. Ins. Co.*, 16 S. D. 17, 91 N. W. 332.

Notice mailed twenty-three days before premium note falls due is insufficient. *Epiphany R. C. Church v. German Ins. Co.*, 16 S. D. 17, 91 N. W. 332.

First and last days in computing time for notice of premiums. 49 L.R.A. 208.

Mode of proving mailing of notice of maturity of premiums or assessments. 7 L.R.A.(N.S.) 238.

Necessity that notice of maturity of premiums or assessments sent through the mail be received. 7 L.R.A.(N.S.) 253.

Effect of custom to give insured notice of maturity of premium where insured is not otherwise entitled to notice. 20 L.R.A.(N.S.) 1037.

#### ARTICLE 7.—WARRANTIES.

**§ 6519. Classified.** A warranty is either express or implied. [R. C. 1905, § 5952; Civ. C. 1877, § 1531; R. C. 1899, § 4503.]

Policy of insurance cannot be avoided after loss where premium was received with full knowledge of facts. *Leisen v. St. Paul F. & M. Ins. Co.*, 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837.

Warranties and representations and their effect. 16 Am. Dec. 462; 59 Am. Rep. 816.

**§ 6520. No form necessary.** No particular form of words is necessary to create a warranty. [R. C. 1905, § 5953; Civ. C. 1877, § 1532; R. C. 1899, § 4504.]

Warranties in case of Lloyds policies. 55 L.R.A. 202.

When may statements be regarded as representations, although expressly denominated in the policy as warranties. 11 L.R.A.(N.S.) 981.

When answers concerning watchmen deemed to be warranties. 33 Am. Rep. 832.

**§ 6521. 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. [R. C. 1905, § 5954; Civ. C. 1877, § 1533; R. C. 1899, § 4505.]

**§ 6522. To what time may relate.** A warranty may relate to the past, the present, the future or to any or all of these. [R. C. 1905, § 5955; Civ. C. 1877, § 1534; R. C. 1899, § 4506.]

**§ 6523. 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. [R. C. 1905, § 5956; Civ. C. 1877, § 1535; R. C. 1899, § 4507.]

Policy of insurance cannot be avoided after loss where premium was received with full knowledge of facts. *Leisen v. St. Paul F. & M. Ins. Co.*, 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837.

On representations and promises made in application for policy as immaterial because policy does comply with this section. *Farmers' & M. State Bank v. United States Fidelity & G. Co.*, 28 S. D. 315, 36 L.R.A.(N.S.) 1152, 133 N. W. 247.

As to similar provision in Cal. Civ. Code, § 2607, see *National Bank v. Union Ins. Co.*, 88 Cal. 497, 22 Am. St. Rep. 324, 26 Pac. 509.

**§ 6524. 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. [R. C. 1905, § 5957; Civ. C. 1877, § 1536; R. C. 1899, § 4508.]

**§ 6525. 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. [R. C. 1905, § 5958; Civ. C. 1877, § 1537; R. C. 1899, § 4509.]

**§ 6526. 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. [R. C. 1905, § 5959; Civ. C. 1877, § 1538; R. C. 1899, § 4510.]

**§ 6527. 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. [R. C. 1905, § 5960; Civ. C. 1877, § 1539; R. C. 1899, § 4511.]

Forfeiture waived by demanding judgment for premium note. *Johnson v. Ins. Co.*, 1 N. D. 167, 45 N. W. 799.

Undisclosed incumbrances will avoid policy. *Peet v. Ins. Co.*, 7 S. D. 410, 64 N. W. 206.

Policy of insurance cannot be avoided after loss where premium was received with full knowledge of facts. *Leisen v. St. Paul F. & M. Ins. Co.*, 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837.

**§ 6528. 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. [R. C. 1905, § 5961; Civ. C. 1877, § 1540; R. C. 1899, § 4512.]

Policy of insurance cannot be avoided after loss where premium was received with full knowledge of the facts. *Leisen v. St. Paul F. & M. Ins. Co.*, 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837.

#### ARTICLE 8.—PREMIUM.

**§ 6529. 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. [R. C. 1905, § 5962; Civ. C. 1877, § 1541; R. C. 1899, § 4513.]

What amounts to waiver of payment of premium. 29 Am. Rep. 777.

As to similar provision in Cal. Civ. Code, § 2616, see *Joshua Hendy Mach. Works v. American Steam Boiler Ins. Co.*, 86 Cal. 248, 21 Am. St. Rep. 33, 24 Pac. 1018.

**§ 6530. 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. [R. C. 1905, § 5963; Civ. C. 1877, § 1542; R. C. 1899, § 4514.]

Premium note past due is collectible though policy is void while due and unpaid. *St. Paul Ins. Co. v. Coleman*, 6 D. 458, 43 N. W. 693; *St. Paul Ins. Co. v. Neidecken*, 6 D. 494, 43 N. W. 696; *Johnson v. Ins. Co.*, 1 N. D. 167, 56 N. W. 799.

Breach of agreement of insurer to make loan on policy as justifying rescission and recovery of premiums by insured. 30 L.R.A.(N.S.) 1202.

Right of insured to return of premium where insurer seeks rescission on ground of misrepresentation by insured. 32 L.R.A.(N.S.) 299.

As to similar provision in Cal. Civ. Code, § 2617, see *Joshua Hendy Mach. Works v. American Steam Boiler Ins. Co.*, 86 Cal. 248, 21 Am. St. Rep. 33, 24 Pac. 1018.

**§ 6531. Premium defined.** The term premium within the meaning of sections 6517, 6518 and 6530 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. [R. C. 1905, § 5964; 1887, ch. 69, § 3; R. C. 1899, § 4515.]

**§ 6532. 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. [R. C. 1905, § 5965; Civ. C. 1877, § 1543; R. C. 1899, § 4516.]

Return of assessment on benefit certificate proving void for fraud. 3 L.R.A.(N.S.) 114.

Right of insured to return of premium where policy is void or voidable because of misrepresentations on his part. 32 L.R.A.(N.S.) 298.

**§ 6533. 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 6517 and 6530. [R. C. 1905, § 5966; Civ. C. 1877, § 1544; R. C. 1895, § 4517.]

**§ 6534. 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. [R. C. 1905, § 5967; Civ. C. 1877, § 1545; R. C. 1899, § 4518.]

**§ 6535. Contribution to return.** When an over insurance is effected by simultaneous policies the insurers contribute to the premium to be returned in proportion to the amount insured by their respective policies. [R. C. 1905, § 5968; Civ. C. 1877, § 1546; R. C. 1899, § 4519.]

**§ 6536. 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. [R. C. 1905, § 5969; Civ. C. 1877, § 1547; R. C. 1899, § 4520.]

#### ARTICLE 9.—Loss.

**§ 6537. 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. [R. C. 1905, § 5970; Civ. C. 1877, § 1548; R. C. 1899, § 4521.]

Losses for which insurer is liable. 36 Am. St. Rep. 852.

What included in fire, loss by. 45 Am. Dec. 657; 23 Am. St. Rep. 915; 133 Am. St. Rep. 1087.

What is proximate cause of loss. 36 Am. St. Rep. 852.

Custom to pay certain class of losses as affecting liability of insurer for such a loss not covered by the policy. 19 L.R.A.(N.S.) 421.

Retention of policy as waiver of mistake or fraud of insurer or agent as to provisions as to risks insured against. 67 L.R.A. 711.

Loss by lightning. 26 L.R.A. 267.

Loss caused by excessive heat, smoke or soot from heating apparatus without actual ignition. 25 L.R.A.(N.S.) 501.

Meaning of "cyclone," "tornado," or other kind of wind storm, in an insurance policy. 8 L.R.A.(N.S.) 308.

Liability of insurer for fire caused by earthquake. 21 L.R.A.(N.S.) 103.

Loss by theft during fire. 35 L.R.A.(N.S.) 892.

Liability of insurer for property destroyed by mob or during riot. 20 L.R.A.(N.S.) 277.

Scope and effect of provision exempting insurer from loss caused by military or usurped power or order of civil authority, etc. 36 L.R.A.(N.S.) 1155.

Fall of building clause in fire insurance policies. 32 L.R.A.(N.S.) 604.

Liability of insurer for loss caused by explosion. 19 L.R.A. 594; 38 L.R.A.(N.S.) 474.

Explosion clause in fire insurance policy. 32 L.R.A.(N.S.) 607.

Effect of escape and explosion of gas upon liability of insurer 29 L.R.A. 359.

What constitutes an accident within accident policy. 30 L.R.A. 206; 54 Am. Rep. 302; 8 Am. St. Rep. 763.

Injury to insured by act of his own while asleep, as an accident. 1 L.R.A.(N.S.) 422.

Rupture of blood vessel as an accident within accident insurance policy. 19 L.R.A.(N.S.) 1206.

Words "sane or insane" or other words relating to mental condition in suicide clause in policy as referring to pure accident. 17 L.R.A.(N.S.) 261.

Previous diseased condition as affecting liability for death or injury from accident. 34 L.R.A.(N.S.) 445.

Liability under accident policy for condition caused by external infection without cut or abrasion. 42 L.R.A.(N.E.) 140.

— for death by drowning. 42 L.R.A.(N.S.) 631.

— for sickness or death caused by blood poisoning. 5 L.R.A.(N.S.) 926.

— for death from asphyxiation. 30 L.R.A. 212; 2 L.R.A.(N.S.) 168.

— for death or injury caused by medical treatment. 26 L.R.A.(N.S.) 1004.

— for injury or disability resulting from exertion or strain. 42 L.R.A.(N.S.) 562; 2 B. R. C. 367.

Risks covered by insurance against sunstroke. 6 L.R.A.(N.S.) 609.

May death or injury from substance taken internally be deemed to have been caused by external means. 30 L.R.A.(N.S.) 1181.

Death from suicide as one caused by external, violent and accidental means. 7 L.R.A.(N.S.) 223.

Applicability of provision in accident insurance policy exempting insurer in case of accident on railroad trains. 22 L.R.A.(N.S.) 1255.

Scope of provision exempting insurer, or limiting its liability, when insured is injured on "roadbed" of railroad company. 8 L.R.A.(N.S.) 970.

Boarding or alighting from moving train as defense under general provisions as to exposure to danger. 10 L.R.A.(N.S.) 957.

Scope and construction of provision for indemnity in case of injury while riding in or on a public conveyance. 37 L.R.A.(N.S.) 618.

Death in known violation of law. 60 Am. St. Rep. 160.

Death resulting from a criminal act. 21 Am. Rep. 542.

Necessity that assured's death be reasonable and legitimate consequence of violation of law, in order to relieve insurer. 13 L.R.A.(N.S.) 258.

Effect of the execution of insured for crime, on right to recover life or accident insurance. 14 L.R.A.(N.S.) 356.

**§ 6538. 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. [R. C. 1905, § 5971; Civ. C. 1877, § 1549; R. C. 1899, § 4522.]

**§ 6539. 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. [R. C. 1905, § 5972; Civ. C. 1877, § 1550; R. C. 1899, § 4523.]

Does general requirement as to external, violent and accidental means apply to a separate provision as to liability in case of death or injury from certain specified causes. 27 L.R.A.(N.S.) 480.

When death or injury may be deemed to have been caused by accidental means, though the voluntary act of insured was the primary cause thereof. 5 L.R.A.(N.S.) 657.

**§ 6540. 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. [R. C. 1905, § 5973; Civ. C. 1877, § 1551; R. C. 1899, § 4524.]

Negligence of assured will not avoid policy. *Angier v. Ina. Co.*, 10 S. D. 82, 71 N. W. 761, 65 Am. St. Rep. 685.

Policyholder cannot recover for loss of personal property where he did not exercise proper diligence to save same. *First Nat. Bank v. German American Ins. Co.*, 23 N. D. 139, 38 L.R.A.(N.S.) 213, 134 N. W. 873.

Liability of insurance company in case of intentional destruction of property by insured. 17 L.R.A.(N.S.) 189.

Voluntary exposure to unnecessary danger within meaning of accident insurance policy. 40 L.R.A. 432; 22 L.R.A.(N.S.) 779; 27 L.R.A.(N.S.) 1164; 40 L.R.A.(N.S.) 135; 12 Am. St. Rep. 272; 139 Am. St. Rep. 699.

Boarding or alighting from moving train as defense under general provision as to exposure to danger. 10 L.R.A.(N.S.) 957.

As to similar provision in Cal. Civ. Code, § 2629, see *Trojan Min. Co. v. Fireman's Ins. Co.*, 67 Cal. 27, 7 Pac. 4; *Sierra Mill. Smelting & Min. Co. v. Hartford F. Ins. Co.*, 76 Cal. 235, 18 Pac. 267; *McKenzie v. Scottish Union & Nat. Ins. Co.*, 112 Cal. 548, 44 Pac. 922.

#### ARTICLE 10.—NOTICE OF LOSS.

§ 6541. **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. [R. C. 1905, § 5974; Civ. C. 1877, § 1552; R. C. 1899, § 4525.]

Proof of loss in case of Lloyd's policies. 55 L.R.A. 200.

Delay in giving notice of claim under employers' indemnity policy. 47 L.R.A.(N.S.) 1214.

Condition in burglary insurance policy as to notice and proofs of loss. 46 L.R.A.(N.S.) 571.

Waiver by requiring further proofs of loss. 9 Am. St. Rep. 236.

§ 6542. **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. [R. C. 1905, § 5975; Civ. C. 1877, § 1553; R. C. 1899, § 4526.]

Effect of false swearing in proofs of loss. 32 L.R.A.(N.S.) 453.

Conclusiveness of proofs of loss as against insured or beneficiary. 44 L.R.A. 846.

Furnishing proofs of loss not under oath as substantial compliance with policy requiring proofs under oath. 28 L.R.A.(N.S.) 651.

Duty of insured to submit to examination and furnish information. 52 L.R.A. 424.

§ 6543. **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. [R. C. 1905, § 5976; Civ. C. 1877, § 1554; R. C. 1899, § 4527.]

Objection to proofs of loss come too late after suit brought. *Fosmark v. Equitable F. Asso.*, 23 S. D. 102, 120 N. W. 777.

Waiver of condition as to arbitration by accepting proof of loss. 15 L.R.A.(N.S.) 1073.

§ 6544. **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. [R. C. 1905, § 5977; Civ. C. 1877, § 1555; R. C. 1899, § 4528.]

Evidence examined and held waived. *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.

Forfeiture by failure to furnish proofs of loss within a stipulated time. 18 L.R.A. 85.

When delay in giving notice or making proof of death under policy of life insurance is excusable. 41 L.R.A.(N.S.) 285.

When strict compliance with requirement as to time of notice in accident or health policy is excused. 18 L.R.A.(N.S.) 109; 27 L.R.A.(N.S.) 319.

Validity of provision of accident or health policy requiring notice of accident or sickness within specified time. 18 L.R.A.(N.S.) 106.

Nondevelopment of injury as affecting time for giving the notice required by an accident insurance policy. 14 L.R.A.(N.S.) 503.

Delay in giving notice of claim under employers' indemnity policy. 38 L.R.A.(N.S.) 62; 47 L.R.A.(N.S.) 1214.

Presumption as to time of insured's death after seven years' absence. 26 L.R.A.(N.S.) 294.

**§ 6545. 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 insurer 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. 1905, § 5978; R. C. 1895, § 4529.]

**§ 6546. 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. [R. C. 1905, § 5979; Civ. C. 1877, § 1556; R. C. 1899, § 4530.]

Effect of failure of mortgagor to give notice or proof of loss upon right of mortgagee to recover under the policy. 14 L.R.A.(N.S.) 459.

#### ARTICLE 11.—DOUBLE INSURANCE.

**§ 6547. Defined.** A double insurance exists when the same person is insured by several insurers separately in respect to the same subject and interest. [R. C. 1905, § 5980; Civ. C. 1877, § 1557; R. C. 1899, § 4531.]

Waiver of conditions against other insurance. 27 Am. Rep. 601.

**§ 6548. 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. [R. C. 1905, § 5981; Civ. C. 1877, § 1558; R. C. 1899, § 4532.]

Insurer is entitled to such interpretation of clause making policy void because of increase of hazard occasioned by insured as will include mortgage placed upon property by insured. *Lawver v. Globe Mut. Ins. Co.*, 25 S. D. 549, 127 N. W. 615.

Liability of successive insurers. 28 Am. Dec. 121.

#### ARTICLE 12.—REINSURANCE.

**§ 6549. 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. [R. C. 1905, § 5982; Civ. C. 1877, § 1559; R. C. 1899, § 4533.]

Reinsurance and the remedies of the parties thereunder. 45 Am. St. Rep. 442.

Liability of reinsurer. 8 L.R.A.(N.S.) 845; 44 L.R.A.(N.S.) 317.

§ 6550. **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. [R. C. 1905, § 5983; Civ. C. 1877, § 1560; R. C. 1899, § 4534.]

§ 6551. **Contract of indemnity.** A reinsurance is presumed to be a contract of indemnity against liability and not merely against damage. [R. C. 1905, § 5984; Civ. C. 1877, § 1561; R. C. 1899, § 4535.]

§ 6552. **Original insured no interest.** The original insured has no interest in a contract of reinsurance. [R. C. 1905, § 5985; Civ. C. 1877, § 1562; R. C. 1899, § 4536.]

## CHAPTER 78.

### MARINE INSURANCE.

- ARTICLE 1. DEFINITION OF MARINE INSURANCE, § 6553.  
 2. INSURABLE INTEREST, §§ 6554-6560.  
 3. CONCEALMENT, §§ 6561-6564.  
 4. REPRESENTATIONS, §§ 6565, 6566.  
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 6. THE VOYAGE AND DEVIATION, §§ 6575-6580.  
 7. LOSS, §§ 6581-6591.  
 8. ABANDONMENT, §§ 6592-6608.  
 9. MEASURE OF INDEMNITY, §§ 6609-6619.

#### ARTICLE 1. DEFINITION OF MARINE INSURANCE.

§ 6553. **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. [R. C. 1905, § 5986; Civ. C. 1877, § 1563; R. C. 1899, § 4537.]

#### ARTICLE 2.—INSURABLE INTEREST.

§ 6554. **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. [R. C. 1905, § 5987; Civ. C. 1877, § 1564; R. C. 1899, § 4538.]

§ 6555. **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. [R. C. 1905, § 5988; Civ. C. 1877, § 1565; R. C. 1899, § 4539.]

§ 6556. **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. [R. C. 1905, § 5989; Civ. C. 1877, § 1566; R. C. 1899, § 4540.]

§ 6557. **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. [R. C. 1905, § 5990; Civ. C. 1877, § 1567; R. C. 1899, § 4541.]

§ 6558. **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. [R. C. 1905, § 5991; Civ. C. 1877, § 1568; R. C. 1899, § 4542.]

§ 6559. **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. [R. C. 1905, § 5992; Civ. C. 1877, § 1569; R. C. 1899, § 4543.]



§ 6560. **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. [R. C. 1905, § 5993; Civ. C. 1877, § 1570; R. C. 1899, § 4544.]

#### ARTICLE 3.—CONCEALMENT.

§ 6561. **Disclosures more extensive.** In marine insurance each party is bound to communicate in addition to what is required by section 6482 all the information which he possesses material to the risk, except such as is mentioned in section 6483 and to state the exact and whole truth in relation to all matters that he represents or upon inquiry assumes to disclose. [R. C. 1905, § 5994; Civ. C. 1877, § 1571; R. C. 1899, § 4545.]

§ 6562. **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. [R. C. 1905, § 5995; Civ. C. 1877, § 1572; R. C. 1899, § 4546.]

§ 6563. **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. [R. C. 1905, § 5996; Civ. C. 1877, § 1573; R. C. 1899, § 4547.]

§ 6564. **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. [R. C. 1905, § 5997; Civ. C. 1877, § 1574; R. C. 1899, § 4548.]

#### ARTICLE 4.—REPRESENTATIONS.

§ 6565. **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. [R. C. 1905, § 5998; Civ. C. 1877, § 1575; R. C. 1899, § 4549.]

§ 6566. **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. [R. C. 1905, § 5999; Civ. C. 1877, § 1576; R. C. 1899, § 4550.]

#### ARTICLE 5.—IMPLIED WARRANTIES.

§ 6567. **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. [R. C. 1905, § 6000; Civ. C. 1877, § 1577; R. C. 1899, § 4551.]

What embraced in warranty of seamanship. 1 Am. Dec. 165; 33 Am. Dec. 33.

Implied warranty of seaworthiness. 58 Am. Dec. 671.

§ 6568. **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. [R. C. 1905, § 6001; Civ. C. 1877, § 1578; R. C. 1899, § 4552.]

§ 6569. **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. [R. C. 1905, § 6002; Civ. C. 1877, § 1579; R. C. 1899, § 4553.]

§ 6570. **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. [R. C. 1905, § 6003; Civ. C. 1877, § 1580; R. C. 1899, § 4554.]

§ 6571. **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. [R. C. 1905, § 6004; Civ. C. 1877, § 1581; R. C. 1899, § 4555.]

§ 6572. **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. [R. C. 1905, § 6005; Civ. C. 1877, § 1582; R. C. 1899, § 4556.]

§ 6573. **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. [R. C. 1905, § 6006; Civ. C. 1877, § 1583; R. C. 1899, § 4557.]

§ 6574. **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. [R. C. 1905, § 6007; Civ. C. 1877, § 1584; R. C. 1899, § 4558.]

#### ARTICLE 6.—THE VOYAGE AND DEVIATION.

§ 6575. **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. [R. C. 1905, § 6008; Civ. C. 1877, § 1585; R. C. 1899, § 4559.]

§ 6576. **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. [R. C. 1905, § 6009; Civ. C. 1877, § 1586; R. C. 1899, § 4560.]

§ 6577. **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. [R. C. 1905, § 6010; Civ. C. 1877, § 1587; R. C. 1899, § 4561.]

Effect of deviation by necessity upon policy. 58 Am. Dec. 673.

What is and effect of deviation of vessel. 33 Am. Dec. 60.

§ 6578. **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. [R. C. 1905, § 6011; Civ. C. 1877, § 1588; R. C. 1899, § 4562.]

**§ 6579. Improper.** Every deviation not specified in the last section is improper. [R. C. 1905, § 6012; Civ. C. 1877, § 1589; R. C. 1899, § 4563.]

**§ 6580. Insurer not liable after.** An insurer is not liable for any loss happening to a thing insured subsequently to an improper deviation. [R. C. 1905, § 6013; Civ. C. 1877, § 1590; R. C. 1899, § 4564.]

#### ARTICLE 7.—LOSS.

**§ 6581. Classified.** A loss may be either total or partial. [R. C. 1905, § 6014; Civ. C. 1877, § 1591; R. C. 1899, § 4565.]

Liability of marine insurer for loss caused by explosion. 13 L.R.A. 594; 38 L.R.A.(N.S.) 474.

Effect of navigating in forbidden waters in case of loss within waters covered by policy. 10 L.R.A.(N.S.) 742.

Retention of policy as waiver of mistake or fraud of insurer or its agent as to voyage covered by marine policy. 67 L.R.A. 723.

Effect of voluntary exposure to peril upon liability on marine insurance policy. 1 L.R.A.(N.S.) 1095.

When goods stowed on deck and jettisoned are covered by policy. 86 Am. Dec. 500.

Liability for injuries caused by another vessel through collision with the insured vessel. 54 Am. Dec. 787.

Loss due to neglect to employ a pilot. 33 Am. Dec. 599.

**§ 6582. Partial.** Every loss which is not total is partial. [R. C. 1905, § 6015; Civ. C. 1877, § 1592; R. C. 1899, § 4566.]

**§ 6583. Total loss classified.** A total loss may be either actual or constructive. [R. C. 1905, § 6016; Civ. C. 1877, § 1593; R. C. 1899, § 4567.]

**§ 6584. 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. [R. C. 1905, § 6017; Civ. C. 1877, § 1594; R. C. 1899, § 4568.]

**§ 6585. Constructive total.** A constructive total loss is one which gives to a person insured a right to abandon under section 6593. [R. C. 1905, § 6018; Civ. C. 1877, § 1595; R. C. 1895, § 4569.]

**§ 6586. 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. [R. C. 1905, § 6019; Civ. C. 1877, § 1596; R. C. 1899, § 4570.]

**§ 6587. 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. [R. C. 1905, § 6020; Civ. C. 1877, § 1597; R. C. 1899, § 4571.]

**§ 6588. 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. [R. C. 1905, § 6021; Civ. C. 1877, § 1598; R. C. 1899, § 4572.]

Right to recover under "sue and labor" clause in policy of marine insurance, for moving cargo overland. 14 L.R.A.(N.S.) 1161.

**§ 6589. Payment without notice.** Upon an actual total loss a person insured is entitled to payment without notice of abandonment. [R. C. 1905, § 6022; Civ. C. 1877, § 1599; R. C. 1899, § 4573.]

§ 6590. **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. [R. C. 1905, § 6023; Civ. C. 1877, § 1600; R. C. 1899, § 4574.]

§ 6591. **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. [R. C. 1905, § 6024; Civ. C. 1877, § 1601; R. C. 1899, § 4575.]

#### ARTICLE 8.—ABANDONMENT.

§ 6592. **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. [R. C. 1905, § 6025; Civ. C. 1877, § 1602; R. C. 1899, § 4576.]

§ 6593. **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. [R. C. 1905, § 6026; Civ. C. 1877, § 1603; R. C. 1899, § 4577.]

§ 6594. **Must be absolute.** An abandonment must be neither partial nor conditional. [R. C. 1905, § 6027; Civ. C. 1877, § 1604; R. C. 1899, § 4578.]

§ 6595. **When made.** An abandonment must be made within a reasonable time after information of the loss and after the commencement of the voyage and before the party abandoning has information of its completion. [R. C. 1905, § 6028; Civ. C. 1877, § 1605; R. C. 1899, § 4579.]

§ 6596. **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. [R. C. 1905, § 6029; Civ. C. 1877, § 1606; R. C. 1899, § 4580.]

§ 6597. **Made by written notice.** Abandonment is made by giving notice thereof to the insurer which may be done orally or in writing. [R. C. 1905, § 6030; Civ. C. 1877, § 1607; R. C. 1899, § 4581.]

§ 6598. **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. [R. C. 1905, § 6031; Civ. C. 1877, § 1608; R. C. 1899, § 4582.]

§ 6599. **Sustained only on cause specified.** An abandonment can be sustained only upon the cause specified in the notice thereof. [R. C. 1905, § 6032; Civ. C. 1877, § 1609; R. C. 1899, § 4583.]

§ 6600. **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. [R. C. 1905, § 6033; Civ. C. 1877, § 1610; R. C. 1899, § 4584.]

§ 6601. **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. [R. C. 1905, § 6034; Civ. C. 1877, § 1611; R. C. 1899, § 4585.]

§ 6602. **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. [R. C. 1905, § 6035; Civ. C. 1877, § 1612; R. C. 1899, § 4586.]

§ 6603. **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. [R. C. 1905, § 6036; Civ. C. 1877, § 1613; R. C. 1899, § 4587.]

§ 6604. **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. [R. C. 1905, § 6037; Civ. C. 1877, § 1614; R. C. 1899, § 4588.]

§ 6605. **Accepted is irrevocable.** An abandonment once made and accepted is irrevocable, unless the ground upon which it was made proves to be unfounded. [R. C. 1905, § 6038; Civ. C. 1877, § 1615; R. C. 1899, § 4589.]

§ 6606. **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. [R. C. 1905, § 6039; Civ. C. 1877, § 1616; R. C. 1899, § 4590.]

§ 6607. **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. [R. C. 1905, § 6040; Civ. C. 1877, § 1617; R. C. 1899, § 4591.]

§ 6608. **Rights, if abandonment omitted.** If a person insured omits to abandon he may, nevertheless, recover his actual loss. [R. C. 1905, § 6041; Civ. C. 1877, § 1618; R. C. 1899, § 4592.]

#### ARTICLE 9.—MEASURE OF INDEMNITY.

§ 6609. **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. [R. C. 1905, § 6042; Civ. C. 1877, § 1619; R. C. 1899, § 4593.]

§ 6610. **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. [R. C. 1905, § 6043; Civ. C. 1877, § 1620; R. C. 1899, § 4594.]

§ 6611. **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. [R. C. 1905, § 6044; Civ. C. 1877, § 1621; R. C. 1899, § 4595.]

§ 6612. **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. [R. C. 1905, § 6045; Civ. C. 1877, § 1622; R. C. 1899, § 4596.]

**§ 6613. 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. [R. C. 1905, § 6046; Civ. C. 1877, § 1623; R. C. 1899, § 4597.]

**§ 6614. 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 of 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. [R. C. 1905, § 6047; Civ. C. 1877, § 1624; R. C. 1899, § 4598.]

**§ 6615. 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. [R. C. 1905, § 6048; Civ. C. 1877, § 1625; R. C. 1899, § 4599.]

**§ 6616. 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. [R. C. 1905, § 6049; Civ. C. 1877, § 1626; R. C. 1899, § 4600.]

**§ 6617. 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 toward a general average loss called for by a peril insured against. [R. C. 1905, § 6050; Civ. C. 1877, § 1627; R. C. 1899, § 4601.]

**§ 6618. 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. [R. C. 1905, § 6051; Civ. C. 1877, § 1628; R. C. 1899, § 4602.]

**§ 6619. 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. [R. C. 1905, § 6052; Civ. C. 1877, § 1629; R. C. 1899, § 4603.]

## CHAPTER 79.

## FIRE INSURANCE.

**§ 6620. 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. [R. C. 1905, § 6053; 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.

Indications that building may be intentionally set on fire as an increase of insurance risk. 31 L.R.A.(N.S.) 603.

Necessity of proof of increase of risk to avoid insurance policy because of the vacancy of insured property. 13 L.R.A.(N.S.) 456.

Effect of temporary condition which ceased before loss, under general provision against increase of insurance risk, or specific provision against certain conditions. 10 L.R.A.(N.S.) 736; 28 L.R.A.(N.S.) 593; 32 L.R.A.(N.S.) 240.

Effect of temporary removal of property. 43 Am. Rep. 84.

"Vacant and unoccupied," significance of these and like expressions. 10 Am. St. Rep. 390.

"Hazardous" and "extrahazardous," meaning of. 97 Am. Dec. 798.

Hazardous and prohibited articles kept in the ordinary course of business. 24 Am. Rep. 150.

When use or keeping of forbidden materials avoids policy. 24 Am. Rep. 150.

Condition against keeping petroleum or other inflammable fluids, when violated. 37 Am. Rep. 650.

What results in increase of hazard. 66 Am. St. Rep. 691.

When alterations in premises avoid policy. 26 Am. St. Rep. 407.

Construction of conditions as to use of premises. 30 Am. St. Rep. 731.

As to similar provision in Cal. Civ. Code, § 2753, see *Slinkard v. Manchester Fire Assur. Co.*, 122 Cal. 595, 55 Pac. 417.

**§ 6621. 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. [R. C. 1905, § 6054; Civ. C. 1877, § 1631; R. C. 1899, § 4605.]

As to similar provision in Cal. Civ. Code, § 2754, see *Slinkard v. Manchester Fire Assur. Co.*, 122 Cal. 595, 55 Pac. 417.

**§ 6622. 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. [R. C. 1905, § 6055; Civ. C. 1877, § 1632; R. C. 1899, § 4606.]

**§ 6623. 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. [R. C. 1905, § 6056; Civ. C. 1877, § 1633; R. C. 1899, § 4607.]

**§ 6624. Face of policy to be paid in case of loss.** Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire and that property insured shall be destroyed without fraud on the part of the insured or his assigns, the stated amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured. [1907, ch. 158.]

**§ 6625. 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. [R. C. 1905, § 6057; 1890, ch. 74, § 4; R. C. 1895, § 4608.]

Insurance commissioner cannot compel use of standard policy prepared by himself. *Phenix Ins. Co. v. Perkins*, 19 S. D. 59, 101 N. W. 1110.

**§ 6626. 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. 1905, § 6058; R. C. 1895, § 4609.]

Policy of insurance cannot be avoided after loss where premium was received with full knowledge of factor. *Leisen v. St. Paul F. & M. Ins. Co.*, 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 827.



## CHAPTER 80.

## LIFE AND HEALTH INSURANCE.

**§ 6627. 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. [R. C. 1905, § 6059; Civ. C. 1877, § 1634; R. C. 1899, § 4610.]

**§ 6628. 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. [R. C. 1905, § 6060; Civ. C. 1877, § 1635; R. C. 1899, § 4611.]

- Conflict of laws as to insurable interest. 63 L.R.A. 856; 23 L.R.A.(N.S.) 976.  
 Insurable interest in the life of another, and necessity of. 57 Am. Dec. 93; 46 Am. Rep. 189; 52 Am. Rep. 135; 58 Am. Rep. 852.  
 When life insurance regarded as wagering contract because of the small insurable interest. 60 Am. Rep. 729.  
 Life insurance in favor of persons having no insurable interest. 128 Am. St. Rep. 302.  
 Defense of want of insurable interest as affected by incontestable clause. 42 L.R.A. 257; 5 L.R.A.(N.S.) 747.  
 Consent of person whose life is insured, as a condition. 56 L.R.A. 586.  
 Insurable interest in life of parent or child or other relative by blood. 54 L.R.A. 225.  
 Wife's right to insure life of husband. 53 L.R.A. 817.  
 Right to insure life of betrothed husband. 53 L.R.A. 825.  
 Validity of life insurance for benefit of betrothed wife. 19 L.R.A. 187.  
 Insurable interest of husband as such, in life of wife. 2 B. R. C. 410.  
 Insurable interest in life of foster child or foster parent. 46 L.R.A.(N.S.) 779.  
 Insurable interest of adult child in life of parent. 19 L.R.A.(N.S.) 233.  
 Insurable interest of cousin. 14 L.R.A.(N.S.) 1172.  
 Insurable interest of brother or sister in other's life. 45 L.R.A.(N.S.) 982.  
 Right to take life insurance for benefit of stranger. 25 L.R.A. 627.  
 Insurance on life in favor of paramour. 47 L.R.A.(N.S.) 252.  
 Insurance on life of officer of corporation for benefit of the corporations. 16 L.R.A.(N.S.) 1020.  
 Insurable interest in animals. 44 L.R.A.(N.S.) 569.  
 Who is a member of the "family" within contract of benefit society. 3 L.R.A.(N.S.) 334.  
 Who is a "dependent" within statute or rules defining beneficiaries of mutual benefit societies. 2 L.R.A.(N.S.) 653; 36 L.R.A.(N.S.) 208; 37 L.R.A.(N.S.) 1191.  
 Effect of the death of a beneficiary before that of the person whose life is insured. 11 Am. St. Rep. 721.

**§ 6629. 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. [R. C. 1905, § 6061; Civ. C. 1877, § 1636; R. C. 1899, § 4612.]

- Policy made payable to insured or his personal representative may be willed, but it is subject to statutory allowance of surviving husband or wife and minor children. Meyer v. Meyer, 25 S. D. 596, 127 N. W. 595.  
 Assignment of life insurance policy. 87 Am. St. Rep. 484.  
 Validity of assignment of life insurance policy to one having no insurable interest. 27 Am. St. Rep. 327; 16 Am. St. Rep. 906.  
 Validity of assignment by beneficiary having no insurable interest to one paying premiums. 3 L.R.A.(N.S.) 952.

Validity of assignment of life insurance policy to one having no insurable interest where the assignment is not made by way of cover for a wager policy. 6 L.R.A.(N.S.) 128.

§ 6630. **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. [R. C. 1905, § 6062; Civ. C. 1877, § 1637; R. C. 1899, § 4613.]

§ 6631. **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. [R. C. 1905, § 6063; Civ. C. 1877, § 1638; R. C. 1899, § 4614.]

§ 6632. **Agent defined.** Any person who shall solicit an application for insurance upon the life of another shall, in any controversy between the assured or his beneficiary and the company issuing any policy upon such application, be regarded as the agent of the company and not the agent of the assured. [1907, ch. 146.]

§ 6633. **Suicide no defense after one year.** In all suits on policies of insurance on life issued by any regular or assessment or fraternal beneficiary association, company or corporation, 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 provision or stipulation in the policy to the contrary shall be void. [1911, ch. 157; R. C. 1905, § 6064; 1903, ch. 111.]

Defense that insured committed suicide cannot be set up, when suicide occurs after expiration of one year from date of policy. *Harrington v. Mutual L. Ins. Co.*, 21 N. D. 447, 34 L.R.A.(N.S.) 373, 131 N. W. 246.

Power of legislature to forbid defense of suicide in life insurance. 31 L.R.A. 831.

Conflict of laws as to suicide provision in insurance contract. 63 L.R.A. 867; 23 L.R.A.(N.S.) 981.

Suicide as a defense to action on life insurance policy. 59 Am. Dec. 487; 3 Am. Rep. 454; 19 Am. Rep. 628; 84 Am. St. Rep. 539.

Effect of words "sane or insane" or other words relating to mental condition in suicide clause in policy. 17 L.R.A.(N.S.) 260.

Suicide while sane as a defense to an action on a policy or certificate containing no provision as to effect of suicide. 8 L.R.A.(N.S.) 1124.

Death from suicide as one caused through external, violent and accidental means. 7 L.R.A.(N.S.) 223.

Necessity that suicide be reasonable and legitimate consequence of violation of law in order to relieve insurer. 13 L.R.A.(N.S.) 261.

Retroactive effect of resolution of mutual insurance company changing period during which policy may be contested for suicide. 12 L.R.A.(N.S.) 504.

Incontestability of policy where defense is suicide. 42 L.R.A. 253, 260.

Conclusiveness of proof of death as to suicide. 44 L.R.A. 853.

Duty of insured to negative suicide. 4 L.R.A.(N.S.) 636.

Burden of proof as to suicide in action on life insurance policy. 4 L.R.A.(N.S.) 636.

Insanity as affecting condition as to suicide. 35 L.R.A. 258.

Liability under accident policy for death during delirium. 46 L.R.A.(N.S.) 543.

Subsequent by-law excluding or reducing liability in case of suicide. 46 L.R.A.(N.S.) 308.

## CHAPTER 81.

### STANDARD FORMS OF INSURANCE POLICIES; PROVISIONS IN LIFE INSURANCE POLICIES.

§ 6634. **Authority required to issue policies.** No policy of life insurance shall be issued or delivered in this state and no policy of life insurance of a life insurance company organized under the laws of this state shall be issued, unless authorized by the provisions of this article. [1907, ch. 140, § 1.]

§ 6635. **Standard forms.** The following are established as standard forms in which policies of life insurance may be issued and delivered in this state, and in which policies of life insurance of life insurance companies organized under the laws of this state may be issued:

NORTH DAKOTA STANDARD LIFE INSURANCE POLICY.

(Insert " Ordinary " or " Limited Payment.")

..... Life
Age.....
Amount \$..... Premium \$.....

Of North Dakota.

In consideration of ..... dollars, receipt of which is hereby acknowledged, and of the payment of (insert amounts and times of payments of premiums) until (insert " the death of the insured " in ordinary life and " .... full year's premiums shall have been paid or until the prior death of the insured " in limited payment life).

Promises to pay upon receipt at the home office of the ..... company in ..... of due proof of death of ..... of ..... county of ....., state of North Dakota, herein called the insured, to ..... beneficiary ..... with (insert " out " if so desired) right of revocation, ..... dollars, less any indebtedness hereon to the company and any unpaid portion of the premium for the then current policy year.

Change of Beneficiary. When the right of revocation has been reserved, or in case of death of any beneficiary under either a revocable or irrevocable designation, the insured, subject to any existing assignment of the policy, may designate a new beneficiary with or without reserving right of revocation by filing written notice thereof at the home office of the company, accompanied by the policy for a suitable indorsement thereon. If any beneficiary shall die before the insured and the insured shall not have designated a new beneficiary the interest of such beneficiary shall be payable to the insured (insert " his " or " her " ), executors, administrators or assigns.

Payment of Premiums. The company will accept payment of premiums at other times than as above stated, as follows :

.....

Except as herein provided the payment of the premium or installment thereof shall not maintain the policy in force beyond the date when the next premium or installment thereof is payable.

All premiums are payable in advance at said home office, or to an agent of the company upon delivery of the receipt signed by one or more of the following officers of the company (insert titles of officers who may sign receipts) and countersigned by the said agent.

A grace of one month, subject to any interest charge at the rate of ... per centum per annum, shall be granted for the payment of every premium after the first, during which month the insurance shall continue in force. If the insured shall die during the month of grace, the overdue premiums will be deducted from any amount payable hereon in any settlement hereunder.

Conditions. (The policy may here provide for restrictions of liability by reason of travel, occupation, change of residence and suicide. These restrictions, such as refer to military and naval services in time of war, must be applicable only to cases where the act of the insured provided against occurs within two years after the issuance of the policy.)

Incontestability. The policy constitutes the entire contract between the parties and shall be incontestable from its date, except for nonpayments of premiums and except as otherwise provided in this policy. All statements made by the insured shall in the absence of fraud be deemed representations and not warranties, and no such statement shall avoid this policy, unless it is

contained in written application and a copy of such application shall be indorsed upon or attached to this policy when issued. If the age of the insured has been understated the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

**Participation.** This policy shall participate in the surplus of the company and beginning not later than the end of the (insert first, second or third) policy year, the company will annually determine and account for the portion of the divisible surplus accruing hereon.

**Dividends.** Dividends at the option of the owner of this policy shall on the ..... day of ..... of each year (here may be inserted "after the first policy year" or "after the second policy year") be either:

1. Paid in cash, or,
2. Applied toward payment of any premium or premiums, or,
3. Applied to the purchase of paid-up additions to the policy, or,
4. Left to accumulate to the credit of the policy with interest at (here insert a rate not exceeding that used by the company for calculating its reserves) per centum per annum and payable at the maturity of the policy, but withdrawable at the anniversary of the policy.

Unless the owner of the policy shall elect otherwise within three months after the mailing by the company of a written notice requiring such election the dividends shall be paid in cash.

**Loans.** After three full years' premiums have been paid, the company at any time, while this policy is in force, will advance, on proper assignment of this policy, and on the sole security thereof at a rate of interest not greater than .... per centum per annum, which interest if not paid annually shall be added to the principal and bear the same rate of interest, a sum equal to, or, at the option of the owner of the policy, less than the reserve at the end of the current policy year on this policy and on any dividend additions thereto, computed according to the (designate mortality table adopted by the company for computing reserve) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum, less (here may be inserted not more than two and one-half) per centum of the amount insured by this policy and of the dividend additions thereto.

The company, however, will deduct from such loan value any existing indebtedness to the company on the policy and any unpaid balance of the premium for the current policy year, and may collect interest in advance on the loan to the end of the current policy year. Such loan may be deferred by the company for not exceeding six months after the application therefor is made. Failure to repay any such advance or to pay interest shall not void this policy, unless the total indebtedness hereon to the company shall be equal or exceed such loan value at the time of such failure and until one month after notice shall have been mailed by the company to the last known address of the insured and of the assignee, if any. No condition other than as herein provided shall be exacted as a prerequisite to any such advance.

**Assignment.** No assignment of this policy shall be binding upon the company until it be filed with the company at its said home office. The company assumes no responsibility as to the validity of any assignment.

**Option of Surrender or Lapse.** After this policy shall have been in force three years the owner, within one month after any default, may elect (a) to accept the value of this policy in cash, or, (b) to have the insurance continued in force from date of default, without future participation and without the right to loan, for its face amount, including any outstanding dividend additions, less any indebtedness to the company thereon, or, (c) to purchase non-participating paid-up insurance payable at the same time and on the same conditions as this policy.

The cash value will be the reserve at the date of default on this policy and on any dividend additions thereto, computed according to the (designate mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum, less (here may be inserted not more than two and one-half) per centum of the amount insured by this policy and of any dividend additions thereto, and less any existing indebtedness to the company on this policy. Payment of such cash value may be deferred by the company for not exceeding six months after the application therefor is made. The term for which the insurance will be continued or the amount of the paid-up policy will be such as the cash value will purchase as a net single premium at the attained age of the insured according to the (designate the mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum. If the owner shall not, within one month from default, surrender this policy to the company at its home office for a cash surrender value or for paid-up insurance as provided in options (a) and (c) the insurance will be continued as provided in option (b).

The figures in the following table are computed in accordance with the above provisions and upon the assumption that there is no indebtedness on the policy, and that there are no outstanding dividend additions.

(At the option of the company the following may be here inserted: "The figures apply to a policy for \$1,000. As this contract is for \$ . . . . ., the loan, cash or paid insurance available in any year will be \$ . . . . ., the amount stated in the table for that year:")

	At end of Year	Cash or Loan Value	Paid up Life Insurance	Continued Insurance		
				Years	Months	Days
3	\$ . . . . .	\$ . . . . .	\$ . . . . .			
4	\$ . . . . .	\$ . . . . .	\$ . . . . .			
5	\$ . . . . .	\$ . . . . .	\$ . . . . .			
6	\$ . . . . .	\$ . . . . .	\$ . . . . .			
7	\$ . . . . .	\$ . . . . .	\$ . . . . .			
8	\$ . . . . .	\$ . . . . .	\$ . . . . .			
9	\$ . . . . .	\$ . . . . .	\$ . . . . .			
10	\$ . . . . .	\$ . . . . .	\$ . . . . .			
11	\$ . . . . .	\$ . . . . .	\$ . . . . .			
12	\$ . . . . .	\$ . . . . .	\$ . . . . .			
13	\$ . . . . .	\$ . . . . .	\$ . . . . .			
14	\$ . . . . .	\$ . . . . .	\$ . . . . .			
15	\$ . . . . .	\$ . . . . .	\$ . . . . .			
16	\$ . . . . .	\$ . . . . .	\$ . . . . .			
17	\$ . . . . .	\$ . . . . .	\$ . . . . .			
18	\$ . . . . .	\$ . . . . .	\$ . . . . .			
19	\$ . . . . .	\$ . . . . .	\$ . . . . .			
20	\$ . . . . .	\$ . . . . .	\$ . . . . .			

Figures for later years will be furnished upon request.

Reinstatement. In case of continued temporary insurance under the above provisions this policy upon evidence of insurability satisfactory to the company may be reinstated within the first three years of the term for which the insurance is continued by payment of arrears of premiums with interest at (here insert not more than six) per centum per annum.

Options at Maturity. The insured, by written notice to the company at its home office, and with the written consent of the assignee and irrevocable beneficiary, if any, may elect to have the net sum payable under this policy paid either in cash or as follows:

1. By the payment of interest thereon at . . . . . per centum per annum payable annually, to the payee under this policy at the end of each year



.....  
.....

of North Dakota.

In consideration of ..... dollars, receipt of which is hereby acknowledged, and the payment of (here insert amounts and times of payments of premiums) until ..... full year's premiums shall have been paid or until the prior death of the insured.

Promises to pay at the home office of the company in ..... to ..... of ....., county of ....., state of North Dakota, herein called the insured, on the ..... day of ....., if the insured be then living, or upon receipt at said home office of due record [proof] of the prior death of the insured, to ....., beneficiar....., with (insert " out " if so desired) right of revocation, ..... dollars, less any indebtedness hereon to the company and any unpaid portion of the premium for the then current policy year.

Change of Beneficiary. When the right of revocation has been reserved, or in case of the death of any beneficiary under either a revocable or irrevocable designation, the insured, subject to any existing assignment of the policy, may designate a new beneficiary with or without reserving right of revocation by filing written notice thereof at the home office of the company accompanied by the policy for suitable indorsement thereon. If any beneficiary shall die before the insured, and the insured shall not have designated a new beneficiary, the interest of such beneficiary shall be payable to the insured (insert " his " or " her ") executors, administrators or assigns.

Payments of Premiums. The company will accept payments of premiums at other times than as stated above, as follows:

.....  
.....

Except as herein provided the payment of a premium or installment thereof shall not maintain the policy in force beyond the date when the next premium or installment thereof is payable.

All premiums are payable in advance at the said home office or to any agent of the company upon delivery of a receipt signed by one or more of the following officers of the company (insert titles of officers who may sign receipts), and countersigned by said agent.

A grace of one month, subject to an interest charge at the rate of .... per centum per annum, shall be granted for the payment of every premium after the first, during which month the insurance shall continue in force. If the insured shall die during the month of grace the overdue premium will be deducted from any amount payable hereon in any settlement hereunder.

Conditions. (The policy may here provide for restriction of liability by reason of travel, occupation, change of residence and suicide. These restrictions, except such as refer to military and naval service in time of war, must be applicable only to cases where the act of the insured provided against occurs within two years after the issuance of the policy.)

Incontestability. This policy constitutes the entire contract between the parties and shall be incontestable from its date, except for nonpayment of premiums and except as otherwise provided in this policy. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall void this policy, unless it is contained in a written application and a copy of such application shall be indorsed upon or attached to this policy when issued. If the age of the insured has been understated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Participation. This policy shall participate in the surplus of the company and beginning not later than the end of the (insert first, second or third)

policy year the company will annually determine and account for the portion of the divisible surplus accruing hereon.

**Dividends.** Dividends at the option of the owner of this policy shall on the ..... day of ..... of each year (here may be inserted "after the first policy year" or "after the second policy year") be either:

1. Paid in cash, or,
2. Applied toward the payment of any premium or premiums, or,
3. Applied to the purchase of paid-up additions to the policy, or,
4. Left to accumulate to the credit of the policy with the interest at (here insert a rate not exceeding that used by the company in calculating its reserves) per centum per annum and payable at the maturity of the policy, but withdrawable on any anniversary of the policy.

Unless the owner of this policy shall elect otherwise within three months after the mailing by the company of a written notice requiring such election, the dividends shall be paid in cash.

**Loans.** After three full years' premiums have been paid the company at any time while this policy is in force, will advance, on proper assignment of the policy and on the sole security thereof, at a rate of interest not greater than .... per centum per annum, which interest, if not paid annually, shall be added to the principal and bear the same rate of interest, a sum equal to, or, at the option of the owner of the policy, less than, the reserve at the end of the current policy year, on this policy and on any dividend additions thereto, computed according to the (designate mortality table adopted by the company for computing reserves) mortality table, and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum, less (here may be inserted not more than two and one-half) per centum of the amount insured by this policy and of any dividend additions thereto. The company, however, will deduct from such loan value any existing indebtedness to the company on this policy, and any unpaid balance of the premium for the current policy year, and may collect interest in advance on the loan to the end of the current policy year. Such loan may be deferred by the company for not exceeding six months after the application therefor is made. Failure to repay any such advance or to pay interest shall not void this policy, unless the total indebtedness hereon to the company shall equal or exceed such loan value at the time of such failure and until one month after notice shall have been mailed by the company to the last known address of the insured and of the assignee, if any.

No conditions, other than as herein provided, shall be exacted as a prerequisite to any such advance.

**Assignment.** No assignment of this policy shall be binding upon the company until it be filed with the company at its said home office. The company assumes no responsibility as to the validity of any assignment.

**Options on Surrender or Lapse.** After this policy shall have been in force three full years the owner, within one month after any default, may elect (a) to accept the value of this policy in cash, or, (b) to have the insurance continue in force from date of default without future participation and without the right to loans, for its face amount, including any outstanding dividend additions, less any indebtedness to the company hereon, or, (c) to purchase nonparticipating paid-up insurance payable at the same times and on the same conditions as this policy. The cash value will be the reserve at the date of default on this policy and on any dividend additions thereto computed according to the (designate mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum less (here may be inserted not more than two and one-half) per centum of the amount insured by this policy and of any dividend additions thereto, and less any existing indebtedness to the company on this policy. Payment



of such cash value may be deferred by the company for not exceeding six months after the application therefor is made.

The term for which the insurance will be continued or the amount of the paid-up policy will be such as the cash value will purchase as a net single premium at the attained age of the insured, according to the (designate the mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum. If the sum applicable to the purchase of temporary insurance shall be more than sufficient to continue the insurance to the end of the endowment term named in this policy the excess shall be used to purchase in the same manner nonparticipating paid-up pure endowment, payable at the end of the endowment term and on the same conditions. If the owner shall not, within one month from default surrender this policy to the company at the home office for a cash surrender value or for paid-up insurance as provided in options (a) and (c) the insurance will be continued as provided in option (b).

The figures in the following table are computed in accordance with the above provisions and upon the assumption that there is no indebtedness on the policy, and that there are no outstanding dividend additions.

(At the option of the company the following may be here inserted: "The figures apply to a policy of \$1,000. As this contract is for \$....., the loan, cash, paid-up insurance on pure endowment available in any year will be ..... the amount stated in the table for this year.")

	At End of Year	Cash or Loan Value	Paid Up Endowment Insurance	Years	Continued Insurance Months	Days	Pure Endow- ment
3	\$.....	\$.....	\$.....	.....	.....	.....	\$.....
4	\$.....	\$.....	\$.....	.....	.....	.....	\$.....
5	\$.....	\$.....	\$.....	.....	.....	.....	\$.....
6	\$.....	\$.....	\$.....	.....	.....	.....	\$.....
7	\$.....	\$.....	\$.....	.....	.....	.....	\$.....
8	\$.....	\$.....	\$.....	.....	.....	.....	\$.....
9	\$.....	\$.....	\$.....	.....	.....	.....	\$.....
10	\$.....	\$.....	\$.....	.....	.....	.....	\$.....
11	\$.....	\$.....	\$.....	.....	.....	.....	\$.....
12	\$.....	\$.....	\$.....	.....	.....	.....	\$.....
13	\$.....	\$.....	\$.....	.....	.....	.....	\$.....
14	\$.....	\$.....	\$.....	.....	.....	.....	\$.....
15	\$.....	\$.....	\$.....	.....	.....	.....	\$.....
16	\$.....	\$.....	\$.....	.....	.....	.....	\$.....
17	\$.....	\$.....	\$.....	.....	.....	.....	\$.....
18	\$.....	\$.....	\$.....	.....	.....	.....	\$.....
19	\$.....	\$.....	\$.....	.....	.....	.....	\$.....
20	\$.....	\$.....	\$.....	.....	.....	.....	\$.....

Figures for later years will be furnished upon request.

**Reinstatement.** In case of continued temporary insurance under the above provision this policy upon evidence of insurability satisfactory to the company may be reinstated within the first three years of the term for which the insurance is continued by payment of arrears of premiums with interest at (here insert not greater than six) per centum per annum.

**Options at Maturity.** The insured, by written notice to the company at its home office, and with written consent of the assigned and irrevocable beneficiary, if any, may elect to have the net sum payable under this policy paid either in cash or as follows:

1. By the payment of interest thereon at ..... per centum per annum payable annually, to the payee under this policy at the end of each year during the life of the payee and by the payment upon the death of the payee of the

said net sum and accrued interest to the executors, administrators or assigns of the payee, unless otherwise directed in said notice.

2. By the payment of equal annual installments for a specified number of years, the first installment being payable immediately in accordance with the following table for each one thousand dollars of said net sum.

3. By the payment of equal annual installments payable at the beginning of each year for a fixed period of twenty years, and for so many years longer as the payee shall survive, in accordance with the following table for each one thousand dollars of said net sum.

Installments payable under options two or three which shall not have been paid prior to the death of the payee shall be paid, unless otherwise directed in said notice, to the executors, administrators or assigns of the payee.

If the insured shall not have directed otherwise the beneficiary may, after the death of the insured, by like written notice, and with the written consent of the assignee, if any, select either of the above options.

Unless otherwise specified by the insured the payee may on any interest date receive the amount yet due under option one, and may at any time receive the commuted value of payments yet to be made, computed upon the same basis as option two in the following table, provided that no such commutation will be made under three except after the death of the payee occurring within the aforesaid twenty years.

TABLE OF INSTALLMENTS FOR EACH \$1,000.
OPTION 2. OPTION 3.

Table with 4 columns: Number of Annual Installments, Amount of Each Installment, Age of Payee when Policy Becomes Payable, Amount of Each Installment. The table contains multiple rows of dots representing data points.

Agents are not authorized to modify this policy or to extend the time for paying a premium.

In witness whereof the company has caused this policy to be executed this ... day of .....

NORTH DAKOTA STANDARD LIFE INSURANCE POLICY.
(Insert " Ordinary " or " Limited Payment ") Life Fixed Survivorship Annuity.

Age .....
Amount, \$..... Premium, \$.....

.....  
of North Dakota.

In consideration of ..... dollars, receipt of which is hereby acknowledged, and of the payment of (here insert amounts and times of payments of premium) until (insert " the death of the insured " in ordinary life and " ..... full year's premiums shall have been paid or until the prior death of the insured " in limited payment life).

Promises to pay at its home office in ....., ..... dollars in twenty equal annual installments of \$..... to ..... (herein called the beneficiary), (insert " his " or " her ") executors, administrators or assigns, with (insert " out " if so desired) right of revocation, if (insert " he " or " she ") survives the insured (otherwise to the executors, administrators or assigns of the insured) the first installment being payable immediately upon receipt of due proof of the death of the insured, any indebtedness to the company on this policy, together with the balance, if any, of the then current year's premium being deducted from the amounts first payable under this contract.

Should the beneficiary live to receive the twenty installments payable to (insert " him " or " her ") as above provided, the company will pay (insert " him " or " her ") annually during the remainder of (insert " his " or " her ") life the sum of \$....., beginning one year after the date when the twentieth installment payable hereunder shall fall due.

Change of Beneficiary. When the right of revocation has been reserved, or in case of the death of any beneficiary under either a revocable or irrevocable designation, the insured subject to any existing assignment of the policy, may designate a new beneficiary with or without reserving right of revocation, by filing written notice thereof at the home office of the company, accompanied by the policy for suitable indorsement thereon. If any beneficiary shall die before the insured and the insured shall not have designated a new beneficiary, the interest of such beneficiary shall be payable to the insured (insert " his " or " her ") executors, administrators or assigns. If a new beneficiary shall be designated only twenty annual installments will be payable under this policy, and future (if necessary, insert " semi " or " quarterly ") annual premiums will be reduced to ..... dollars each.

Payment of Premiums. The company will accept payment of premiums at other times than as stated above, as follows:

.....  
.....  
Upon return of this policy to the company accompanied by evidence satisfactory to the company of the death of the beneficiary the company will reduce the future (here insert " annual," " semi-annual " or " quarterly ") premium to \$..... each.

Except as herein provided the payment of a premium or installment thereof shall not maintain the policy in force beyond the date when the next premium or installment thereof is payable.

All premiums are payable in advance at said home office, or to an agent of the company upon delivery of a receipt signed by one or more of the following officers of the company (insert titles of officers who may sign receipts) and countersigned by said agent.

A grace of one month subject to an interest charge at the rate of ..... per centum per annum shall be granted for the payment of every premium after the first, during which month the insurance shall continue in force. If the insured shall die during the month of grace the overdue premium will be deducted from any amount payable hereon in any settlement hereunder.

Conditions. (The policy may here provide for restriction of liability by reason of travel, occupation, change of residence and suicide. These restrictions, except such as refer to military and naval service in time of war,

must be applicable only to cases where the act of the insured provided against occurs within two years after the issuance of the policy.)

**Incontestability.** This policy constitutes the entire contract between the parties and shall be incontestable from its date, except for nonpayment of premiums and except as otherwise provided in this policy. All statements made by the insured shall in the absence of fraud be deemed representations and not warranties and no such statement shall void this policy unless it is contained in a written application and a copy of such application shall be indorsed upon or attached to this policy when issued.

If the age of the insured has been understated or if the age of the beneficiary has been overstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

**Participation.** This policy shall participate in the surplus of the company and beginning not later than the end of the (insert first, second or third) policy year the company will annually determine and account for the portion of the divisible surplus accruing thereon.

**Dividends.** Dividends at the option of the owner of the policy shall on the ..... day of ..... of each year (here may be inserted "after the first policy year" or "after the second policy year" be either:

1. Paid in cash, or,
2. Applied toward the payment of any premium or premiums, or,
3. Applied to the purchase of paid-up additions to the policy, payable in twenty annual installments at the same times as the original amount insured under this policy is payable. The payments of such twenty installments shall discharge the company from all liability on account of such dividend additions, or,

4. Left to accumulate to the credit of the policy with interest at (here insert a rate not exceeding that used by the company in calculating its reserves) per centum per annum and payable at the maturity of the policy, but withdrawable on any anniversary of the policy.

Unless the owner of this policy shall elect otherwise within three months after the mailing by the company of a written notice requiring such election, the dividends shall be paid in cash.

**Loans.** After three full year's premiums have been paid, the company at any time, while this policy is in force, will advance on the proper assignment of this policy and on the sole security thereof, at a rate of interest not greater than ..... per centum per annum, which interest if not paid annually shall be added to the principal and bear the same rate of interest, a sum equal to, or, at the option of the owner of the policy, less than, the reserve at the end of the current policy year required to provide for the twenty installments payable under this policy and for any dividend additions thereto and no more, computed according to the (designate mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum. less (here may be inserted not more than two and one-half) per centum per annum of the amount insured by the policy, and of any dividend additions thereto. The company will deduct, however, from such loan value any existing indebtedness to the company on the policy and any unpaid balance of the premium for the current policy year, and may collect interest in advance on the loan to the end of the current policy year. Such loan may be deferred by the company for not exceeding six months after the application therefor is made. Failure to repay any such advance or to pay interest shall not void this policy unless the total indebtedness hereon to the company shall equal or exceed such loan value at the time of such failure, and until one month after notice shall have been mailed by the company to the last known address of the insured and of the assignee, if any. No condition other than as herein provided shall be exacted as a prerequisite to any such advance.

**Assignment.** No assignment of this policy shall be binding upon the company until it be filed with the company at its said home office. The company assumes no responsibility as to the validity of any assignment.

**Options on Surrender or Lapse.** After this policy shall have been in force three full years the owner, within one month after any default may elect,

- (a) To accept the value of the policy in cash, or,
- (b) To have the insurance continued in force from date of default without future participation and without the right to loans, for its face amount, including any outstanding dividend additions, less any indebtedness to the company hereon, or,

(c) To purchase nonparticipating paid-up insurance, payable except as hereinafter provided, at the same time and on the same conditions as this policy. The cash value will be the reserve at the date of default required to provide for the twenty installments payable under this policy and for any dividend additions hereto, computed according to the (designate mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum, less (here may be inserted not more than two and one-half) per centum of the amount insured by this policy and of any dividend additions thereto, and less any existing indebtedness to the company on this policy. Payment of such cash value may be deferred by the company for not exceeding six months after the application therefor is made. The term for which the insurance will be continued or the amount of the paid-up policy will be such as the cash value would purchase as a net single premium at the attained age of the insured according to the (designate the mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate the rate of interest adopted by the company for computing reserves) per centum per annum. If the owner shall not within one month from default surrender this policy to the company at its home office for a cash surrender value or paid-up insurance as provided in options (a) and (c) the insurance will be continued as provided in option (b). The paid-up or continued temporary insurance will be payable in twenty equal installments and a payment of twenty installments under either option shall discharge the company from all liability under this policy. The figures in the following table are computed in accordance with the above provisions and upon the assumption that there is no indebtedness upon the policy, and that there are no outstanding dividend additions. (At the option of the company the following may be here inserted: "The figures apply to a policy for \$1,000. As this contract is for \$..... the loan, cash or paid-up insurance, available in any year will be \$....., the amount stated in the table for that year.")

	At End of Year	Cash or Loan Value	Paid up Life Insurance	Continued Insurance		
				Years	Months	Days
3	.....	\$.....	\$.....	.....	.....	.....
4	.....	\$.....	\$.....	.....	.....	.....
5	.....	\$.....	\$.....	.....	.....	.....
6	.....	\$.....	\$.....	.....	.....	.....
7	.....	\$.....	\$.....	.....	.....	.....
8	.....	\$.....	\$.....	.....	.....	.....
9	.....	\$.....	\$.....	.....	.....	.....
10	.....	\$.....	\$.....	.....	.....	.....
11	.....	\$.....	\$.....	.....	.....	.....
12	.....	\$.....	\$.....	.....	.....	.....
13	.....	\$.....	\$.....	.....	.....	.....
14	.....	\$.....	\$.....	.....	.....	.....
15	.....	\$.....	\$.....	.....	.....	.....
16	.....	\$.....	\$.....	.....	.....	.....
17	.....	\$.....	\$.....	.....	.....	.....

	At End of Year	Cash or Loan Value	Paid up Life Insurance	Years	Continued Insurance Months	Days
18	.....	\$.....	\$.....	.....	.....	.....
19	.....	\$.....	\$.....	.....	.....	.....
20	.....	\$.....	\$.....	.....	.....	.....

Figures for later years will be furnished upon request.

Reinstatement. In case of continued temporary insurance under the above provisions this policy upon evidence of insurability satisfactory to the company may be reinstated within the first three years of the term for which the insurance is continued by payment of arrears of premium with interest at (here insert not greater than six) per centum per annum.

Agents are not authorized to modify this policy or extend the time for paying the premium.

In witness whereof the company has caused this policy to be executed this ..... day of .....

NORTH DAKOTA STANDARD LIFE INSURANCE POLICY.

Endowment Fixed Survivorship Annuity.

Age .....

Amount \$..... Premium \$.....

of North Dakota.

In consideration of ..... dollars, receipt of which is hereby acknowledged, and of the payment of (here insert amounts in times of payments of premiums) until ..... full year's premiums shall have been paid or until the prior death of the insured.

Promises to pay at its home office in ....., ..... dollars in twenty equal annual installments of \$..... to the insured, the first installment to be payable on the ..... day of ....., 190..., and ..... if the insured shall die before receiving all the twenty installments herein provided for, the remainder of such twenty installments shall be payable as they fall due to ..... (herein called the beneficiary), (insert " his " or " her ") executors, administrators or assigns, with ..... (insert " out " if so desired) right of revocation, if (insert " he " or " she ") survives the insured, otherwise to the executors, administrators or assigns of the insured.

Should the insured die before (insert date of maturity) this policy shall be payable to the beneficiary (insert " his " or " her ") executors, administrators or assigns, if (insert " he " or " she ") survives the insured, otherwise to the executors, administrators or assigns of the insured, (the first installment, being payable immediately upon receipt of due proof of the death of the insured.)

Any indebtedness to the company on this policy together with the balance, if any, of the then current year's premium, will be deducted from the amounts first payable under this contract.

Should the insured or beneficiary live to receive the twenty installments payable as above provided, the company, beginning one year after the date when the twentieth installment payable hereunder shall fall due, will pay the sum of \$..... annually to the insured, or, in the event of the death of the insured, to the beneficiary the said annual payment to be due and payable so long as either the insured or beneficiary is living.

Change of Beneficiary. When the right of revocation has been reserved, or in case of the death of any beneficiary under either a revocable or irrevocable designation, the insured, subject to any existing assignment of the policy,

may designate a new beneficiary with or without reserving right of revocation by filing written notice thereof at the home office of the company, accompanied by the policy for suitable indorsement thereon.

If any beneficiary shall die before the insured and the insured shall not have designated a new beneficiary the interest of such beneficiary shall be payable to the insured, (insert " his " or " her ") executors, administrators or assigns. If a new beneficiary shall be designated only twenty annual installments will be payable under this policy, and future, (if necessary, insert " semi " or " quarter ") annual premiums will be reduced to ..... dollars each.

Payment of Premiums. The company will accept payment of premiums at other times than as stated above, as follows:

.....

Upon return of this policy accompanied by evidence satisfactory to the company of the death of the beneficiary the company will reduce the future (here insert " annual, " " semi-annual " or " quarterly ") premiums to \$. .... each.

Except as herein provided the payment of a premium or installment thereof shall not maintain the policy in force beyond the date when the next premium or installment thereof is payable. All the premiums are payable in advance at said home office, or to any agent of the company upon delivery of a receipt signed by one or more of the following officers of the company (insert titles of officers who may sign receipts) and countersigned by said agent.

A grace of one month subject to an interest charge at the rate of ..... per centum per annum shall be granted for the payment of every premium after the first, during which month the insurance will continue in force. If the insured shall die during the month of grace the overdue premium will be deducted from any amount payable hereon in any settlement hereunder.

Conditions. (The policy may here provide for restrictions of liability by reason of travel, occupation, change of residence and suicide. These restrictions, except such as refer to military and naval service in time of war, must be applicable only to cases where the act of the insured provided against occurs within two years after the issuance of the policy.)

Incontestability. This policy constitutes the entire contract between the parties and shall be incontestable from its date, except for nonpayment of premiums and except as otherwise provided in this policy. All statements made by the insured shall in the absence of fraud be deemed representations and not warranties and no such statement shall void this policy unless it is contained in a written application and a copy of such application shall be indorsed upon or attached to this policy when issued.

If the age of the insured has been understated, or if the age of the beneficiary has been overstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Participation. This policy shall participate in the surplus of the company and beginning not later than the end of the (insert first, second or third) policy year the company will annually determine and account for the portion of the divisible surplus accruing thereon.

Dividends. Dividends at the option of the owner of this policy shall on the ..... day of ..... of each year (here may be inserted " after the first policy year " or " after the second policy year ") be either:

1. Paid in cash, or,
2. Applied toward the payment of any premium or premiums, or,
3. Applied to the purchase of paid-up additions to the policy, payable in twenty annual installments at the same time as the original amount insured under this policy is payable. The payment of such twenty installments shall discharge the company from all liability on account of such dividend additions ; or,

4. Left to accumulate to the credit of the policy with interest at (here insert a rate not exceeding that used by the company in calculating its reserves) per centum per annum and payable at the maturity of the policy, but withdrawable on any anniversary of the policy.

Unless the owner of this policy shall elect otherwise within three months after the mailing by the company of a written notice requiring such election, the dividends shall be paid in cash.

Loans. After three full year's premiums have been paid the company at any time, while this policy is in force, will advance, on proper assignment of this policy and on the sole security thereof, at a rate of interest not greater than ..... per centum per annum, which interest if not paid annually shall be added to the principal and bear the same rate of interest, a sum equal to, or, at the option of the owner of the policy, less than, the reserve at the end of the current policy year required to provide for the twenty installments payable under this policy and for any dividend additions thereto, and no more, computed according to the (designate mortality table adopted by the company for computing reserves) mortality table, and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum, less (here may be inserted not more than two and one-half per centum) of the amount insured by this policy and of any dividend addition thereto. The company, however, will deduct from such loan value any existing indebtedness to the company on the policy and any unpaid balance of the premium for the current policy year, and may collect interest in advance on the loan to the end of the current policy year. Such loan may be deferred by the company for not exceeding six months after the application therefor is made. Failure to repay any such advance or to pay interest shall not avoid this policy unless the total indebtedness hereon to the company shall equal or exceed such loan value at the time of such failure, and until one month after notice shall have been mailed by the company to the last known address of the insured and of the assignee, if any. No condition other than as herein provided shall be exacted as a prerequisite to any such advance.

Assignment. No assignment of this policy shall be binding upon the company until it be filed with the company at its said home office. The company assumes no responsibility as to the validity of the assignment.

Options on Surrender or Lapse. After this policy shall have been in force three full years the owner, within one month after any default, may elect:

- (a) To accept the value of this policy in cash, or,
- (b) To have the insurance continued in force from date of default, without future participation and without the right of loans, for its face amount, including outstanding dividend additions, less any indebtedness to the company hereon, or,
- (c) To purchase nonparticipating paid-up insurance, payable, except as hereinafter provided, at the same time and on the same conditions as this policy. The cash value will be the reserve at the date of default required to provide for the twenty installments payable under this policy and for any dividend additions thereto, computed according to the (designate mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum, less (here may be inserted not more than two and one-half) per centum of the amount insured by this policy and of any dividend additions thereto, and less any existing indebtedness to the company on this policy. Payment of such cash value may be deferred by the company for not exceeding six months after the application therefor is made. The term for which the insurance will be continued or the amount of the paid-up policy will be such as the cash value will purchase as a net single premium at the attained age of the insured according to the (designate the



mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum. If the sum applicable to the purchase of temporary insurance shall be more than sufficient to continue the insurance to the end of the endowment term named in this policy, the excess shall be used to purchase in the same manner nonparticipating, paid-up pure endowment, payable at the end of the endowment term and on the same conditions.

If the owner shall not within one month from default surrender this policy to the company at its home office for a cash surrender value or for paid-up insurance as provided in options (a) and (c) the insurance will be continued as provided in option (b). The paid-up or continued temporary and pure endowment insurance will be payable in twenty equal annual installments and the payment of twenty installments under either option shall discharge the company from all liability under this policy.

The figures in the following table are computed in accordance with the above provisions and upon the assumption that there is no indebtedness on the policy, and that there are no outstanding dividend additions.

(At the option of the company the following may be here inserted: "The figures apply to a policy of \$1,000. As this contract is for \$....., the loan, cash, paid-up insurance or pure endowment available in any year will be ..... the amount stated in the table for that year.")

At End of Year	Cash or Loan Value	Paid Up Endowment Insurance	Continued Insurance			Pure Endowment
			Years	Months	Days	
3	\$.....	\$.....	.....	.....	.....	\$.....
4	\$.....	\$.....	.....	.....	.....	\$.....
5	\$.....	\$.....	.....	.....	.....	\$.....
6	\$.....	\$.....	.....	.....	.....	\$.....
7	\$.....	\$.....	.....	.....	.....	\$.....
8	\$.....	\$.....	.....	.....	.....	\$.....
9	\$.....	\$.....	.....	.....	.....	\$.....
10	\$.....	\$.....	.....	.....	.....	\$.....
11	\$.....	\$.....	.....	.....	.....	\$.....
12	\$.....	\$.....	.....	.....	.....	\$.....
13	\$.....	\$.....	.....	.....	.....	\$.....
14	\$.....	\$.....	.....	.....	.....	\$.....
15	\$.....	\$.....	.....	.....	.....	\$.....
16	\$.....	\$.....	.....	.....	.....	\$.....
17	\$.....	\$.....	.....	.....	.....	\$.....
18	\$.....	\$.....	.....	.....	.....	\$.....
19	\$.....	\$.....	.....	.....	.....	\$.....
20	\$.....	\$.....	.....	.....	.....	\$.....

Figures for later years will be furnished upon request.

Reinstatement. In case of continued temporary insurance under the above provisions this policy upon evidence of insurability satisfactory to the company may be reinstated within the first three years of the term for which the insurance is continued by payment of arrears of premiums with interest at (here insert not greater than six) per centum per annum.

Agents are not authorized to modify this policy or to extend the time for paying a premium.

In witness whereof, the company has caused this policy to be executed this ..... day of .....

NORTH DAKOTA STANDARD LIFE INSURANCE POLICY.

Term.

Age .....

Amount \$.....

Premium \$.....

.....  
.....  
.....

Of North Dakota.

In consideration of ..... dollars, receipt of which is hereby acknowledged, and of the payment of (here insert amounts and times of payments of premiums) until ..... full year's premiums shall have been paid or until the prior death of the insured, promises to pay upon receipt at the home office of the company in ..... of due proof of the death of, ..... of ....., county of ..... state of North Dakota, herein called the insured, within ..... years from the date hereof, ..... dollars, less any indebtedness hereon to the company and any unpaid portion of the premium for the then current policy year, at said home office, to ..... beneficiary..... with (insert " out " if so desired) right of revocation.

Change of Beneficiary. When the right of revocation has been reserved, or in case of the death of any beneficiary under either a revocable or irrevocable designation, the insured, subject to any existing assignment of the policy, may designate a new beneficiary with or without reserving the right of revocation by filing written notice thereof at the home office of the company, accompanied by the policy for suitable indorsement thereon. If any beneficiary shall die before the insured and the insured shall not have designated a new beneficiary the interest of such beneficiary shall be payable to the insured, (insert " his " or " her ") executors, administrators or assigns.

Payment of Premiums. The company will accept payment of premiums at other times than as stated above, as follows:

.....  
.....

Except as herein provided the payment of a premium or installment thereof shall not maintain the policy in force beyond the date when the next premium or installment thereof is payable.

All premiums are payable in advance at said home office, or to an agent of the company upon delivery of a receipt signed by one or more of the following officers of the company (insert titles of officers who may sign receipts) and countersigned by said agent.

A grace of one month subject to an interest charge at the rate of ..... per centum per annum shall be granted for the payment of every premium after the first, during which month the insurance shall continue in force. If the insured shall die during the month of grace the overdue premium will be deducted from any amount payable hereon in any settlement hereunder.

Conditions. (The policy may here provide for restrictions of liability by reason of travel, occupation, change of residence and suicide. These restrictions, except such as refer to military and naval service in time of war, must be applicable only to cases where the act of the insured provided against occurs within two years after the issuance of the policy.)

Incontestability. This policy constitutes the entire contract between the parties and shall be incontestable, from its date, except for nonpayment of premiums and except as otherwise provided in this policy. All statements made by the insured shall in the absence of fraud be deemed representations and not warranties and no such statement shall avoid this policy unless it is contained in a written application and a copy of such application shall be indorsed upon or attached to this policy when issued. If the age of the insured

has been understated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Participation. This policy shall participate in the surplus of the company and beginning not later than the end of the (insert first, second or third) policy year the company will annually determine and account for the portion of the divisible surplus accruing hereon.

Dividends. Dividends at the option of the owner of this policy shall on the ..... day of ..... of each year (here may be inserted " after the first policy year " or " after the second policy year ") be either

1. Paid in cash, or,
2. Applied toward the payment of any premium or premiums, or (the policy, at the option of the company, may here provide for a further option, as follows:)
3. Left to accumulate to the credit of the policy with interest at (here insert a rate not exceeding that used by the company in calculating its reserves) per centum per annum and payable at the maturity of the policy, or at the expiration of the term, but withdrawable on any anniversary of the policy.

Unless the owner of this policy shall elect otherwise within three months after the mailing by the company of a written notice requiring such election, the dividends shall be paid in cash.

Assignment. No assignment of this policy shall be binding upon the company, until it be filed with the company at its said home office. The company assumes no responsibility as to the validity of any assignment.

(If the term of the policy is for more than twenty years, the company shall provide for continuance of insurance on surrender or lapse in the following form:)

Continuance of Insurance on Lapse. In event of default in premium payments after this policy shall have been in force three full years, the reserve hereon according to the (designate mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum, less (here may be inserted not more than two and one-half) per centum of the amount insured by this policy will be applied to the purchase of nonparticipating continued temporary insurance for the face amount of this policy at net single premium rates at the attained age of the insured according to the same table of mortality and rate of interest.

TABLE OF CONTINUED INSURANCE.

End of Year	Years	Continued Insurance Months	Days
3	.....	.....	.....
4	.....	.....	.....
5	.....	.....	.....
6	.....	.....	.....
7	.....	.....	.....
8	.....	.....	.....
9	.....	.....	.....
10	.....	.....	.....
11	.....	.....	.....
12	.....	.....	.....
13	.....	.....	.....
14	.....	.....	.....
15	.....	.....	.....
16	.....	.....	.....
17	.....	.....	.....
18	.....	.....	.....
19	.....	.....	.....
20	.....	.....	.....

Figures for later years will be furnished upon request.

(If the term policy is for more than twenty years the company shall provide for reinstatement in the following form:)

Reinstatement. Upon evidence of insurability satisfactory to the company this policy may be reinstated within the first three years of the term for which the insurance is continued by payment of arrears of premiums with interest at (here insert not greater than six) per centum per annum.

Options at Maturity. The insured, by written notice to the company at its home office and with written consent of the assignee and irrevocable beneficiary, if any, may elect to have the net sum payable under this policy paid either in cash or as follows:

1. By the payment of interest thereon at . . . . . per centum per annum, payable annually to the payee under this policy at the end of each year during the life of the payee and by the payment upon the death of the payee of the said net sum and accrued interest to the executors, administrators or assigns of the payee, unless otherwise directed in said notice.

2. By the payment of equal annual installments for a specified number of years, the first installment being payable immediately, in accordance with the following table for each one thousand dollars of said net sum.

3. By the payment of equal annual payments payable at the beginning of each year for a fixed period of twenty years and for so many years longer as the payee shall survive, in accordance with the following table for each one thousand dollars of said net sum.

Installments payable under options (2) or (3) which shall not have been paid prior to the death of the payee shall be paid, unless otherwise directed in said notice, to the executors, administrators or assigns of the payee.

If the insured shall not have directed otherwise the beneficiary may, after the death of the insured, by like written notice, and with the written consent of the assignee, if any, select either of the above options.

Unless otherwise specified by the insured the payee may on any interest date receive the amount yet due under option (1), and may at any time receive the commuted value of payments yet to be made, computed upon the same basis as option (2) in the following table, provided that no such commutation will be made under (3), except after the death of the payee occurring within the aforesaid twenty years.

TABLE OF INSTALLMENTS FOR EACH \$1,000.

OPTION 2		OPTION 3	
Number of Annual Installments	Amount of Each Installment	Age of Payee When Policy Becomes Payable	Amount of Each Installment

(Blank lines)

Agents are not authorized to modify this policy or to extend the time for paying a premium.

In Witness Whereof, the company has caused this policy to be executed this . . . . . day of . . . . .

NORTH DAKOTA STANDARD LIFE INSURANCE POLICY.

Term with right to renew and change.

Age . . . .

Amount \$ . . . . . Premium \$ . . . . .

OF NORTH DAKOTA.

In consideration of . . . . . dollars, receipt of which is hereby acknowledged, and of the payment of (here insert amounts and times

of payments of premium) until ..... full year's premium shall have been paid or until the prior death of the insured.

Promises to pay upon receipt at the home office of the company in ..... of due proof of the death of ..... of ....., county of ....., state of North Dakota, herein called the insured, within ..... years from the date hereof, ..... dollars, less any indebtedness hereon to the company and any unpaid portion of the premium for the then current policy year, at said home office, to..... beneficiary.... with (insert " out " if so desired) right of revocation.

Change of Beneficiary. When the right of revocation has been reserved, or in case of the death of any beneficiary under either a revocable or irrevocable designation, the insured, subject to any existing assignment of the policy, may designate a new beneficiary with or without reserving right of revocation by filing written notice thereof at the home office of the company, accompanied by the policy for suitable indorsement thereon. If any beneficiary shall die before the insured and the insured shall not have designated a new beneficiary the interest of such beneficiary shall be payable to the insured (insert " his " or " her ") executors, administrators or assigns.

Payment of Premiums. The company will accept payment of premiums at other times than as stated above, as follows:

.....

Except as herein provided the payment of premium or installment thereof shall not maintain the policy in force beyond the date when the next premium or installment thereof is payable.

All premiums are payable in advance at said home office, or to an agent of the company upon delivery of a receipt signed by one or more of the following officers of the company (insert titles of officers who may sign receipts) and countersigned by said agent.

A grace of one month subject to an interest charge at the rate of ..... per centum per annum shall be granted for the payment of every premium after the first, during which month the insurance shall continue in force. If the insured shall die during the month of grace the overdue premium will be deducted from any amount payable hereon in any settlement hereunder.

Conditions. (The policy may here provide for restrictions of liability by reason of travel, occupation, change of residence, and suicide. These restrictions, except such as refer to military and naval service in time of war, must be applicable only to cases where the act of the insured provided against occurs within two years after the issuance of the policy.)

Incontestability. This policy constitutes the entire contract between the parties and shall be incontestable from its date, except for nonpayment of premiums and except as otherwise provided in this policy. All statements made by the insured shall in the absence of fraud be deemed representations and not warranties and no such statement shall avoid this policy unless it is contained in a written application and a copy of such application shall be indorsed upon or attached to this policy when issued.

If the age of the insured has been understated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Participation. This policy shall participate in the surplus of the company and beginning not later than the end of the (insert first, second and third) policy year the company will annually determine and account for the portion of the divisible surplus accruing hereon.

Dividends. Dividends at the option of the owner of this policy shall on the ..... day of ....., of each year (here may be inserted " after the first policy year " or " after the second policy year ") be either :

1. Be paid in cash, or,
  2. Applied toward the payment of any premium or premiums. (The policy at the option of the company may here provide for a further option, as follows:)
  3. Left to accumulate to the credit of the policy with interest at (here insert a rate not exceeding that used by the company in calculating its reserves) per centum per annum and payable at the maturity of the policy, or at the expiration of the term, but withdrawable on any anniversary of the policy.
- Unless the owner of this policy shall elect otherwise within three months after the mailing by the company of a written notice requiring such election, the dividends shall be paid in cash.

**Privilege of Renewal.** The owner of this policy, if the insured be not over the age of sixty-five years, may renew this policy for the further terms of ..... years each by written notice to the company at its said home office accompanied by this policy for suitable indorsement on or before the expiration of the insurance hereunder and by paying the premiums to be fixed by the age on the birthday nearest to the date of such renewal in accordance with the following table for each one thousand dollars of insurance; if the insured shall be over the age of sixty-five years this policy may upon similar notice be surrendered for an ordinary life policy which shall require premiums during life in accordance with the following table for each one thousand dollars of insurance.

TABLE OF PREMIUMS FOR RENEWALS.

Attained Age	Years Term Premium Payable in Advance for Each \$1,000	Attained Age	Ordinary Life Premium Payable in Advance for Each \$1,000
-----------------	--	-----------------	---

(Blank lines.)

**Privilege to Change to Other Forms of Policies.** The owner of this policy may at any time within the first ..... years exchange this policy for a participating policy for the same amount or any less amount upon the ordinary life, limited payment life, or endowment plan upon any anniversary of the policy, or within the month of grace by surrendering the policy to the company at said home office with written notice of the election and by paying the premiums to be fixed by the age on the birthday nearest to the date of such exchange according to the rates of the company then in force.

**Assignment.** No assignment of this policy shall be binding upon the company, until it be filed with the company at its said home office. The company assumes no responsibility as to the validity of any assignment.

(If the term of the policy is for more than twenty years the company shall provide for continuance of insurance on surrender or lapse in the following form:)

**Continuance of Insurance on Lapse.** In event of default in premium payments after this policy shall have been in force three full years, the reserve hereon according to the (designate mortality table, adopted by the company for computing reserves) mortality table, and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum, less (here may be inserted not more than two and one-half) per centum of the amount insured by this policy will be applied to the purchase of nonparticipating continued temporary insurance for the face amount of this policy at net single premium rates at the attained age of the insured according to the same table of mortality and rate of interest.

TABLE OF CONTINUED INSURANCE.

At End of Year	Years	Continued Insurance Months	Days
3	.....	.....	.....
4	.....	.....	.....
5	.....	.....	.....
6	.....	.....	.....
7	.....	.....	.....
8	.....	.....	.....
9	.....	.....	.....
10	.....	.....	.....
11	.....	.....	.....
12	.....	.....	.....
13	.....	.....	.....
14	.....	.....	.....
15	.....	.....	.....
16	.....	.....	.....
17	.....	.....	.....
18	.....	.....	.....
19	.....	.....	.....
20	.....	.....	.....

Figures for later years will be given upon request.

(If the term of the policy is for more than twenty years, the company shall provide for reinstatement in the following form:)

Reinstatement. Upon evidence of insurability satisfactory to the company this policy may be reinstated within the first three years of the term for which the insurance is continued by payment of arrears of premiums with interest at (here insert not greater than six) per centum per annum.

Options at Maturity. The insured, by written notice to the company at its home office and with the written consent of the assignee and irrevocable beneficiary, if any, may elect to have the net sum payable under this policy paid either in cash or as follows:

1. By the payment of interest thereon at ..... per centum per annum, payable annually, to the payee under this policy at the end of each year during the life of the payee and by the payment upon the death of the payee of the said net sum and accrued interest to the executors, administrators or assigns of the payee, unless otherwise directed in said notice.

2. By the payment of equal annual installments for a specified number of years, the first installment being payable immediately, in accordance with the following table for each one thousand dollars of said net sum.

3. By the payment of equal annual installments payable at the beginning of each year for a fixed period of twenty years and for so many years longer as the payee shall survive, in accordance with the following table for each one thousand dollars of said net sum.

Installments payable under (2) or (3) which shall not have been paid prior to the death of the payee shall be paid, unless otherwise directed in said notice, to the executors, administrators or assigns of the payee.

If the insured shall not have otherwise directed the beneficiary may after the death of the insured by like written notice and with the written consent of the assignee, if any, select either of the above options.

Unless otherwise specified by the insured the payee may, on any interest date, receive the amount yet due under option (1) and may at any time receive the commuted value of payments yet to be made, computed upon the same basis as option (2) in the following table, provided that no such commutation will be made under (3), except after the death of the payee occurring within the aforesaid twenty years.

TABLE OF INSTALLMENTS FOR EACH \$1,000.  
 (Option 2) (Option 3)

Number of Annual Installments	Amount of Each Installment	Age of Payee When Policy Becomes Payable	Amount of Each Installment
(Blank lines.)			

Agents are not authorized to modify this policy or to extend the time for payment of a premium.

In Witness Whereof, the company has caused this policy to be executed this ..... day of ..... [1907, ch. 140, § 2.]

**§ 6635a. Single premium policies.** Single premium policies may be issued in any form prescribed in section 6635, omitting therefrom provisions or portions thereof applicable only to other than single premium policies. Nonparticipating policies may be issued in any form prescribed in section 6635 if they shall contain a provision that the policy shall be nonparticipating, and such policies shall omit therefrom clauses for participation in the surplus of the company. [1907, ch. 140, § 3.]

**§ 6635b. Term insurance.** Policies issued on the standard forms prescribed in section 6635 may provide for not more than one year preliminary term insurance by corporation therein of the following clause immediately preceding the "change of beneficiary" clause: "The first year's insurance under this policy is term insurance." If the premium charged for term insurance under a limited payment life preliminary term policy providing for the payment of all premiums thereon in less than twenty years from the date of the policy or under an endowment preliminary term policy, exceeds that charged for like insurance under twenty payment preliminary term policies of the same company, the reserve thereon at the end of any year, including the first, shall not be less than the reserve on the twenty payment preliminary term policy issued in the same year and at the same age, together with an amount which shall be equivalent to the accumulation of a net level premium sufficient to provide for a pure endowment at the end of the premium-payment period equal to the difference between the value at the end of such period of such twenty payment preliminary term policy and the full reserve at such time of such a limited payment or endowment policy. [1909, ch. 149; 1907, ch. 140, § 4.]

**§ 6635c. Provisions of life policies.** No policy of life insurance in form other than as provided in section 6635 shall be issued in this state or be issued by a life insurance company organized under the laws of this state unless the same shall contain the following provisions:

1. A provision that all premiums shall be payable in advance either at the home office of the company, or to an agent of the company, upon delivery of a receipt signed by one or more of the officers who shall be named in the policy.
2. A provision for a grace of one month for the payment of every premium after the first, which may be subject to an interest charge during which month the insurance shall continue in force, which provision may contain a stipulation that if the insured shall die during the month of grace the over-due premium will be deducted in any settlement under the policy.
3. A provision that the policy shall constitute the entire contract between the parties and shall be incontestable after two years from its date, except for nonpayment of premiums and except for violations of the conditions of the policy relating to naval and military services in time of war.
4. A provision that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties and that no such statement shall void the policy unless it is contained in a written application and a copy of such application shall be indorsed upon or attached to the policy when issued.



5. A provision that if the age of the insured has been understated the amount payable under the policy shall be such as the premium would have purchased at the correct age.

6. A provision that the policy shall participate in the surplus of the company and that, beginning not later than the end of the third policy year, the company will annually determine and account for the portion of the divisible surplus accruing on the policy, and that the owner of the policy shall have the right each year to have the current dividend arising from such participation paid in cash and if the policy shall provide other dividend options, it shall further provide that if the owner of the policy shall not elect any such other options the dividends shall be paid in cash. This provision shall not be required in nonparticipating policies.

7. A provision that after three full years' premiums have been paid the company at any time while the policy is in force will advance on proper assignment of the policy and on the sole security thereof, at a specified rate of interest, a sum equal to, or at the option of the owner of the policy, less than, the reserve at the end of the current policy year on the policy and on any dividend additions thereto, specifying the mortality table and rate of interest adopted for computing such reserve, less a sum not more than two and one-half per centum of the amount insured by the policy and of any dividend additions thereto; and that the company will deduct from such loan value any existing indebtedness on the policy and any unpaid balance of the premium for the current policy year, and may collect interest in advance on the loan to the end of the current policy year; which provision may further provide that such loan may be deferred for not exceeding six months after the application thereof is made. It shall be further stipulated in the policy that failure to repay any such advance or to pay interest shall not void the policy unless the total indebtedness thereon to the company shall equal or exceed such loan value at the time of such failure nor until one month after notice shall have been mailed by the company to the last known address of the insured and of the assignee, if any. No condition other than as herein provided shall be exacted as a prerequisite to any such advance. This provision shall not be required in term insurances.

8. A provision which, in event of default in premium payments, after premium shall have been paid for three years, shall secure to the owner of the policy a stipulated form of insurance, the net value of which shall be at least equal to the reserve at the date of default on the policy and on any dividend additions thereto, specifying the mortality table and rate of interest adopted for computing such reserves, less a sum of not more than two and one-half per centum of the amount insured by the policy and of any existing dividend additions thereto, and less any existing indebtedness to the company on the policy. Such provision shall stipulate that the policy may be surrendered to the company at its home office within one month from date of default for a specified cash value at least equal to the sum which would otherwise be available for the purchase of insurance as aforesaid and may stipulate that the company may defer payment for not more than six months after the application therefor is made. This provision shall not be required in term insurances of twenty years or less.

9. A table showing in figures the loan values, and the options available under the policies each year upon default in premium payments, during at least the first twenty years of the policy, beginning with the year in which such values and options become available.

10. A provision that if, in event of default in premium payments, the value of the policy shall be applied to the purchase of other insurance, and if such insurance shall be in force and the original policy shall not have been surrendered to the company and cancelled, the policy may be reinstated within

three years from such default, upon evidence of insurability satisfactory to the company and payment of arrears of premiums with interest.

11. A provision that when a policy shall become a claim by the death of the insured settlement shall be made upon receipt of due proof of death, or not later than two months after receipt of such proof.

12. A table showing the amounts of installments in which the policy may provide its proceeds may be payable.

13. A title on the face and on the back of the policy correctly describing the same.

Any of the foregoing provisions or portions thereof relating to premiums not applicable to single [premium] policies, shall to that extent not be incorporated therein. [1907, ch. 140, § 5.]

**§ 6635d. Provisions prohibited.** No policy of life insurance in form other than as prescribed in section 6635 shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of this state, if it contain any of the following provisions:

1. A provision for forfeiture of the policy for failure to repay any loan on the policy or to pay interest on such loan while the total indebtedness on the policy is less than the loan value thereof; or any provision for forfeiture for failure to repay any such loan or to pay interest thereon, unless such provision contain a stipulation that no such forfeiture shall occur until at least one month after notice shall have been mailed by the company to the last known address of the insured and of the assignee, if any.

2. A provision limiting the time within which any action at law or in equity may be commenced to less than five years after the cause of action shall accrue.

3. A provision by which the policy shall purport to be issued or to take effect before the original application for the insurance was made, if thereby the assured would rate at an age younger than his age at date when the application was made, according to his age at nearest birthday.

4. A provision for any mode of settlement at maturity of less value than the amount insured on the face of the policy plus dividend additions, if any, less any indebtedness to the company on the policy and less any premium that may by the terms of the policy be deducted. [1907, ch. 140, § 6.]

**§ 6635e. Preliminary term policies.** Preliminary term policies not issued on the standard forms shall also be subject to the provisions of section 6635b. [1907, ch. 140, § 7.]

**§ 6635f. Form filed with insurance commissioner.** No policy of life insurance shall be issued or delivered in this state, or be issued by a life insurance company organized under the laws of this state, until the form of the same has been filed with the insurance commissioner; and after the insurance commissioner shall have notified any company of his disapproval of any form it shall be unlawful for such company to issue any policy in the form so disapproved. The commissioner's action shall be subject to review by any court of competent jurisdiction. [1907, ch. 140, § 8.]

**§ 6635g. Provisions restricted.** The policies of a life insurance company, not organized under the laws of this state, may contain any provision which the law of this state, territory, district or county under which the company is organized, prescribes shall be in such policies when issued in this state, and the policies of a life insurance company organized under the laws of this state may, when issued or delivered in any other state, territory, district or county, contain any provision required by the laws of the state, territory, district or county in which the same are issued, anything in this act to the contrary notwithstanding. [1907, ch. 140, § 9.]

**§ 6635h. What companies exempt.** This act [sections 6634-6635i] shall not apply to annuities, industrial policies or to corporations or associations operating on the assessment or fraternal plan. [1907, ch. 140, § 10.]

**§ 6635i. "Company" defined.** Wherever the word "company" is used

in this act [sections 6634-6635i] it shall be held to include corporations and associations. [1907, ch. 140, § 11.]

**§ 6636. Policy must contain entire contract.** Every policy of life insurance issued or delivered within this state on or after the first day of January, 1908, by any life insurance corporation doing business within the state shall contain the entire contract between the parties. [1907, ch. 155.]

## CHAPTER 82.

### POLICIES OF HEALTH OR ACCIDENT INSURANCE.

**§ 6637. Typography of policy, and provisions required.** No policy of insurance against loss or damage by the sickness, bodily injury or death by accident of the assured shall be issued or delivered in this state, unless the same shall be plainly printed, no portion thereof in smaller than long primer type, and every policy so issued and delivered shall contain the following provisions:

1. A provision that notice of accident or disability shall be given within forty (40) days, unless such notice may be shown not to have been reasonably possible, to some certain office or officer designated therein.

2. A provision that the policy or certificate contains the entire contract.

3. A provision that if a past-due premium is accepted after lapse, such acceptance shall reinstate the policy in full.

4. A provision that if the occupation of the insured be changed to a more hazardous one, then the benefit and payment to be such as the premium would pay for in that occupation.

5. All benefits called for by the policy shall be specifically stated in full therein, and all exceptions shall be stated specifically and with the same prominence as the benefits. [1911, ch. 158, § 1.]

**§ 6638. Provisions forbidden.** No policy of insurance against loss or damage by the sickness, bodily injury or death by accident of the assured shall be issued or delivered in this state if it contain any of the following provisions:

1. A provision limiting the time in which an action at law or in equity may be commenced to less than two years after date upon which final proof of loss or disability shall have been filed with the company.

2. A provision referring to the constitution, by-laws or rules of the company or association or attempting to make the same a part of the policy.

3. A provision for the deduction of advance premiums or assessments from benefits payable under the terms of the policy.

4. A provision limiting the amount of indemnity to be paid to a sum less than the indemnity as stated in the policy and for which the premium has been paid. [1911, ch. 158, § 2.]

**§ 6639. Application of this chapter.** This chapter shall apply to all companies, corporations or associations issuing a policy of insurance against loss or damage caused by the sickness, bodily injury or death by accident of the assured, except fraternal beneficiary associations. [1911, ch. 158, § 3.]

**§ 6640. Form of policy to be filed with insurance commissioner for approval.** No policy of insurance against loss or damage by the sickness, bodily injury or death by accident of the assured shall be issued or delivered in this state by any company, corporation or association until the form of the same, together with a table of rates and classification of risks, has been filed with the commissioner of insurance; and after the commissioner of insurance shall have notified any company, corporation or association of his disapproval of any form, stating his reasons therefor in writing, it shall be unlawful for such company, corporation or association to issue any policy in the form so disapproved. The commissioner's action shall be subject to review by any court of competent jurisdiction. [1911, ch. 158, § 4.]

## CHAPTER 83.

## INDEMNITY.

**§ 6641. 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. [R. C. 1905, § 6065; Civ. C. 1877, § 1639; R. C. 1899, § 4615.]

Contracts of indemnity within the statute of frauds. 42 Am. St. Rep. 186.

As to similar provision in Cal. Civ. Code, § 2772, see *Graves v. Moore*, 58 Cal. 435; *Magee v. McManus*, 70 Cal. 553, 12 Pac. 451.

**§ 6642. 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. [R. C. 1905, § 6066; Civ. C. 1877, § 1640; R. C. 1899, § 4616.]

Validity of agreement to indemnify bail in a criminal case. 14 L.R.A. 78; 20 L.R.A.(N.S.) 58.

Agreements to indemnify against illegal acts. 40 Am. Dec. 425.

**§ 6643. 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. [R. C. 1905, § 6067; Civ. C. 1877, § 1641; R. C. 1899, § 4617.]

**§ 6644. 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. [R. C. 1905, § 6068; Civ. C. 1877, § 1642; R. C. 1899, § 4618.]

**§ 6645. Several includes each.** An agreement to indemnify several persons applies to each, unless a contrary intention appears. [R. C. 1905, § 6069; Civ. C. 1877, § 1643; R. C. 1899, § 4619.]

**§ 6646. 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. [R. C. 1905, § 6070; Civ. C. 1877, § 1644; R. C. 1899, § 4620.]

**§ 6647. 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. [R. C. 1905, § 6071; 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.

Indemnification of bail in criminal actions is governed by these sections. *Western Surety Co. v. Kelley*, 27 S. D. 465, 131 N. W. 808.

Construction of bond or policy indemnifying employer against loss from negligence of employe. 31 L.R.A.(N.S.) 775.

Injuries covered by employer's indemnity policy. 30 L.R.A.(N.S.) 1192.

How far does limitation of liability in policy of indemnity insurance against liability for injuries to employes and others include expenses of litigation. 12 L.R.A.(N.S.) 478.

Liability under policy indemnifying against liability for injuries to compensate insured for expenses incurred in successful defense or compromise of action. 30 L.R.A.(N.S.) 1105.

Construction of policy or contract insuring against loss of rents. 16 L.R.A.(N.S.) 1055; 23 L.R.A.(N.S.) 123.

When surety becomes liable on contract of indemnity. 1 Am. Dec. 47.

Indemnity to sheriffs for damages suffered by them in executing civil process. 89 Am. St. Rep. 448.

Conclusiveness of judgments against principals in action against indemnitors. 22 Am. St. Rep. 204.

When right of action accrues on contract of indemnity. 49 Am. Dec. 362.

As to similar provision in Cal. Civ. Code, § 2778, see *McBeth v. McIntyre*, 57 Cal. 49; *Commercial Union Assur. Co. v. American Cent. Ins. Co.*, 68 Cal. 430, 9 Pac. 712; *Showers v. Wadsworth*, 81 Cal. 270, 22 Pac. 663; *Fernandez v. Tormey*, 121 Cal. 515, 53 Pac. 1119.

#### § 6648. 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. [R. C. 1905, § 6072; Civ. C. 1877, § 1646; R. C. 1899, § 4622.]

§ 6649. 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. [R. C. 1905, § 6073; Civ. C. 1877, § 1647; R. C. 1899, § 4623.]

As verb word "bail" means to deliver arrested person to sureties upon their giving security for his appearance in court. *State v. Western Surety Co.*, 26 S. D. 170, 128 N. W. 173.

Presumption that obligation is joint and not several which arises under section 1118 does not depend on particular obligation imposed on persons therein named as bail *State v. Western Surety Co.*, 26 S. D. 170, 128 N. W. 173.

§ 6650. Obligations of bail, how governed. The obligations of bail are governed by the statutes specially applicable thereto. [R. C. 1905, § 6074; Civ. C. 1877, § 1648; R. C. 1895, § 4624.]

## CHAPTER 84.

### GUARANTY.

- ARTICLE 1. DEFINITION OF GUARANTY, §§ 6651, 6652.  
 2. CREATION OF GUARANTY, §§ 6653-6656.  
 3. INTERPRETATION OF GUARANTY, §§ 6657-6660.  
 4. LIABILITY OF GUARANTORS, §§ 6661-6665.  
 5. CONTINUING GUARANTY, §§ 6666, 6667.  
 6. EXONERATION OF GUARANTORS, §§ 6668-6674.

#### ARTICLE 1.— DEFINITION OF GUARANTY.

§ 6651. **Defined.** A guaranty is a promise to answer for the debt, default or miscarriage of another person. [R. C. 1905, § 6075; Civ. C. 1877, § 1649; R. C. 1899, § 4625.]

The contract of guaranty. 105 Am. St. Rep. 502.

Effect on contract of guaranty of death of party thereto. 23 L.R.A. 709; 45 L.R.A.(N.S.) 350.

Is liability of guarantor or surety determined by his death. 2 B. R. C. 937.

Indorser of note as guarantor. 18 L.R.A.(N.S.) 565.

Letter in reply to inquiry as to third party's financial condition. 1 L.R.A.(N.S.) 305.

Request to make advances to another as implied guaranty of payment. 15 L.R.A.(N.S.) 1115; 46 L.R.A.(N.S.) 484.

As to similar provision in Cal. Civ. Code, § 2787, see *Fessenden v. Summers*, 62 Cal. 484.

**§ 6652. Knowledge of principal unnecessary.** A person may become guarantor even without the knowledge or consent of the principal. [R. C. 1905, § 6076; Civ. C. 1877, § 1650; R. C. 1899, § 4626.]

#### ARTICLE 2.—CREATION OF GUARANTY.

**§ 6653. 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. [R. C. 1905, § 6077; 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.

Where one has collected money on note which he has not paid over, the moral obligation to pay is sufficient to support guaranty. *Rankin v. Matthiesen*, 10 S. D. 628, 75 N. W. 196.

Necessity of new consideration to bind third person who signs as guarantor after execution and delivery of original contract by principal. 44 L.R.A.(N.S.) 481.

**§ 6654. 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. [R. C. 1905, § 6078; Civ. C. 1877, § 1652; R. C. 1899, § 4628.]

**§ 6655. 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 promisor 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 promisor, 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. [R. C. 1905, § 6079; Civ. C. 1877, § 1653; R. C. 1899, § 4629.]

Oral contract to pay debt of another. *McArthur v. Dryden*, 6 N. D. 433, 71 N. W. 125; *McMillan v. Aitchison*, 3 N. D. 183, 54 N. W. 1030.

Promise to see that one gets his money from third person an original agreement and binding, though not in writing. *Meldrum v. Keneffick*, 15 S. D. 370, 89 N. W. 863.

One's agreement to pay another's claim to discharge his own obligation as "original obligation." *Grimsrud Shoe Co. v. Jackson*, 22 S. D. 114, 115 N. W. 656.

Validity of lessor's oral promise to pay for goods delivered to lessee. *Wood v. Dodge*, 23 S. D. 95, 120 N. W. 774.

Is oral promise to pay another's pre-existing debt made in order to secure benefit to promisor without releasing original debtor within statute of frauds. 22 L.R.A.(N.S.) 1077; 40 L.R.A.(N.S.) 242.

Contemporary promise of one person to pay where benefit inures to another as a promise to answer for default of another within statute of frauds. 15 L.R.A.(N.S.) 214; 32 L.R.A.(N.S.) 598.

**§ 6656. 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. [R. C. 1905, § 6080; 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.

Mutual assent or meeting of minds necessary to make guaranty absolute. *Standard Sewing Mach. Co. v. Church*, 11 N. D. 420, 92 N. W. 805.

Offer to guaranty fulfillment of obligations by agent is not binding until receipt of notice of acceptance. *William Deering & Co. v. Mortell*, 21 S. D. 159, 16 L.R.A.(N.S.) 352, 110 N. W. 86.

Necessity of notice of acceptance to bind guarantor. 16 L.R.A.(N.S.) 353; 33 L.R.A.(N.S.) 960; 48 L.R.A.(N.S.) 198; 39 Am. Dec. 221.

As to similar provision in Cal. Civ. Code, § 2795, see *London & S. F. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164.

#### ARTICLE 3.—INTERPRETATION OF GUARANTY.

**§ 6657. 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. [R. C. 1905, § 6081; Civ. C. 1877, § 1655; R. C. 1899, § 4631.]

**§ 6658. 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. [R. C. 1905, § 6082; Civ. C. 1877, § 1656; R. C. 1899, § 4632.]

"For value received we hereby guarantee the collection of the within note," guarantees only that makers were solvent. *Roberts, Throp & Co. v. Laughlin*, 4 N. D. 167, 59 N. W. 967.

Guaranty of collection. 64 Am. Rep. 393.

**§ 6659. 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. [R. C. 1905, § 6083; Civ. C. 1877, § 1657; R. C. 1899, § 4633.]

**§ 6660. When insolvency presumed from removal.** In the cases mentioned in section 6658, 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. [R. C. 1905, § 6084; Civ. C. 1877, § 1658; R. C. 1899, § 4634.]

#### ARTICLE 4.—LIABILITY OF GUARANTORS.

**§ 6661. When guaranty deemed unconditional.** A guaranty is to be deemed unconditional, unless its terms import some condition precedent to the liability of the guarantor. [R. C. 1905, § 6085; Civ. C. 1877, § 1659; R. C. 1899, § 4635.]

As to similar provision in Cal. Civ. Code, § 2806, see *Coburn v. Brooks*, 78 Cal. 443, 21 Pac. 2.

**§ 6662. 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. [R. C. 1905, § 6086; Civ. C. 1877, § 1660; R. C. 1899, § 4636.]

Guaranty examined and held absolute. *Fisk v. Stone*, 6 D. 35, 50 N. W. 125.

Laches releases guarantor, insolvency of guarantor will not excuse laches. *Thorp v. Laughlin*, 4 N. D. 167, 59 N. W. 967.

Guaranty by indorser makes purchaser indorsee within rule protecting innocent purchasers. *Dunham v. Peterson*, 5 N. D. 414, 67 N. W. 293, 57 Am. St. Rep. 556, 36 L.R.A. 232.

Notice of acceptance not necessary to render absolute guarantor liable. *Fisk v. Stone*, 6 D. 35, 50 N. W. 125.

When verbal guaranty will be sufficient. *Dodge v. Furber*, 6 D. 217, 50 N. W. 831.

In absence of contract, grantee in deed does not guarantee payment of mortgage on land. *Granger v. Roll*, 6 S. D. 611, 62 N. W. 970.

"I hereby guarantee collection and payment within five years from the date hereof," guaranty both of collection and payment. *Greely v. McCoy*, 3 S. D. 218, 52 N. W. 1050.

Guaranty to "satisfy all orders Mr. G. gives this spring, such as ploughs and cultivators," complete in itself. *Gilbert v. Moline Plough Co.*, 119 U. S. 491, 30 L. ed. 476, 7 S. Ct. R. 305.

"Guaranty of collection of the within note," guarantees that makers were solvent when note was made. *Roberts, Thorp & Co. v. Laughlin*, 4 N. D. 167, 59 N. W. 967.

No demand or notice is required where written guaranty is indorsed upon back of contract for purchase of goods, to pay for same in accordance with terms of contract. *McConnon v. Lawisen*, 22 N. D. 604, 135 N. W. 213.

As to similar provision in Cal. Civ. Code, § 2807, see *Fessenden v. Summers*, 62 Cal. 484; *Coburn v. Brooks*, 78 Cal. 443, 21 Pac. 2.

**§ 6663. 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. [R. C. 1905, § 6087; Civ. C. 1877, § 1661; R. C. 1899, § 4637.]

Necessity of notice of default to bind guarantor. 20 L.R.A. 257.

**§ 6664. 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. [R. C. 1905, § 6088; Civ. C. 1877, § 1662; R. C. 1899, § 4638.]

Liability of guaranty members of mutual fire insurance company. 32 L.R.A. 496.

Character of, and rules governing, contracts by corporations engaged for profit in business of guarantying the fidelity or contracts of other persons. 33 L.R.A.(N.S.) 513.

**§ 6665. 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. [R. C. 1905, § 6089; Civ. C. 1877, § 1663; R. C. 1899, § 4639.]

#### ARTICLE 5.—CONTINUING GUARANTY.

**§ 6666. 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. [R. C. 1905, § 6090; Civ. C. 1877, § 1664; R. C. 1899, § 4640.]

When is a guaranty a continuing one. 39 L.R.A.(N.S.) 724; 55 Am. Rep. 701.

When does contract of guaranty of commercial paper cover renewals. 16 L.R.A.(N.S.) 775.

Does guaranty of credit extended for price of goods sold cover sales to successor. 19 L.R.A.(N.S.) 901.

Does liability of guarantor of payment of interest cease at maturity of the obligation. 21 L.R.A.(N.S.) 154.

Liability, under continuing guaranty running to partnership or corporation, for goods sold or credits extended after a change in the firm or corporation. 14 L.R.A.(N.S.) 1281.



**§ 6667. 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. [R. C. 1905, § 6091; Civ. C. 1877, § 1665; R. C. 1899, § 4641.]

Change of guaranty; release of guarantor. *Moline Plow Co. v. Gilbert*, 3 D. 239, 15 N. W. 1; *Foley-Wadsworth Imp. Co. v. Solomon*, 9 S. D. 511, 70 N. W. 639.

Discharge of guarantor for causes existing prior to his entering upon contract of guaranty. 63 Am. St. Rep. 327.

#### ARTICLE 6.—EXONERATION OF GUARANTORS.

**§ 6668. 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. [R. C. 1905, § 6092; Civ. C. 1877, § 1666; R. C. 1899, § 4642.]

Release of guarantor by failure to bring action within reasonable time. *Stackpole v. Trust Co.*, 10 S. D. 389, 73 N. W. 258; *Roberts, Throp & Co. v. Laughlin*, 4 N. D. 167, 59 N. W. 967.

Guarantor not released, unless there be some act by creditor by which obligation of principal is without guarantor's consent altered, or his rights impaired. *Bailey Loan Co. v. Seward*, 9 S. D. 326, 69 N. W. 58.

As to agreement extending time of payment of indebtedness, exonerating guarantor. *Foster County State Bank v. Hester*, 18 N. D. 135, 119 N. W. 1044.

Mortgagor who becomes surety on conveyance to grantee who assumes mortgage with mortgagee's consent, is discharged by extension of time of payment. *Iowa Loan & Trust Co. v. Schnose*, 19 S. D. 248, 103 N. W. 22, 9 A. & E. Ann. Cas. 255.

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.

Prior to negotiable instrument laws of 1899, extension of time of payment of note, without consent of guarantor, released guarantor from liability. *Northern State Bank v. Bellamy*, 19 N. D. 509, 31 L.R.A.(N.S.) 149, 125 N. W. 888.

Surety company which is paid premium for issuing bond will be treated as insurer rather than according to strict rules of suretyship. *Long v. American Surety Co.*, 23 N. D. 492, 137 N. W. 41.

Release of principal after maturity of obligation as affecting guarantor. 38 L.R.A.(N.S.) 875.

Estoppel to enforce contract of suretyship or guaranty released through mistake. 13 L.R.A.(N.S.) 576.

As to similar provision in Cal. Civ. Code, § 2819, see *Tuohy v. Woods*, 122 Cal. 665, 55 Pac. 683.

**§ 6669. 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. [R. C. 1905, § 6093; Civ. C. 1877, § 1667; R. C. 1899, § 4643.]

**§ 6670. 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. [R. C. 1905, § 6094; Civ. C. 1877, § 1668; R. C. 1899, § 4644.]

**§ 6671. 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. [R. C. 1905, § 6095; Civ. C. 1877, § 1669; R. C. 1899, § 4645.]

Effect on guarantor's liability of obligee's insistence upon part payment before expiration of the term of credit. 22 L.R.A.(N.S.) 713.

**§ 6672. 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. [R. C. 1905, § 6096; Civ. C. 1877, § 1670; R. C. 1899, § 4646.]

Delay in collection will not release an absolute guaranty. *Porter v. Andrus*, 10 N. D. 558, 88 N. W. 567.

Guarantor is liable absolutely on default of principal, where he agrees by written guaranty on back of contract for purchase of goods to pay for them according to terms of contract. *McComor v. Lawson*, 22 N. D. 604, 135 N. W. 213.

§ 6673. **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. [R. C. 1905, § 6097; Civ. C. 1877, § 1671; R. C. 1899, § 4647.]

§ 6674. **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. [R. C. 1905, § 6098; Civ. C. 1877, § 1672; R. C. 1899, § 4648.]

## CHAPTER 85.

### SURETYSHIP.

- ARTICLE 1. WHO ARE SURETIES, §§ 6675, 6676.  
 2. LIABILITY OF SURETIES, §§ 6677-6681.  
 3. RIGHTS OF SURETIES, §§ 6682-6688.  
 4. RIGHTS OF CREDITORS, § 6689.  
 5. LETTER OF CREDIT, §§ 6690-6698.

#### ARTICLE 1.—WHO ARE SURETIES.

§ 6675. **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. [R. C. 1905, § 6099; Civ. C. 1877, § 1673; R. C. 1899, § 4649.]

Wife becomes surety only by signing land mortgage with husband, without signing note. *Peoples Bank v. Francis*, 8 N. D. 369, 79 N. W. 853.

Surety contracts primarily for benefit of debtor, but a guarantor, for benefit of creditor. *Bailey Loan Co. v. Seward*, 9 S. D. 326, 69 N. W. 58.

Application of principal and surety rule as to creditors an assumption of debts at dissolution of partnership. 48 L.R.A.(N.S.) 552.

As to similar provision in Cal. Civ. Code, § 2831, see *Adams v. Wallace*, 119 Cal. 67, 51 Pac. 14; *McDonald v. Randall*, 139 Cal. 246, 72 Pac. 997.

§ 6676. **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. [R. C. 1905, § 6100; Civ. C. 1877, § 1674; R. C. 1899, § 4650.]

Parol evidence admissible to show that apparent joint maker of note is surety. *Windhorst v. Bergendahl*, 21 S. D. 218, 130 Am. St. Rep. 715, 111 N. W. 544.

As to similar provision in Cal. Civ. Code, § 2832, see *Harlan v. Ely*, 55 Cal. 340; *Leeke v. Hancock*, 76 Cal. 127, 17 Pac. 937.

#### ARTICLE 2.—LIABILITY OF SURETIES.

§ 6677. **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. [R. C. 1905, § 6101; Civ. C. 1877, § 1675; R. C. 1899, § 4651.]

Surety cannot be held beyond express terms of his contract. *Northern Light Lodge v. Kennedy*, 7 N. D. 146, 73 N. W. 524.

Contract of suretyship in behalf of partnership continues no longer than partnership itself. *London Fire Ins. Co. v. Holdt*, 10 S. D. 171, 72 N. W. 403.

Sureties on fidelity bond of firm as agents, not liable for acts of members after dissolution. *Standard Oil Co. v. Arnestad*, 6 N. D. 255, 69 N. W. 197, 34 L.R.A. 861, 66 Am. St. Rep. 604.

Collateral security need not be exhausted before commencing action against surety. *Deering Co. v. Russell*, 5 N. D. 319, 65 N. W. 691; *Bingham v. Mears*, 4 N. D. 437, 61 N. W. 808, 27 L.R.A. 257.

Liability when each surety signs a bond for only a specified amount. *Custer County v. Albien*, 7 S. D. 482, 64 N. W. 533.

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.

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.

Penalty as limit of liability on statutory bond. 55 L.R.A. 381.

Right, in an action on a bond, to recover interest when the total sum is thereby made to exceed the penalty. 19 L.R.A.(N.S.) 84.

Does bond of highway contractor cover personal injuries of members of public. 34 L.R.A.(N.S.) 152.

Liability of sureties under civil damage act for sales causing injury where not confined to the period covered by their bonds. 25 L.R.A.(N.S.) 585.

Elements of damages recoverable in action on replevin bond. 30 L.R.A.(N.S.) 367.

Right to interest on replevin bond. 28 L.R.A.(N.S.) 12.

Guaranty by surety of genuineness of other signatures. 49 L.R.A. 315.

Liability on guaranty or surety obligation obtained by fraud. 21 L.R.A. 409.

As to similar provision in Cal. Civ. Code, § 2836, see *Alaska Improv. Co. v. Hirsch*, 119 Cal. 249, 47 Pac. 124, 51 Pac. 340.

**§ 6678. 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. [R. C. 1905, § 6102; Civ. C. 1877, § 1676; R. C. 1899, § 4652.]

As to similar provision in Cal. Civ. Code, § 2837, see *Humboldt Sav. & L. Soc. v. Wennerhold*, 81 Cal. 528, 22 Pac. 920.

**§ 6679. Is surety after judgment.** Notwithstanding the recovery of judgment by a creditor against a surety, the latter still occupies the relation of surety. [R. C. 1905, § 6103; Civ. C. 1877, § 1677; R. C. 1899, § 4653.]

**§ 6680. 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. [R. C. 1905, § 6104; Civ. C. 1877, § 1678; R. C. 1899, § 4654.]

Payment voidable under bankruptcy act as discharge of surety, guarantor or indorser. 9 L.R.A.(N.S.) 581.

Payment of promissory note by maker, which proves ineffectual as a satisfaction, as affecting the liability of a surety thereon. 13 L.R.A.(N.S.) 204.

Release of surety on building contractor's bond by making payments not authorized by the contract. 5 L.R.A.(N.S.) 418.

Release of surety by receipt of commercial paper for obligation. 35 L.R.A.(N.S.) 68.

As to similar provision in Cal. Civ. Code, § 2839, see *Randol v. Tatum*, 98 Cal. 390, 33 Pac. 433.

**§ 6681. 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. [R. C. 1905, § 6105; 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 for consideration, without knowledge of surety, will release. *Niblack v. Champeney*, 10 S. D. 165, 72 N. W. 402.

Mortgagor who becomes surety on conveyance to grantee who assumes mortgage with mortgagee's consent, is discharged by extension of time of payment. *Iowa Loan & Trust Co. v. Schnoe*, 19 S. D. 248, 103 N. W. 22, 9 A. & E. Ann. Cas. 255.

Surety company which is paid premium for issuing bond will be treated as insurer, rather than according to strict law of suretyship. *Long v. American Surety Co.*, 23 N. D. 492, 137 N. W. 41.

Wife who signs note with husband as joint maker is not released, because of failure of holder of note to file it as claim against deceased husband's estate. *Yerxa v. Ruthruff*, 19 N. D. 13, 25 L.R.A.(N.S.) 139, 120 N. W. 758, Ann. Cas. 1912D, 809.

Is surety discharged by obligee's surrender of original obligation and acceptance of another which is defective. 16 L.R.A.(N.S.) 343.

Release of indorser of note by failure to exhaust security against maker. 18 L.R.A.(N.S.) 539, 551.

Effect of failure to present claim against the estate of a deceased or bankrupt principal, to release surety. 25 L.R.A.(N.S.) 139.

Effect on liability of tenant's surety of surrender of lease containing an option to purchase. 9 L.R.A.(N.S.) 557.

Effect upon surety of bank's failure to apply principal's deposit account upon note. 8 L.R.A.(N.S.) 944.

Effect upon mortgagor's obligation of modification between mortgagee and subsequent grantee. 4 L.R.A.(N.S.) 666.

Change of principals to obligation as discharge of surety. 10 L.R.A.(N.S.) 1160.

Release of indorser by giving time by unenforceable contract. 18 L.R.A.(N.S.) 534.

Effect of renewal of principal's obligation to release party to a note executed to the creditor as collateral. 23 L.R.A.(N.S.) 141.

Effect under negotiable instrument law of extension of time to principal to release surety or guarantor. 31 L.R.A.(N.S.) 149.

Effect of extension of time by creditor on assumption of debts on dissolution of partnership. 9 L.R.A.(N.S.) 90.

Extension of time by attorney as discharging surety. 39 L.R.A.(N.S.) 62.

Extension of time for levying execution as discharge of surety. 5 L.R.A.(N.S.) 764.

When extension of time by the legislature releases the surety. 45 Am. Rep. 406.

Effect, under negotiable instruments law, of extension of time to principal to release one who, on the face of the instrument, is primarily liable, but is in fact a surety. 10 L.R.A.(N.S.) 129; 26 L.R.A.(N.S.) 99.

Effect of payment of usury or contract to pay usury in consideration for extension of time to principal, on surety's liability. 53 L.R.A. 316, 320.

Reservation of rights against party secondarily liable on a bill or note upon granting extension of time to party primarily liable, as preventing discharge of former. 46 L.R.A.(N.S.) 92.

When release of principal may not relieve surety. 73 Am. Dec. 297.

Release of surety by an acceptance or other evidence of indebtedness. 33 Am. Rep. 85.

Release of surety by changing the duties or obligations of the principal. 6 Am. St. Rep. 458.

Release of surety by indulgence of principal. 30 Am. Dec. 257.

What operates as release of surety. 28 Am. St. Rep. 691.

Is liability of surety determined by his death. 2 B. R. C. 937.

When will discharge of principal in bankruptcy release surety on bond given by principal in an action at law. 14 L.R.A.(N.S.) 507; 28 L.R.A.(N.S.) 234.

Release of mortgage as surety by mortgagee's dealings with vendee who has assumed mortgage. 16 L.R.A. 85.

Estoppel to enforce contract of suretyship or guaranty released through mistake. 13 L.R.A.(N.S.) 576.

Compromise or consent to affirmance as affecting liability of surety upon appeal bond. 43 L.R.A.(N.S.) 1040.

Discharge of surety for causes existing prior to his entering upon contract of suretyship. 63 Am. St. Rep. 327.

As to similar provision in Cal. Civ. Code, § 2840, see *Eppinger v. Kendrick*, 114 Cal. 620, 46 Pac. 613.

### ARTICLE 3.—RIGHTS OF SURETIES.

**§ 6682. Same as guarantor.** A surety has all the rights of a guarantor whether he becomes personally responsible or not. [R. C. 1905, § 6106; Civ. C. 1877, § 1680; R. C. 1899, § 4656.]

Specific performance of contract to give indemnity to surety. 6 L.R.A.(N.S.) 590.  
Injunction in behalf of surety against judgment. 30 L.R.A. 567.

**§ 6683. 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. [R. C. 1905, § 6107; 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.

Payment of amount of mortgage and notes to mortgagee who has assigned mortgage and notes before maturity does not discharge notes or mortgage. *Cosgrave v. McAvay*, 24 N. D. 343, 139 N. W. 693.

Effect upon surety of bank's failure to apply principal's deposit account upon note. 8 L.R.A. (N.S.) 944.

Effect of failure to present claim against the estate of a deceased or bankrupt principal, to release surety. 25 L.R.A. (N.S.) 139.

Release of indorser of note by failure to exhaust security against maker. 18 L.R.A. (N.S.) 539, 551.

Creditor's duty to surety. 115 Am. St. Rep. 85.

Duty of creditor to surety with respect to management and collection of collateral. 37 L.R.A. (N.S.) 699.

Duty of the creditor to collect of the principal when requested by the surety. 34 Am. Rep. 580.

Liability of corporate officers who fail to file report required by statute, to surety or guarantor of corporate paper. 35 L.R.A. (N.S.) 855.

As to similar provision in Cal. Civ. Code, § 2845, see *Taylor v. Reynolds*, 53 Cal. 686.

**§ 6684. May compel principal to perform.** A surety may compel his principal to perform the obligation when due. [R. C. 1905, § 6108; Civ. C. 1877, § 1682; R. C. 1899, § 4658.]

Proceedings by surety to compel principal to discharge his obligation. 117 Am. St. Rep. 35.

As to similar provision in Cal. Civ. Code, § 2846, see *Taylor v. Reynolds*, 53 Cal. 686.

**§ 6685. 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. [R. C. 1905, § 6109; Civ. C. 1877, § 1683; R. C. 1899, § 4659.]

Demand and notice not necessary to sustain action by latter against former. 13 Am. Dec. 122.

When sureties' cause of action against principal becomes perfect and enforceable. 134 Am. St. Rep. 557.

As to similar provision in Cal. Civ. Code, § 2847, see *Taylor v. Reynolds*, 53 Cal. 686; *Tulare County v. Kings County*, 117 Cal. 195, 49 Pac. 8.

**§ 6686. 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. [R. C. 1905, § 6110; Civ. C. 1877, § 1684; R. C. 1899, § 4660.]

Although parties to note may be cosureties as to payee of note, yet if they are not such as between themselves, contribution will not lie. *Harris v. Jones*, 23 N. D. 488, 136 N. W. 1080.

Liability between different sets of sureties. 70 Am. St. Rep. 443.

Contribution between sureties and the remedies for its enforcement. 10 Am. St. Rep. 639; 70 Am. St. Rep. 444.

As to similar provision in Cal. Civ. Code, § 2848, see *Taylor v. Reynolds*, 53 Cal. 686.

**§ 6687. 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. [R. C. 1905, § 6111; 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.

Right of sureties of public officer who made good a loss occasioned by their principal's default or misconduct to be subrogated to the rights of the obligee or beneficiary of the bond against a third person. 46 L.R.A. (N.S.) 557.

Right of surety to participate in indemnity given to cosurety. 15 Am. Dec. 526; 43 Am. Dec. 563.

Right of surety or principal to interpose an independent cause of action in favor of the latter against the plaintiff as a defense or counterclaim. 18 L.R.A. (N.S.) 600.

Right of surety, prior to obtaining a judgment or lien, to enjoin principal's transfer of property to defraud him. 15 L.R.A. (N.S.) 484.

Extinction of judgment against principal by sureties' payment. 16 L.R.A. 115; 68 L.R.A. 513.

Right of surety to sue to set aside judgment against principal. 54 L.R.A. 765.

As to similar provision in Cal. Civ. Code, § 2849, see *Crystal v. Hutton*, 1 Cal. App. 251, 81 Pac. 1115.

**§ 6688. 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. [R. C. 1905, § 6112; Civ. C. 1877, § 1686; R. C. 1899, § 4662.]

Sureties on appeal bond not released by refusal to resort to collateral security, unless prejudice is shown. *Bingham v. Mears*, 4 N. D. 437, 61 N. W. 808, 27 L.R.A. 257.

Application of property of maker of note before surety's to satisfy obligation. *State v. Mellette*, 21 S. D. 404, 113 N. W. 83.

#### ARTICLE 4.—RIGHTS OF CREDITORS.

**§ 6689. 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. [R. C. 1905, § 6113; Civ. C. 1877, § 1687; R. C. 1899, § 4663.]

#### ARTICLE 5.—LETTER OF CREDIT.

**§ 6690. 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. [R. C. 1905, § 6114; Civ. C. 1877, § 1688; R. C. 1899, § 4664.]

What writing constitutes. *Parlin v. Hall*, 2 N. D. 473, 52 N. W. 405.

Right of action upon letter of credit. 28 Am. Rep. 347.

**§ 6691. May be several.** A letter of credit may be addressed to several persons in succession. [R. C. 1905, § 6115; Civ. C. 1877, § 1689; R. C. 1899, § 4665.]

**§ 6692. 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. [R. C. 1905, § 6116; Civ. C. 1877, § 1690; R. C. 1899, § 4666.]

**§ 6693. 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. [R. C. 1905, § 6117; Civ. C. 1877, § 1691; R. C. 1899, § 4667.]

**§ 6694. 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. [R. C. 1905, § 6118; Civ. C. 1877, § 1692; R. C. 1899, § 4668.]

**§ 6695. Successive credits.** Several persons may successively give credit upon a general letter. [R. C. 1905, § 6119; Civ. C. 1877, § 1693; R. C. 1899, § 4669.]

**§ 6696. 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. [R. C. 1905, § 6120; Civ. C. 1877, § 1694; R. C. 1899, § 4670.]

**§ 6697. 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. [R. C. 1905, § 6121; Civ. C. 1877, § 1695; R. C. 1899, § 4671.]

§ 6698. **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. [R. C. 1905, § 6122; Civ. C. 1877, § 1696; R. C. 1899, § 4672.]

## CHAPTER 86.

## LIENS IN GENERAL.

- ARTICLE 1. DEFINITION OF LIENS, §§ 6699-6703.  
 2. CREATION OF LIENS, §§ 6704-6708.  
 3. EFFECT OF LIENS, §§ 6709-6713.  
 4. PRIORITY OF LIENS, §§ 6714-6716.  
 5. REDEMPTION OF LIENS, §§ 6717-6719.  
 6. EXTINCTION OF LIENS, §§ 6720-6724.

## ARTICLE 1.—DEFINITION OF LIENS.

§ 6699. **Defined.** A lien is a charge imposed upon specific property by which it is made security for the performance of an act. [R. C. 1905, § 6123; Civ. C. 1877, § 1697; R. C. 1899, § 4673.]

Word "lien" applies to miner's liens only. *Phillips v. Branch Mint Min. & Mill. Co.*, 27 S. D. 350, 131 N. W. 308.

As to similar provision in Cal. Civ. Code, § 2872, see *Kreling v. Kreling*, 118 Cal. 413, 50 Pac. 546; *Sacramento Bank v. Alcorn*, 121 Cal. 379, 53 Pac. 813; *Higgins v. Manson*, 126 Cal. 467, 77 Am. St. Rep. 192, 58 Pac. 907; *Pauly v. State Loan & T. Co.*, 7 C. C. A. 422, 15 U. S. App. 259, 58 Fed. 666.

§ 6700. **Classified.** Liens are either general or special. [R. C. 1905, § 6124; Civ. C. 1877, § 1698; R. C. 1899, § 4674.]

§ 6701. **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. [R. C. 1905, § 6125; Civ. C. 1877, § 1699; R. C. 1899, § 4675.]

Order of discharge of assignee for benefit of creditors as final judgment. *Freeman v. Wood*, 14 N. D. 95, 103 N. W. 392.

§ 6702. **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. [R. C. 1905, § 6126; Civ. C. 1877, § 1700; R. C. 1899, § 4676.]

Junior mortgagee may pay prior mortgage or interest after default thereon, and add amount so paid to his own lien. *Foster v. Furlong*, 8 N. D. 282, 76 N. W. 986.

Right of plaintiff in action to foreclose deed as mortgage, to credit for taxes paid and interest paid on prior mortgage to protect lien. *Merchants State Bank v. Tufts*, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760.

Right of one advancing money to pay off lien or incumbrance upon defective security to be subrogated to such lien or incumbrance. 5 L.R.A.(N.S.) 838; 46 L.R.A.(N.S.) 1049.

Right of life tenant who pays off liens or incumbrances as against remainderman. 29 L.R.A.(N.S.) 153.

As to similar provision in Cal. Civ. Code, § 2875, see *Stone v. Harris*, 146 Cal. 555, 80 Pac. 711.

As to similar provision in Cal. Civ. Code, § 2876, see *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254.

§ 6703. **Certain liens subject to this chapter.** Contracts of mortgage, pledge, bottomry or respondentia are subject to all the provisions of this chapter. [R. C. 1905, § 6127; Civ. C. 1877, § 1701; R. C. 1899, § 4677.]

Chattel mortgage is within provision of this chapter. *Everett v. Buchanan*, 2 D. 249, 6 N. W. 439.

On mortgage as embraced within statutory word "lien." *Phillips v. Branch Mint Min. & Mill. Co.*, 27 S. D. 350, 131 N. W. 308.

## ARTICLE 2.—CREATION OF LIENS.

§ 6704. **How created.** A lien is created:

1. By contract of the parties; or,
2. By operation of law. [R. C. 1905, § 6128; Civ. C. 1877, § 1702; R. C. 1899, § 4678.]

As to similar provision in Cal. Civ. Code, § 2881, see *Fresno Canal & Irrig. Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53; *Moisant v. McPhee*, 92 Cal. 76, 23 Pac. 46; *Kreling v. Kreling*, 118 Cal. 413, 50 Pac. 546; *Higgins v. Manson*, 126 Cal. 467, 77 Am. St. Rep. 192, 58 Pac. 907; *Stone v. Harris*, 146 Cal. 555, 80 Pac. 711.

§ 6705. **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. [R. C. 1905, § 6129; Civ. C. 1877, § 1703; R. C. 1899, § 4679.]

As to similar provision in Cal. Civ. Code, § 2882, see *Fresno Canal & Irrig. Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53.

§ 6706. **Liens on future interest.** An agreement may be made to create a lien upon property not yet acquired or not yet in existence by the party agreeing to give the lien. 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, that no lien or mortgage shall be created on the future earnings of any machine or machinery operated in whole or in part with man or animal. [1907, ch. 166; R. C. 1905, § 6130; Civ. C. 1877, § 1704; R. C. 1899, § 4680; 1901, ch. 118.]

Under lease providing that title to crop shall remain in landlord until division, tenant's mortgage of ungrown crops passes no title. *Savings Bank v. Canfield*, 12 S. D. 330, 81 N. W. 630.

Chattel mortgage on unplanted crop within statute. *McKay v. Shotwell*, 6 D. 124, 50 N. W. 622; *Schweiber v. Elevator Co.*, 9 N. D. 113, 81 N. W. 35; *Donovan v. Elevator Co.*, 7 N. D. 513, 75 N. W. 809, 66 Am. St. Rep. 674; *Nichols, Shepard & Co. v. Barnes* 3 D. 148, 14 N. W. 110; *Hostetter v. Elevator Co.*, 4 N. D. 357, 61 N. W. 49; *Merchants Nat. Bank v. Mann*, 2 N. D. 456, 51 N. W. 946; *Grand Forks Bank v. Elevator Co.*, 6 D. 357, 43 N. W. 806; *Mort. Bank & Inv. Co. v. Hanson*, 3 N. D. 465, 57 N. W. 345; *Phil. Beat Brewing Co. v. Hurlbut*, 5 D. 62, 37 N. W. 763.

Mortgage on ungrown crop need not be refilled after its growth. *Grand Forks Bank v. Elevator Co.*, 6 D. 357, 43 N. W. 806.

Mortgage upon tenant's interest in crop attaches on division. *Bidgood v. Elevator Co.*, 9 N. D. 627, 84 N. W. 561, 81 Am. St. Rep. 604.

Mortgage on crop to be grown on land given before acquiring lease of land is valid. *Iverson v. Soo Elevator Co.*, 22 S. D. 638, 119 N. W. 1006.

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.

Under former statute it was permissible for owner of threshing rig to 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. For note on chattel mortgage of future earnings of threshing outfit, see 20 L.R.A.(N.S.) 505.

Chattel mortgage of future accounts or earnings. 14 L.R.A. 126.

Chattel mortgage on after-acquired property, generally. 1 L.R.A.(N.S.) 451.

Voidability of mortgage on after-acquired property given within four months of bankruptcy pursuant to executory agreement antedating such period. 17 L.R.A.(N.S.) 938.

Efficacy of mortgage on chattels to be manufactured or acquired, as independent articles, and not as the increase or fruits of existing property. 18 L.R.A. 298.

Chattel mortgage on crops to be grown on land on which mortgagor has no present interest. 19 L.R.A.(N.S.) 910.

As to similar provision in Cal. Civ. Code, § 2883, see *Kreling v. Kreling*, 118 Cal. 413, 50 Pac. 546.

§ 6707. **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. [R. C. 1905, § 6131; 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.

As to mortgage on crop covering crop to be sown during following season. *Gorder v. Hillboe*, 17 N. D. 281, 115 N. W. 843.

Chattel mortgage of future crops. 23 L.R.A. 449.



Chattel mortgage on crops to be grown on land on which mortgagor has no present interest. 19 L.R.A.(N.S.) 910.

**§ 6708. 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. [R. C. 1905, § 6132; Civ. C. 1877, § 1705; R. C. 1899, § 4682.]

As to similar provision in Cal. Civ. Code, § 2884, see *Tapia v. Demartini*, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641; *Fresno Canal & Irrig. Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53; *Lemon v. Wolff*, 121 Cal. 272, 53 Pac. 801.

### ARTICLE 3.—EFFECT OF LIENS.

**§ 6709. Transfer no title.** Notwithstanding an agreement to the contrary, a lien or a contract for a lien transfers no title to the property subject to the lien. [R. C. 1905, § 6133; 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. Ins. Co.*, 10 S. D. 64, 71 N. W. 755; *Roberts v. Parker*, 14 S. D. 323, 85 N. W. 591; *Grand Forks Bank v. Elevator Co.*, 6 D. 357, 43 N. W. 806; *Walter A. Wood Co. v. Lee*, 4 S. D. 495, 57 N. W. 238; *Everett v. Buchanan*, 2 D. 249, 6 N. W. 439; *Keith v. Haggart*, 4 D. 438, 33 N. W. 465.

Mortgagee does not assign mortgage on real estate by executing deed. *Yankton B. & L. Ass. v. Dowling*, 10 S. D. 540, 74 N. W. 438.

In action of claim and delivery by second mortgagee, mortgagor cannot set up prior mortgage. *James v. Wilson*, 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. 238.

As to similar provision in Cal. Civ. Code, § 2888, see *Cross v. Eureka Lake & Y. Canal Co.*, 73 Cal. 302, 2 Am. St. Rep. 808, 14 Pac. 885; *Foley v. Bullard*, 99 Cal. 516, 33 Pac. 1081; *Haber v. Brown*, 101 Cal. 445, 35 Pac. 1035; *Stone v. Owens*, 105 Cal. 292, 38 Pac. 726; *Works v. Merritt*, 105 Cal. 467, 38 Pac. 1109; *Maier v. Freeman*, 112 Cal. 8, 53 Am. St. Rep. 151, 44 Pac. 357; *Shoobert v. De Motta*, 112 Cal. 215, 53 Am. St. Rep. 207, 44 Pac. 487; *Anderson v. Pacific Bank*, 112 Cal. 598, 32 L.R.A. 479, 53 Am. St. Rep. 228, 44 Pac. 1063; *Smith v. San Francisco & N. P. R. Co.*, 115 Cal. 584, 35 L.R.A. 309, 56 Am. St. Rep. 119, 47 Pac. 582; *Fernandez v. Tormey*, 121 Cal. 515, 53 Pac. 1119; *Breedlove v. Norwich Union F. Ins. Soc.*, 6 Cal. Unrep. 94, 54 Pac. 93; *Alferitz v. Borgwardt*, 126 Cal. 201, 58 Pac. 460; *Garwood v. Wheaton*, 128 Cal. 399, 60 Pac. 961; *Mathew v. Mathew*, 138 Cal. 334, 71 Pac. 344; *Pauly v. State Loan & T. Co.*, 7 C. C. A. 422, 15 U. S. App. 259, 58 Fed. 666.

**§ 6710. 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. [R. C. 1905, § 6134; Civ. C. 1877, § 1707; R. C. 1895, § 4684.]

As to similar provision in Cal. Civ. Code, § 2889, see *Chandler v. People's Sav. Bank*, 61 Cal. 396; *Phelan v. De Martin*, 85 Cal. 355, 24 Pac. 725; *Corcoran v. Hinkel*, 4 Cal. Unrep. 360, 34 Pac. 1031; *Watson v. Edwards*, 105 Cal. 70, 38 Pac. 527; *Bradbury v. Davenport*, 114 Cal. 593, 55 Am. St. Rep. 92, 46 Pac. 1062; *Bradbury v. Davenport*, 120 Cal. 152, 52 Pac. 301; *Garwood v. Wheaton*, 128 Cal. 399, 60 Pac. 961; *Pauly v. State Loan & T. Co.*, 7 C. C. A. 422, 15 U. S. App. 259, 58 Fed. 666.

**§ 6711. 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. [R. C. 1905, § 6135; Civ. C. 1877, § 1708; R. C. 1899, § 4685.]

As to similar provision in Cal. Civ. Code, § 2890, see *Hellman v. Shoulders*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

**§ 6712. 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. [R. C. 1905, § 6136; Civ. C. 1877, § 1709; R. C. 1899, § 4686.]

Mortgagee cannot hold mortgage as security for another debt after mortgage debt is paid. *Locke v. Hubbard*, 9 S. D. 364, 69 N. W. 588.

As to similar provision in Cal. Civ. Code, § 2891, see *Stone v. Harris*, 146 Cal. 555, 80 Pac. 711.

**§ 6713. 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 6057 and 6058. [R. C. 1905, § 6137; Civ. C. 1877, § 1710; R. C. 1899, § 4687.]

#### ARTICLE 4.—PRIORITY OF LIENS.

**§ 6714. 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. [R. C. 1905, § 6138; Civ. C. 1877, § 1711; R. C. 1899, § 4688.]

Lien of chattel mortgage properly filed paramount to that of agister for subsequently pasturing mortgaged stock. *Wright v. Sherman*, 3 S. D. 290, 52 N. W. 1093, 17 L.R.A. 792; *First Nat. Bank v. Scott*, 7 N. D. 312, 75 N. W. 254.

Lien for personal taxes is inferior to that of prior mortgage. *Miller v. Anderson*, 1 S. D. 589, 47 N. W. 957, 111 Am. St. Rep. 317.

Lien of carrier for transportation charges on property is inferior to that of chattel mortgage of which carrier has notice. *Owen v. Ry. Co.*, 11 S. D. 153, 76 N. W. 302, 74 Am. St. Rep. 786.

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.

Priority of mortgages on buildings upon leased premises. 21 L.R.A. 348.

Priority as between agister's lien and chattel mortgage. 17 L.R.A. 792; 12 L.R.A.(N.S.) 310.

Right of seller of chattel retaining title thereto or a lien thereon as against existing mortgagees of the realty to which it is affixed by the owner. 37 L.R.A.(N.S.) 119.

Rights of seller of fixtures, retaining title thereto or a lien thereon, as against purchasers or incumbrancers of the realty. 1 B. R. C. 664.

Priority as between a chattel mortgagee who surrenders mortgage and accepts new form of security on same property and an intervening lienor. 26 L.R.A.(N.S.) 496.

Retroactive effect of filing chattel mortgage for record in regard to liens acquired on same property after execution of the mortgage. 33 L.R.A. 163.

Priority of claims against property in hands of receiver over recorded liens. 2 L.R.A.(N.S.) 1013; 41 L.R.A.(N.S.) 695.

Priority of claims against property in hands of receiver over mechanics' liens. 2 L.R.A.(N.S.) 1013.

Priority of lien in distribution of assets of insolvent insurance company. 38 L.R.A. 108.

Priority as between lien of corporation and pledgee or bona fide purchaser of corporate stock. 39 L.R.A.(N.S.) 292.

Priority of judgment lien on future crops as against purchaser or mortgagee. 23 L.R.A. 466.

Priority of judgment lien as to unrecorded conveyance. 16 L.R.A. 668.

Priority of judgment over conveyance made after beginning of term. 38 L.R.A. 245.

Priority of judgment on after-acquired property. 42 L.R.A. 209.

Priority of mechanics' lien as to earlier mortgages. 14 L.R.A. 306.

Priority of notes falling due at different times secured by same mortgage. 24 L.R.A. 800; 42 L.R.A.(N.S.) 183.

Superiority as between special assessment for public improvement and private mortgage. 35 L.R.A. 372; 30 L.R.A.(N.S.) 769.

**§ 6715. 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. [R. C. 1905, § 6139; Civ. C. 1877, § 1712; R. C. 1899, § 4689.]

Mortgage of real estate may be complete without power of sale. *Grant County v. Colonial & U. S. Mort. Co.*, 3 S. D. 390, 53 N. W. 746.

Priority of purchase-money mortgage. *Kalscheuer v. Upton*, 6 D. 449, 43 N. W. 816.

Priority of vendor's lien as against purchaser at judicial sale. 21 L.R.A. 39.

Rights of seller of fixtures, retaining title thereto or a lien thereon, as against lien of vendor or realty. 1 B. R. Co. 670.

Is money loaned to improve land part of the purchase price within rule that a purchase-money lien takes priority over homestead rights. 41 L.R.A.(N.S.) 89.

As to similar provision in Cal. Civ. Code, § 2898, see *Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272, 25 Pac. 919; *Van Loben Sels v. Bunnell*, 120 Cal. 650, 53 Pac. 266.

**§ 6716. 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. [R. C. 1905, § 6140; 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.

Mortgagee not required to ascertain whether mortgagor has subsequently incumbered part of premises. *Blanchette v. Farsch*, 18 S. D. 20, 99 N. W. 79.

As to marshaling securities. *Merchants' State Bank v. Tufts*, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760.

As to similar provision in Cal. Civ. Code, § 2899, see *Kent v. Williams*, 114 Cal. 537, 46 Pac. 462; *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542; *Irvine v. Perry*, 119 Cal. 352, 51 Pac. 544, 949; *Mack v. Shafer*, 135 Cal. 113, 67 Pac. 40; *Re Levin Bros.*, 139 Cal. 350, 63 Pac. 335, 73 Pac. 159; *Merced Secur. Sav. Bank v. Simon*, 141 Cal. 11, 74 Pac. 356; *Summerville v. March*, 142 Cal. 554, 100 Am. St. Rep. 145, 76 Pac. 388.

#### ARTICLE 5.—REDEMPTION OF LIENS.

§ 6717. **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. [R. C. 1905, § 6141; Civ. C. 1877, § 1714; R. C. 1899, § 4691.]

Mortgagor cannot consent to sale of property by superior mortgagee so as to defeat junior mortgage. *Everitt v. Buchanan*, 2 D. 249, 6 N. W. 439.

Lienholder not made party to mechanic's 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. *De Luce 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.

None but lien holder can object to payment and redemption from lien before claim due. *Kalscheuer v. Upton*, 6 D. 449, 43 N. W. 816.

Unrecorded assignment of mortgage is void as to subsequent purchasers or incumbrancers in good faith. *Merrill v. Luce*, 6 S. D. 354, 61 N. W. 43, 55 Am. St. Rep. 844.

Right of mortgagee who secures a deficiency degree to redeem from the sale. 35 L.R.A.(N.S.) 413.

Right of wife during husband's lifetime to redeem from mortgage on his real property. 3 L.R.A.(N.S.) 1068.

May a purchaser or mortgagee from the original owner, after a sale under a prior mortgage and during the redemption period, be a redemptioner. 29 L.R.A.(N.S.) 508.

As to similar provision in Cal. Civ. Code, § 2903, see *Randall v. Duff*, 79 Cal. 115, 3 L.R.A. 754, 19 Pac. 532, 21 Pac. 610; *Allen v. Allen*, 95 Cal. 184, 16 L.R.A. 646, 27 Pac. 30, 30 Pac. 213.

§ 6718. **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. [R. C. 1905, § 6142; Civ. C. 1877, § 1715; R. C. 1899, § 4692.]

On right of junior mortgagee to redeem at any time. *Home Invest. Co. v. Clarson*, 21 S. D. 72, 109 N. W. 507.

Purchaser at foreclosure of second mortgage, being informed that first mortgage is paid, has constructive notice of second mortgagee's rights under redemption. *Malmberg v. Peterson*, 20 S. D. 587, 108 N. W. 339.

Junior execution creditor redeeming from mortgage foreclosure continues to be a creditor and is also subrogated to rights of mortgagee. *MacGregor v. Pierce*, 17 S. D. 51, 95 N. W. 281.

As to similar provision in Cal. Civ. Code, § 2904, see *Swain v. Stockton Sav. & L. Soc.*, 78 Cal. 600, 12 Am. St. Rep. 118, 21 Pac. 365.

**§ 6719. 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 [R. C. 1905, § 6143; Civ. C. 1877, § 1716; R. C. 1895, § 4693.]

As to similar provision in Cal. Civ. Code, § 2905, see *Chielovich v. Krauss* 2 Cal. Unrep. 700, 11 Pac. 781; *Sutton v. Stephan*, 101 Cal. 545, 36 Pac. 106.

#### ARTICLE 6.—EXTINCTION OF LIENS.

**§ 6720. 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. [R. C. 1905, § 6144; 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.

Docketing of judgment in mortgage foreclosure proceedings does not extinguish mortgage lien and leave only ten-year judgment lien. *Rhomberg v. Bender*, 28 S. D. 609, 134 N. W. 805.

Effect of death of principal contractor on rights of subcontractor or materialman to a lien, or to payment by owner. 20 L.R.A.(N.S.) 45.

Effect of bankruptcy of contractor on right of laborer or materialman to enforce lien against property improved. 26 L.R.A.(N.S.) 409.

Payment to contractors or subcontractors as affecting liens of subordinate claimants. 20 L.R.A. 560.

Assumption of debts on dissolution of partnership as affecting partnership lien. 9 L.R.A.(N.S.) 102.

Taking of property by general owner for purpose of defeating lien thereon as larceny. 12 L.R.A.(N.S.) 94.

Effect of discharge in bankruptcy on real property liens. 42 L.R.A.(N.S.) 292.

Rescission of purchase of real estate as affecting assumption of lien thereon. 40 L.R.A.(N.S.) 672.

Release or satisfaction of lien by giving commercial paper. 35 L.R.A.(N.S.) 86.

Lienor joining in mortgage on the property as a waiver of his lien. 35 L.R.A.(N.S.) 348.

New obligation given by debtor to secure release of a lien as a novation of the original obligation. 36 L.R.A.(N.S.) 464.

As to similar provision in Cal. Civ. Code, § 2909, see *Duncan v. Hawn*, 104 Cal. 10, 37 Pac. 626.

**§ 6721. 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. [R. C. 1905, § 6145; Civ. C. 1877, § 1718; R. C. 1895, § 4695.]

Sale of property under chattel mortgage extinguishes lien. *La Crosse B. & S. Co. v. Anderson*, 13 S. D. 301, 83 N. W. 331; *La Crosse B. & S. Co. v. Anderson*, 9 S. D. 560, 70 N. W. 877; *American Banking & Trust Co. v. Lynch*, 10 S. D. 410, 73 N. W. 908.

Where first mortgagee takes possession of property under his mortgage, and sells same at private sale without foreclosure, such sale is a conversion. *Lovejoy v. Bank*, 5 N. D. 623, 67 N. W. 956.

Mortgagee's use of chattels against mortgagor's will, not conversion. *Van Dusen & Co. v. Arnold*, 5 S. D. 588, 59 N. W. 961.

Purchaser of mortgaged property liable for conversion. *Nichols, Shepard & Co. v. Barnes*, 3 D. 148, 14 N. W. 110.

Conversion of property forfeits lien. *Everett v. Buchanan*, 2 D. 249, 6 N. W. 439.  
Wrongful conversion by lienor extinguishes lien. *Mosteller v. Holborn*, 21 S. D. 547, 114 N. W. 693.

Verdict may be directed where, upon undisputed facts, instrument on which rights of parties depends, being pledge, chattel mortgage or absolute conveyance of title, with secret reservation of interest, is void. *Walklin v. Horswill*, 24 S. D. 191, 123 N. W. 668.

Waiver of lien by attachment or execution. 50 L.R.A. 714; 24 L.R.A.(N.S.) 490.

As to similar provision in Cal. Civ. Code, § 2910, see *Loughborough v. McNevin*, 74 Cal. 250, 5 Am. St. Rep. 435, 14 Pac. 369, 15 Pac. 773; *Lehmann v. Schmidt*, 87 Cal. 15, 25 Pac. 161; *Story & I. Commercial Co. v. Story*, 100 Cal. 30, 34 Pac. 671; *Williams v. Ashe*, 111 Cal. 180, 43 Pac. 535; *Chase v. Putnam*, 117 Cal. 364, 49 Pac. 204; *Latta v. Tutton*, 122 Cal. 279, 68 Am. St. Rep. 30, 54 Pac. 844; *Southern P. Co. v. Prosser*, 122 Cal. 413, 55 Pac. 145; *Brittan v. Oakland Bank*, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84; *Summerville v. Stockton Mill. Co.*, 142 Cal. 529, 76 Pac. 243.

**§ 6722. 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. [R. C. 1905, § 6146; Civ. C. 1877, § 1719; R. C. 1899, § 4696.]

Lien of mortgage security is not extinguished by running of statute against note. *Alexander v. Ransom*, 16 S. D. 302, 92 N. W. 418.

As to lien not being extinguished by bar of action upon principal obligation. *Colonial & U. S. Mortg. Co. v. Northwest Thresher Co.*, 14 N. D. 147, 70 L.R.A. 814, 116 Am. St. Rep. 642, 103 N. W. 915, 8 A. & E. Ann. Cas. 1160.

Mortgage security not barred by running of statute against notes. *Philip v. Stearns*, 20 S. D. 220, 105 N. W. 467, 11 A. & E. Ann. Cas. 1108.

Foreclosure of mortgage is not barred by running of limitation against indebtedness. *Green v. Frick*, 25 S. D. 342, 126 N. W. 579.

As to similar provision in Cal. Civ. Code, § 2911, see *Wells v. Harter*, 56 Cal. 342; *Jeffers v. Cook*, 58 Cal. 147; *Henderson v. Grammar*, 66 Cal. 332, 5 Pac. 488; *Raynor v. Drew*, 72 Cal. 307, 13 Pac. 866; *California Sav. Bank v. Parrish*, 116 Cal. 254, 48 Pac. 73; *London & S. F. Bank v. Bandmann*, 120 Cal. 220, 65 Am. St. Rep. 179, 52 Pac. 583; *San Francisco Sav. Union v. Long*, 6 Cal. Unrep. 60, 53 Pac. 907; *Southern P. Co. v. Prosser*, 122 Cal. 413, 55 Pac. 145; *Newhall v. Sherman*, 124 Cal. 509, 57 Pac. 387; *Conway v. Supreme Council, C. K.*, 131 Cal. 437, 63 Pac. 727; *Frost v. Witter*, 132 Cal. 421, 84 Am. St. Rep. 53, 64 Pac. 705; *Conway v. Supreme Council, C. K.*, 137 Cal. 384, 70 Pac. 223; *Commercial Sav. Bank v. Hornberger*, 140 Cal. 16, 73 Pac. 625; *Vandall v. Teague*, 142 Cal. 471, 76 Pac. 35; *Mutual L. Ins. Co. v. Pacific Fruit Co.*, 142 Cal. 477, 76 Pac. 67; *San Jose Safe Deposit Bank v. Bank of Madero*, 144 Cal. 574, 78 Pac. 5.

**§ 6723. 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. [R. C. 1905, § 6147; Civ. C. 1877, § 1720; R. C. 1899, § 4697.]

By sale of part of mortgaged property lien on the rest not discharged. *First Nat. Bank v. Elevator Co.*, 4 S. D. 409, 57 N. W. 77.

As to similar provision in Cal. Civ. Code, § 2912, see *Southern P. Co. v. Prosser*, 122 Cal. 413, 55 Pac. 145.

**§ 6724. 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. [R. C. 1905, § 6148; Civ. C. 1877, § 1721; R. C. 1899, § 4698.]

Lien on personal property for repairs lost by parting with possession. *Burdick v. Marshall*, 8 S. D. 308, 66 N. W. 462.

As to similar provision in Cal. Civ. Code, § 2913, see *Palmtag v. Doutrick*, 59 Cal. 154, 43 Am. Rep. 245; *Foley v. Bullard*, 99 Cal. 516, 33 Pac. 1081; *Southern P. Co. v. Prosser*, 122 Cal. 413, 55 Pac. 145.

## CHAPTER 87.

## MORTGAGE.

- ARTICLE 1. MORTGAGE IN GENERAL, §§ 6725-6749.  
 2. MORTGAGE OF REAL PROPERTY, §§ 6750-6755.  
 3. MORTGAGE OF PERSONAL PROPERTY, §§ 6756-6768.  
 4. SATISFACTION OF LIEN OR MORTGAGE BEFORE MATURITY, § 6769.

## ARTICLE 1.— MORTGAGE IN GENERAL.

§ 6725. **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. [R. C. 1905, § 6149; 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 lien for rent on the lessee's chattels, not chattel mortgage within statute requiring delivery of copy. *Kennedy v. Hull*, 14 S. D. 234, 85 N. W. 223.

Lease of realty making rent lien on building and improvements, is an incumbrance in nature of mortgage. *Peet v. Ins. Co.*, 7 S. D. 410, 64 N. W. 206.

Mortgage as lien only. *Northwestern Port Huron Co. v. Iverson*, 22 S. D. 314, 133 Am. St. Rep. 920, 117 N. W. 372.

Estate of the mortgagee at the common law. 7 Am. St. Rep. 31.

When new mortgage may be enforced as a continuation of the lien of prior mortgages. 5 Am. St. Rep. 705.

Effect of deed delivered in escrow as further security for a mortgage debt. 2 L.R.A.(N.S.) 628.

Mortgage to secure future accounts. 10 Am. Dec. 108.

Mortgage to secure future advances. 20 Am. Dec. 658; 116 Am. Dec. 690.

Mortgage to secure several notes which entitled to precedence of payment. 38 Am. Dec. 440.

What constitute equitable mortgage. 4 Am. St. Rep. 696.

Equitable mortgage by deposit of title deeds. 19 L.R.A.(N.S.) 206.

Right to foreclose deed intended as security for debt as an equitable mortgage. 22 L.R.A.(N.S.) 572.

As to similar provision in Cal. Civ. Code, § 2920, see *Spect v. Spect*, 88 Cal. 437, 13 L.R.A. 137, 22 Am. St. Rep. 314, 26 Pac. 203.

§ 6726. **Lien special. Independent of possession.** The lien of a mortgage is special, unless otherwise expressly agreed and is independent of possession. [R. C. 1905, § 6150; Civ. C. 1877, § 1723; R. C. 1899, § 4700.]

As to mortgage not transferring title or right of possession to mortgagee. *Nash v. Northwest Land Co.*, 15 N. D. 566, 108 N. W. 792.

§ 6727. **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. [R. C. 1905, § 6151; Civ. C. 1877, § 1724; R. C. 1899, § 4701.]

As to what instrument constitutes mortgage. *Langmaack v. Keith*, 19 S. D. 351, 103 N. W. 210.

Warranty deed given to trustee to secure payment of notes is a mortgage. *David Bradley & Co. v. Helgerson*, 14 S. D. 593, 86 N. W. 634.

Fraudulent conveyance of realty by one holding it as security to purchaser with knowledge is only effective as assignment of grantor's mortgage interest. *Shimerda v. Wohlford*, 13 S. D. 155, 82 N. W. 393.

Conveyance of real property to third person in trust as security for a debt operates as mortgage. *Merrill v. Hurley*, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859.

Validity of mortgage can only be questioned by purchaser or incumbrancer in good faith. *Murphy v. Plankinton Bank*, 13 S. D. 501, 83 N. W. 575.

As to right to give trust deed as security for payment of indebtedness. *Brown v. Comonow*, 17 N. D. 84, 114 N. W. 728.

As to when assignment is given for security only. *Fifer v. Fifer*, 13 N. D. 20, 99 N. W. 763.

As to when absolute deed constitutes mortgage. *Wells v. Geyer*, 12 N. D. 316, 96 N. W. 289.

Transfer of real property by deed to secure loan constitutes a mortgage. *Krug v. Kautz*, 21 S. D. 461, 113 N. W. 623.

As to similar provision in Cal. Civ. Code, § 2924, see *Works v. Merritt*, 105 Cal. 467, 38 Pac. 1109.

**§ 6728. 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. [R. C. 1905, § 6152; Civ. C. 1877, § 1725; R. C. 1899, § 4702.]

**§ 6729. 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. [R. C. 1905, § 6153; 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 incumbrancer 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.

As to necessity of grantor in security deed tendering all indebtedness due grantee before he can compel reconveyance. *Smith v. Jensen*, 16 N. D. 408, 114 N. W. 306.

Intention of parties as to whether instrument is deed or mortgage may be shown by parol evidence. *Miller v. Smith*, 20 N. D. 96, 126 N. W. 499.

Deed absolute on face may be shown to be in fact mortgage securing debt existing at time of its execution. *Adams v. McIntyre*, 22 N. D. 337, 133 N. W. 915.

Parol evidence to show absolute deeds to be mortgages. 15 Am. Dec. 47.

Deeds absolute in form with agreements to reconvey as mortgages. 17 Am. Dec. 300.

Right to foreclose deed intended as security for debt as an equitable mortgage. 22 L.R.A.(N.S.) 572.

Does a deed absolute on its face, but intended as a mortgage, convey the legal title. 11 L.R.A.(N.S.) 209.

Jurisdiction of equity over suit to have deed declared a mortgage as to land in another state or country. 69 L.R.A. 685.

Grantee's oral promise to grantor to hold in trust, as giving rise to constructive trust, where conveyance was made as security. 39 L.R.A.(N.S.) 922.

Protection of purchaser from apparent vendee under instrument apparently a conveyance, but intended as a mortgage. 32 L.R.A.(N.S.) 1046; 38 L.R.A.(N.S.) 982.

Effect of failure to record defeasance as against creditors of the grantee. 5 L.R.A.(N.S.) 387.

Effect of debt becoming barred by limitations, upon rights and remedies under conveyance absolute on its face, but intended as a mortgage. 11 L.R.A.(N.S.) 825; 24 L.R.A.(N.S.) 840.

Right to accept favorable part of decree on absolute deed decreed to be a mortgage and appeal from the rest. 29 L.R.A.(N.S.) 11.

**§ 6730. What may be mortgaged.** Any interest in property which is capable of being transferred may be mortgaged. [R. C. 1905, § 6154; Civ. C. 1877, § 1727; R. C. 1899, § 4704.]

Mortgage for future advances valid. Second mortgages with notice, subject to first mortgage. Recording of second lien not notice to prior incumbrancer. *Bank v. Modine & Co.*, 7 N. D. 201, 73 N. W. 527.

As to real estate being subject to mortgage by holder of legal title between foreclosure sale and expiration of redemption period. *North Dakota Horse & Cattle Co. v. Serungard*, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 117 N. W. 453.

Right to mortgage privilege to use streets for quasi-public purposes. 47 L.R.A. 87.

Right to mortgage burial lot. 67 L.R.A. 122.

What articles are included in such general terms as appurtenances, fixtures and the like employed in chattel mortgage. 46 L.R.A.(N.S.) 206.

**§ 6731. 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. [R. C. 1905, § 6155; Civ. C. 1877, § 1727; R. C. 1899, § 4705.]

Woman signing mortgage with her husband and acquiring title afterward holds same for mortgagee. *Yerkes v. Hadley*, 5 D. 324, 40 N. W. 340, 2 L.R.A. 263.

Assignment of mortgage note. *Merrill v. Hurley*, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859.

Assignment of mortgage taken by grantor of land under general warranty will be presumed to have been taken for benefit of grantee. *Sommers v. Wagner*, 21 N. D. 531, 131 N. W. 797.

Title, after acquired by patent to homesteader, inures to mortgagee as of date of execution and delivery of mortgage. *Adam v. McClintock*, 21 N. D. 483, 131 N. W. 394.

Mortgage of after-acquired property and of property having only a potential existence. 46 Am. Dec. 712; 109 Am. St. Rep. 510.

Effect of mortgage upon after-acquired personal property. 76 Am. Dec. 723; 109 Am. St. Rep. 510.

Does chattel mortgage on domestic animals cover their increase when not mentioned therein. 14 L.R.A.(N.S.) 431.

Title to increase of animals as between mortgagee of dam and other claimants. 17 L.R.A. 82.

Necessity that increase of animals be in gestation at time of execution of mortgage in order to be covered thereby. 17 L.R.A.(N.S.) 203.

After-acquired property which passes by railroad mortgage. 99 Am. St. Rep. 252.

**§ 6732. 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. [R. C. 1905, § 6156; Civ. C. 1877, § 1727; R. C. 1899, § 4706.]

As to similar provision in Cal. Civ. Code, § 2928, see *Jones v. Gardner*, 57 Cal. 641.

**§ 6733. Assigning debt carries security.** The assignment of a debt secured by mortgage carries with it the security. [R. C. 1905, § 6157; Civ. C. 1877, § 1727; R. C. 1899, § 4707.]

Right of assignee of mortgage to enforce option to declare entire mortgage due for default of payments. 15 L.R.A.(N.S.) 590.

**§ 6734. 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. [R. C. 1905, § 6158; Civ. C. 1877, § 1728; R. C. 1899, § 4708.]

As to right to mortgage property adversely held. *Galbraith v. Payne*, 12 N. D. 164, 96 N. W. 258.

**§ 6735. 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. [R. C. 1905, § 6159; Civ. C. 1877, § 1729; R. C. 1899, § 4709.]

**§ 6736. 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. [R. C. 1905, § 6160; Civ. C. 1877, § 1730; R. C. 1899, § 4710.]

Mortgagor may grant power of sale in trust for benefit of both parties. *Robinson v. McKinney*, 4 D. 290, 29 N. W. 658.

Mortgagor empowered to confer power of sale upon mortgagee or any other person. *Brown v. Comonow*, 17 N. D. 84, 114 N. W. 728.



As to remedy of power of sale in mortgage. *Olson v. Casselman*, 15 N. D. 34, 105 N. W. 1105.

Mortgage of realty may be complete without power of sale; only a mortgage with express power of sale may be foreclosed by advertisement. *Grant Co. v. Col. & U. S. Mort. Co.*, 3 S. D. 390, 53 N. W. 746.

Must sell in manner pointed out in instrument. *Everett v. Buchanan*, 2 D. 249, 6 N. W. 439.

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.

Does power of sale in a mortgage or deed of trust confer an interest which prevents its revocation by death of mortgagor. 70 L.R.A. 135.

Foreclosure by exercise of power of sale. 92 Am. St. Rep. 573.

Necessity for sales under powers to be for reasonable price. 103 Am. St. Rep. 51.

Right of mortgagee to exercise power of sale during pendency of mortgage foreclosure or of action for debt secured. 2 B. R. C. 841.

Effect on mortgage lien of sale under the mortgage. 58 Am. Dec. 569.

Remedies of mortgagee to reach surplus proceeds after judicial or other sale. 88 Am. St. Rep. 359.

**§ 6737. 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. [R. C. 1905, § 6161; 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.

**§ 6738. 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. [R. C. 1905, § 6162; Civ. C. 1877, § 1731; R. C. 1899, § 4712.]

**§ 6739. 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. [R. C. 1905, § 6163; 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.

One obtaining title through attachment is not purchaser in good faith, so as to defeat prior unrecorded deed which is in fact a mortgage. *Murphy v. Bank*, 13 S. D. 501, 83 N. W. 575; *Kohn v. Lapham*, 13 S. D. 78, 82 N. W. 408.

Lien of chattel mortgage properly filed is paramount to that of agister for subsequently pasturing mortgaged stock. *Wright v. Sherman*, 3 S. D. 290, 52 N. W. 1093, 17 L.R.A. 792; *First Nat. Bank v. Scott*, 7 N. D. 312, 75 N. W. 254.

**§ 6740. 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. [R. C. 1905, § 6164; Civ. C. 1877, § 1733; R. C. 1899, § 4714.]

Mortgagor entitled to possession until foreclosure and time of redemption has expired. *Shimerda v. Wohlford*, 13 S. D. 155, 82 N. W. 393; *Yankton B. & L. Ass'n v. Dowling*, 10 S. D. 535, 74 N. W. 436; *McKay v. Shotwell*, 6 D. 124, 50 N. W. 622.

Bill of sale to secure a debt constitutes a mortgage as between parties, and does not entitle mortgagee to possession. *Rosenbaum v. Ross*, 4 S. D. 184, 56 N. W. 114.

Receiver may be appointed to take possession of property on foreclosure. *Roberts v. Parker*, 14 S. D. 323, 85 N. W. 591.

Mortgagee cannot take possession of land before foreclosure in absence of clause expressly permitting it. *McClory v. Ricks*, 11 N. D. 38, 88 N. W. 1042.

Necessity of mortgagor's consent to possession by mortgagee. *Nash v. Northwest Land Co.*, 15 N. D. 566, 108 N. W. 792.

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.

Duties and liabilities of mortgagee in possession. 4 Am. St. Rep. 69.

**§ 6741. Foreclosure.** A mortgagee may foreclose the right of redemption of the mortgagor in the manner prescribed by the code of civil procedure. [R. C. 1905, § 6165; Civ. C. 1877, § 1734; R. C. 1899, § 4715.]

Right to subject equity of redemption to execution on judgment for the mortgage debt. 11 Am. Dec. 193.

**§ 6742. 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. [R. C. 1905, § 6166; Civ. C. 1877, § 1735; R. C. 1899, § 4716.]

Assignment of real estate mortgage is proper instrument for record. *Merrill v. Luce*, 6 S. D. 354, 61 N. W. 43, 55 Am. St. Rep. 844.

As to similar provision in Cal. Civ. Code, § 2934, see *Adler v. Sargent*, 109 Cal. 42, 41 Pac. 799; *Rodgers v. Peckham*, 120 Cal. 238, 52 Pac. 483.

**§ 6743. 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. [R. C. 1905, § 6167; Civ. C. 1877, § 1735; R. C. 1899, § 4717.]

Neglect to take and record assignment cannot prejudice an innocent purchaser. *Pickford v. Peebles*, 7 S. D. 166, 63 N. W. 779.

Though contract is one between Minnesota parties, the Minnesota recording statute does not discharge mortgage debt, and cannot affect mortgage as contract for security upon lands in this state. *Coogrove v. McAvay*, 24 N. D. 343, 139 N. W. 693.

As to similar provision in Cal. Civ. Code, § 2935, see *Rodgers v. Peckham*, 120 Cal. 238, 52 Pac. 483.

**§ 6744. 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 mortgaged 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.) [R. C. 1905, § 6168; Civ. C. 1877, § 1735; R. C. 1899, § 4719; 1901, ch. 125; 1905, ch. 154.]

As to similar provision in Cal. Civ. Code, § 2937, see *Beal v. Stevens*, 72 Cal. 451, 14 Pac. 186; *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542.

**§ 6745. 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. 1905, § 6169; R. C. 1895, § 4720.]

**§ 6746. 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. 1905, § 6170; R. C. 1895, § 4721.]

**§ 6747. 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. 1905, § 6170; R. C. 1895, § 4722.]

**§ 6748. 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. [R. C. 1905, § 6172; 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.

Presumptions that certificate of officer on discharge was proper. *Jones v. Trust Co.*, 7 S. D. 122, 63 N. W. 553.

Tender of amount due on mortgage, and its deposit in bank as provided by law, is payment and satisfaction and renders mortgagee liable for this penalty. *Kronebusch v. Raumin*, 6 D. 243, 42 N. W. 656.

Demand made in another state upon mortgagee and his refusal or neglect there to execute and discharge same does not subject such mortgagee to penalty, but renders him liable for consequential damages. *Jones v. Trust Co.*, 7 S. D. 122, 63 N. W. 553.

Forfeiture can be recovered only by counting expressly upon the statute. *Greenberg v. Bank*, 5 N. D. 483, 67 N. W. 597; *Peckham v. Van Bergen*, 10 N. D. 43, 84 N. W. 566.

**§ 6749. 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 upon demand of the owner of the property execute and deliver to him a certificate of the discharge thereof and must 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 or 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 representative for all damages which he or they may sustain by reason of such refusal, and shall also forfeit to them the sum of one hundred dollars; provided, however, that when a mortgage or lien upon personal property has been satisfied, the owner of such mortgage or lien must within thirty days thereafter cause a certificate of discharge thereof to be trans-

mitted to the office of the register of deeds of the county where such mortgage or lien is of record, and any owner of any mortgage or lien who fails to cause a certificate of discharge thereof to be so transmitted shall be liable to the owner of such property, and his assignee or legal representative in damage in the sum of ten dollars for each and every satisfaction not so transmitted. [1907, ch. 176; R. C. 1905, § 6173; 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 D. 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 contract 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 in action for failure to release paid mortgage must allege that expense of release was paid or tendered. *Mader v. Piano Mfg. Co.*, 17 S. D. 553, 97 N. W. 843.

ARTICLE 2.—MORTGAGE OF REAL PROPERTY.

§ 6750. **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.

[R. C. 1905, § 6174; Civ. C. 1877, § 1736; R. C. 1899, § 4725.]

§ 6751. **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. [R. C. 1905, § 6175; Civ. C. 1877, § 1737; R. C. 1899, § 4726.]

§ 6752. **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. [R. C. 1905, § 6176; Civ. C. 1877, § 1738; R. C. 1899, § 4727.]

§ 6753. **To whom record notice.** The record of a mortgage duly made operates as notice to all subsequent purchasers and incumbrancers. [R. C. 1905, § 6177; Civ. C. 1877, § 1739; R. C. 1899, § 4728.]

§ 6754. **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 86 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. [R. C. 1905, § 6178; Civ. C. 1877, § 1740; R. C. 1899, § 4729.]

Deed absolute in form, although intended as mortgage, is properly recorded in record of deeds. *Merchants' State Bank v. Tufts*, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760.

§ 6755. **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. [R. C. 1905, § 6179; Civ. C. 1877, § 1741; R. C. 1899, § 4730.]

Action to have trust deed declared a mortgage. *McKenna v. Whittaker*, 9 S. D. 442, 69 N. W. 587.

Purported absolute deed cannot be defeated by parol defeasance as against mortgagee without actual notice. *Patnode v. Deschenes*, 15 N. D. 100, 106 N. W. 573.

Mortgagee without actual notice of rights of vendee in possession under contract for defeasance, is innocent purchaser. *Gray v. Harvey*, 17 N. D. 1, 113 N. W. 1034.

"Any other person" as used in statute means subsequent purchasers and incumbrancers. *Valley v. First Nat. Bank*, 14 N. D. 580, 5 L.R.A.(N.S.) 387, 116 Am. St. Rep. 700, 106 N. W. 127.

### ARTICLE 3.—MORTGAGE OF PERSONAL PROPERTY.

§ 6756. **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 ....., mortgagee, 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.

[R. C. 1905, § 6180; Civ. C. 1877, § 1742; R. C. 1899, § 4731.]

Sufficiency of description. *Bank v. Oium*, 3 N. D. 193, 54 N. W. 1034, 44 Am. St. Rep. 533; *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.

Statute applies to chattel mortgage on unplanted crop. *Schweiberger v. Elevator Co.*, 9 N. D. 113, 81 N. W. 35; *Donovan v. Elevator Co.*, 7 N. D. 513, 74 N. W. 809, 66 Am. St. Rep. 674; *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.

Description of crop and land in crop mortgage. *Coughran v. Sundback*, 9 S. D. 483, 70 N. W. 644; *Advance Thresher Co. v. Schmidt*, 9 S. D. 489, 70 N. W. 646.

Lease making rents a lien on personal property operates as chattel mortgage. *Greeley v. Winsor*, 1 S. D. 117, 45 N. W. 325, 36 Am. St. Rep. 720; *Peet v. Ins. Co.*, 7 S. D. 410, 64 N. W. 206; *Esshom v. Hotel Co.*, 7 S. D. 74, 63 N. W. 229.

Description of property on sale or mortgage of future crops. 23 L.R.A. 458.

Curing of insufficient or inaccurate description by chattel mortgagee taking possession before any specific right or lien of creditors has attached. 25 L.R.A.(N.S.) 117.

Validity of verbal chattel mortgage. 7 L.R.A.(N.S.) 418.

Pre-existing debt as consideration for chattel mortgage. 33 L.R.A. 305.

As to similar provision in Cal. Civ. Code, § 2955, see *Glenn v. Arnold*, 56 Cal. 631; *Raventas v. Green*, 57 Cal. 254; *Martin v. Thompson*, 63 Cal. 3; *Duffey v. Shields*, 63 Cal. 332; *Hitchcock v. Hassett*, 71 Cal. 331, 12 Pac. 228; *Grangers' Business Asso. v. Clark*, 84 Cal. 201, 23 Pac. 1081; *Blaisdell v. McDowell*, 91 Cal. 285, 25 Am. St. Rep. 178, 27 Pac. 656; *Harms v. Silva*, 91 Cal. 636, 27 Pac. 1088; *Re Fischer*, 94 Cal. 523, 29 Pac. 951; *Barker v. Maskell*, 101 Cal. 9, 35 Pac. 641; *San Francisco Breweries v. Schurtz*, 104 Cal. 420, 38 Pac. 92; *Works v. Merritt*, 105 Cal. 467, 38 Pac. 1109; *Bank of Ukiah v. Gibson*, 5 Cal. Unrep. 11, 39 Pac. 1069; *Bank of Ukiah v. Moore*, 106 Cal. 673, 39 Pac. 1071; *Rohrbough v. Johnson*, 107 Cal. 144, 40 Pac. 37; *Bank of Ukiah v. Gibson*, 109 Cal. 197, 41 Pac. 1008, 1010; *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484; *Scott v. Hotchkiss*, 115

Cal. 89, 47 Pac. 45; *First Nat. Bank v. Erreca*, 116 Cal. 81, 58 Am. St. Rep. 133, 47 Pac. 926; *Locke v. Klunker*, 123 Cal. 231, 55 Pac. 993; *Bishop v. McKillican*, 124 Cal. 321, 71 Am. St. Rep. 68, 57 Pac. 76; *Alferitz v. Borgwardt*, 126 Cal. 201, 58 Pac. 460; *McLeod v. Barnum*, 131 Cal. 605, 63 Pac. 924; *Perkins v. Maier & Z. Brewery*, 133 Cal. 496, 65 Pac. 1030.

§ 6757. **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. 1905, § 6181; R. C. 1895, § 4732.]

Failure to file contract of conditional sale, effect of. *Thompson v. Armstrong*, 11 N. D. 198, 91 N. W. 39.

Not unconstitutional as depriving persons of property without due process of law. *Pringle v. Canfield*, 19 S. D. 506, 104 N. W. 223.

Applicable to sale with provision that goods are held in trust by buyer as security for purchase price. *Webber v. Conklin*, 20 S. D. 52, 104 N. W. 675.

Reservation of title is not void as to one obtaining possession of property before filing of contract with register of deeds when he does not claim to be subsequent creditor without notice or purchaser or incumbrancer in good faith. *Rock Island Plow Co. v. Western Implement Co.*, 21 N. D. 608, 132 N. W. 351.

The trustee in bankruptcy is neither a subsequent creditor without notice nor a purchaser or incumbrancer in good faith for value within this section. *In re Pierce*, 157 Fed. 755.

Necessity of recording instrument creating lien or reserving title to personal property in state to which property is subsequently removed. 64 L.R.A. 356; 35 L.R.A. (N.S.) 385.

Effect of failure to record contract of conditional sale on vendor's right to relief in case of purchaser's bankruptcy. 38 L.R.A. (N.S.) 554.

Recordation of lien on fixtures as personalty as notice to mortgagee of realty. 1 B. R. C. 691.

§ 6758. **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. [R. C. 1905, § 6182; Civ. C. 1877, § 1744; R. C. 1899, § 4733.]

Original must be filed in some county; certified copy not constructive notice if original returned to mortgagee; copy filed in other county must be certified to by register. *Rosenbaum v. Foss*, 4 S. D. 184, 56 N. W. 114; *Kimball Co. v. Kirby*, 4 S. D. 152, 55 N. W. 1110.

Withholding from files to allow mortgagor to purchase goods is fraud. *Jewett v. Sundback*, 5 S. D. 111, 58 N. W. 20.

Making and filing equivalent to change in possession of property. *Richert v. Simons*, 6 D. 239, 42 N. W. 657.

Lien superior to that of agister attaching after execution and filing. *First Nat. Bank v. Scott*, 7 N. D. 312, 75 N. W. 254; *Wright v. Sherman*, 3 S. D. 367, 53 N. W. 425.

On property removed from one state to another need not be refiled unless required by statute. *Wilson v. Rustad*, 1 N. D. 330, 75 N. W. 260, 66 Am. St. Rep. 649.

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.

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.

Words "In good faith for value" apply only to subsequent purchasers and incumbrancers 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.

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.)

Unfiled chattel mortgage void as to creditors after its execution. *Noyes v. Brace*, 8 S. D. 190, 65 N. W. 1071.

Unrecorded contract of conditional sale is void as to vendee's creditors only upon proof that they are such. *Thompson v. Armstrong*, 11 N. D. 198, 91 N. W. 39.

Effect of recording on validity of mortgage of merchandise leaving mortgagor in possession with power of sale. 18 L.R.A. 610.

Retroactive effect of filing chattel mortgages for record in regard to liens acquired on the same property after the execution of the mortgage. 33 L.R.A. 163.

Failure to record chattel mortgage as fraud on other creditors. 31 L.R.A. 638.

Necessity of recording mortgage of future crops. 23 L.R.A. 463.

When local law deemed to require registering or recording of a transfer within section 60a of the bankruptcy law. 5 L.R.A.(N.S.) 148; 18 L.R.A.(N.S.) 1233.

Effect of chattel mortgage taking possession before any specific right or lien of creditors has attached to cure failure to record. 25 L.R.A.(N.S.) 115.

Sufficiency of record notice of mortgage on chattels to be manufactured or acquired as independent articles and not as the increase or fruits of existing property. 18 L.R.A. 303.

Necessity of filing or recording chattel mortgage in state where property located. 64 L.R.A. 361.

Necessity of recording mortgage in state to which property is subsequently removed. 64 L.R.A. 356; 6 L.R.A.(N.S.) 940; 35 L.R.A.(N.S.) 386.

As to similar provision in Cal. Civ. Code, § 2957, see *Berson v. Nunan*, 63 Cal. 550; *Wood v. Franks*, 67 Cal. 32, 7 Pac. 50; *Meherin v. Oaks*, 67 Cal. 57, 7 Pac. 47; *Beamer v. Freeman*, 84 Cal. 554, 24 Pac. 169; *Harms v. Silva*, 91 Cal. 636, 27 Pac. 1088; *Yost v. Commercial Bank*, 94 Cal. 494, 29 Pac. 858; *San Francisco Breweries v. Schurtz*, 104 Cal. 420, 38 Pac. 92; *Adlard v. Rodgers*, 105 Cal. 327, 38 Pac. 889; *Works v. Merritt*, 105 Cal. 467, 38 Pac. 1109; *Cardenas v. Miller*, 108 Cal. 250, 49 Am. St. Rep. 84, 39 Pac. 783, 41 Pac. 472; *Bank of Ukiah v. Gibson*, 5 Cal. Unrep. 11, 39 Pac. 1069; *Bank of Ukiah v. Moore*, 106 Cal. 673, 39 Pac. 1071; *Fassett v. Wise*, 115 Cal. 316, 36 L.R.A. 505, 1095, 47 Pac. 47; *Lemon v. Wolff*, 121 Cal. 272, 53 Pac. 801; *Bishop v. McKillican*, 124 Cal. 321, 71 Am. St. Rep. 68, 57 Pac. 76; *Ruggles v. Cannedy*, 127 Cal. 290, 46 L.R.A. 371, 53 Pac. 911, 59 Pac. 827; *First Nat. Bank v. Menke*, 128 Cal. 103, 60 Pac. 675; *Alferitz v. Scott*, 130 Cal. 474, 62 Pac. 735; *McLeod v. Barnum*, 131 Cal. 605, 63 Pac. 924; *Talcott v. Hurlbert*, 143 Cal. 4, 76 Pac. 647.

**§ 6759. 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. [R. C. 1905, § 6183; Civ. C. 1877, § 1745; R. C. 1899, § 4734.]

As to similar provision in Cal. Civ. Code, § 2963, see *Bishop v. McKillican*, 124 Cal. 321, 71 Am. St. Rep. 68, 57 Pac. 76.

**§ 6760. 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. [R. C. 1905, § 6184; Civ. C. 1877, § 1746; R. C. 1899, § 4735.]

As to similar provision in Cal. Civ. Code, § 2960, see *Bishop v. McKillican*, 124 Cal. 321, 71 Am. St. Rep. 68, 57 Pac. 76.

**§ 6761. 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. [R. C. 1905, § 6185; 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.)

As to similar provision in Cal. Civ. Code, § 2959, see *Berson v. Nunan*, 63 Cal. 550; *Fassett v. Wise*, 115 Cal. 316, 36 L.R.A. 505, 1095, 47 Pac. 47; *Bishop v. McKillican*, 124 Cal. 321, 71 Am. St. Rep. 68, 57 Pac. 76.

**§ 6762. 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; and, provided further, that trust deeds or other trust conveyances or instruments executed to secure bonds of corporations need not be renewed. [1911, ch. 191; R. C. 1905, § 6186; Civ. C. 1877, § 1748; 1881, ch. 25, § 1; 1890, ch. 41, § 1; R. C. 1895, § 4737; 1905, ch. 60.]

Failure to refile does not render void as against mortgagor. *Deering & Co. v. Hanson*, 7 N. D. 288, 75 N. W. 249.

Keeping crop mortgage alive by refileing. *Merchants' Nat. Bank v. Mann*, 2 N. D. 456, 51 N. W. 946.

**§ 6.63. Chattel mortgage, how executed.** A mortgage of personal property must be signed by the mortgagor in the presence of two witnesses who must sign the same as witnesses thereto, or acknowledge the execution of the same before some official qualified to take acknowledgments. And every mortgagee must surrender to the mortgagor at the time of the execution of the mortgage a correct copy of the original mortgage so signed, with witnesses or acknowledgment shown thereon. And the mortgagor must surrender to the mortgagee a receipt which shall be attached to the original mortgage showing that the mortgagee has surrendered to him a copy of such mortgage, and said receipt must accompany the mortgage when presented to the register of deeds and filed therewith. Otherwise said mortgage shall not be filed as a chattel mortgage by the register of deeds. [1913, ch. 66; R. C. 1905, § 6187; Civ. C. 1877, § 1749; R. C. 1899, § 4738; 1903, ch. 133.]

Witnesses only required for purpose of filing. *Walter A. Wood Co. v. Lee*, 4 S. D. 495, 57 N. W. 238.

Subscribing witnesses must be called to prove execution of mortgage, or their absence accounted for. *Brynjolfson v. Elevator Co.*, 6 N. D. 450, 71 N. W. 555, 66 Am. St. Rep. 612.

Mortgagee may be witness to chattel mortgage. *Fisher v. Porter*, 11 S. D. 311, 77 N. W. 112.

Mortgagee disqualified from being witness to chattel mortgage. *Donovan v. Elevator Co.*, 8 N. D. 585, 80 N. W. 772, 46 L.R.A. 721, 73 Am. St. Rep. 779.

Requirement as to witnesses met by words "in the presence of," and signatures of two persons as witnesses. *First Nat. Bank v. Elevator Co.*, 4 S. D. 409, 57 N. W. 77.

Proof of execution of chattel mortgage has not been dispensed with by statute. *Lander v. Propper*, 6 D. 64, 50 N. W. 400.

In action between mortgagee and mortgagor, not necessary to show that the execution of chattel mortgage was witnessed. *J. I. Case Thresh. Mach. Co. v. Olson*, 10 N. D. 170, 86 N. W. 718.

Chattel mortgage which is not acknowledged or witnessed according to law is not entitled to be filed. *Pease v. Magill*, 17 N. D. 166, 115 N. D. 260.

Effect of chattel mortgagee taking possession before any specific right or lien of creditors has attached to cure original defect in execution. 25 L.R.A.(N.S.) 110.



As to similar provision in Cal. Civ. Code, § 2922, see *Dingley v. Bank of Ventura*, 57 Cal. 467; *London & S. F. Bank v. Bandmann*, 120 Cal. 220, 65 Am. St. Rep. 179, 52 Pac. 583; *Daniels v. Johnson*, 129 Cal. 415, 79 Am. St. Rep. 123, 61 Pac. 1107.

**§ 6764. Duty of register of deeds. Cancellation.** The register of deeds for 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 cancelled, except as hereafter provided. All instruments shall be kept in the regular files of his office for three years from the date of filing or date of filing the last renewal of the same and thereafter shall be placed in a separate file provided for that purpose. Provided, further, that all chattel mortgages may be destroyed ten years after date of filing or date of filing of last renewal. Every such mortgage may be cancelled by the register of deeds upon presentation to him of a receipt for the sum, money or property secured, or an acknowledgment of satisfaction thereof signed by the mortgagee. [1911, ch. 259; R. C. 1905, § 6188; Civ. C. 1877, § 1750; R. C. 1899, § 4739.]

**§ 6765. 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. [R. C. 1905, § 6189; Civ. C. 1877, § 1751; R. C. 1899, § 4740.]

Lienors are not affected by failure of register to properly number the liens. *Schouweiler v. McCaull*, 18 S. D. 70, 99 N. W. 95.

**§ 6766. 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. [R. C. 1905, § 6190; 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.

**§ 6767. 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. [R. C. 1905, § 6191; Civ. C. 1877, § 1756; R. C. 1899, § 4742.]

**§ 6768. Provisions inapplicable to ship mortgages.** Sections 6758 to 6766 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. [R. C. 1905, § 6192; Civ. C. 1877, § 1756; R. C. 1899, § 4743.]

#### ARTICLE 4.—SATISFACTION OF LIEN OR MORTGAGE BEFORE MATURITY.

**§ 6769. Satisfaction, how effected.** Any lien or mortgage upon property may be paid or satisfied before the date of maturity if the mortgagor so desires, providing that the full amount which would otherwise be due on date of maturity shall first be tendered or delivered in satisfaction thereof. [1907, ch. 175.]

Effect of unaccepted tender on lien of mortgage. 33 L.R.A. 231; 23 L.R.A.(N.S.)

## CHAPTER 88.

## PLEDGE.

**§ 6770. Defined.** Pledge is a deposit of personal property by way of security for the performance of another act. [R. C. 1905, § 6193; Civ. C. 1877, § 1757; R. C. 1899, § 4744.]

Shares of stock in corporation may be pledged. *Van Cise v. Bank*, 4 D. 485, 33 N. W. 897.

Definition and nature of pledge. 49 Am. Dec. 730.

Setting aside pledged or mortgaged property retained by pledgor or mortgagor on his own premises or under his own control as a delivery or change of possession. 25 L.R.A.(N.S.) 525.

How far may pledge be effectual of which the pledgor's agent is made depository. 25 L.R.A. 577.

**§ 6771. What contracts deemed pledge.** Every contract by which the possession of personal property is transferred as security only is to be deemed a pledge. [R. C. 1905, § 6194; 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.

The law of collateral securities. 32 Am. St. Rep. 711.

As to similar provision in Cal. Civ. Code, § 2987, see *Irwin v. McDowell*, 4 Cal. Unrep. 329, 34 Pac. 708.

**§ 6772. 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. [R. C. 1905, § 6195; Civ. C. 1877, § 1759; R. C. 1899, § 4746.]

Lien of pledge is dependent upon possession. *Willard v. Monarch Elevator Co.*, 10 N. D. 400, 87 N. W. 996; *Purdin v. Archer*, 4 S. D. 54, 54 N. W. 1043.

Effect of surrender of pledged property on rights of pledgee. 39 L.R.A.(N.S.) 887.

Priority as between lien of corporation and pledgee of corporate stock. 39 L.R.A.(N.S.) 292.

As to similar provision in Cal. Civ. Code, § 2988, see *Palmtag v. Doutrick*, 59 Cal. 154, 43 Am. Rep. 245; *Hitchcock v. Hassett*, 71 Cal. 331, 12 Pac. 228; *Maier v. Freeman*, 112 Cal. 8, 53 Am. St. Rep. 151, 44 Pac. 357; *McFall v. Buckeye Grangers' Warehouse Asso.*, 122 Cal. 468, 68 Am. St. Rep. 47, 55 Pac. 253.

**§ 6773. Includes increase.** The increase of property pledged is pledged with the property. [R. C. 1905, § 6196; Civ. C. 1877, § 1760; R. C. 1899, § 4747.]

**§ 6774. Lien may be pledged.** One who has a lien upon property may pledge it to the extent of his lien. [R. C. 1905, § 6197; Civ. C. 1877, § 1761; R. C. 1899, § 4748.]

**§ 6775. 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. [R. C. 1905, § 6198; Civ. C. 1877, § 1762; R. C. 1899, § 4749.]

Right to have trust property wrongfully pledged by a trustee for his individual benefit redeemed by money belonging to his insolvent estate. 6 L.R.A.(N.S.) 487.

As to similar provision in Cal. Civ. Code, § 2991, see *Palmtag v. Doutrick*, 59 Cal. 154, 43 Am. Rep. 245; *Shafer v. Lacy*, 121 Cal. 574, 54 Pac. 72.

**§ 6776. 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. [R. C. 1905, § 6199; Civ. C. 1877, § 1763; R. C. 1899, § 4750.]

**§ 6777. 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. [R. C. 1905, § 6200; Civ. C. 1877, § 1764; R. C. 1899, § 4751.]

**§ 6778. 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. [R. C. 1905, § 6201; Civ. C. 1877, § 1765; R. C. 1899, § 4752.]

**§ 6779. 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. [R. C. 1905, § 6202; Civ. C. 1877, § 1766; R. C. 1899, § 4753.]

**§ 6780. 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. [R. C. 1905, § 6203; Civ. C. 1877, § 1767; R. C. 1899, § 4754.]

As to similar provision in Cal. Civ. Code, § 2996, see *Faulkner v. First Nat. Bank*, 130 Cal. 258, 62 Pac. 463.

**§ 6781. Liability of pledgee or pledge holder.** A pledgee, or a pledge holder for reward, assumes the duties and liabilities of a depository for reward. [R. C. 1905, § 6204; Civ. C. 1877, § 1768; R. C. 1899, § 4755.]

Use of pledged property forbidden, unless consented to by pledgor. - *Hawkins v. Hubbard*, 2 S. D. 631, 51 N. W. 774.

Duty of pledgee as to care of thing pledged. 17 L.R.A. 193; 83 Am. St. Rep. 392.

**§ 6782. Liability of gratuitous pledge holder.** A gratuitous pledge holder assumes the duties and liabilities of a gratuitous depository. [R. C. 1905, § 6205; Civ. C. 1877, § 1769; R. C. 1899, § 4756.]

**§ 6783. 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. [R. C. 1905, § 6206; Civ. C. 1877, § 1770; R. C. 1899, § 4757.]

**§ 6784. 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. [R. C. 1905, § 6207; Civ. C. 1877, § 1771; R. C. 1899, § 4758.]

Implied authority of pledgee to sell corporate stock. 43 L.R.A. 742.

Wrongful sale of pledged property or collateral as larceny. 31 L.R.A. (N.S.) 999.

Pledgee's conversion of pledged property by invalid sale. 43 L.R.A. 737.

Remedies of pledgees. 79 Am. Dec. 499.

As to similar provision in Cal. Civ. Code, § 3000, see *Stewart v. Naud*, 125 Cal. 596, 58 Pac. 186; *Merchants' Nat. Bank v. Escondido Irrig. Dist.*, 144 Cal. 329, 77 Pac. 937.

**§ 6785. 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. [R. C. 1905, § 6208; Civ. C. 1877, § 1772; R. C. 1899, § 4759.]

As to similar provision in Cal. Civ. Code, § 3001, see *Hill v. Finigan*, 62 Cal. 426; *Bendel v. Crystal Ice Co.*, 82 Cal. 199, 22 Pac. 1112; *Stewart v. Naud*, 125 Cal. 596, 58 Pac. 186.

**§ 6786. 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. [R. C. 1905, § 6209; Civ. C. 1877, § 1773; R. C. 1899, § 4760.]

Notice of sale must be given. *Stanford v. McGill*, 6 N. D. 536, 72 N. W. 938, 38 L.R.A. 760.

As to similar provision in Cal. Civ. Code, § 3002, see *Bendel v. Crystal Ice Co.*, 82 Cal. 199, 22 Pac. 1112; *Stewart v. Naud*, 125 Cal. 596, 58 Pac. 186.

**§ 6787. 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. [R. C. 1905, § 6210; Civ. C. 1877, § 1774; R. C. 1899, § 4761.]

As to similar provision in Cal. Civ. Code, § 3003, see *Bendel v. Crystal Ice Co.*, 82 Cal. 199, 22 Pac. 1112; *Stewart v. Naud*, 125 Cal. 596, 58 Pac. 186.

**§ 6788. 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. [R. C. 1905, § 6211; Civ. C. 1877, § 1775; R. C. 1899, § 4762.]

As to similar provision in Cal. Civ. Code, § 3004, see *Bendel v. Crystal Ice Co.*, 82 Cal. 199, 22 Pac. 1112; *Stewart v. Naud*, 125 Cal. 596, 58 Pac. 186.

**§ 6789. 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. [R. C. 1905, § 6212; Civ. C. 1877, § 1776; R. C. 1899, § 4763.]

Sale must be at public auction. *Stanford v. McGill*, 6 N. D. 536, 72 N. W. 938, 38 L.R.A. 760; *Everett v. Buchanan*, 2 D. 249, 6 N. W. 439; *Lane v. Starr*, 1 S. D. 107, 45 N. W. 212.

Sale of personal property by pledgee or mortgagee, after default, not at public sale and on public notice, is conversion of property, which extinguishes lien. *Walklin v. Horswill*, 24 S. D. 191; 123 N. W. 668.

As to similar provision in Cal. Civ. Code § 3005, see *Stewart v. Naud*, 125 Cal. 596, 58 Pac. 186.

**§ 6790. 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 8128 in chattel mortgage foreclosures, and when so filed shall have the same force and effect. [R. C. 1905, § 6213; 1897, ch. 109; R. C. 1899, § 4764.]

Evidence of debt when pledged must be collected, and cannot be sold. *Deering & Co. v. Russell*, 5 N. D. 319, 65 N. W. 691.

Implied authority of pledgee to sell bonds. 43 L.R.A. 743.

Extent of recovery by pledgee on note. 44 L.R.A. 243.

Authority of pledgee to compromise obligations held as collateral security. 88 L.R.A. (N.S.) 980.

Right of one who takes commercial paper of corporation as security for an individual debt of officer. 31 L.R.A. (N.S.) 169.

Holder of bill or note as collateral security as a bona fide holder. 31 L.R.A. (N.S.) 287.

Effect of failure of holder to make demand or give notice of dishonor of paper held as collateral or conditional payment. 68 L.R.A. 482.

Duty of pledgee of stock to sell at maturity of debt. 8 L.R.A. (N.S.) 1199.

Diligence required of one who holds negotiable paper as collateral security. 34 Am. Dec. 451.

Rights and remedies of parties to collateral securities. 38 Am. St. Rep. 711.

As to similar provision in Cal. Civ. Code, § 3006, see *Kelly v. Matlock*, 85 Cal. 122, 24 Pac. 642; *McArthur v. Magee*, 114 Cal. 126, 45 Pac. 1068; *Stewart v. Naud*, 125 Cal. 596, 58 Pac. 186.

**§ 6791. 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. [R. C. 1905, § 6214; Civ. C. 1877, § 1778; R. C. 1899, § 4765.]

As to similar provision in Cal. Civ. Code, § 3007, see *Stewart v. Naud*, 125 Cal. 596, 58 Pac. 186.

**§ 6792. 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. [R. C. 1905, § 6215; Civ. C. 1877, § 1779; R. C. 1899, § 4766.]

Effect of application to indebtedness of proceeds of sale of collateral security upon running of statute of limitations. 27 L.R.A.(N.S.) 843.

Garnishment of claim to surplus on pledge. 59 L.R.A. 368.

As to similar provision in Cal. Civ. Code, § 3008, see *Stewart v. Naud*, 125 Cal. 596, 58 Pac. 186.

**§ 6793. 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. [R. C. 1905, § 6216; Civ. C. 1877, § 1780; R. C. 1899, § 4767.]

As to similar provision in Cal. Civ. Code, § 3009, see *Stewart v. Naud*, 125 Cal. 596, 58 Pac. 186.

**§ 6794. When pledgee cannot purchase.** A pledgee or pledge holder cannot purchase the property pledged except by direct dealing with the pledgor. [R. C. 1905, § 6217; Civ. C. 1877, § 1781; R. C. 1899, § 4768.]

As to inability of personal property lienor to purchase at own foreclosure sale. *Reeves & Co. v. Bruening*, 16 N. D. 398, 114 N. W. 313.

As to similar provision in Cal. Civ. Code, § 3010, see *Stewart v. Naud*, 125 Cal. 596, 58 Pac. 186.

**§ 6795. 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. [R. C. 1905, § 6218; Civ. C. 1877, § 1782; R. C. 1899, § 4769.]

As to similar provision in Cal. Civ. Code, § 3011, see *Stewart v. Naud*, 125 Cal. 596, 58 Pac. 186; *Farmers' & M. Bank v. Copsy*, 134 Cal. 287, 66 Pac. 324.

## CHAPTER 89.

### BOTTOMRY.

**§ 6796. 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. [R. C. 1905, § 6219; Civ. C. 1877, § 1783; R. C. 1899, § 4770.]

Bottomry as supporting maritime lien. 70 L.R.A. 418.

**§ 6797. 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. [R. C. 1905, § 6220; Civ. C. 1877, § 1784; R. C. 1899, § 4771.]

**§ 6798. 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. [R. C. 1905, § 6221; Civ. C. 1877, § 1785; R. C. 1899, § 4772.]

**§ 6799. 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. [R. C. 1905, § 6222; Civ. C. 1877, § 1786; R. C. 1899, § 4773.]

§ 6800. **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. [R. C. 1905, § 6223; Civ. C. 1877, § 1787; R. C. 1899, § 4774.]

§ 6801. **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. [R. C. 1905, § 6224; Civ. C. 1877, § 1788; R. C. 1899, § 4775.]

§ 6802. **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. [R. C. 1905, § 6225; Civ. C. 1877, § 1789; R. C. 1899, § 4776.]

§ 6803. **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. [R. C. 1905, § 6226; Civ. C. 1877, § 1790; R. C. 1899, § 4777.]

§ 6804. **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. [R. C. 1905, § 6227; Civ. C. 1877, § 1791; R. C. 1899, § 4778.]

§ 6805. **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. [R. C. 1905, § 6228; Civ. C. 1877, § 1792; R. C. 1899, § 4779.]

§ 6806. **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. [R. C. 1905, § 6229; Civ. C. 1877, § 1793; R. C. 1899, § 4780.]

§ 6807. **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 seamen's wages, a subsequent lien of material men for supplies or repairs indispensable to the safety of the ship and a subsequent lien for salvage. [R. C. 1905, § 6230; Civ. C. 1877, § 1794; R. C. 1899, § 4781.]

§ 6808. **When last preferred.** Of two or more bottomry liens on the same subject the latter in date has preference if created out of necessity. [R. C. 1905, § 6231; Civ. C. 1877, § 1795; R. C. 1899, § 4782.]

## CHAPTER 90.

### RESPONDENTIA.

§ 6809. **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. [R. C. 1905, § 6232; Civ. C. 1877, § 1796; R. C. 1899, § 4783.]

*Respondentia as supporting maritime lien.* 70 L.R.A. 429.

*Acceptance of commercial paper as discharge of lien for material and supplies.* 35 L.R.A. (N.S.) 94.

§ 6810. **Owner may hypothecate.** The owner of the cargo may hypothecate it upon respondentia at any time and place and for any lawful purpose. [R. C. 1905, § 6233; Civ. C. 1877, § 1787; R. C. 1899, § 4784.]

§ 6811. **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 benefiting the cargo thereby. [R. C. 1905, § 6234; Civ. C. 1877, § 1798; R. C. 1899, § 4785.]

§ 6812. **Other sections applicable.** The provisions of sections 6801 to 6808 apply equally to loans on respondentia. [R. C. 1905, § 6235; Civ. C. 1877, § 1799; R. C. 1899, § 4786.]

§ 6813. **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. [R. C. 1905, § 6236; Civ. C. 1877, § 1800; R. C. 1899, § 4787.]

## CHAPTER 91.

### MECHANICS' LIENS.

§ 6814. **Who may have. For what. Duty of material man.** 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 erection, alteration or repair of any building or other structure upon lands or in making any other improvements thereon, including fences, sidewalks, pavings, wells, grades, drains or excavations under a contract with the owner of such land, his agent, contractor or subcontractor, or with the consent of such owner, shall upon compliance with the provisions of this chapter have for his labor done, or materials, fixtures or machinery 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 said work was done, or the things furnished, to secure the payment for such labor, machinery, material or fixtures, provided no person furnishing material, machinery or fixtures for any of the purposes aforesaid, shall be entitled to a lien under this chapter unless he shall keep an itemized account thereof, separate and apart from all other items of account against the purchaser, and has made a written demand for payment of such account at least fifteen days prior to the filing of the lien, and in the case of furnishing such materials, machinery or fixtures to a contractor or subcontractor no liens shall be allowed therefor unless the party furnishing the same shall keep a separate account against said contractor or subcontractor of the material, machinery or fixtures so furnished to be used in the construction, alteration, repair or improvement of the property of each separate person (except in cases where the property is owned by several persons jointly or as cotenants, in which case such joint owners or cotenants shall be deemed a person within the meaning of this act), and the mingling of charges in one account for material, machinery or fixtures to be used in the construction, alteration, repair or improvement of the property of different persons (except in cases of joint owners or all owners in common) shall defeat the right to a lien against either of such persons, provided, further, that no person who furnishes any material, machinery or fixtures as aforesaid to a contractor or subcontractor shall be entitled to file such lien under this chapter unless he notifies the owner or one of the owners, in case of joint owners, of the premises upon or for which the same is to be used, by registered letter immediately after the making of such contract to so furnish material or machinery or fixtures to such contractor or subcontractor, that he is about to furnish the same and the probable charge therefor, provided, further, that where the work or material for which mechanics' lien is being claimed was furnished under contract with the contractor or subcontractor, the property owner shall not be liable to lien claimants to an aggregate amount greater than the contract price he was to pay

such contractor or subcontractor. The owner shall be presumed to have consented to the furnishing of such labor or material or machinery or fixtures if at the time, he had knowledge thereof and did not give notice of his objections thereto to the person entitled to such lien. The provisions of this chapter shall not be construed to apply to claims or contracts for lightning rods or any of their attachments. [1911, ch. 187; 1909, ch. 158; R. C. 1905, § 6237; 1899, ch. 109; R. C. 1899, § 4788.]

Lien not destroyed by repeal of law. *Craig v. Herzman*, 9 N. D. 140, 81 N. W. 238.

Who may have mechanics' lien. *Pinkerton v. Le Beau*, 3 S. D. 440, 54 N. W. 97; *Sutton v. Min. Co.*, 14 S. D. 33, 84 N. W. 211; *Albright v. Smith*, 2 S. D. 577, 51 N. W. 590; *Fullerton v. Leonard*, 3 S. D. 118, 52 N. W. 325; *Kehoe v. Hanson*, 8 S. D. 198, 65 N. W. 1075, 59 Am. St. Rep. 759; *Haxtum Co. v. Gordon*, 2 N. D. 246, 50 N. W. 708, 83 Am. St. Rep. 776.

Amendment of statute does not change right. *Mahon v. Surerus*, 9 N. D. 57, 81 N. W. 64.

Supervising architect furnishing plans and specifications is entitled to mechanics' lien. *Friedlander v. Taintor*, 14 N. D. 393, 116 Am. St. Rep. 697, 104 N. W. 527, 9 A. & E. Ann. Cas. 96.

Right of materialman furnishing lumber to vendee of land under contract for purchase thereof to lien on building. *Salzer Lumber Co. v. Claffin*, 16 N. D. 601, 113 N. W. 1036.

As to when materialman acquires no mechanics' lien under statute. *Christianson Drug Co. v. Hughes*, 18 N. D. 282, 122 N. W. 384.

Contractor is entitled to mechanics' lien for drilling and casing well on land. *Rolewitch v. Harrington*, 20 S. D. 375, 6 L.R.A.(N.S.) 550, 107 N. W. 207.

Payment to contractor within time limited for filing liens will not defeat subcontractor's lien. *Red Riv. Lumb. Co. v. Children of Israel*, 7 N. D. 46, 73 N. W. 203; *Albright v. Smith*, 2 S. D. 577, 51 N. W. 590; *Albright v. Smith*, 3 S. D. 631, 54 N. W. 816.

Fraudulently filing lien for greater amount than due defeats lien. *Bohn Mfg. Co. v. Keenan*, 15 S. D. 377, 89 N. W. 1009.

Statement may be verified by agent. *Fullerton v. Leonard*, 3 S. D. 118, 52 N. W. 325.

Description of property; sufficiency of. *Howe & Co. v. Smith*, 6 N. D. 432, 71 N. W. 552.

Subcontractor is entitled to direct lien for materials furnished under contract between contractor and owner. *Robertson Lumber Co. v. State Bank*, 14 N. D. 511, 105 N. W. 719.

Materialman is not entitled to lien where he filed his statement of account more than four months after last item of material. *Smith v. Dunn*, 26 S. D. 129, 128 N. W. 493.

Person who has paid consideration for land, though it is deeded to another, is "owner" thereof. *Anderson Lumber Co. v. Spears*, 25 S. D. 624, 127 N. W. 643.

Person furnishing materials for building on married woman's land, pursuant to contract with husband, is entitled to lien whether or not agency was disclosed to him. *H. C. Behrens Lumber Co. v. Lager*, 26 S. D. 160, 128 N. W. 698, Ann. Cas. 1913A, 1128.

Authorizes filing of lien against two or more buildings and land upon which they stand, where labor or material is furnished under entire contract. *Robertson Lumber Co. v. Clarke*, 24 N. D. 134, 138 N. W. 984.

More personal knowledge of owner that particular person is furnishing material to contractor does not supply statutory notice upon which one furnishing material can predicate mechanics' lien. *North Dakota Lumber Co. v. Bulger*, 19 N. D. 516, 125 N. W. 883.

If lienor can trace materials into one of several buildings of two or more separate owners, he is limited to lien thereon, and owner of adjacent building is not subjected to burden of such other's debt. *Meyer Lumber Co. v. Trygstad*, 122 N. D. 558, 134 N. W. 714.

Owner must keep advised whether material used in his building is paid for or not, and if he pays contractor during the ninety days after material furnished, he does so at his peril. *Langworthy Lumber Co. v. Hunt*, 19 N. D. 433, 122 N. W. 865.

"Owner" of real estate on whose interest mechanics' lien will attach is person for whose immediate use and benefit building is made. *Johnson v. Soliday*, 19 N. D. 463, 126 N. W. 99.

Mechanics' lien for sinking well. 6 L.R.A.(N.S.) 550; 43 L.R.A.(N.S.) 559.

Right to a lien for labor in preparing materials in manufactured form, under a statute giving a lien for work or labor performed on a building or structure. 30 L.R.A.(N.S.) 82.

Food furnished contractor for employes and teams as material giving lien on railroad. 15 L.R.A.(N.S.) 509.

Effect of death of principal contractor on rights of subcontractor or materialman to a lien, or to payment by owner. 20 L.R.A.(N.S.) 45.

Effect of bankruptcy of contractor on right of laborer or materialman to enforce lien against property improved. 26 L.R.A.(N.S.) 409.

Payment to contractors or subcontractor as affecting liens of subordinate claimants. 20 L.R.A. 560.



Right to statutory lien on property of third person for rental of personal property let to contractor for use in work of a lienable nature. 16 L.R.A.(N.S.) 585.

Right to mechanics' lien for labor or material furnished on order of architect before abandonment of contract by contractor. 29 L.R.A.(N.S.) 89.

Explosives as materials used in improving real property for purpose of mechanics' lien. 2 L.R.A.(N.S.) 238.

Heating apparatus as part of realty for purpose of mechanics' lien. 1 B. R. C. 982.

Mechanics' lien for materials furnished for structure, but not actually used. 31 L.R.A.(N.S.) 749; 64 Am. Dec. 678.

Mechanics' lien for materials wholly or partially consumed in process of work, but not becoming a part of the structure. 36 L.R.A.(N.S.) 866.

Mechanics' lien upon premises for an improvement not placed thereon but having a physical or beneficial connection therewith. 42 L.R.A.(N.S.) 354.

Mechanics' lien for services of architect. 16 L.R.A. 600; 36 L.R.A.(N.S.) 354.

Right to mechanics' lien when without fault of the owner the building is not completed. 43 Am. St. Rep. 900.

May stipulations in contracts destroy the lien of subcontractors and materialmen. 19 Am. St. Rep. 699.

Waiver of mechanics' lien. 41 Am. Dec. 221.

Lien of materialmen. 79 Am. Dec. 268.

Effect of death of owner before filing claim for mechanics' lien. 43 Am. St. Rep. 778.

Mechanics' lien upon building erected by vendee. 62 L.R.A. 380.

Statute giving liens for improvements made under contracts with owner. 23 L.R.A.(N.S.) 601.

Requiring another to make improvements upon land at his own expense as a consent by the owner which will subject his interest to a lien. 11 L.R.A.(N.S.) 764.

Mechanics' lien under contract made or performed in another state. 38 L.R.A. 410.

Constitutionality of statute giving mechanics' lien contrary to agreement of contractor. 36 L.R.A.(N.S.) 574.

Contractor's bonds as substitutes for mechanics' liens. 27 L.R.A.(N.S.) 579.

Does building contractor's bond indemnify owner against mechanics' liens, when not expressly mentioned. 24 L.R.A.(N.S.) 1075.

As to similar provision in Wis. Stat. 1898 § 3314, see *Chapman Valve Mfg. Co. v. Oconto Water Co.*, 89 Wis. 264, 40 Am. St. Rep. 836, 60 N. W. 1004; *Standard Oil Co. v. Lane*, 75 Wis. 636, 7 L.R.A. 191, 44 N. W. 644.

**§ 6815. Notice to be filed.** Every person who shall be entitled to have a mechanics' lien for material under the provisions of section 6237 of the Revised Codes for 1905 and acts amendatory thereto [section 6814 herein], and who wishes to avail himself of the provisions of said section, shall, in addition to the requirements of said section, file with the clerk of the district court of the county in which such land, building or improvement is situated, a notice in writing, giving the name of the possessor of the land, a description of the property to be charged with the lien, the date of the contract, and that he will claim and thereafter file a verified account thereof, as provided by statute, and perfect a mechanic's lien against the said described building, improvements or premises according to law, in the event the same shall not have been paid. This notice shall be signed by such person so entitled to such mechanics' lien or by authorized agent. The clerk of court shall file and record such notice in a book to be entitled the "book of mechanics' liens notice" upon the receipt of a fee of twenty-five cents for filing and indexing the same. A mechanics' lien shall be void against the owner or holder of any mortgage or deed or conveyance, whose mortgage, deed or conveyance shall have been filed and recorded prior to the filing for record of the herein prescribed notice of mechanics' liens. [1913, ch. 209, § 1.]

**§ 6816. Notice and consent of owner required.** Every person who shall be entitled to a mechanics' lien for material under the provisions of said chapter and acts amendatory thereto, and who wishes to avail himself of the provisions of said section shall in addition to the requirements of said section file with his lien a statement to the effect that the owner of the premises has consented that said lien may be filed, which statement must be signed by the owner of said premises, and which statement must be made in duplicate and duplicate delivered to the owner of the premises, and both original and duplicate notice be signed on or before the time the first material is furnished; provided, that when the owner of the premises has consented that a lien may

be filed against the premises by a contractor it shall not be necessary for any subcontractor or material man to obtain any further consent to the filing of liens for materials furnished for the improvement of said premises. Such notice must be substantially in the following form:

I hereby acknowledge that notice has been given me that a mechanic's lien may be filed for material furnished, under my contract with (name of contractor or person furnishing material) made on this ..... day of ....., 191.., and I hereby consent that such lien may be filed as security for material furnished to me (character of improvement). [1913, ch. 209, § 2.]

**§ 6817. Penalty for filing unlawful lien.** Whoever signs and files a mechanic's lien under the provisions of section 6237 of the Revised Codes of 1905 and acts amendatory thereto [section 6814 herein], and knowingly and willfully includes in said lien classes of said material for which the law does not permit the filing of a lien, shall be guilty of a misdemeanor. [1913, ch. 209, § 3.]

**§ 6818. 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. 1905, § 6238; R. C. 1895, § 4789.]

Subcontractor is entitled to joint lien only, where builder made joint contract with adjoining lot owner. *Stoltze v. Hurd*, 20 N. D. 412, 30 L.R.A.(N.S.) 1219, 128 N. W. 115. Ann. Cas. 1912C, 871.

Mechanics' lien where building covers adjoining lots held in severalty. 30 L.R.A.(N.S.) 1219.

Right to file a single mechanics' lien against several buildings. 17 L.R.A. 314.

**§ 6819. 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. [R. C. 1905, § 6239; C. Civ. P. 1877, § 657; R. C. 1895, § 4790.]

Owner's liability limited to amount due under contract at time services were performed. *Adams v. Ry. Co.*, 10 S. D. 239, 73 N. W. 577.

Lien is lost unless filed within proper time. *Congdon & Henry Hardware Co. v. Ry. Co.*, 14 S. D. 575, 86 N. W. 633; *Wis. Trust Co. v. Rob. & Cary Co.*, 66 Fed. 778, 15 C. C. A. 668.

Sufficient to describe that portion of road on which subcontractor was employed. *Adams v. Ry. Co.*, 12 S. D. 424, 81 N. W. 960.

**§ 6820. 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. [R. C. 1905, § 6240; C. Civ. P. 1877, § 662; R. C. 1895, § 4791.]

Mechanics' lien notice need not state name of owner. *Red Riv. Lumb. Co. v. Children of Israel*, 7 N. D. 46, 73 N. W. 203.

Account upon which lien is based. *Turner v. St. John*, 8 N. D. 245, 78 N. W. 340; *Pinkerton v. Le Beau*, 3 S. D. 440, 54 N. W. 97.

Correction of lien after filing. *Sarles v. Sharlow*, 5 D. 100, 37 N. W. 748.

Lien for greater sum than is due; effect of. *McCormack v. Phillips*, 4 D. 506, 34 N. W. 39.

Description of property; sufficiency of. *Howe & Co. v. Smith*, 6 N. D. 432, 71 N. W. 552; *Laird-Norton Co. v. Hopkins*, 6 S. D. 217, 60 N. W. 857.

A mechanics' lien is superior to a mortgage made and recorded within ninety days, though the holder of the lien failed to file his account within ninety days after the completion of the performance of his contract. *Wisconsin Trust Co. v. Robinson & Cary Co.*, 68 Fed. 778.

Error in fixing amount due under lien will not affect its validity. *Robertson Lumber Co. v. Clarke*, 24 N. D. 134, 138 N. W. 934.

Materialman is not entitled to lien where he filed his statement of account more than four months after last item of material. *Smith v. Dunn*, 26 S. D. 129, 128 N. W. 493.

Materialman cannot obtain lien by filing affidavit and statement of account more than four months after last item of material. *Smith v. Dunn*, 26 S. D. 129, 128 N. W. 493.

Where claim complied with statute, and contained error as to matter which need not have been mentioned, it was sufficient as against subsequent purchaser and incumbrancer. *H. C. Behrens Lumber Co. v. Lager*, 26 S. D. 160, 128 N. W. 698, Ann. Cas. 1913A, 1128.

Effect on mechanics' lien of failure of description of land in affidavit of claim on buildings distinct from land. 62 L.R.A. 382.

Effect of filing excessive mechanics' lien. 29 L.R.A.(N.S.) 306.

Intentional or fraudulent overstatement in mechanics' liens. 29 L.R.A.(N.S.) 317.

First and last days in computing time for filing mechanics' liens. 49 L.R.A. 236.

Work done, or material furnished, in perfecting original work, as lienable items to establish period for filing claim. 12 L.R.A.(N.S.) 864.

Right to tack different contracts to perform labor or furnish material for purpose of extending time to file lien. 15 L.R.A.(N.S.) 299.

Effect of addition of new items to extend time for filing mechanics' lien. 35 L.R.A.(N.S.) 902.

**§ 6821. Duty of clerk of court.** The clerk of the district court shall indorse upon every account the date of its filing, and shall 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. He shall also make and keep a tract index in which shall be entered a description of all property covered or charged with the lien. [1907, ch. 167; R. C. 1905, § 6241; C. Civ. P. 1877, § 663; R. C. 1895, § 4792.]

**§ 6822. Priority of mechanics' 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. [R. C. 1905, § 6242; C. Civ. P. 1877, § 664; R. C. 1895, § 4793.]

Waiver of priority by laches. *Bastien v. Barras*, 10 N. D. 29, 84 N. W. 559.

Lien superior to mortgage executed after commencement of building. *Haxtum Steam Heater Co. v. Gordon*, 2 N. D. 246, 50 N. W. 708, 33 Am. St. Rep. 776.

Mechanics' lien will not attach to interest of vendor under executory contract of sale whose vendee is in possession, and who erects building. *Johnson v. Soliday*, 19 N. D. 463, 126 N. W. 99.

Relation back of subcontractor's lien to the date of that of the original contractor. 16 L.R.A. 335.

Priority of mechanics' lien over mortgage for advances. 14 L.R.A. 307.

Priority of claims against property in hands of receiver over mechanics' liens. 9 L.R.A.(N.S.) 1013.

Rights of seller of fixtures, retaining title thereto or lien thereon, as against holder of mechanics' lien. 1 B. R. C. 673.

**§ 6823. 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. [R. C. 1905, § 6243; C. Civ. P. 1877, § 665; R. C. 1895, § 4794.]

Mortgage given before completion of building subject to mechanics' lien though contract for building may have been changed if building when completed is substantially same as contemplated. *Haxtum Steam Co. v. Gordon et al.*, 2 N. D. 246, 50 N. W. 708.

Mechanics' 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.

"Owner" of real estate on whose interest mechanics' lien will attach is person for whose immediate use and benefit building is made. *Johnson v. Soliday*, 19 N. D. 463, 126 N. W. 99.

Lien claim properly filed when owner conveyed premises attaches both to land and building in preference to purchaser's title. *H. C. Behrens Lumber Co. v. Lager*, 26 S. D. 160, 128 N. W. 698, Ann. Cas. 1913A, 1128.

Estates and interests affected by mechanics' lien. 45 Am. Dec. 678.

Buildings and other property subject to mechanics' lien. 78 Am. Dec. 694.

Mechanics' lien on buildings distinct from land. 62 L.R.A. 369.

When mechanics' lien may include property in addition to that upon which work was performed. 65 Am. St. Rep. 165.

Effect upon rights of owner of lien on building of its wrongful removal and attachment to third person's land without former's consent. 14 L.R.A.(N.S.) 435.

Removal, removability or destruction of work or improvement as affecting lien on the property improved. 41 L.R.A.(N.S.) 206.

Mechanics' lien on landlord's interest for labor or materials furnished tenant for the building or improvement removable by tenant. 6 L.R.A.(N.S.) 485.

Mechanics' liens on claim or interest in public lands for debts contracted before issuance of patent. 34 L.R.A.(N.S.) 409.

Extent of land to which mechanics' lien attaches. 26 L.R.A.(N.S.) 836.

Mechanics' lien on public property. 35 L.R.A. 141; 20 L.R.A.(N.S.) 261; 41 L.R.A.(N.S.) 315; 27 Am. Rep. 83.

**§ 6824. 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. [R. C. 1905, § 6244; 1901, ch. 101.]

Party in possession under contract of purchase may subject property to mechanics' lien. *Pinkerton v. Le Beau*, 3 S. D. 440, 54 N. W. 97.

Priority to mortgage; sale of building. *James River Lumb. Co. v. Danner*, 3 N. D. 470, 57 N. W. 343; *Laird-Norton Co. v. Herker*, 6 S. D. 509, 62 N. W. 104; *Craig v. Herzman*, 9 N. D. 140, 81 N. W. 288; *Gull River Lumb. Co. v. Briggs*, 9 N. D. 485, 84 N. W. 349.

Lien upon building on homestead. *Mahon v. Surerus*, 9 N. D. 57, 81 N. W. 64; *McCormack v. Phillips*, 4 D. 506, 34 N. W. 39; *Morgan v. Beuthein*, 10 S. D. 650, 75 N. W. 204, 65 Am. St. Rep. 733.

Right to remove building from land covered by homestead filing. *Mahon v. Surerus*, 9 N. D. 57, 81 N. W. 64.

**§ 6825. Action to enforce.** Any person having a lien by virtue of this chapter may bring 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; provided, however, that before such lien holder may enforce such lien as herein provided, he shall give ten days' written notice to the record owner of property affected, of his intentions so to do, which notice shall be made by personal service, or by registered letter directed to the person's last known address. Provided, further, that if notice is given by registered letter, that twenty days' notice from date of registry receipt must be given before beginning action to enforce such lien. 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. [1913, ch. 208; R. C. 1905, § 6245; C. Civ. P. § 667; 1883, ch. 83, § 1; R. C. 1895, § 4706; 1905, ch. 130.]

Subcontractors having liens must be made parties to foreclosure. *Grand Island & W. C. R. Co. v. Sweeney*, 103 Fed. 342, 4 C. C. A. 253; *Sweeney v. Ry. Co.*, 61 Fed. 3; *Southard v. Smith*, 8 S. D. 230, 66 N. W. 316; *Rust-Owen Lumb. Co. v. Fitch*, 3 S. D. 213, 52 N. W. 879.

Nonresident contractor is not necessary party to action by subcontractor to enforce mechanics' liens. *Burgi v. Rudgers*, 20 S. D. 646, 108 N. W. 253.

Enlargement of remedy for enforcing a mechanics' lien after sale under foreclosure of a mortgage, subject to the lien, does not impair obligation of the contract with the mortgagee or the purchaser on foreclosure. *Red River Valley Nat. Bank v. Craig*, 181 U. S. 548, 45 L.ed. 994, 21 Sup. Ct. Rep. 703.

Lienor is not required to exhaust his remedy at law before resorting to security of lien. *Erickson v. Russ*, 21 N. D. 208, 32 L.R.A.(N.S.) 1072, 129 N. W. 1025.

Contractor as a necessary party to a bill to enforce a mechanics' lien. 33 L.R.A.(N.S.) 69.

Right of subcontractor or materialman to personal judgment against owner. 14 L.R.A.(N.S.) 1036; 24 L.R.A.(N.S.) 321.

Recovering personal judgment against owner as waiver of mechanics' lien. 32 L.R.A.(N.S.) 1073.

Personal judgment in action to enforce mechanics' lien on public property. 35 L.R.A. 145.

**§ 6826. 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. [R. C. 1905, § 6246; C. Civ. P. 1877, § 668; R. C. 1899, § 4797.]

**§ 6827. 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. [R. C. 1905, § 6247; C. Civ. P. 1877, § 668; R. C. 1899, § 4797.]

As to joinder of cause of action for equitable relief forfeiting mechanics' lien with one to recover penalty for failure to release lien on demand. *Sheets v. Prosser*, 16 N. D. 180, 112 N. W. 72.

Assignment of mechanics' liens. 49 Am. St. Rep. 530.

**§ 6828. 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. [R. C. 1905, § 6248; C. Civ. P. 1877, § 669; R. C. 1899, § 4798.]

Party residing upon land, for whose immediate use a house is built, is an "owner." *Mahon v. Surerus*, 9 N. D. 57, 81 N. W. 64; *Gull River Lumb. Co. v. Briggs*, 9 N. D. 485, 84 N. W. 349.

Owner of real estate on whose interest mechanics' lien will attach is person for whose immediate use and benefit building is made. *Johnson v. Soliday*, 19 N. D. 463, 126 N. W. 99.

Mortgagee as owner within mechanics' lien laws. 39 L.R.A.(N.S.) 84.

Right to mechanics' lien for improvements made on infant's land by authority of guardian. 15 L.R.A.(N.S.) 1159.

**§ 6829. 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. [R. C. 1905, § 6249; C. Civ. P. 1877, § 670; R. C. 1895, § 4799; 1905, ch. 131.]

As to allegations of complaint in action to recover penalty imposed by statute. *Sheets v. Prosser*, 16 N. D. 180, 112 N. W. 72.

**§ 6830. 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. [R. C. 1905, § 6250; C. Civ. P. 1877, § 671; R. C. 1899, § 4800.]

Who are subcontractors. *Adams v. Ry.*, 10 S. D. 239, 72 N. W. 587.

One furnishing materials under contract with contractor as subcontractor. *Robertson Lumber Co. v. Bank of Edinburg*, 14 N. D. 511, 105 N. W. 719.

**§ 6831. 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. 1905, § 6251; R. C. 1895, § 4801.]

Waiver of mechanics' liens by taking notes or other securities. 41 Am. St. Rep. 761.

Acceptance of commercial paper as extinguishment of mechanics' lien. 35 L.R.A.(N.S.) 93.

Recovering personal judgment against owner as waiver of mechanics' lien. 32 L.R.A.(N.S.) 1073.

Effect of discharge in bankruptcy on mechanics' lien. 42 L.R.A.(N.S.) 295.

Waiver of laborer's lien by attachment or execution. 50 L.R.A. 723.

## CHAPTER 92.

## BONDS FOR LABOR AND MATERIAL FOR PUBLIC BUILDINGS.

§ 6832. **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. [R. C. 1905, § 6252; 1901, ch. 133, § 1.]

Liability of sureties on contractor's bond to laborers or materialmen not entitled to a lien, when bond is conditioned against liens or claims. 9 L.R.A.(N.S.) 889.

Effect of invalidity of contract for public work upon the liability of the contractor's bondsmen for material, etc., furnished in carrying out the contract. 13 L.R.A.(N.S.) 793.

Effect of surrender or discharge, by owner of property, of bond given by contractor conditioned for the payment of materialmen and laborers upon the right of the latter to recover thereon. 18 L.R.A.(N.S.) 455.

Does building contractor's bond indemnify owner against mechanics' liens, when not expressly mentioned. 24 L.R.A.(N.S.) 1075.

Contractor's bonds as substitutes for mechanics' liens. 27 L.R.A.(N.S.) 579.

Does bond of highway contractor cover personal injuries to members of public. 34 L.R.A.(N.S.) 152.

§ 6833. **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. [R. C. 1905, § 6253; 1901, ch. 133, § 2.]

§ 6834. **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. [R. C. 1905, § 6254; 1901, ch. 133, § 3.]

§ 6835. **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. [R. C. 1905, § 6255; 1901, ch. 133, § 4.]

## CHAPTER 93.

## MINER'S LIEN.

§ 6836. **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. [R. C. 1905, § 6256; 1879, ch. 41, § 1; R. C. 1895, § 4805.]

§ 6837. **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. [R. C. 1905, § 6257; 1879, ch. 41, § 2; R. C. 1895, § 4806.]

§ 6838. **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. [R. C. 1905, § 6258; 1879, ch. 41, § 3; R. C. 1895, § 4807.]

§ 6839. **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. [R. C. 1905, § 6259; 1879, ch. 41, § 4; R. C. 1895, § 4808.]

§ 6840. **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. [R. C. 1905, § 6260; 1879, ch. 41, § 5; R. C. 1899, § 4809.]

§ 6841. **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. [R. C. 1905, § 6261; 1879, ch. 41, § 6; R. C. 1895, § 4810.]

§ 6842. **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. [R. C. 1905, § 6262; 1879, ch. 41, § 7; R. C. 1899, § 4811.]

§ 6843. **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. [R. C. 1905, § 6263; 1879, ch. 41, § 8; R. C. 1899, § 4812.]

## CHAPTER 94.

### LIENS FOR KEEPING AND PASTURING STOCK.

§ 6844. **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. [R. C. 1905, § 6264; C. Civ. P. 1877, § 672; R. C. 1899, § 4813.]

Lien not lost because temporarily in possession of owner. *Welsh v. Barnes*, 5 N. D. 277, 65 N. W. 675.

Lien of chattel mortgage superior to pasture lien. *Wright v. Sherman*, 3 S. D. 290, 52 N. W. 1093, 17 L.R.A. 792; *First Nat. Bank v. Scott*, 7 N. D. 312, 75 N. W. 254.

Lien on animals for cost of keeping. 17 L.R.A. 792.

Taking of animal by general owner for purpose of defeating lien as larceny. 12 L.R.A.(N.S.) 94.

Waiver of lien by attachment or execution. 50 L.R.A. 720.

Right of servant to the common-law possessory lien or its statutory substitute, for services in connection with property. 42 L.R.A.(N.S.) 731.

**§ 6845. 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. [R. C. 1905, § 6265; C. Civ. P. 1877, § 673; R. C. 1899, § 4814.]

As to similar provision in Cal. Civ. Code, § 3051, see *Johnson v. Perry*, 53 Cal. 351; *Love v. Woods*, 100 Cal. 408, 38 Am. St. Rep. 301, 34 Pac. 959; *Michaelson v. Fish*, 1 Cal. App. 116, 81 Pac. 661.

**§ 6846. 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 6844, 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. 1905, § 6266; R. C. 1895, § 4815.]

Priority as between lien of chattel mortgage and lien acquired by furnishing food or care to animals. 17 L.R.A. 792; 12 L.R.A.(N.S.) 310.

## CHAPTER 95.

### LIENS FOR SERVICE OF SIRES.

This chapter is superseded by section 2775, at least as to stallions and jacks.

**§ 6847. 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. [R. C. 1905, § 6267; 1899, ch. 146, § 1; R. C. 1899, § 4816.]

**§ 6848. 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. [R. C. 1905, § 6268; 1899, ch. 146, § 2; R. C. 1899, § 4817.]

**§ 6849. 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. [R. C. 1905, § 6269; 1899, ch. 146, § 3; R. C. 1899, § 4818.]

**§ 6850. 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 8132 of the code of civil procedure. [R. C. 1905, § 6270; 1899, ch. 146, § 4; R. C. 1899, § 4819.]

## CHAPTER 96.

### SEED LIEN.

**§ 6851. 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. [R. C. 1905, § 6271; 1887, ch. 150, § 1; R. C. 1895 § 4820; 1901, ch. 181.]

Necessary averments of complaint. *Lavin v. Bradley*, 1 N. D. 291, 47 N. W. 384; *First Nat. Bank v. Elevator Co.*, 10 S. D. 167, 72 N. W. 402; *Joslyn v. Smith*, 2 N. D. 53, 49 N. W. 382.

Enforcement; right of possession. *Black v. Elevator Co.*, 7 N. D. 129, 73 N. W. 90.

**§ 6852. 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. [R. C. 1905, § 6272; 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.

One furnishing seed grain is entitled to lien for full price thereof although only part of seed is sown. *Schlusser v. Moors*, 16 N. D. 185, 112 N. W. 78.

Description of land in seed lien may include more than one tract and quantity include seed for all. *Schouweiler v. McCaull*, 18 S. D. 70, 99 N. W. 95.

§ 6853. **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 97. [R. C. 1905, § 6273; 1887, ch. 150, § 2; R. C. 1895, § 4822.]

## CHAPTER 97.

### THRESHING LIEN.

§ 6854. **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. [R. C. 1905, § 6274; 1889, ch. 88, § 1; R. C. 1895, § 4823.]

Proof necessary to establish lien. *Martin v. Hawthorne*, 5 N. D. 66, 63 N. W. 895.

Not unconstitutional as depriving grain buyer of property without due process of law *Hahn v. Sleepy Eye Mill Co.*, 21 S. D. 324, 112 N. W. 843.

§ 6855. **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. [R. C. 1905, § 6275; 1889, ch. 88, § 2; R. C. 1895, § 4824.]

Only owner and operator entitled to lien; notice must contain description of land. *Parker v. First Nat. Bank*, 3 N. D. 87, 54 N. W. 313; *Anderson v. Alseth*, 6 S. D. 566, 62 N. W. 435; *Martin v. Hawthorn*, 3 N. D. 412, 57 N. W. 87.

Quantity of each grain threshed need not be stated in thresher's lien, when total is stated. *Mitchell v. Monarch Elevator Co.*, 15 N. D. 495, 107 N. W. 1085, 11 A. & E. Ann. Cas. 1001.

Lien must be executed in duplicate and filed in both counties, where grain is grown in two counties. *Gorthy v. Jarvis*, 15 N. D. 509, 108 N. W. 39.

Failure to set forth "the amount and quantity of grain threshed" in statement filed with clerk of court fatal to lien. *Moher v. Rasmussen*, 12 N. D. 71, 95 N. W. 152.

§ 6853. **Priority.** Such lien shall have priority over all other liens and incumbrances upon such grain. [R. C. 1905, § 6276; 1889, ch. 88, § 2; 1890, ch. 87, § 1; R. C. 1895, § 4825.]

## CHAPTER 98.

### FARM LABORER'S LIEN.

§ 6857. **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. [B. C. 1905, § 6277; 1895, ch. 63, § 1; B. C. 1899, § 4826.]

Female cook on farm is not entitled to lien for wages. *Lowe v. Abrahamson*, 18 N. D. 182, 19 L.R.A.(N.S.) 1039, 119 N. W. 241.

As to whether woman employed on farm as domestic was farm laborer and entitled to lien for wages. *Mead v. First Nat. Bank*, 24 N. D. 12, 138 N. W. 365.

Who is a "farm or agricultural" laborer within statute giving lien. 19 L.R.A.(N.S.) 1039.

**§ 6858. 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. [R. C. 1905, § 6278; 1895, ch. 63, § 2; R. C. 1899, § 4827; 1901, ch. 87.]

**§ 6859. 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. [R. C. 1905, § 6279; 1895, ch. 63, § 3; R. C. 1899, § 4828.]

**§ 6860. 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. [R. C. 1905, § 6280; 1895, ch. 63, § 4; R. C. 1899, § 4829.]

## CHAPTER 99.

### OTHER LIENS.

**§ 6861. 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. [R. C. 1905, § 6281; 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.

Vendor's lien for unpaid purchase money. 4 Am. St. Rep. 704; 36 Am. St. Rep. 174.

The right of a vendor of real estate, upon purchaser's refusal to perform, to resell at latter's risk and hold him liable for deficiency. 8 L.R.A.(N.S.) 137.

Effect of statutory bar of action for purchase money on right to enforce vendor's lien. 39 L.R.A.(N.S.) 1171; 31 Am. Rep. 41; 95 Am. St. Rep. 663.

Deficiency decree in action to foreclose vendor's lien. 13 L.R.A.(N.S.) 874.

Vendor's lien on superstructure on railroad right of way. 66 L.R.A. 44.

Effect of payment by volunteer or stranger. 23 L.R.A. 130.

Agreement for support in consideration of conveyance as basis for equitable lien. 13 L.R.A.(N.S.) 725; 28 L.R.A.(N.S.) 607.

Vendor's lien as affecting sole and unconditional ownership. 7 L.R.A.(N.S.) 627.

Priority of vendor's lien as against purchaser at judicial sale. 21 L.R.A. 39.

Is money loaned to improve land part of the purchase price within the rule that a purchase money lien takes priority over homestead rights. 41 L.R.A.(N.S.) 89.

Rights of seller of fixtures, retaining title thereto or a lien thereon, as against lien of vendor of realty. 1 B. R. C. 670.

Remedies for enforcing lien of vendor. 17 Am. St. Rep. 232.

As to similar provision in Cal. Civ. Code, § 3046, see *Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272, 25 Pac. 919; *Gessner v. Palmateer*, 89 Cal. 89, 13 L.R.A. 187, 24 Pac. 608, 26 Pac. 789; *Claiborne v. Castle*, 98 Cal. 30, 32 Pac. 807.

§ 6862. **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. [R. C. 1905, § 6282; Civ. C. 1877, § 1802; R. C. 1899, § 4831.]

Waiver of vendor's lien. 137 Am. St. Rep. 185; 12 Am. Dec. 262; 28 Am. Dec. 199.

—by attachment or execution. 50 L.R.A. 717.

—by acceptance of commercial paper. 35 L.R.A.(N.S.) 91.

—by joining in mortgage. 35 L.R.A.(N.S.) 348.

Effect of discharge in bankruptcy on vendor's lien, 42 L.R.A.(N.S.) 295.

As to similar provision in Cal. Civ. Code, § 3047, see *Bancroft v. Cosby*, 74 Cal. 583, 16 Pac. 504; *Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272, 25 Pac. 919; *Gessner v. Palmateer*, 89 Cal. 89, 13 L.R.A. 187, 24 Pac. 608, 26 Pac. 789; *Selna v. Selna*, 125 Cal. 357, 73 Am. St. Rep. 47, 58 Pac. 16.

§ 6863. **Certain liens subject to creditors' rights.** The liens defined in sections 6861 and 6865 shall be subject to the rights of subsequent creditors without notice, or purchasers or incumbrancers in good faith and for value. [R. C. 1905, § 6283; Civ. C. 1877, § 1803; R. C. 1895, § 4832.]

As to similar provision in Cal. Civ. Code, § 3048, see *Selna v. Selna*, 125 Cal. 357, 73 Am. St. Rep. 47, 58 Pac. 16.

§ 6864. **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. [R. C. 1905, § 6284; Civ. C. 1877, § 1804; R. C. 1899, § 4833.]

Expense incurred in shipping cattle to market is element of damage in action for breach of agreement to buy them. *Olson v. Rydl*, 25 S. D. 268, 126 N. W. 587.

Lienor cannot purchase at his foreclosure sale of personal property. *Reeves & Co. v. Bruening*, 16 N. D. 398, 114 N. W. 313.

Law governing right to vendor's lien. 64 L.R.A. 831.

Vendor's lien for purchase price of railroad rails. 66 L.R.A. 44.

Right of vendor by conditional sale to assert lien on default of payment. 32 L.R.A. 464.

Personal liability of purchaser of personal property which is subject to a lien. 59 L.R.A. 737.

Waiver of seller's lien by attachment or execution. 50 L.R.A. 714.

Lien of vendor of personalty. 28 Am. Dec. 694; 83 Am. St. Rep. 451.

As to similar provision in Cal. Civ. Code, § 3049, see *Hewes v. Germain Fruit Co.*, 106 Cal. 441, 39 Pac. 853; *Eads v. Kessler*, 121 Cal. 244, 53 Pac. 656.

§ 6865. **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. [R. C. 1905, § 6285; Civ. C. 1877, § 1805; R. C. 1899, § 4834.]

Lien of vendee. 127 Am. St. Rep. 873.

As to similar provision in Cal. Civ. Code, § 3050, see *Merrill v. Merrill*, 103 Cal. 287, 35 Pac. 768; 37 Pac. 392; *Haile v. Smith*, 113 Cal. 656, 45 Pac. 872.

§ 6866. **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. [R. C. 1905, § 6286; Civ. C. 1877, § 1806; R. C. 1899, § 4835.]

Right of owner of garage to lien. 1 L.R.A.(N.S.) 240.

Right of servant to the common-law possessory lien or its statutory substitute for services in connection with property. 42 L.R.A.(N.S.) 731.

Right of one not in the storage business to a common-law lien for storage charge. 39 L.R.A.(N.S.) 1164.

Lien of warehouseman. 42 Am. Dec. 257.

Lien by cotenant for improvements. 29 L.R.A. 446.

Lien by cotenant for repairs. 29 L.R.A. 459.

Express lien for obligation to contribute to cost of party wall. 66 L.R.A. 703, 704.

Improvement of personal property at bailee's request as creating liability against bailor of property. 38 L.R.A.(N.S.) 97.

Maritime lien for freight. 70 L.R.A. 358, 368.

Lien for demurrage. 3 L.R.A.(N.S.) 327.

Waiver of lien of carrier by attachment or execution. 50 L.R.A. 721.

Lien of artisans and tradesmen at the common law. 87 Am. Dec. 522.

**§ 6867. 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. [R. C. 1905, § 6287; Civ. C. 1877, § 1807; R. C. 1899, § 4836.]

Factor's lien; delivery of possession. *Rosenbaum v. Hayes*, 5 N. D. 478, 67 N. W. 951; *Rosenbaum v. Hayes*, 8 N. D. 461, 70 N. W. 987.

Factor's lien; how waived. *Rosenbaum v. Hayes*, 10 N. D. 311, 86 N. W. 973.

**§ 6868. 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. [R. C. 1905, § 6288; Civ. C. 1877, § 1808; R. C. 1899, § 4837.]

Lien of bank on commercial paper in its possession. *Bank of Commerce v. Humphrey*, 6 S. D. 415, 61 N. W. 444.

Lien of bank on deposits. 6 L.R.A. 227.

Lien on commercial paper purchased by bank after it has mingled trust money with its own funds. 15 L.R.A.(N.S.) 1100.

Banker's lien not founded on contract. 4 Am. St. Rep. 202; 111 Am. St. Rep. 419.

As to similar provision in Cal. Civ. Code, § 3054, see *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359.

**§ 6869. 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. [R. C. 1905, § 6289; Civ. C. 1877, § 1809; R. C. 1899, § 4838.]

Contract between master and ship supporting maritime liens. 70 L.R.A. 381.

**§ 6870. 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. [R. C. 1905, § 6290; Civ. C. 1877, § 1810; R. C. 1899, § 4839.]

Contracts with seamen supporting maritime liens. 70 L.R.A. 377.

Maritime lien for services of pilots. 70 L.R.A. 384.

**§ 6871. 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. [R. C. 1905, § 6291; Civ. C. 1877, § 1811; R. C. 1899, § 4840.]

**§ 6872. Innkeeper's lien.** The keeper of any inn or hotel, whether individual, partnership or corporation, shall have a lien on the baggage and other property in and about such inn belonging to or under the control of his guests or boarders for the proper charges due him from such guests for the accommodation, board and lodging, and for all money paid for or advanced to them not to exceed the sum of two hundred dollars, and for such other extras as are furnished at their request, and said innkeeper or hotel keeper shall have the right to detain the baggage and other property until the amount of such charges is paid, and such baggage and other property shall be exempt from attachment or execution until such innkeeper's lien and the cost of satisfying it are satisfied. [1913, ch. 183, § 5; R. C. 1905, § 6292; Civ. C. 1877, § 1062; R. C. 1895, § 4841.]

Innkeeper has no lien on property leased of third person and brought to and left at hotel by guest. *McCain v. Williams*, 11 S. D. 227, 76 N. W. 930, 49 L.R.A. 610, 74 Am. St. Rep. 791.

Innkeeper's lien. 21 L.R.A. 229; 107 Am. St. Rep. 868.

§ 6873. **Sale of property for innkeeper's lien.** The innkeeper or hotel keeper shall retain such baggage and other property upon which he has a lien for a period of ninety days, at the expiration of which time, if such lien is not satisfied, he may sell such baggage and other property at public auction, after giving ten days' notice of the time and place of sale in a newspaper of circulation in the county where the inn or hotel is situated, and also by mailing a copy of such notice addressed to said guest or boarder at the place of residence registered by him in the register of such inn or hotel. [1913, ch. 183, § 6.]

§ 6874. **Disposal of property sold for innkeeper's lien.** And after satisfying the lien and any costs that may accrue, any residue remaining shall, on demand within six months, be paid such guest or boarder, and if not so demanded within six months from date of such sale, such residue shall be deposited by such innkeeper or hotel keeper, with the treasurer of the county in which the inn or hotel is situated, together with a statement of the innkeeper's claim and the cost of enforcing same, a copy of the published notice, and of the amounts received for the goods sold at said sale; said residue shall by said county treasurer be credited to the general revenue fund for said county, subject to a right of said guest or boarder, or his representative, to reclaim at any time within three years of the date of deposit with said treasurer. [1913, ch. 183, § 7.]

§ 6875. **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. 1905, § 6293; R. C. 1899, § 4842.]

Entry of notice is notice to none except judgment debtor. *Clark v. Sullivan*, 3 N. D. 280, 55 N. W. 733.

Attorney must show possession in course of professional employment to establish lien. *Winans v. Grable*, 18 S. D. 132, 99 N. W. 1110.

Lien attaches not only to judgment, but to cause of action on bond on appeal therefrom. *Leighton v. Serveson*, 8 S. D. 350, 66 N. W. 938.

Lien cannot be defeated by judgment debtor's right of set-off. *Hroch v. Aultman & Taylor Co.*, 3 S. D. 477, 54 N. W. 269.

Lien is dormant until actively asserted. *Pirie v. Harkness*, 3 S. D. 178, 52 N. W. 581; *Hroch v. Aultman & Taylor Co.*, 3 S. D. 477, 54 N. W. 269.

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.

Liens of attorneys. 31 Am. Dec. 755; 51 Am. St. Rep. 251.

Attorney's lien on cause of action for tort. 3 L.R.A.(N.S.) 379.

Attorney's lien on fund in bastardy proceedings. 11 L.R.A.(N.S.) 630.

Effect of agreement giving attorney employed by personal representative lien on subject-matter in litigation on liability of estate to him. 25 L.R.A.(N.S.) 75.

Right of attorney, under local statute, to a lien upon money in the hands of an adverse party to a suit in proceeding in another state. 31 L.R.A.(N.S.) 1215.

Right of attorney who takes case on contingent fee or for certain percentage to implied or equitable lien on fund recovered. 27 L.R.A.(N.S.) 634.

Constitutionality of statutes providing for attorneys' liens. 40 L.R.A.(N.S.) 529.

Dismissal of suit to defeat attorney's lien or claims to compensation. 5 L.R.A.(N.S.) 390.



Waiver of attorney's lien by taking security. 2 B. R. C. 58.

Assignment of judgment to attorney defeating lien. 23 L.R.A. 339.

Assignment of judgment as affecting attorney's lien thereon. 37 L.R.A.(N.S.) 226.

**§ 6876. 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. 1905, § 6294; R. C. 1899, § 4843.]

On judgment releasing attorney's lien on judgment on giving of bond for payment thereof. *Mosteller v. Holborn*, 21 S. D. 547, 114 N. W. 693.

**§ 6877. Lien for repairs of personalty.** Any blacksmith or machinist having an established place of business within the state who makes, alters or repairs any engine, threshing machine or well machine at the request of the owner or legal possessor of the property, shall have a lien upon the same for his reasonable charges for work done and materials furnished, until the charges are paid, and said lien shall have priority over all other liens, chattel mortgages or incumbrances against said personal property; provided, however, that any person entitled to a lien, under this section, shall, within thirty days after materials are furnished or labor performed in altering or repairing such personal property, file in the office of the register of deeds of the county a statement in writing, verified by oath, showing the labor performed, materials furnished, the price agreed on for the same, if no price is agreed on then state the reasonable value thereof, the name of the person for whom the work or labor was performed, or to whom materials were furnished, or both, and descriptions of the property upon which the lien was claimed; provided, that when the person retains possession of this property so altered or repaired no statement is required to be filed as above provided; provided, that if any person makes, alters or repairs more than one article of personal property for the same owner or legal possessor thereof, he may include all such articles of personal property so made, altered or repaired, within thirty days preceding the filing thereof, in the same statement, and the statement so made shall have the same force and effect as to each article enumerated therein as though a separate statement had been filed for each of said articles so made, altered or repaired. Unless the person entitled to said lien shall file such statement within the time aforesaid, he shall be deemed to have waived his right thereto; provided, further, that the person holding such lien on property that has been previously incumbered by mortgage, before the foreclosure of same, shall give to the record holder of such mortgage twenty days' notice in writing of his intention to foreclose said lien before beginning action or proceedings for foreclosure of the same, which notice may be served by sending same in a registered letter addressed to such lien holder at his last known post office address; and provided, further, that the holder of any mortgage against property on which the lien herein provided for, shall have been filed, may at any time previous to sale, pay off the amount due on such lien, the holder thereof shall assign the same to such person and thereafter he shall be entitled to all the rights that the person filing said lien would have been had the same not been paid. [1907, ch. 168; R. C. 1905, § 6295; 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.

Mechanic's lien for repair of engine. *Gaar, Scott & Co. v. Clements*, 4 N. D. 559, 62 N. W. 640; *Burdick v. Marshall*, 8 S. D. 308, 66 N. W. 462.

## CHAPTER 100.

## FILING AND FORECLOSING LIENS ON PERSONAL PROPERTY.

§ 6878. **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 8132. A report of such foreclosure shall be made in the manner set forth in section 8128; 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. 1905, § 6296; R. C. 1895, § 4845; 1903, ch. 120.]

Report of sale on foreclosure to be filed within ten days. *Martin v. Hawthorne*, 5 N. D. 66, 63 N. W. 895.

§ 6879. **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. 1905, § 6297; R. C. 1895, § 4846.]

Lienors are not affected by failure of register to properly number the liens. *Schouweiler v. McCaull*, 18 S. D. 70, 99 N. W. 95.

## CHAPTER 101.

## DISCHARGE OF LIENS.

The title of the following section constituting this chapter, as enacted in Laws 1911, ch. 178, is as follows: "An act regulating the discharge of liens, not dependent upon possession and to provide for the release of liens, filed of record against real property, and personal property, and the giving of an undertaking for the payment thereof."

§ 6880. **Discharge of record upon notice, affidavit and undertaking.** That whenever any mechanics' lien, lien for the service of sires, seed liens, threshing lien, farm laborer's lien, miner's lien, shall have been heretofore, or may be hereafter filed against the real property or personal property of a resident of North Dakota, the officer having control of the record of said lien shall discharge the same of record by making an entry on the margin of the record thereof, as follows:

"Discharged by Undertaking," and the officer shall date and sign the discharge, and thereafter said lien shall be void and of no effect.

Provided, that the owner of said lien real or personal property shall first cause to be filed with said officer the affidavit of the owner of said property, or the owner of a substantial interest therein, or, of his agent or attorney, setting forth an interest in said property, and that the said owner has a defense against the collection of said lien, or a part thereof, and that there exists a disagreement between the parties affecting the amount or validity of said lien, and that the lienor desires a discharge of said lien of record.

Provided, that the owner of said property, or the owner of an interest in said property, as aforesaid, shall first file with the officer having control of the records of said lien, an undertaking with two sureties thereon, providing that the owner of said property, aforesaid, will pay any amount the lien claimant shall recover thereon, and all costs, and said sureties shall each

justify in at least the amount of said lien. The lien claimant, his agent or attorney shall be served with a copy of said affidavit, a copy of said undertaking and a notice stating the day, hour and place where the application will be made for the release of said lien. The lien claimant shall have notice of said application to be served in the manner following: If personal, there shall be five days' notice, and the proof of the service of notice shall be the same as required of a summons in a civil action. If service be made by registered letter, ten days' notice shall be given from the date of mailing of the letter, and the proof of the service by registered letter shall be the postmaster's receipt, and an affidavit showing that a copy of the notice, undertaking and affidavit of interest was inclosed in said letter, and that the same was properly addressed to the lien claimant, sealed, and sufficient postage attached thereto to carry the same to its destination, and such service on the agent or attorney of the lien claimant shall be sufficient. At the time and place specified in the notice for the hearing, the lien claimant, his agent or attorney, may except to the sufficiency of the surety, and if an exception be made to the sufficiency of the surety, the surety shall justify before the officer named in the original notice, and the statute governing justification under bail and arrest shall govern the justification of the sureties. If said sureties, or other surety fail to justify within ten days from the date named for the hearing of said application, then said application shall be dismissed. If no exception is taken to the sufficiency of the surety, or if the surety justify as herein provided, and if said officer approve said undertaking, then said lien shall be discharged of record, as herein provided.

The officer before whom said proceedings are had shall be entitled to charge not exceeding one dollar to be paid in advance by the applicant, and if said officer be the clerk of the district court, he shall record the notice, affidavit and undertaking in the order book and if the officer be the register of deeds, he shall record said notice, affidavit and undertaking in his book of miscellaneous records, and certified copies of said documents shall be prima facie evidence of the matters therein contained in the courts of North Dakota. [1911, ch. 178.]

## CHAPTER 102.

### STOPPAGE IN TRANSIT.

**§ 6881. 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. [R. C. 1905, § 6298; Civ. C. 1877, § 1815; R. C. 1899, § 4847.]

Right exists even while goods are in warehouse before delivery. *Powell v. McKechnie*, 3 D. 319, 19 N. W. 410.

Right of stoppage in transitu, when and by whom it may be exercised. 29 Am. Dec. 384; 19 Am. Rep. 87; 1 Am. St. Rep. 312.

When right of stoppage in transitu terminates. 60 Am. Rep. 51.

Waiver of stoppage in transitu by attachment or execution. 50 L.R.A. 721.

Effect on stoppage in transitu of contract to ship goods f. o. b. 62 L.R.A. 805.

Right of stoppage in transitu after reshipment. 34 L.R.A. (N.S.) 31.

**§ 6882. 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. [R. C. 1905, § 6299; Civ. C. 1877, § 1816; R. C. 1899, § 4848.]

**§ 6883. 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. [R. C. 1905, § 6300; Civ. C. 1877, § 1817; R. C. 1899, § 4849.]

§ 6884. How effected. Stoppage in transit can be effected only by notice to the carrier or depository of the property, or by taking actual possession thereof. [R. C. 1905, § 6301; Civ. C. 1877, § 1818; R. C. 1899, § 4850.]

§ 6885. 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. [R. C. 1905, § 6302; Civ. C. 1877, § 1819; R. C. 1899, § 4851.]

## CHAPTER 103.

### NEGOTIABLE INSTRUMENTS.

#### TITLE I.—NEGOTIABLE INSTRUMENTS IN GENERAL.

- ARTICLE 1. FORM AND INTERPRETATION, §§ 6886-6908.  
 2. CONSIDERATION, §§ 6909-6914.  
 3. NEGOTIATION, §§ 6915-6935.  
 4. RIGHTS OF THE HOLDER, §§ 6936-6944.  
 5. LIABILITIES OF PARTIES, §§ 6945-6954.  
 6. PRESENTMENT FOR PAYMENT, §§ 6955-6973.  
 7. NOTICE OF DISHONOR, §§ 6974-7003.  
 8. DISCHARGE OF NEGOTIABLE INSTRUMENTS, §§ 7004-7010.

#### TITLE II.—BILLS OF EXCHANGE.

- ARTICLE 1. FORM AND INTERPRETATION, §§ 7011-7016.  
 2. ACCEPTANCE, §§ 7017-7027.  
 3. PRESENTMENT FOR ACCEPTANCE, §§ 7028-7035.  
 4. PROTEST, §§ 7036-7044.  
 5. ACCEPTANCE FOR HONOR, §§ 7045-7054.  
 6. PAYMENT FOR HONOR, §§ 7055-7061.  
 7. BILLS IN A SET, §§ 7062-7067.

#### TITLE III.

- ARTICLE 1. PROMISSORY NOTES AND CHECKS, §§ 7068-7073.

#### TITLE IV.

- ARTICLE 1. GENERAL PROVISIONS, §§ 7074-7080.

Chapter 88, Civil Code, R. C. 1899, the old law relating to negotiable instruments was repealed by Laws 1905, ch. 138, 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." Chapter 103 herein, consisting of Laws 1899, ch. 113, which constituted R. C. 1899, Civil Code, chapter 100, and R. C. 1905, Civil Code, chapter 90, takes the place of said chapter 88.

#### TITLE I.

##### NEGOTIABLE INSTRUMENTS IN GENERAL.

###### ARTICLE 1.—FORM AND INTERPRETATION.

§ 6886. 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. [R. C. 1905, § 6303; 1899, ch. 113, § 1.]

Innocent purchaser of negotiable municipal bonds may enforce payment. *City of Pierre v. Dunscomb*, 106 Fed. 611, 45 C. C. A. 499; *Nat. Life Ins. Co. v. Board of Education*, 62 Fed. 778, 10 C. C. A. 637; *Board of Education v. McLean*, 106 Fed. 817, 45 C. C. A. 658.

Affixing corporate seal to corporation's note does not destroy its negotiability. *Landauer v. Implement Co.*, 10 S. D. 205, 72 N. W. 467.

Implied notice to maker of transfer. *Hollinshead v. Stuart & Co.*, 8 N. D. 35, 77 N. W. 89, 42 L.R.A. 659.

Township warrants not negotiable instruments. *Gilman v. Township of Gilby*, 8 N. D. 627, 80 N. W. 889, 73 Am. St. Rep. 791.

City warrants are not negotiable instruments in sense that they are not subject to lawful defenses, though in hands of innocent purchasers. *Watson v. City of Huron*, 97 Fed. 449, 38 C. C. A. 264; *Hubbell v. Town of Custer City*, 15 S. D. 55, 87 N. W. 520.

Conflict of laws concerning negotiability. 91 Am. St. Rep. 718, 733; 61 L.R.A. 205; 19 L.R.A.(N.S.) 667.

2. Stipulation for attorney's fees, though void, does not destroy negotiability. *Chandler v. Kennedy*, 8 S. D. 56, 65 N. W. 439; *National Bank v. Feeney*, 9 S. D. 550, 70 N. W. 874, 46 L.R.A. 732.

Stipulation for attorney and collection fees destroys negotiability. *Garretson v. Purdy*, 3 D. 178, 14 N. W. 100; *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473.

Promissory note "with exchange and cost of collection" not negotiable. *Second Nat. Bank v. Basuler*, 65 Fed. 58, 12 C. C. A. 517.

Provision for payment of exchange destroys negotiability. *Flagg v. School District*, 4 N. D. 30, 58 N. W. 499, 25 L.R.A. 363.

Provision for payment of costs renders note nonnegotiable. *Johnson v. Schar*, 9 S. D. 536, 40 N. W. 838.

Stipulation for discount fee paid before due makes note nonnegotiable. *Nat. Bank v. Feeney*, 12 S. D. 156, 80 N. W. 186, 76 Am. St. Rep. 594, 46 L.R.A. 732.

Negotiability not affected by provision for additional rate of interest after maturity. *Merrill v. Hurlley*, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859; *Hollinshead v. Stuart*, 8 N. D. 35, 77 N. W. 89.

Note "with interest from date until paid at ten per cent, eight if paid when due," is not negotiable. *Hegeler v. Comstock*, 1 S. D. 138, 45 N. W. 331, 8 L.R.A. 393.

Note is not negotiable which contains the following provision: "Payee's ownership of goods account of which this note is given, the account thereof, and the contract conditions of original sale, are not affected by accepting this note until receipt of full amount due thereon." *Fleming v. Sherwood*, 24 N. D. 144, 43 L.R.A.(N.S.) 945, 139 N. W. 101.

Unconditional promise to pay is essential to negotiable instruments. 42 Am. Rep. 366.

Negotiability as affected by provision for discount in event of payment before maturity. 40 L.R.A.(N.S.) 177.

Payments indorsed on note as affecting negotiability. 38 L.R.A. 823.

3. Negotiability of note unaffected by provision waiving notice of protest and consenting to extension of time. *First Nat. Bank v. Buttery*, 17 N. D. 326, 16 L.R.A.(N.S.) 878, 116 N. W. 341, 17 A. & E. Ann. Cas. 52.

Negotiability as affected by uncertainty of time of maturity. 1 L.R.A.(N.S.) 1120.

—as affected by provision permitting extension of time. 16 L.R.A.(N.S.) 878; 83 L.R.A.(N.S.) 738.

Provision for renewal as affecting negotiability. 31 L.R.A. 234.

Provision accelerating maturity. 35 L.R.A.(N.S.) 390.

Negotiability of note payment of which depends on termination of life. 27 L.R.A.(N.S.) 1017.

4. Promissory note not negotiable unless payable to order or to bearer. *Searles v. Seipp*, 6 S. D. 472, 61 N. W. 804.

§ 6887. 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. [R. C. 1905, § 6304; 1899, ch. 113, § 2.]

4. Provision for exchange as affecting negotiability. 27 L.R.A. 222.

5. Effect of provision for attorney's fee on negotiability. 21 Am. Rep. 212.

Effect of stipulation for attorney's fees in mortgage upon negotiability of note secured thereby. 26 L.R.A.(N.S.) 217.

**§ 6888. 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. [R. C. 1905, § 6305; 1899, ch. 113, § 3.]

Negotiability of note payable out of particular fund. 35 L.R.A. 647; 8 L.R.A.(N.S.) 231.

**§ 6889. 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. [R. C. 1905, § 6306; 1899, ch. 113, § 4.]

2. Note payable on or before certain date is regarded as payable on date named. State ex rel. Bithullitic & Contracting Co. v. Murphy, 20 N. D. 427, 128 N. W. 303.  
Negotiability of note payment of which depends on termination of life. 27 L.R.A.(N.S.) 1017.

**§ 6890. 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. [R. C. 1905, § 6307; 1899, ch. 113, § 5.]

1. Recital in note as to security as affecting negotiability. 32 L.R.A.(N.S.) 858.

**§ 6891. 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. [R. C. 1905, § 6308; 1899, ch. 113, § 6.]

Reservation of title of property as affecting negotiability of note for purchase price. 43 L.R.A. 277; 43 L.R.A.(N.S.) 945.

Reference to extrinsic agreement as affecting negotiability. 30 L.R.A.(N.S.) 40.

**§ 6892. 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. [R. C. 1905, § 6309; 1899, ch. 113, § 7.]

As to negotiability of instrument in which no time for payment is expressed. First Nat. Bank v. Buttery, 17 N. D. 326, 16 L.R.A.(N.S.) 878, 116 N. W. 341, 17 A. & E. Ann. Cas. 52.

**§ 6893. 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. [R. C. 1905, § 6310; 1899, ch. 113, § 8.]

**§ 6894. 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 nonexisting 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. [R. C. 1905, § 6311; 1899, ch. 113, § 9.]

**§ 6895. 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. [R. C. 1905, § 6312; 1899, ch. 113, § 10.]

**§ 6896. 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. [R. C. 1905, § 6313; 1899, ch. 113, § 11.]

**§ 6897. 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. [R. C. 1905, § 6314; 1899, ch. 113, § 12.]

**§ 6898. 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. [R. C. 1905, § 6315; 1899, ch. 113, § 13.]

Alteration of date to correct mistake. 32 L.R.A.(N.S.) 517.

**§ 6899. 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. [R. C. 1905, § 6316; 1899, ch. 113, § 14.]

Filling of blanks after execution. 13 Am. Dec. 669.

Materiality of alteration of instrument by inserting place of payment. 31 L.R.A.(N.S.) 644.

Right of an innocent payee to recover on a note signed in blank and intrusted to a third person, who exceeds his authority in filling up the blanks before delivery to the payee. 13 L.R.A.(N.S.) 490.

**§ 6900. 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. [R. C. 1905, § 6317; 1899, ch. 113, § 15.]

**§ 6901. 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. [R. C. 1905, § 6318; 1899, ch. 113, § 16.]

Admissibility of parol evidence to show delivery of bill or note upon condition. 18 L.R.A.(N.S.) 288.

Agreement for other signatures to bill or note before delivery. 45 L.R.A. 343.

**§ 6902. 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. [R. C. 1905, § 6319; 1899, ch. 113, § 17.]

**§ 6903. 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. [R. C. 1905, § 6320; 1899, ch. 113, § 18.]

**§ 6904. 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. [R. C. 1905, § 6321; 1899, ch. 113, § 19.]

Liability of principal on negotiable paper executed by an agent. 21 L.R.A.(N.S.) 1046.

Payment by principal of previous drafts drawn upon him by his agent without authority, as implied authority to draw another. 34 L.R.A.(N.S.) 440.

Circumstances sufficient to put one taking paper from guardian on inquiry. 29 L.R.A.(N.S.) 365.

**§ 6905. 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. [R. C. 1905, § 6322; 1899, ch. 113, § 20.]

Liability of one who signs note as indorser adding words indicating representative capacity to his signature. 42 L.R.A.(N.S.) 25, 28, 32.

**§ 6906. "Procuration."** A signature by "procurator" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority. [R. C. 1905, § 6323; 1899, ch. 113, § 21.]

**§ 6907. 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. [R. C. 1905, § 6324; 1899, ch. 113, § 22.]

**§ 6908. 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. [R. C. 1905, § 6325; 1899, ch. 113, § 23.]

Ratification of forged instrument. 36 L.R.A.(N.S.) 1006.

Liability of person whose signature is forged on commercial paper. 36 L.R.A. 539.

Forgery of bill or note by obtaining signature through trick or fraud. 1 L.R.A.(N.S.) 1075.

Forgery of renewal obligation as affecting original agreement. 33 L.R.A. 628.

Liability upon paper given in renewal of forged paper. 23 L.R.A.(N.S.) 1234.

Forgery of part of signatures of makers or sureties as defense against bona fide holder by makers whose signatures were genuine. 13 L.R.A.(N.S.) 426.

Right of drawee of forged paper to recover money paid thereon. 10 L.R.A.(N.S.) 49; 25 L.R.A.(N.S.) 1308; 29 L.R.A.(N.S.) 100.

Delay in giving notice of forgery as estoppel of true owner to recover against party who has paid paper on a forged indorsement. 40 L.R.A.(N.S.) 653.

## ARTICLE 2.—CONSIDERATION.

**§ 6909. 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. [R. C. 1905, § 6326; 1899, ch. 113, § 24.]

Name of payee on back of note does not prove indorsement. *Vickery v. Burton*, 6 N. D. 245, 69 N. W. 193.

Presumption that indorsement was for valuable consideration. *Stone v. Crow*, 2 S. D. 525, 51 N. W. 335.

Presumption that holder of negotiable paper is indorsee in due course, overcome by evidence that instrument was unlawfully put in circulation. *Landauer v. Implement Co.*

10 S. D. 205, 76 N. W. 467; *Dunn v. Nat. Bank*, 11 S. D. 305, 77 N. W. 111; *John Hancock Mut. Life Ins. Co. v. City of Huron*, 80 Fed. 652.

Burden is on holder of bank cashier's check issued without consideration, to show that he took paper for value and without notice of fraud in its inception. *Thompson v. Sioux Falls Nat. Bank*, 150 U. S. 231, 37 L.ed. 1063, 14 S. Ct. R. 94.

Compromise of a controversy is a good consideration for a promissory note. *McGlynn v. Scott*, 4 N. D. 18, 58 N. W. 460.

Right of bona fide holder to enforce note which does not indicate nature of its consideration as required by statute. 10 L.R.A.(N.S.) 82.

Effect of knowledge of consideration by purchaser of note which did not indicate the nature of its consideration as required by statute. 24 L.R.A.(N.S.) 1057.

Necessity of new consideration to bind third person who signs as surety, indorser or guarantor, after execution and delivery of original note by principal. 44 L.R.A.(N.S.) 1034.

**§ 6910. 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. [R. C. 1905, § 6327; 1899, ch. 113, § 25.]

Consideration for note, payment of which depends on termination of life. 27 L.R.A.(N.S.) 1019.

Cancellation of invalid contract as consideration for bill or note. 5 L.R.A.(N.S.) 725.

**§ 6911. 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. [R. C. 1905, § 6328; 1899, ch. 113, § 26.]

**§ 6912. 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. [R. C. 1905, § 6329.]

**§ 6913. 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. [R. C. 1905, § 6330; 1899, ch. 113, § 28.]

Lack or failure of consideration as defense against transferee after maturity. 46 L.R.A. 761.

Failure of executory consideration for bill or note as affecting purchaser with knowledge of the character of the consideration. 46 L.R.A.(N.S.) 862.

**§ 6914. 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. [R. C. 1905, § 6331; 1899, ch. 113, § 29.]

Rights inter se of accommodation parties to commercial paper. 28 L.R.A.(N.S.) 1039.

Right of accommodation party who is obliged to pay bill or note, to recover from the accommodated party. 37 L.R.A.(N.S.) 783.

Availability of defense of party to accommodation paper as against transferee after maturity. 46 L.R.A. 772.

Effect of transfer after maturity of accommodation paper which has been diverted from the use for which it was intended by the accommodating party. 11 L.R.A.(N.S.) 1034.

Liability of national bank on accommodation guaranty by it. 32 L.R.A.(N.S.) 545.

### ARTICLE 3.—NEGOTIATION.

**§ 6915. 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. [R. C. 1905, § 6332; 1899, ch. 113, § 30.]

Injunction against negotiation of note. 28 L.R.A. 577.

**§ 6916. 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. [R. C. 1905, § 6333; 1899, ch. 113, § 31.]

To destroy negotiability by indorsement, words showing that purpose must be used. *Merrill v. Hurley*, 6 S. D. 592, 62 N. W. 938, 55 Am. St. Rep. 859.

When payee of negotiable promissory note transfers it by indorsing thereon guaranty of payment, purchaser is an indorsee within rule protecting innocent purchaser. *Dunham v. Peterson*, 5 N. D. 414, 67 N. W. 293, 36 L.R.A. 232, 57 Am. St. Rep. 556.

Indorsement of forged instrument as uttering or publishing. 8 L.R.A.(N.S.) 1178. Indorser's duty to see that spaces on commercial paper are filled so as to prevent raising. 21 L.R.A.(N.S.) 402.

Liability for transferring note to bona fide holder so as to cut off defenses. 27 L.R.A. 519.

Assignor of promissory note as indorser. 36 L.R.A. 117.

Conflict of laws as to validity of transfer of commercial paper. 2 B. R. C. 304.

What law governs as to sufficiency of indorsement or assignment of bill or note. 61 L.R.A. 222.

— as to liability of, and defenses available to, indorser. 61 L.R.A. 212.

— as to character and liability of irregular indorser. 61 L.R.A. 200; 19 L.R.A.(N.S.) 668.

Parol evidence to vary effect of indorsement. 7 Am. St. Rep. 366.

Admissibility of parol evidence as between indorser and indorsee that unrestricted indorsement was made merely to transfer title to the owner. 28 L.R.A.(N.S.) 530.

Right to show by parol evidence that indorsement unrestricted in form was for purpose of collection only. 17 L.R.A.(N.S.) 838.

Necessity of new consideration to bind third person who signs as indorser after execution and delivery of original note by principal. 44 L.R.A.(N.S.) 481.

Right of indorser to offset obligation as against assignee of debt due from him to the principal. 46 L.R.A.(N.S.) 62.

Are conveyances by indorsers within statute as to fraudulent conveyances. 47 L.R.A.(N.S.) 321.

**§ 6917. 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. [R. C. 1905, § 6334; 1899, ch. 113, § 32.]

**§ 6918. Special or blank indorsements.** An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional. [R. C. 1905, § 6335; 1899, ch. 113, § 33.]

Transfer of title to note by indorsement in form of guaranty. 36 L.R.A. 232; 41 L.R.A.(N.S.) 1009.

**§ 6919. 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. [R. C. 1905, § 6336; 1899, ch. 113, § 34.]

Rights of owner of negotiable paper indorsed in blank as against bona fide purchaser from one unlawfully in possession thereof. 19 L.R.A.(N.S.) 107.

Indorsement in blank by a person other than the payee or holder. 29 Am. St. Rep. 297.

**§ 6920. 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. [R. C. 1905, § 6337; 1899, ch. 113, § 35.]

**§ 6921. 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. [R. C. 1905, § 6338; 1899, ch. 113, § 36.]

**§ 6922. 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. [R. C. 1905, § 6339; 1899, ch. 113, § 37.]

**§ 6923. 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. [R. C. 1905, § 6340; 1899, ch. 113, § 38.]

Indorsement "without recourse." 87 Am. Dec. 389; 134 Am. St. Rep. 993.

Assignment of promissory note without recourse. 36 L.R.A. 119.

Trust in proceeds of collection by insolvent bank as against claims of subagent in case of restrictive indorsement. 32 L.R.A. 721.

**§ 6924. 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. [R. C. 1905, § 6341; 1899, ch. 113, § 39.]

**§ 6925. 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. [R. C. 1905, § 6342; 1899, ch. 113, § 40.]

**§ 6926. 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. [R. C. 1905, § 6343; 1899, ch. 113, § 41.]

**§ 6927. 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. [R. C. 1905, § 6344; 1899, ch. 113, § 42.]

**§ 6928. 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. [R. C. 1905, § 6345; 1899, ch. 113, § 43.]

**§ 6929. 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. [R. C. 1905, § 6346; 1899, ch. 113, § 44.]

**§ 6930. 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. [R. C. 1905, § 6347; 1899, ch. 113, § 45.]

**§ 6931. 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. [R. C. 1905, § 6348; 1899, ch. 113, § 46.]

**§ 6932. Restrictive indorsement.** An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise. [R. C. 1905, § 6349; 1899, ch. 113, § 47.]

**§ 6933. Privilege of holder.** The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorse-

ment is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument. [R. C. 1905, § 6350; 1899, ch. 113, § 48.]

§ 6934. **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 transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. 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. [R. C. 1905, § 6351; 1899, ch. 113, § 49.]

§ 6935. **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. [R. C. 1905, § 6352; 1899, ch. 113, § 50.]

#### ARTICLE 4.—RIGHTS OF THE HOLDER.

§ 6936. **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. [R. C. 1905, § 6353; 1899, ch. 113, § 51.]

§ 6937. **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.

[R. C. 1905, § 6354; 1899, ch. 113, § 52.]

One who takes check for gambling debt is not holder in due course. *Drinkall v. Movins State Bank*, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 341, 88 N. W. 724.

In determining whether plaintiff is holder in due course of note given to state bank, and by it assigned to its president, relationship of indorsee to payee must be considered with and as supplementing negotiable instruments act. *McCarty v. Keprata*, 24 N. D. 395, 48 L.R.A.(N.S.) 65, 139 N. W. 992.

Bank deemed holder in bad faith where cashier knew that premium note was not to be effective until defendant's application for insurance was accepted. *Citizens' State Bank v. Garceau*, 22 N. D. 576, 134 N. W. 882.

Purchaser of two overdue notes secured by chattel mortgage and who takes assignment of such mortgage which shows that it is given to secure seven other notes not due, and recites that all will become due upon default in payment of any note, is affected with notice as to all notes, and takes none of them before maturity. *Rowe v. Scott*, 28 S. D. 145, 132 N. W. 695.

Taking note from maker as constructive notice of the accommodation character of an irregular indorsement and lack of authority for such indorsement. 2 L.R.A.(N.S.) 525.

Holder of accommodation paper as collateral security as a bona fide holder. 31 L.R.A.(N.S.) 296.

§ 6938. **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. [R. C. 1905, § 6355; 1899, ch. 113, § 53.]

Note which is payable on demand, and is purchased over a year after its date, will be considered to be overdue when so purchased. *McAdam v. Grand Forks Mercantile Co.*, 24 N. D. 645, 47 L.R.A.(N.S.) 246, 140 N. W. 725.

§ 6939. **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. [R. C. 1905, § 6356; 1899, ch. 113, § 54.]

Bank deemed holder in bad faith where cashier knew that premium note was not to be effective until defendant's application for insurance was accepted. *Citizens' State Bank v. Garceau*, 22 N. D. 576, 134 N. W. 882.

**§ 6940. 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. [R. C. 1905, § 6357; 1899, ch. 113, § 55.]

Title of indorsee of cashier's check is defective where he procured indorsement by unlawful means and for illegal consideration. *Drinkall v. Movins State Bank*, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 341, 88 N. W. 724.

In determining whether plaintiff is holder in due course relationship of indorsee to payee must be considered, and notice of defect in title to note cannot be construed as excluding general law governing relationship of bank and its president. *McCarty v. Kepreta*, 24 N. D. 395, 48 L.R.A.(N.S.) 65, 139 N. W. 902.

Note obtained by original payee through fraud is valid in hands of indorser, unless he had actual knowledge of fraud or knowledge of such facts as amount to bad faith. *American Nat. Bank v. Lundy*, 21 N. D. 167, 129 N. W. 99.

**§ 6941. 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. [R. C. 1905, § 6358; 1899, ch. 113, § 56.]

What circumstances are sufficient to put a purchaser of negotiable paper on inquiry. 29 L.R.A.(N.S.) 351; 44 L.R.A.(N.S.) 395.

**§ 6942. 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. [R. C. 1905, § 6359; 1899, ch. 113, § 57.]

**§ 6943. 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 nonnegotiable. 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. [R. C. 1905, § 6360; 1899, ch. 113, § 58.]

As to holder having burden of showing that he took instrument in due course when title of negotiator is shown to be defective. *Kerr v. Anderson*, 16 N. D. 36, 111 N. W. 614.

Bank deemed holder in bad faith where cashier knew that note was not to be effective until defendant's application for insurance was accepted. *Citizens' State Bank v. Garceau*, 22 N. D. 576, 134 N. W. 882.

**§ 6944. 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. [R. C. 1905, § 6361; 1899, ch. 113, § 59.]

Every holder of negotiable instrument is prima facie holder in due course. *Drinkall v. Movins State Bank*, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 341, 88 N. W. 724.

#### ARTICLE 5.—LIABILITIES OF PARTIES.

**§ 6945. 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. [R. C. 1905, § 6362; 1899, ch. 113, § 60.]

Proof of incorporation of payee of note is unnecessary in suit on note by indorsee. *Grover v. Muralt*, 23 N. D. 576, 137 N. W. 830.

**§ 6946. 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 negating or limiting his own liability to the holder. [R. C. 1905, § 6363; 1899, ch. 113, § 61.]

§ 6947. **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. [R. C. 1905, § 6364; 1899, ch. 113, § 62.]

§ 6948. **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. [R. C. 1905, § 6365; 1899, ch. 113, § 63.]

§ 6949. **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. [R. C. 1905, § 6366; 1899, ch. 113, § 64.]

In case of indorsement of demand note more than one year after its date indorsee can recover from indorser only consideration he has actually paid. *McAdam v. Grand Forks Mercantile Co.*, 24 N. D. 645, 47 L.R.A. (N.S.) 246, 140 N. W. 725.

Although parties to note may be cosureties as to payee of note, yet if they are not such as between themselves contribution will not lie, under section 6686, Revised Codes. *Harris v. Jones*, 23 N. D. 488, 136 N. W. 1080.

Character under uniform negotiable instrument law of one who places name on back of note prior to or at time of delivery. 14 L.R.A. (N.S.) 842.

§ 6950. **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. [R. C. 1905, § 6367; 1899, ch. 113, § 65.]

§ 6951. **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. [R. C. 1905, § 6368; 1899, ch. 113, § 66.]

Holder of negotiable paper writing above his indorsement contract of guaranty is indorser with enlarged liability. *Dunham v. Peterson*, 5 N. D. 414, 67 N. W. 293, 36 L.R.A. 232, 57 Am. St. Rep. 556.

Every indorser contracts that negotiable paper will be paid unless exonerated. *Warner v. Bank*, 6 S. D. 152, 60 N. W. 746.

Guarantor is estopped to deny signature of maker. *Austin, Tomlinson & Webster Co. v. Heiser*, 6 S. D. 429, 61 N. W. 445.

Oral promise of indorser waiving notice of dishonor not binding. *Schmitz v. Min. Co.*, 8 S. D. 544, 67 N. W. 618.

Indorsee may show parol waiver of protest subsequent to execution of note in suit against maker and indorser. *Dewey v. Sibert*, 21 S. D. 480, 113 N. W. 721, 16 A. & E. Ann. Cas. 151.

As to signification of contract of indorsement. *Farquhar Co. v. Higham*, 16 N. D. 106, 112 N. W. 557.

Implied warranty by one passing worthless paper of third person without indorsement. 10 L.R.A.(N.S.) 542.

**§ 6952. 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. [R. C. 1905, § 6369; 1899, ch. 113, § 67.]

**§ 6953. 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 indorseees who indorse are deemed to indorse jointly and severally. [R. C. 1905, § 6370; 1899, ch. 113, § 68.]

Although parties to note may be cosureties as to payee of note, yet if they are not such as between themselves, contribution will not lie under section 6686, Revised Codes. *Harris v. Jones*, 23 N. D. 488, 136 N. W. 1080.

**§ 6954. Negotiation by agent.** Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section 6950, unless he discloses the name of his principal, and the fact that he is acting only as agent. [R. C. 1905, § 6371; 1899, ch. 113, § 69.]

#### ARTICLE 6.—PRESENTMENT FOR PAYMENT.

**§ 6955. 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. [R. C. 1905, § 6372; 1899, ch. 113, § 70.]

Demand not necessary before suit to recover. *Acme Harvester Co. v. Butterfield*, 12 S. D. 91, 80 N. W. 170.

What law governs demand and protest of negotiable paper. 61 L.R.A. 216, 217.

Necessity for demand when paper held as collateral or conditional payment. 68 L.R.A. 487.

Necessity of demand and protest to enable accommodation indorser who has been obliged to pay bill or note to recover from accommodated maker. 37 L.R.A.(N.S.) 785.

Effect of loss of check on holder's right to recover against maker without presentment. 14 L.R.A.(N.S.) 616.

Presentment to joint makers to hold indorsers of note. 36 L.R.A. 703.

Demand required where notes are payable in specific articles. 46 Am. Rep. 307.

Demand when maker is out of the state. 13 Am. Dec. 346.

**§ 6956. 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. [R. C. 1905, § 6373; 1899, ch. 113, § 71.]

Demand and notice necessary to render demand notes overdue. 46 L.R.A. 807.

**§ 6957. 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. [R. C. 1905, § 6374; 1899, ch. 113, § 72.]

As to sufficiency of presentment of note. *Nelson v. Grondaki*, 13 N. D. 363, 100 N. W. 1093.

Validity of presentment of bill or note by telephone. 34 L.R.A.(N.S.) 417.

Presentation and payment through clearing house. 25 L.R.A. 826.

§ 6958. **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. [R. C. 1905, § 6375; 1899, ch. 113, § 73.]

§ 6959. **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. [R. C. 1905, § 6376; 1899, ch. 113, § 74.]

Necessity of actual presentation of commercial paper to effect its dishonor. 13 L.R.A.(N.S.) 303.

§ 6960. **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. [R. C. 1905, § 6377; 1899, ch. 113, § 75.]

§ 6961. **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. [R. C. 1905, § 6378; 1899, ch. 113, § 76.]

Presentment and demand of bills and notes in case of death of prior obligor. 23 L.R.A. 711.

Contingency of claim against, as affecting limitation of time for presentation against estate of deceased indorser. 58 L.R.A. 87.

§ 6962. **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. [R. C. 1905, § 6379; 1899, ch. 113, § 77.]

§ 6963. **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. [R. C. 1905, § 6380; 1899, ch. 113, § 78.]

§ 6964. **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. [R. C. 1905, § 6381; 1899, ch. 113, § 79.]

§ 6965. **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. [R. C. 1905, § 6382; 1899, ch. 113, § 88.]

§ 6966. **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. [R. C. 1905, § 6383; 1899, ch. 113, § 81.]

*Lost draft; laches of drawee after discovery of loss will discharge drawer. Bank of Gilby v. Farnsworth, 7 N. D. 6, 72 N. W. 901, 38 L.R.A. 843.*

**§ 6967. 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. [R. C. 1905, § 6384; 1899, ch. 113, § 82.]

3. Implied waiver of presentment and notice by indorser before maturity. 33 L.R.A.(N.S.) 639.

Waiver of demand of notice of protest when paper held as collateral or conditional payment. 68 L.R.A. 491.

Effect of statement by indorser to holder that party primarily liable cannot pay, as waiver of presentment to latter. 27 L.R.A.(N.S.) 516.

**§ 6968. When instrument is dishonored.** The instrument is dishonored by nonpayment 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. [R. C. 1905, § 6385; 1899, ch. 113, § 83.]

**§ 6969. Dishonored by nonpayment.** Subject to the provisions of this chapter, when the instrument is dishonored by nonpayment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder. [R. C. 1905, § 6386; 1899, ch. 113, § 84.]

**§ 6970. 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. [R. C. 1905, § 6387; 1899, ch. 113, § 85.]

Section not applicable to instruments entitled to days of grace; note payable on Sunday is due three days thereafter. *Morris v. Bailey, 10 S. D. 507, 79 N. W. 443.*

**§ 6971. 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. [R. C. 1905, § 6388; 1899, ch. 113, § 86.]

**§ 6972. 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. [R. C. 1905, § 6389; 1899, ch. 113, § 87.]

**§ 6973. 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. [R. C. 1905, § 6390; 1899, ch. 113, § 88.]

#### ARTICLE 7.—NOTICE OF DISHONOR.

**§ 6974. Notice of dishonor.** Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, 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. [R. C. 1905, § 6391; 1899, ch. 113, § 89.]

Effect of failure of holder to make demand or give notice of dishonor of paper held as collateral or conditional payment. 68 L.R.A. 482.

**§ 6975. 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. [R. C. 1905, § 6392; 1899, ch. 113, § 90.]

**§ 6976. 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. [R. C. 1905, § 6393; 1899, ch. 113, § 91.]

Notice of dishonor; agent or subagent may give; notice inures to benefit of all whose right to give notice had not at that time been lost. *Ashè v. Beasley*, 6 N. D. 191, 69 N. W. 188.

**§ 6977. 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. [R. C. 1905, § 6394; 1899, ch. 113, § 92.]

**§ 6978. 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. [R. C. 1905, § 6395; 1899, ch. 113, § 93.]

**§ 6979. 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. [R. C. 1905, § 6396; 1899, ch. 113, § 94.]

**§ 6980. 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. [R. C. 1905, § 6397; 1899, ch. 113, § 95.]

**§ 6981. 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 nonacceptance or nonpayment. It may in all cases be given by delivering it personally or through the mails. [R. C. 1905, § 6398; 1899, ch. 113, § 96.]

**§ 6982. Notice of dishonor, to whom given.** Notice of dishonor may be given either to the party himself or to his agent in that behalf. [R. C. 1905, § 6399; 1899, ch. 113, § 97.]

To whom should notice of protest or nonpayment be given after appointment of receiver, assignee or other representative of insolvent? 61 L.R.A. 300.

**§ 6983. 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. [R. C. 1905, § 6400; 1899, ch. 113, § 98.]

**§ 6984. 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. [R. C. 1905, § 6401; 1899, ch. 113, § 99.]

**§ 6985. 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. [R. C. 1905, § 6402; 1899, ch. 113, § 100.]

**§ 6986. Bankruptcy or insolvency.** Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of cred-

itors, notice may be given either to the party himself or to his trustee or assignee. [R. C. 1905, § 6403; 1899, ch. 113, § 101.]

§ 6987. **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. [R. C. 1905, § 6404; 1899, ch. 113, § 102.]

§ 6988. **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. [R. C. 1905, § 6405; 1899, ch. 113, § 103.]

§ 6989. **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. [R. C. 1905, § 6406; 1899, ch. 113, § 104.]

§ 6990. **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. [R. C. 1905, § 6407; 1899, ch. 113, § 105.]

§ 6991. **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. [R. C. 1905, § 6408; 1899, ch. 113, § 106.]

§ 6992. **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. [R. C. 1905, § 6409; 1899, ch. 113, § 107.]

§ 6993. **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. [R. C. 1905, § 6410; 1899, ch. 113, § 108.]

§ 6994. **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. [R. C. 1905, § 6411; 1899, ch. 113, § 109.]

Necessity for new consideration to support waiver of failure to give notice. 29 L.R.A. 305; 3 L.R.A.(N.S.) 1079.

**§ 6995. 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. [R. C. 1905, § 6412; 1899, ch. 113, § 110.]

Indorsee may show parol waiver of protest subsequent to execution of note in suit against maker and indorser. *Dewey v. Siebert*, 21 S. D. 480, 113 N. W. 721, 16 A. & E. Ann. Cas. 151.

**§ 6996. 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. [R. C. 1905, § 6413; 1899, ch. 113, § 111.]

**§ 6997. 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. [R. C. 1905, § 6414; 1899, ch. 113, § 112.]

**§ 6998. 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. [R. C. 1905, § 6415; 1899, ch. 113, § 113.]

**§ 6999. 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. [R. C. 1905, § 6416; 1899, ch. 113, § 114.]

**§ 7000. 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. [R. C. 1905, § 6417; 1899, ch. 113, § 115.]

**§ 7001. Nonacceptance.** Where due notice of dishonor by nonacceptance has been given, notice of a subsequent dishonor by nonpayment is not necessary, unless in the meantime the instrument has been accepted. [R. C. 1905, § 6418; 1899, ch. 113, § 116.]

**§ 7002. In case of omission.** An omission to give notice of dishonor by nonacceptance does not prejudice the rights of a holder in due course subsequent to the omission. [R. C. 1905, § 6419; 1899, ch. 113, § 117.]

**§ 7003. Protested for nonacceptance.** Where any negotiable instrument has been dishonored it may be protested for nonacceptance or nonpayment as the case may be; but protest is not required, except in the case of foreign bills of exchange. [R. C. 1905, § 6420; 1899, ch. 113, § 118.]

#### ARTICLE 8.—DISCHARGE OF NEGOTIABLE INSTRUMENTS.

**§ 7004. 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. [R. C. 1905, § 6421; 1899, ch. 113, § 119.]

Obligation of party extinguished as in contract generally. *Taylor v. Bank*, 6 S. D. 511, 62 N. W. 99.

**§ 7005. 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. [R. C. 1905, § 6422; 1899, ch. 113, § 120.]

Negotiability of note unaffected by provision waiving notice of protest and consenting to extension of time. *Firat Nat. Bank v. Buttery*, 17 N. D. 326, 16 L.R.A. (N.S.) 878, 116 N. W. 341, 17 A. & E. Ann. Cas. 52.

Extension of time to principal debtor without consent of guarantor operates to release latter from liability. *Northern State Bank v. Bellamy*, 19 N. D. 509, 31 L.R.A. (N.S.) 149, 125 N. W. 868.

Payment voidable under bankruptcy act as discharge of surety, guarantor or indorser. 9 L.R.A. (N.S.) 581.

**§ 7006. 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. [R. C. 1905, § 6423; 1899, ch. 113, § 121.]

**§ 7007. 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. [R. C. 1905, § 6424; 1899, ch. 113, § 122.]

**§ 7008. 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. [R. C. 1905, § 6425; 1899, ch. 113, § 123.]

**§ 7009. 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. [R. C. 1905, § 6426; 1899, ch. 113, § 124.]

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 Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473.

Duty of indorser, maker or surety to see that spaces on commercial paper are filled so as to prevent raising. 21 L.R.A.(N.S.) 402.

Alteration as affecting question whether commercial paper operates as payment of debt. 35 L.R.A.(N.S.) 76.

Erasure, marks and defects as putting purchaser of negotiable paper on inquiry. 29 L.R.A.(N.S.) 376.

§ 7010. **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. [R. C. 1905, § 6427; 1899, ch. 113, § 125.]

Erasing or otherwise cancelling or obliterating a material provision without the substitution of new matter. 32 L.R.A.(N.S.) 519.

Change to correct a mistake in designation of party. 31 L.R.A.(N.S.) 127.

Alteration by insertion of interest clause in note. 2 L.R.A.(N.S.) 217.

1. Alteration of date to correct mistake. 32 L.R.A.(N.S.) 517.

3. Materiality of alteration of instrument by inserting place of payment. 31 L.R.A.(N.S.) 643.

## TITLE II.

### BILLS OF EXCHANGE.

See also sections 7081-7125.

#### ARTICLE 1.—FORM AND INTERPRETATION.

§ 7011. **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. [R. C. 1905, § 6428; 1899, ch. 113, § 126.]

See section 7081.

§ 7012. **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. [R. C. 1905, § 6429; 1899, ch. 113, § 127.]

Detention of bill of exchange or check by drawee as acceptance thereof. 17 L.R.A.(N.S.) 1266.

§ 7013. **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. [R. C. 1905, § 6430; 1899, ch. 113, § 128.]

§ 7014. **Inland or foreign 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. [R. C. 1905, § 6431; 1899, ch. 113, § 129.]

§ 7015. **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. [R. C. 1905, § 6432; 1899, ch. 113, § 130.]

§ 7016. **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 nonacceptance or nonpayment. 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. [R. C. 1905, § 6433; 1899, ch. 113, § 131.]

#### ARTICLE 2.—ACCEPTANCE.

§ 7017. **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. [R. C. 1905, § 6434; 1899, ch. 113, § 132.]

Liability of bank on claimed contract of acceptance external to check. 8 L.R.A. (N.S.) 1148.

Validity of parol promise to accept an order or bill of exchange. 26 L.R.A. 620.

§ 7018. **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. [R. C. 1905, § 6435; 1899, ch. 113, § 133.]

§ 7019. **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. [R. C. 1905, § 6436; 1899, ch. 113, § 134.]

§ 7020. **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. [R. C. 1905, § 6437; 1899, ch. 113, § 135.]

§ 7021. **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. [R. C. 1905, § 6438; 1899, ch. 113, § 136.]

§ 7022. **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 nonaccepted to the holder, he will be deemed to have accepted the same. [R. C. 1905, § 6439; 1899, ch. 113, § 137.]

§ 7023. **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 nonpayment. But when a bill payable after sight is dishonored by nonacceptance 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. [R. C. 1905, § 6440; 1899, ch. 113, § 138.]

§ 7024. **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. [R. C. 1905, § 6441; 1899, ch. 113, § 139.]

§ 7025. **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. [R. C. 1905, § 6442; 1899, ch. 113, § 140.]

§ 7026. **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. [R. C. 1905, § 6443; 1899, ch. 113, § 141.]

Reference to consideration for draft as making acceptance conditional. 38 L.R.A. (N.S.) 747.

**§ 7027. 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 nonacceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives 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. [R. C. 1905, § 6444; 1899, ch. 113, § 142.]

#### ARTICLE 3.—PRESENTMENT FOR ACCEPTANCE.

**§ 7028. 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. [R. C. 1905, § 6445; 1899, ch. 113, § 143.]

**§ 7029. 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. [R. C. 1905, § 6446; 1899, ch. 113, § 144.]

**§ 7030. 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. [R. C. 1905, § 6447; 1899, ch. 113, § 145.]

**§ 7031. 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 6957 and 6970. When Saturday is not otherwise a holiday presentment for acceptance may be made before twelve o'clock noon on that day. [R. C. 1905, § 6448; 1899, ch. 113, § 146.]

**§ 7032. 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. [R. C. 1905, § 6449; 1899, ch. 113, § 147.]

**§ 7033. Dishonored by nonacceptance.** Presentment for acceptance is excused and a bill may be treated as dishonored by nonacceptance, 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. [R. C. 1905, § 6450; 1899, ch. 113, § 148.]

Place of presentment for payment is place where bill is drawn as between drawer and payee. *Warner v. Bank*, 6 S. D. 152, 60 N. W. 746.

**§ 7033a. When dishonored.** A bill is dishonored by nonacceptance:

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. [R. C. 1905, § 6451; 1899, ch. 113, § 149.]

**§ 7034. 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 nonacceptance or he loses the right of recourse against the drawer and indorsers. [R. C. 1905, § 6452; 1899, ch. 113 § 150.]

**§ 7035. Right of recourse.** When a bill is dishonored by nonacceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary. [R. C. 1905, § 6453; 1899, ch. 113, § 151.]

#### ARTICLE 4.—PROTEST.

**§ 7036. Protest for nonpayment.** Where a foreign bill appearing on its face to be such is dishonored by nonacceptance, it must be duly protested for nonacceptance, and where such a bill which has not previously been dishonored by nonacceptance is dishonored by nonpayment, it must be duly protested for nonpayment. 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. [R. C. 1905, § 6454; 1899, ch. 113, § 152.]

**§ 7037. 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. [R. C. 1905, § 6455; 1899, ch. 113, § 153.]

**§ 7038. 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. [R. C. 1905, § 6456; 1899, ch. 113, § 154.]

**§ 7039. 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. [R. C. 1905, § 6457; 1899, ch. 113, § 155.]

**§ 7040. 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 than the drawee, has been

dishonored by nonacceptance, it must be protested for nonpayment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary. [R. C. 1905, § 6458; 1899, ch. 113, § 156.]

§ 7041. **Protest for nonpayment.** A bill which has been protested for nonacceptance may be subsequently protested for nonpayment. [R. C. 1905, § 6459; 1899, ch. 113, § 157.]

§ 7042. **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. [R. C. 1905, § 6460; 1899, ch. 113, § 158.]

§ 7043. **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. [R. C. 1905, § 6461; 1899, ch. 113, § 159.]

§ 7044. **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. [R. C. 1905, § 6462; 1899, ch. 113, § 160.]

#### ARTICLE 5.—ACCEPTANCE FOR HONOR.

§ 7045. **Acceptance for honor.** Where a bill of exchange has been protested for dishonor by nonacceptance 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. [R. C. 1905, § 6463; 1899, ch. 113, § 161.]

§ 7046. **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. [R. C. 1905, § 6464; 1899, ch. 113, § 162.]

§ 7047. **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. [R. C. 1905, § 6465; 1899, ch. 113, § 163.]

§ 7048. **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. [R. C. 1905, § 6466; 1899, ch. 113, § 164.]

§ 7049. **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 nonpayment and notice of dishonor given to him. [R. C. 1905, § 6467; 1899, ch. 113, § 165.]

§ 7050. **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 nonacceptance and not from the date of the acceptance for honor. [R. C. 1905, § 6468; 1899, ch. 113, § 166.]

§ 7051. **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 nonpayment before it is presented for

payment to the acceptor for honor or referee in case of need. [R. C. 1905, § 6469; 1899, ch. 113, § 167.]

§ 7052. **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 nonpayment 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 6989. [R. C. 1905, § 6470; 1899, ch. 113, § 168.]

§ 7053. **Delay in making presentment.** The provisions of section 6966 apply where there is delay in making presentment to the acceptor for honor or referee in case of need. [R. C. 1905, § 6471; 1899, ch. 113, § 169.]

§ 7054. **When protested for nonpayment.** When the bill is dishonored by the acceptor for honor it must be protested for nonpayment by him. [R. C. 1905, § 6472; 1899, ch. 113, § 170.]

#### ARTICLE 6.— PAYMENT FOR HONOR.

§ 7055. **Payment for honor.** Where a bill has been protested for nonpayment, 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. [R. C. 1905, § 6473; 1899, ch. 113, § 171.]

§ 7056. **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. [R. C. 1905, § 6474; 1899, ch. 113, § 172.]

§ 7057. **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. [R. C. 1905, § 6475; 1899, ch. 113, § 173.]

§ 7058. **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. [R. C. 1905, § 6476; 1899, ch. 113, § 174.]

§ 7059. **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 payor 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. [R. C. 1905, § 6477; 1899, ch. 113, § 175.]

§ 7060. **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. [R. C. 1905, § 6478; 1899, ch. 113, § 176.]

§ 7061. **Rights of payor for honor.** The payor 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. [R. C. 1905, § 6479; 1899, ch. 113, § 177.]

Payment to agent ostensibly authorized to receive payment binds principal. *Reid v. Kellogg*, 8 S. D. 596, 67 N. W. 687.

#### ARTICLE 7.— BILLS IN A SET.

§ 7062. **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. [R. C. 1905, § 6480; 1899, ch. 113, § 178.]

§ 7063. **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. [R. C. 1905, § 6481; 1899, ch. 113, § 179.]

**§ 7064. 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. [R. C. 1905, § 6482; 1899, ch. 113, § 180.]

**§ 7065. 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. [R. C. 1905, § 6483; 1899, ch. 113, § 181.]

**§ 7066. 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. [R. C. 1905, § 6484; 1899, ch. 113, § 182.]

**§ 7067. 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. [R. C. 1905, § 6485; 1899, ch. 113, § 183.]

### TITLE III.

#### ARTICLE I.—PROMISSORY NOTES AND CHECKS.

See also sections 7126-7133.

**§ 7068. 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. [R. C. 1905, § 6486; 1899, ch. 113, § 184.]

See section 7126.

**§ 7069. 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. [R. C. 1905, § 6487; 1899, ch. 113, § 185.]

See section 7131.

**§ 7070. 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. [R. C. 1905, § 6488; 1899, ch. 113, § 186.]

Burden of proof is upon person claiming injury caused by delay in presenting check for payment. *Pickett v. Thomas J. Baird Investment Co.*, 22 N. D. 343, 133 N. W. 1026, 2 N. C. C. A. 722.

Effect of transfer of check on time for presentment. 10 L.R.A.(N.S.) 1153.

Time allowed for mailing check or notice of dishonor, as affected by the hour at which the mail closes or departs. 4 L.R.A.(N.S.) 132.

Effect of loss of check upon right of holder to recover against maker without presentment. 14 L.R.A.(N.S.) 616.

Release of indorser of check by delay in presenting it. 22 L.R.A. 785.

Effect on drawer's liability of delay in presenting check where drawee remains solvent. 53 L.R.A. 432; 38 L.R.A.(N.S.) 255.

**§ 7071. Certified checks.** Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance. [R. C. 1905, § 6489; 1899, ch. 113, § 187.]

Certification of check as release of drawer or indorser. 9 L.R.A.(N.S.) 698; 29 L.R.A.(N.S.) 205.

Certifying check as payment of debt for which given. 35 L.R.A.(N.S.) 35.

Effect of transfer without indorsement of worthless certified check of third person. 10 L.R.A.(N.S.) 536.

Right of drawer to stop payment of certified check. 20 L.R.A.(N.S.) 290.

§ 7072. **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. [R. C. 1905, § 6490; 1899, ch. 113, § 188.]

§ 7073. **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. [R. C. 1905, § 6491; 1899, ch. 113, § 189.]

#### TITLE IV.

##### ARTICLE 1.—GENERAL PROVISIONS.

§ 7074. **Negotiable instruments law.** This chapter shall be known as the negotiable instruments law. [R. C. 1905, § 6492; 1899, ch. 113, § 190.]

§ 7075. **Definitions of terms.** In this chapter, unless the context otherwise requires:

“Acceptance” means an acceptance completed by delivery or notification.

“Action” includes counterclaim 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. [R. C. 1905, § 6493; 1899, ch. 113, § 191.]

§ 7076. **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. [R. C. 1905, § 6494; 1899, ch. 113, § 192.]

Terms “primarily liable” and “secondarily liable,” as used in section, have reference to remedy provided by law for enforcing obligation, rather than to character and limits of obligation itself. *Northern State Bank v. Bellamy*, 19 N. D. 509, 35 L.R.A. (N.S.) 149, 125 N. W. 888.

§ 7077. **“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. [R. C. 1905, § 6495; 1899, ch. 113, § 193.]

§ 7078. **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. [R. C. 1905, § 6496; 1899, ch. 113, § 194.]

§ 7079. **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. [R. C. 1905, § 6497; 1899, ch. 113, § 195.]

§ 7080. **Rules of the law merchant govern.** In any case not provided for in this chapter the rules of the law merchant shall govern. [R. C. 1905, § 6498; 1899, ch. 113, § 196.]

## CHAPTER 104.

## BILLS OF EXCHANGE.

- ARTICLE 1. FORM AND INTERPRETATION OF A BILL, §§ 7081-7087.**
1. FORM AND INTERPRETATION OF A BILL, §§ 7081-7087.
  2. DAYS OF GRACE, § 7088.
  3. PRESENTMENT FOR ACCEPTANCE, §§ 7089-7093.
  4. ACCEPTANCE, §§ 7094-7100.
  5. ACCEPTANCE OR PAYMENT FOR HONOR, §§ 7101-7105.
  6. PRESENTMENT FOR PAYMENT, §§ 7106-7109.
  7. EXCUSE OF PRESENTMENT AND NOTICE, §§ 7110-7112.
  8. FOREIGN BILLS, §§ 7113-7125.

See also sections 7011-7067.

## ARTICLE 1.—FORM AND INTERPRETATION OF A BILL.

**§ 7081. 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. [R. C. 1905, § 6499; Civ. C. 1877, § 1882; R. C. 1899, § 4914.]

See section 7011.

**§ 7082. 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. [R. C. 1905, § 6500; Civ. C. 1877, § 1883; R. C. 1899, § 4915.]

**§ 7083. 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. [R. C. 1905, § 6501; Civ. C. 1877, § 1884; R. C. 1899, § 4916.]

**§ 7084. 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. [R. C. 1905, § 6502; Civ. C. 1877, § 1885; R. C. 1899, § 4917.]

**§ 7085. 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. [R. C. 1905, § 6503; Civ. C. 1877, § 1886; R. C. 1899, § 4918.]

**§ 7086. 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 nonpayment. [R. C. 1905, § 6504; 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.

**§ 7087. 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. [R. C. 1905, § 6505; Civ. C. 1877, § 1888; R. C. 1899, § 4920.]

## ARTICLE 2.—DAYS OF GRACE.

**§ 7088. No days of grace.** Days of grace are not allowed. [R. C. 1905, § 6506; Civ. C. 1877, § 1889; R. C. 1899, § 4921.]

Note payable on Sunday not entitled to four days of grace. Morris v. Bailey, 10 S. D. 507, 74 N. W. 443.

Note from which it cannot be ascertained how interest is to be figured is non-negotiable and not entitled to grace. Davis v. Brady, 17 S. D. 511, 97 N. W. 719.

## ARTICLE 3.—PRESENTMENT FOR ACCEPTANCE.

§ 7089. **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. [R. C. 1905, § 6507; Civ. C. 1877, § 1890; R. C. 1899, § 4922.]

§ 7090. **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. [R. C. 1905, § 6508; Civ. C. 1877, § 1891; R. C. 1899, § 4923.]

§ 7091. **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. [R. C. 1905, § 6509; Civ. C. 1877, § 1892; R. C. 1899, § 4924.]

§ 7092. **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. [R. C. 1905, § 6510; Civ. C. 1877, § 1893; R. C. 1899, § 4925.]

§ 7093. **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. [R. C. 1905, § 6511; Civ. C. 1877, § 1894; R. C. 1899, § 4926.]

Presentment for payment must be made at proper time and place. *Warner v. Bank*, 6 S. D. 152, 60 N. W. 746.

Loss by mail; laches of drawee after discovery discharges drawer. *Bank of Gilby v. Farnsworth*, 7 N. D. 6, 72 N. W. 901, 38 L.R.A. 843.

## ARTICLE 4.—ACCEPTANCE.

§ 7094. **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. [R. C. 1905, § 6512; Civ. C. 1877, § 1895; R. C. 1899, § 4927.]

Validity of parol promise to accept an order or bill of exchange. 26 L.R.A. 620.

§ 7095. **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. [R. C. 1905, § 6513; Civ. C. 1877, § 1896; R. C. 1899, § 4928.]

§ 7096. **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 present-



ment; in which case the bill is payable immediately without regard to its terms. [R. C. 1905, § 6514; Civ. C. 1877, § 1897; R. C. 1899, § 4929.]

Personal liability of one who signs note as acceptor by adding words indicating representative capacity to his signature. 42 L.R.A.(N.S.) 28, 33, 44.

§ 7097. **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. [R. C. 1905, § 6515; Civ. C. 1877, § 1898; R. C. 1899, § 4930.]

§ 7098. **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. [R. C. 1905, § 6516; Civ. C. 1877, § 1899; R. C. 1899, § 4931.]

§ 7099. **When acceptance may be cancelled.** 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. [R. C. 1905, § 6517; Civ. C. 1877, § 1900; R. C. 1899, § 4932.]

§ 7100. **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. [R. C. 1905, § 6518; Civ. C. 1877, § 1901; R. C. 1899, § 4933.]

#### ARTICLE 5.—ACCEPTANCE OR PAYMENT FOR HONOR.

§ 7101. **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. [R. C. 1905, § 6519; Civ. C. 1877, § 1902; R. C. 1899, § 4934.]

§ 7102. **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. [R. C. 1905, § 6520; Civ. C. 1877, § 1903; R. C. 1899, § 4935.]

§ 7103. **How made. Reimbursement.** An acceptor or payor 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. [R. C. 1905, § 6521; Civ. C. 1877, § 1904; R. C. 1899, § 4936.]

§ 7104. **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. [R. C. 1905, § 6522; Civ. C. 1877, § 1905; R. C. 1899, § 4937.]

§ 7105. **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. [R. C. 1905, § 6523; Civ. C. 1877, § 1906; R. C. 1899, § 4938.]

#### ARTICLE 6.—PRESENTMENT FOR PAYMENT.

§ 7106. **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. [R. C. 1905, § 6524; Civ. C. 1877, § 1907; R. C. 1899, § 4939.]

Necessity of actual presentation of commercial paper to effect its dishonor. 13 L.R.A.(N.S.) 303.

§ 7107. **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. [R. C. 1905, § 6525; Civ. C. 1877, § 1908; R. C. 1899, § 4940.]

§ 7108. **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. [R. C. 1905, § 6526; Civ. C. 1877, § 1909; R. C. 1899, § 4941.]

Section makes more definite time within which bill of exchange should be presented for payment. *Warner v. Bank*, 6 S. D. 152, 60 N. W. 746; *Bank of Gilby v. Farnsworth*, 7 N. D. 6, 72 N. W. 901, 38 L.R.A. 843.

Instrument reciting "Due W. C. R. the sum of . . . payable at this office on 20th day of June, 1893, to him or order," is promissory note. *Schmitz v. Min. Co.*, 8 S. D. 544, 67 N. W. 618.

Inapplicable to creditor's failure to collect check of third person for five days. *Manitoba Mortg. & Invest. Co. v. Weisa*, 18 S. D. 459, 112 Am. St. Rep. 799, 101 N. W. 37, 5 A. & E. Ann. Cas. 868.

§ 7109. **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. [R. C. 1905, § 6527; Civ. C. 1877, § 1910; R. C. 1899, § 4942.]

As to similar provision in Cal. Civ. Code, § 3214, see *Machado v. Fernandez*, 74 Cal. 362, 16 Pac. 19.

#### ARTICLE 7.—EXCUSE OF PRESENTMENT AND NOTICE.

§ 7110. **Incapacity to accept.** The presentment of a bill of exchange for acceptance is excused if the drawee has not capacity to accept it. [R. C. 1905, § 6528; Civ. C. 1877, § 1911; R. C. 1899, § 4943.]

§ 7111. **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. [R. C. 1905, § 6529; Civ. C. 1877, § 1912; R. C. 1899, § 4944.]

§ 7112. **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. [R. C. 1905, § 6530; Civ. C. 1877, § 1913; R. C. 1899, § 4945.]

#### ARTICLE 8.—FOREIGN BILLS.

§ 7113. **Inland bill defined.** An inland bill of exchange is one drawn and payable within this state. All others are foreign. [R. C. 1905, § 6531; Civ. C. 1877, § 1914; R. C. 1899, § 4946.]

§ 7114. **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. [R. C. 1905, § 6532; Civ. C. 1877, § 1915; R. C. 1899, § 4947.]

Failure to give notice of protest of foreign bill of exchange constituted such bill payment. *Mankey v. Hoyt*, 27 S. D. 561, 132 N. W. 230.

§ 7115. **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. [R. C. 1905, § 6533; Civ. C. 1877, § 1916; R. C. 1899, § 4948.]

§ 7116. **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 assigned,

if any; and finally protesting against all the parties to be charged. [R. C. 1905, § 6534; Civ. C. 1877, § 1917; R. C. 1899, § 4949.]

§ 7117. **Where protest made.** A protest for nonacceptance must be made in the city or town in which the bill is presented for acceptance and a protest for nonpayment, in the city or town in which it is presented for payment. [R. C. 1905, § 6535; Civ. C. 1877, § 1918; R. C. 1899, § 4950.]

§ 7118. **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. [R. C. 1905, § 6536; Civ. C. 1877, § 1919; R. C. 1899, § 4951.]

§ 7119. **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. [R. C. 1905, § 6537; Civ. C. 1877, § 1920; R. C. 1899, § 4952.]

§ 7120. **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. [R. C. 1905, § 6538; Civ. C. 1877, § 1921; R. C. 1899, § 4953.]

§ 7121. **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. [R. C. 1905, § 6539; Civ. C. 1877, § 1922; R. C. 1899, § 4954.]

§ 7122. **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. [R. C. 1905, § 6540; Civ. C. 1877, § 1923; R. C. 1899, § 4955.]

§ 7123. **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 nonacceptance or nonpayment. [R. C. 1905, § 6541; Civ. C. 1877, § 1924; R. C. 1899, § 4956.]

§ 7124. **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. [R. C. 1905, § 6542; Civ. C. 1877, § 1925; R. C. 1899, § 4957.]

§ 7125. **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 ex-

pressed 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. [R. C. 1905, § 6010; Civ. C. 1877, §§ 1926, 1927; R. C. 1899, § 4958.]

## CHAPTER 105.

## PROMISSORY NOTES.

**§ 7126. Defined.** A promissory note is an instrument negotiable in form whereby the signer promises to pay a specified sum of money. [R. C. 1905, § 6544; Civ. C. 1877, § 1928; R. C. 1899, § 4959.]

See section 7068.

Note from which it cannot be ascertained how interest is to be figured is non-negotiable and not entitled to grace. *Davis v. Brady*, 17 S. D. 511, 97 N. W. 719.

**§ 7127. 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: [R. C. 1905, § 6545; Civ. C. 1877, § 1929; R. C. 1899, § 4960.]

**§ 7128. 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. [R. C. 1905, § 6546; Civ. C. 1877, § 1930; R. C. 1899, § 4961.]

**§ 7129. Other laws applicable.** Chapter 103 and sections 7088 and 7099 of this code apply to promissory notes. [R. C. 1905, § 6547; Civ. C. 1877, § 1931; R. C. 1899, § 4962.]

**§ 7130. 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. [R. C. 1905, § 6548; Civ. C. 1877, § 1932; R. C. 1899, § 4963.]

## CHAPTER 106.

## CHECKS.

**§ 7131. 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. [R. C. 1905, § 6549; Civ. C. 1877, § 1933; R. C. 1899, § 4964.]

See section 7069.

Holder of check may sue bank to recover same on its refusing payment, where maker has funds deposited. *Turner v. Hot Springs Nat. Bank*, 18 S. D. 498, 112 Am. St. Rep. 804, 101 N. W. 348, 5 A. & E. Ann. Cas. 937.

**§ 7132. 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. [R. C. 1905, § 6550; Civ. C. 1877, § 1934; R. C. 1899, § 4965.]

Contract of drawer of check is to pay if check is dishonored. *Warner v. Bank*, 6 S. D. 152, 60 N. W. 746.

**§ 7133. Bank's liability to depositor limited.** No bank shall be liable to a depositor for the payment by it of a forged or raised check unless within thirty days after the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid is forged or raised. [1909, ch. 44.]

## CHAPTER 107.

## BONDS, BANK NOTES AND CERTIFICATES OF DEPOSIT.

§ 7134. **Bank note negotiable after payment.** A bank note remains negotiable even after it has been paid by the maker. [R. C. 1905, § 6551; Civ. C. 1877, § 1935; R. C. 1899, § 4966.]

§ 7135. **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. [R. C. 1905, § 6552; Civ. C. 1877, § 1936; R. C. 1899, § 4967.]

Certificate of deposit payable to order of depositor does not mature, and action not maintainable, until demand. *Tobin v. McKinney*, 15 S. D. 257, 88 N. W. 572.

Sufficiency of evidence to sustain title. *First Nat. Bank v. Dickson*, 6 D. 301, 50 N. W. 124.

## CHAPTER 108.

## GENERAL PROVISIONS.

§ 7136. **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. [R. C. 1905, § 6553; Civ. C. 1877, § 1937; R. C. 1899, § 4968.]

As to waiver of a cause of action or right of action, see section 6002.

"The foregoing fifty-seven chapters" here printed in brackets is the language of the corresponding section in R. C. 1905, R. C. 1899 and R. C. 1895. In the present compilation, however, by reason of the interpolation of new chapters, "the foregoing fifty-seven chapters" are chapters 48-107, inclusive, excepting chapters 81, 82 and 101.

## CHAPTER 109.

## RELIEF IN GENERAL.

§ 7137. **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 110 of this code. [R. C. 1905, § 6554; Civ. C. 1877, § 1938; R. C. 1899, § 4969.]

Railroad cannot be enjoined from operating road on its own property until payment of damages to other property in neighborhood. *Hyde v. Minnesota, D. & P. R. Co.*, 24 S. D. 386, 123 N. W. 849.

As to similar provision in Cal. Civ. Code, § 3274, see *Spreckels v. Hawaiian Commercial & S. Co.*, 117 Cal. 377, 49 Pac. 353.

§ 7138. **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. [R. C. 1905, § 6555; Civ. C. 1877, § 1939; R. C. 1899, § 4970.]

Contract for sale of land providing for forfeiture in case of default within this section. *Barnes v. Clement*, 12 S. D. 270, 80 N. W. 301.

As to when party is entitled to be relieved from forfeiture under contract. *Bennett v. Glaspell*, 15 N. D. 239, 107 N. W. 45.

As to similar provision in Cal. Civ. Code, § 3275, see *Parsons v. Smilie*, 97 Cal. 647, 32 Pac. 702.

## CHAPTER 110.

## COMPENSATORY RELIEF.

- ARTICLE 1. DAMAGES IN GENERAL, §§ 7139-7145.**  
 2. MEASURE OF DAMAGES, §§ 7146-7164.  
 3. DAMAGES FOR WRONGS, §§ 7165-7176.  
 4. GENERAL PROVISIONS, §§ 7177-7184.  
 5. SPECIFIC AND PREVENTIVE RELIEF, §§ 7185-7188.  
 6. POSSESSION OF REAL AND PERSONAL PROPERTY, §§ 7189-7191.  
 7. SPECIFIC PERFORMANCE OF OBLIGATIONS, §§ 7192-7201.  
 8. REVISION AND RESCISSION OF CONTRACTS, §§ 7202-7208.  
 9. CANCELLATION OF INSTRUMENTS, §§ 7209, 7210.  
 10. PREVENTIVE RELIEF, §§ 7211-7214.

## ARTICLE 1.—DAMAGES IN GENERAL.

§ 7139. **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. [R. C. 1905, § 6556; Civ. C. 1877, § 1940; R. C. 1899, § 4971.]

Action for malicious prosecution and false imprisonment. *Kaeppler v. Bank*, 8 N. D. 406, 79 N. W. 869; *Jackson v. Bell*, 5 S. D. 257, 58 N. W. 671.

School treasurer issuing illegal warrant liable to innocent purchaser. *Whitbeck v. Sees*, 10 S. D. 417, 73 N. W. 915.

Liability of abutting owner for damages by street obstruction. *Heckman v. Evenson*, 7 N. D. 173, 73 N. W. 427.

Damages recoverable for illegal levy by sheriff is value of property at time of levy, and fair compensation for time and money expended. *Keith v. Haggard*, 4 D. 438, 33 N. W. 465.

Land owner is not liable in damages for failure to destroy noxious weeds, under sections 2086, 2088 and 2089, Revised Codes, until after county commissioners have prescribed time and manner of destruction. *Langer v. Goode*, 21 N. D. 462, 131 N. W. 258, Ann. Cas. 1913D, 429, 1 N. C. C. A. 772.

§ 7140. **Detriment defined.** Detriment is a loss or harm suffered in person or property. [R. C. 1905, § 6557; Civ. C. 1877, § 1941; R. C. 1899, § 4972.]

§ 7141. **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. [R. C. 1905, § 6558; Civ. C. 1877, § 1942; R. C. 1899, § 4973.]

As to right of plaintiff in action for possession of property and rent, to recover for rent up to disposition of appeal. *McLain v. Nurnberg*, 16 N. D. 138, 112 N. W. 245.

As to similar provision in Cal. Civ. Code, § 3283, see *Hicks v. Drew*, 117 Cal. 305, 49 Pac. 139.

§ 7142. **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. [R. C. 1905, § 6559; Civ. C. 1877, § 1943; R. C. 1899, § 4974.]

One rendering services is entitled to interest on wages from conclusion of work. *Corcoran v. Halloran*, 20 S. D. 384, 107 N. W. 210.

Right to interest on damages. 28 L.R.A.(N.S.) 1.

—on damages for personal injuries. 14 L.R.A. 548; 18 L.R.A. 449.

—on damages for injuries to property by railroad fires. 18 L.R.A. 449.

—on damages for injury by damming back water of stream. 59 L.R.A. 897.

—on unliquidated damages. 28 L.R.A.(N.S.) 1.

—on claim for penalty against national bank for reserving illegal interest. 56 L.R.A. 707.

—on claims allowed in bankruptcy. 29 L.R.A.(N.S.) 867.

Governing law with respect to interest as damages. 56 L.R.A. 303; 62 L.R.A. 87.

Purchaser's right of interest on breach of warranty on sale of seeds. 37 L.R.A.(N.S.)

Right of purchaser upon rescinding contract for breach of warranty to recover interest. 27 L.R.A.(N.S.) 928.

As to similar provision in Cal. Civ. Code, § 3287, see *Easterbrook v. Farquharson*, 110 Cal. 311, 42 Pac. 811.

**§ 7143. 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. [R. C. 1905, § 6560; Civ. C. 1877, § 1944; R. C. 1899, § 4975.]

Question of interest should be left to discretion of jury. *Uhe v. C. M. & St. P. Ry. Co.*, 3 S. D. 563, 54 N. W. 601; *Uhe v. C. M. & St. P. Ry. Co.*, 4 S. D. 505, 57 N. W. 484; *Johnson v. N. P. Ry. Co.*, 1 N. D. 354, 48 N. W. 227; *Bailey v. C. M. & St. P. Ry. Co.*, 3 S. D. 531, 54 N. W. 596, 19 L.R.A. 653.

The question of allowing interest in mandamus to compel execution of deed is for the jury. *Hollister v. Donahoe*, 16 S. D. 206, 92 N. W. 12.

In tort actions allowance of interest is discretionary and not obligatory upon jury. *Seckerson v. Sinclair*, 24 N. D. 625, 140 N. W. 239.

As to similar provision in Cal. Civ. Code, § 3288, see *Coburn v. Goodall*, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190; *Hewes v. Germain Fruit Co.*, 106 Cal. 441, 39 Pac. 853.

**§ 7144. 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. [R. C. 1905, § 6561; Civ. C. 1877, § 1945; R. C. 1895, § 4976.]

**§ 7145. 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. [R. C. 1905, § 6562; Civ. C. 1877, § 1946; R. C. 1899, § 4977.]

Jury should be instructed that exemplary damages are to be assessed only when fraud or malice exists. *Lindblom v. Sonstelle*, 10 N. D. 140, 86 N. W. 357.

Exemplary damages not recoverable in action against city. *Larson v. City of Grand Forks*, 3 D. 307, 19 N. W. 414.

Master liable for exemplary damages because of servant's wrongful act, though unauthorized. *Fell v. N. P. Ry. Co.*, 44 Fed. 248.

May recover in recovery of specific property. *Holt v. Van Eps*, 1 D. 198, 46 N. W. 689.

Widow cannot recover exemplary damages for death of husband from intoxication in suit against liquor dealer and bondsman. *Garrigan v. Thompson*, 17 S. D. 132, 95 N. W. 294.

Exemplary damages not recoverable in malpractice action in absence of presumption of malice. *Baxter v. Campbell*, 17 S. D. 475, 97 N. W. 386.

Exemplary damages may be given in action for breach of obligation not arising from contract where defendant has been guilty of oppression, fraud or malice. *Bailey v. Walton*, 24 S. D. 118, 123 N. W. 701.

Demurrer to answer in libel must be overruled, if facts showing mitigating circumstances are alleged, irrespective of whether either justification or privilege is shown. *Williams v. Black*, 24 S. D. 501, 124 N. W. 728.

Charge in assault action that plaintiff was not entitled to exemplary damages, unless it was shown that defendant was prompted by "a wish to vex, annoy and injure" plaintiff, and that assault was malicious, was proper. *Bogue v. Gunderson*, 30 S. D. 1, 137 N. W. 595.

Necessity of actual malice to justify exemplary damages for tort. 16 L.R.A.(N.S.) 440.

Punitive damages, when allowable. 27 Am. Dec. 684; 28 Am. St. Rep. 870.

— for act punishable criminally. 50 Am. Dec. 771.

— for death by negligence. 17 L.R.A. 72.

— for act of servant or agent. 62 Am. Dec. 379; 101 Am. St. Rep. 730.

— for willful or malicious acts of servant or agent. 27 L.R.A. 193; 10 L.R.A.(N.S.)

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— for infringing trademark, tradename or copyright where amount of actual damages not established. 37 L.R.A.(N.S.) 533.

— for maintaining nuisance. 3 L.R.A.(N.S.) 1119.

— against municipality for injury by defect or obstruction in street. 20 L.R.A.(N.S.) 764.

— against telegraph company for handling libelous message. 9 L.R.A.(N.S.) 141.

— against newspaper proprietor for libel published without his knowledge or consent. 26 L.R.A. 779.

- Punitive damages for wanton failure to transport baggage. 9 L.R.A.(N.S.) 1218.  
 —for carrying passenger beyond destination. 17 L.R.A.(N.S.) 1230; 41 L.R.A.(N.S.) 746.  
 —for placing white passenger in a car for colored persons. 41 L.R.A.(N.S.) 960.  
 —for assault by carrier's servant on passenger. 32 L.R.A.(N.S.) 1201.  
 Refusal of conductor to listen to passenger's explanation as to his contract, as justification for punitive damages for passenger's expulsion. 17 L.R.A.(N.S.) 344.  
 Exemplary damages in action for malicious prosecution or for abuse of process in suing out attachment for collection of debt only. 29 L.R.A.(N.S.) 272.  
 Want of probable cause to believe alleged ground of attachment as condition of action for wrongful attachment where exemplary damages are sought. 38 L.R.A.(N.S.) 127.  
 Corporation's liability for punitive damages. 59 Am. St. Rep. 589.  
 Expense of litigation as element, or as limit, of punitive or exemplary damages. 4 L.R.A.(N.S.) 907.  
 Allowance of interest on exemplary damages. 18 L.R.A. 457.  
 As to similar provision in Cal. Civ. Code, § 3294, see *Yerian v. Linkletter*, 80 Cal. 135, 22 Pac. 70; *Jones v. Sanders*, 138 Cal. 405, 71 Pac. 506; *Maher v. Wilson*, 139 Cal. 514, 73 Pac. 418; *Greenberg v. Western Turf Asso.*, 140 Cal. 357, 73 Pac. 1050.

## ARTICLE 2.—MEASURE OF DAMAGES.

§ 7146. 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. [R. C. 1905, § 6563; Civ. C. 1877, §§ 1947, 1948; R. C. 1899, § 4978.]

Measure of damages for breach of contract is the same as at common law. *Needham v. Halverson*, 22 N. D. 594, 135 N. W. 203.

If contract is silent upon measure of damages for breach thereof, statutory rule prevails. *Russell v. Olson*, 22 N. D. 410, 37 L.R.A.(N.S.) 1217, 133 N. W. 1030.

One who wrongfully puts end to contract of employment is estopped from denying that injured party has not been damaged to extent of actual loss and outlay fairly incurred. *McLean v. News Pub. Co.*, 21 N. D. 89, 129 N. W. 93.

Damages to credit or business not recoverable on attachment bond. *Thompson v. Webber*, 4 D. 240, 29 N. W. 671.

For failure to complete building within time agreed is reasonable rental value for time left uncompleted. *Seim v. Krause*, 13 S. D. 530, 83 N. W. 583.

For agent's fraudulent representation as to location of real estate, measure is actual loss sustained. *Roberts v. Holliday*, 10 S. D. 576, 74 N. W. 1034.

For breach of contract, amount may be submitted to the jury. *Nebraska Land Co. v. Burris*, 10 S. D. 430, 73 N. W. 919.

Measure for fraudulent representation as to value of land, is resultant loss. *Glaspel v. N. P. Ry. Co.*, 43 Fed. 900.

Recovery for breach of obligation limited to what could have been gained by full performance 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.

Only nominal damages recoverable unless clearly ascertainable in both nature and origin. *Hudson v. Archer*, 9 S. D. 240, 68 N. W. 541.

Measure of damages for failure to furnish materials for heating plant on time is increase in cost of putting in plant later. *Hickok v. W. E. Adams Co.*, 18 S. D. 14, 99 N. W. 77.

Measure of damages where owner of mortgaged land agrees to pay taxes and another promises to pay interest, and both fail to perform, resulting in loss of land. *Gardner v. Welch*, 21 S. D. 151, 110 N. W. 110.

As being common-law rule for measure of damages on breach of contract. *Hayes v. Cooley*, 13 N. D. 204, 100 N. W. 250.

As to sufficiency of counterclaim for damages for refusal to deliver goods. *Scully Steel & I. Co. v. Hann*, 18 N. D. 528, 123 N. W. 275.

Expense incurred in shipping cattle to market is element of damage in action for breach of agreement to buy them. *Olson v. Rydl*, 25 S. D. 268, 126 N. W. 587.

Conflict of laws as to measure of damages for breach of contract. 56 L.R.A. 301, 303.

Right to interest on damages for breach of contract. 28 L.R.A.(N.S.) 24, 46, 82.

Duty to prevent or reduce damages on breach of contract. 53 L.R.A. 108.

Effect of provision for forfeiture of sums paid or retained under executory contract, to prevent recovery of any other damages after breach of contract. 4 L.R.A.(N.S.) 755.



Measure of damages for breach of contract to furnish water for irrigation. 19 L.R.A.(N.S.) 938; 31 L.R.A.(N.S.) 743.

As to similar provision in Cal. Civ. Code, §§ 3300, 3301, see *Muldoon v. Lynch*, 66 Cal. 536, 6 Pac. 417; *Friend & T. Lumber Co. v. Miller*, 67 Cal. 464, 8 Pac. 40; *Smith v. Los Angeles & P. R. Co.*, 98 Cal. 210, 33 Pac. 53; *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. 625; *Westwater v. Grace Church*, 140 Cal. 339, 73 Pac. 1055.

**§ 7147. 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. [R. C. 1905, § 6564; Civ. C. 1877, § 1949; R. C. 1899, § 4979.]

For delay in payment of money, interest only. *North Star B. & S. Co. v. Stebbins*, 3 S. D. 540, 54 N. W. 593.

Vendor in land contract was not entitled to interest on purchase money in excess of legal interest. *Smith v. Johnson*, 30 S. D. 200, 138 N. W. 18.

**§ 7148. Dishonor of foreign bills.** For the dishonor of foreign bills of exchange the damages are prescribed by sections 7124 and 7125 of this code. [R. C. 1905, § 6565; Civ. C. 1877, § 1950; R. C. 1899, § 4980.]

**§ 7149. 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. [R. C. 1905, § 6566; Civ. C. 1877, § 1951; R. C. 1899, § 4981.]

Statutory rule not inflexible, but subject to same variations as pre-existent common-law rule. *Bowne v. Wolcott*, 1 N. D. 415, 48 N. W. 336.

Only covenants that run with land are of warranty, and for further assurance. *Gale v. Frazier*, 4 D. 196, 30 N. W. 138.

This statute not applicable to covenants against incumbrances. *Loiseau v. Threlstad*, 14 S. D. 257, 85 N. W. 189.

Measure of damages for breach of warranty of title. 24 Am. St. Rep. 266.

— for breach of warranty by existence of unexpired lease. 35 L.R.A.(N.S.) 779.

— for breach of covenant of quiet enjoyment. 58 Am. Rep. 606; 53 Am. St. Rep. 116.

— for breach of covenant in grant of water power. 67 L.R.A. 405.

— for tenant's breach of covenant to repair, in action brought after expiration of the term. 16 L.R.A.(N.S.) 210.

— for misrepresentation in the sale of real property. 123 Am. St. Rep. 776.

**§ 7150. 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. [R. C. 1905, § 6567; Civ. C. 1877, § 1952; R. C. 1899, § 4982.]

Right of grantee in deed with covenant against incumbrance to damages on paying off mortgage. *Dahl v. Stakke*, 12 N. D. 325, 96 N. W. 333.

**§ 7151. 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. [R. C. 1905, § 6568; Civ. C. 1877, § 1953; R. C. 1895, § 4983.]

Complaint to recover damages for breach of contract to convey real estate; ground for damages must be stated. *Narregang v. Trust Co.*, 7 S. D. 574, 64 N. W. 1129; *Coates v. Arthur*, 5 S. D. 274, 58 N. W. 675.

Complete and adequate remedy at law is not shown, where complaint for specific performance shows making of improvements and alleged value of improvements. *Steenland v. Noel*, 28 S. D. 522, 134 N. W. 207.

Measure of damages for breach of contract to convey real estate. 16 L.R.A.(N.S.) 768; 106 Am. St. Rep. 963.

—for breach of parol contract to convey real estate. 2 L.R.A.(N.S.) 713.

Loss of profits as element of damages. 52 L.R.A. 240.

Provision for damages in land contract as penalty or stipulated damages. 34 L.R.A.(N.S.) 4.

As to similar provision in Cal. Civ. Code, § 3306, see *Haynes v. White*, 55 Cal. 38; *Yates v. James*, 89 Cal. 474, 26 Pac. 1073; *Clark v. Yocum*, 116 Cal. 515, 48 Pac. 498.

**§ 7152. 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. [R. C. 1905, § 6569; Civ. C. 1877, § 1954; R. C. 1895, § 4984.]

See *Barnes v. Clement*, 8 S. D. 421, 66 N. W. 810.

Forfeiture of bond for deed; recovery of amount paid in excess of actual damage. *Barnes v. Clement*, 8 S. D. 421, 66 N. W. 810.

Measure of, against vendee for refusing to perform his contract to purchase. 67 Am. Dec. 275.

As to similar provision in Cal. Civ. Code, § 3307, see *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749.

**§ 7153. 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. [R. C. 1905, § 6570; Civ. C. 1877, § 1955; R. C. 1899, § 4985.]

Statute applies to breach of contracts of exchange of personal. *Talbot v. Boyd*, 11 N. D. 81, 88 N. W. 1026.

Measure of damages on breach of contract for exchange of personal property. *Talbot v. Boyd*, 11 N. D. 81, 88 N. W. 1026.

As to sufficiency of counterclaim for damages for refusal to deliver goods. *Scully Steel & I. Co. v. Hann*, 18 N. D. 528, 123 N. W. 275.

Measure of damages for breach by vendor of contract of sale of article having no market price. 57 L.R.A. 193.

Delay by purchaser in securing substitute as affecting his damages for seller's failure to deliver. 32 L.R.A.(N.S.) 192.

Offer by seller to furnish goods at advanced price as affecting measure of damages for refusal to furnish them at contract price. 38 L.R.A.(N.S.) 837.

Duty to prevent or reduce damages on breach of contract for sale or purchase. 52 L.R.A. 259.

Measure of damages against vendor of seeds. 37 L.R.A.(N.S.) 85.

Loss of profits as element of damages for breach of contract to sell. 42 Am. Rep. 461.

Profits lost in consequence of breach of contract of sale of machinery purchased for vendee's use. 2 B. R. C. 79.

As to similar provision in Cal. Civ. Code, § 3308, see *Bullard v. Stone*, 67 Cal. 477, 8 Pac. 17.

**§ 7154. 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. [R. C. 1905, § 6571; Civ. C. 1877, § 1956; R. C. 1899, § 4986.]

Part owner of notes may sue his co-owner for conversion. *Grigsby v. Day*, 9 S. D. 585, 70 N. W. 881.

**§ 7155. Of buyer to pay for personalty when title in him.** The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is vested in him, is deemed to be the contract price. [R. C. 1905, § 6572; Civ. C. 1877, § 1957; R. C. 1899, § 4987.]

For failure to accept property is contract price. *Dowagiac Mfg. Co. v. Higinbotham*, 15 S. D. 547, 91 N. W. 330.

For breach of executory contract of sale. *Stanford v. McGill*, 6 N. D. 536, 72 N. W. 938, 38 L.R.A. 760; *Minn. Thresh. Mach. Co. v. McDonald*, 10 N. D. 408, 87 N. W. 993.

Applicable only to contract where there is unconditional change or transfer of title. *Reeves v. Bruening*, 13 N. D. 157, 100 N. W. 241.

Rescission by purchaser for seller's fraud as affecting former's right to recover damages, other than loss of contract. 31 L.R.A.(N.S.) 910.

**§ 7156. Same when title not in buyer.** The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be:

1. If the property has been resold pursuant to section 6864 the excess, if any, of the amount due from the buyer under the contract, over the net proceeds of the resale; or,

2. If the property has not been resold in the manner prescribed by section 6864 the excess, if any, of the amount due from the buyer under the contract over the value to the seller together with the excess, if any, of the expenses properly incurred in carrying the property to market over those which would have been incurred for the carriage thereof, if the buyer had accepted it. [R. C. 1905, § 6573; Civ. C. 1877, § 1958; R. C. 1899, § 4988.]

Not applicable to conditional sale to prevent recovery by seller of purchase price, where buyer has accepted article sold. *Manganese Steel Safe Co. v. First State Bank*, 25 S. D. 119, 125 N. W. 572.

Applicable to breach of agreement to buy personal property. *Talbot v. Boyd*, 11 N. D. 81, 88 N. W. 1026.

As giving remedy on refusal to receive property under contract of sale. *Reeves v. Bruening*, 13 N. D. 157, 100 N. W. 241.

Inapplicable where property has been delivered to vendee. *Dowagiac Mfg. Co. v. Mahon*, 13 N. D. 516, 101 N. W. 903.

Vendor cannot treat sale as absolute on breach of contract to buy chattels and sue for purchase price. *Dowagiac Mfg. Co. v. White Rock Lumber & Hardware Co.*, 18 S. D. 105, 99 N. W. 854.

Vendor who forecloses lien and purchases property held for vendee without vendee's consent to purchase cannot recover under statute. *Reeves & Co. v. Bruening*, 16 N. D. 398, 114 N. W. 313.

Recovery of damages on breach of contract to buy goods. *Fountain City Drill Co. v. Lindquist*, 22 S. D. 7, 114 N. W. 1098.

Expense incurred in shipping cattle to market is element of damage in action for breach of agreement to buy them. *Olson v. Rydl*, 25 S. D. 268, 126 N. W. 587.

Measure of damage is not changed where plaintiff sold machinery to defendant for resale providing that title to all should remain in plaintiff till sold in regular course of business, because defendant sold part of it and settled therefor. *Dowagiac Mfg. Co. v. White Rock Lumber & Hardware Co.*, 26 S. D. 374, 128 N. W. 334.

Order for machinery given to plaintiff's agent, providing that it was subject to plaintiff's approval, did not become binding contract until approval and acceptance. *Thomas Mfg. Co. v. Lyons*, 29 S. D. 600, 137 N. W. 340.

Resale to fix damage for refusal of purchaser to accept goods. 42 L.R.A.(N.S.) 670.

Measure of damages for breach by vendee of contract of sale of article having no market price. 57 L.R.A. 204.

— for purchaser's refusal to accept goods specially manufactured for him. 4 L.R.A.(N.S.) 740; 18 L.R.A.(N.S.) 613.

As to similar provision in Cal. Civ. Code, § 3311, see *Hill v. McKay*, 94 Cal. 5, 29 Pac. 406.

**§ 7157. Breach of warranty of title to personalty.** The detriment caused by the breach of a warranty of the title of personal property sold is deemed to be the value thereof to the buyer, when he is deprived of its possession, together with any costs which he has become liable to pay in an action brought for the property by the true owner. [R. C. 1905, § 6574; Civ. C. 1877, § 1959; R. C. 1899, § 4989.]

Reasonable attorney fees are recoverable as damages in defending title to property at request of mortgagor, who sold property which was subject to mortgage. *St. Anthony & D. Elevator Co. v. Dawson*, 20 N. D. 18, 126 N. W. 1013, Ann. Cas. 1912B; 1337.

Measure of damages on failure of title to property sold. 53 Am. Rep. 788.

Right of purchaser of goods to recover costs and other expenses incurred by him in defending a collateral action, as damages for breach of the seller's warranty. 20 L.R.A.(N.S.) 492.

**§ 7158. Same of quality of personalty.** The detriment caused by the breach of warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred if it had been complied with, over its actual value at that time. [R. C. 1905, § 6575; Civ. C. 1877, § 1960; R. C. 1899, § 4990.]

For breach of warranty on sale is difference between what property would have been worth if as warranted, and actual value. *Western Twine Co. v. Wright*, 11 S. D. 521, 78 N. W. 942, 44 L.R.A. 438; *Hermion v. Silver*, 15 S. D. 476, 90 N. W. 141; *Fargo Gas & Coke Co. v. Gas Co.*, 4 N. D. 219, 59 N. W. 1066, 37 L.R.A. 593; *Seiberling v. Mortinson*, 9 S. D. 576, 70 N. W. 835.

If no evidence to contrary presumed that property would have been worth contract price if as warranted. *Aultman & Co. v. Ginn*, 1 N. D. 402, 48 N. W. 336.

Question of value not established by opinion of witness as to value to him. *Aultman & Co. v. Ferguson*, 8 S. D. 458, 66 N. W. 1081.

Cost of medicine, care and feed will be included in measure of damages on breach of warranty of horse against "glanders." *Larson v. Calder*, 16 N. D. 248, 113 N. W. 103.

Proof of value must refer to time when property was delivered under warranty in action for damages for breach of warranty. *Houghton Implement Co. v. Doughty*, 14 N. D. 331, 104 N. W. 516.

Measure of damages for breach of implied warranty on sale of engine was governed by this section, and that evidence of loss of profits was inadmissible in action for breach. *Christiernson v. Hendrie & B. Mfg. & Supply Co.*, 26 S. D. 519, 128 N. W. 603.

Amount of recovery by owner, not indorsee in due course, of notes given for goods purchased on warranty depends on amount of maker's damage for breach of such warranty. *Rowe v. Scott*, 28 S. D. 145, 132 N. W. 695.

Price at which goods are resold as affecting measure of damage for breach of warranty as to quality. 5 L.R.A.(N.S.) 1151.

Measure of, in actions for breach of warranty of soundness. 40 Am. Dec. 303.

— for breach of implied warranty on contract of sale. 18 L.R.A. 385.

— for breach of warranty on sale of seeds. 37 L.R.A.(N.S.) 85.

May purchaser recover damages for breach of warranty or fraud as to both articles, where one article is substituted for another at his request, and both are defective. 37 L.R.A.(N.S.) 298.

Damages recoverable for breach of warranty in selling diseased animals. 34 L.R.A.(N.S.) 698.

Personal injuries as element of damages for breach of warranty. 3 L.R.A.(N.S.) 1047.

Purchaser's election to rescind for breach of warranty as affecting recovery against seller. 27 L.R.A.(N.S.) 925.

Profits lost in consequence of breach of warranty of machinery purchased for vendee's use as element of damages. 2 B. R. C. 83.

As to similar provision in Cal. Civ. Code, § 3313, see *Shearer v. Park Nursery Co.*, 103 Cal. 415, 42 Am. St. Rep. 125, 37 Pac. 412.

**§ 7159. Same of fitness of personalty.** The detriment caused by the breach of a warranty of the fitness of an article of personal property for a particular purpose is deemed to be that which is defined by the last section together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose. [R. C. 1905, § 6576; Civ. C. 1877, § 1961; R. C. 1899, § 4991.]

As to similar provision in Cal. Civ. Code, § 3314, see *Correlo v. Lynch*, 65 Cal. 273, 3 Pac. 889.

**§ 7160. Breach of carrier's obligation to accept freight, etc.** The detriment caused by the breach of a carrier's obligation to accept freight, messages or 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. [R. C. 1905, § 6577; Civ. C. 1877, § 1962; R. C. 1899, § 4992.]

Measure of damages for carrier's default or delay as to transportation of passenger. 23 L.R.A. 545.

What injuries may be deemed the proximate result of failure to stop street car for waiting passenger. 33 L.R.A.(N.S.) 1007.

Damages incident to attempt to reach destination by other means as an element of recovery for failure to stop train for intending passenger. 8 L.R.A.(N.S.) 880.

Passenger's duty to minimize damages from carrier's default of duty towards him. 2 L.R.A.(N.S.) 1087.

Measure of damages for failure to furnish cars. 8 L.R.A.(N.S.) 112.

**§ 7161. 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: [R. C. 1905, § 6578; Civ. C. 1877, § 1963; R. C. 1899, § 4993.]

Right to recover expenses or damages incidental to loss of baggage. 7 L.R.A.(N.S.) 188.

Amount of carrier's liability for loss of goods. 2 L.R.A.(N.S.) 773.

Time of notice to warrant special damages for failure of carrier to deliver property. 3 L.R.A.(N.S.) 1111.

Effect of misrepresentation as to character, quantity or value of goods by shipper on his right to recover for loss. 23 L.R.A.(N.S.) 745.

§ 7162. 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. [R. C. 1905, § 6579; Civ. C. 1877, § 1964; R. C. 1899, § 4994.]

Right to recover expenses or damages incidental to delay in delivering baggage. 7 L.R.A.(N.S.) 188.

Allowance of interest on damages to property injured, delayed or lost in transportation. 18 L.R.A. 451.

Measure of damages for carrier's delay in delivery of receptacles for perishable goods. 24 L.R.A.(N.S.) 134.

— for preventing exhibition or show by breach of contract of carriage. 4 L.R.A.(N.S.) 569.

Damages recoverable in action by addressee of telegram for delay in delivery. 30 L.R.A.(N.S.) 1133.

§ 7163. 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. [R. C. 1905, § 6580; Civ. C. 1877, § 1965; R. C. 1899, § 4995.]

As to liability of one assuming to act as agent. *Kennedy v. Stonehouse*, 13 N. D. 232, 100 N. W. 258, 3 A. & E. Ann. Cas. 217.

§ 7164. Of promise to marry. The damages for the breach of a promise of marriage rest in the sound discretion of the jury. [R. C. 1905, § 6581; Civ. C. 1877, § 1966; R. C. 1899, § 4996.]

Measure of damages for breach of promise to marry. 41 L.R.A.(N.S.) 840.

Right to prove seduction in aggravation of damages in breach of promise case. 4 L.R.A.(N.S.) 616; 36 L.R.A.(N.S.) 388.

Necessity of averring seduction in order to recover therefor in an action for breach of promise. 33 L.R.A.(N.S.) 702.

Mitigation of damages for breach of promise of marriage. 26 L.R.A. 432.

### ARTICLE 3.— DAMAGES FOR WRONGS.

§ 7165. 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. [R. C. 1905, § 6582; Civ. C. 1877, § 1967; R. C. 1899, § 4997.]

Measure of damages in tort is the same as at common law. *Needham v. Halverson*, 22 N. D. 594, 135 N. W. 203.

Damages recoverable even when the injury is proximate, and could not be reasonably anticipated. *Ouverson v. City of Grafton*, 5 N. D. 281, 65 N. W. 676.

Section fixes general measure for class of cases named. *Uhe v. C. M. & St. P. Ry. Co.*, 4 S. D. 505, 57 N. W. 484.

As to right to recover special damages in rearing sucking colt due to defendant's killing of dam. *McDonell v. Minneapolis, St. P. & S. Ste. M. R. Co.*, 17 N. D. 606, 118 N. W. 819.

Measure of damages in trespass action. *Peterson v. Conlan*, 18 N. D. 205, 119 N. W. 367.

As to when exemplary damages will be awarded for assault. *Shoemaker v. Sonju*, 15 N. D. 518, 108 N. W. 42, 11 A. & E. Ann. Cas. 1173.

- Measure of damages for total injury to ice in plaintiff's ice house by reason of collapse of building caused by excavation on defendant's land, is market value at time and place of injury with interest. *Slattery v. Rhud*, 23 N. D. 274, 136 N. W. 237.
- Measure of damages against promoters of corporations. 18 L.R.A.(N.S.) 1131.
- against municipality for injury from defect or obstruction in street. 20 L.R.A.(N.S.) 763.
- recoverable from landlord for injury to tenant from defect in premises. 34 L.R.A. 831.
- for personal injury by dog. 37 L.R.A.(N.S.) 865.
- in action for malicious prosecution for wrongful search of premises. 39 L.R.A.(N.S.) 207.
- for libel or slander reflecting on integrity or responsibility of merchant. 44 L.R.A.(N.S.) 351.
- for death caused by negligence. 17 L.R.A. 71; 12 Am. St. Rep. 375.
- for negligent killing of collateral relative. 11 L.R.A.(N.S.) 623.
- in action under federal employers' liability act. 47 L.R.A.(N.S.) 80.
- for disinterment of dead bodies. 42 L.R.A. 729.
- for being prevented from voting at a public election. 31 L.R.A.(N.S.) 1106.
- for forcing cropper from premises. 38 L.R.A.(N.S.) 714.
- for obstructing water of stream. 59 L.R.A. 892.
- for an unintentional trespass. 54 Am. Rep. 421.
- for removal of lateral or subjacent support. 68 L.R.A. 701.
- for mining and carrying away coal. 33 Am. Rep. 282.
- for injury to or destruction of growing crops. 12 L.R.A.(N.S.) 267; 27 L.R.A.(N.S.) 168; 37 L.R.A.(N.S.) 976.
- for injury to, or destruction of, trees or shrubbery not valuable for their timber or firewood. 11 L.R.A.(N.S.) 930; 28 L.R.A.(N.S.) 757; 37 L.R.A.(N.S.) 1115.
- for wrongful cutting or destruction of standing timber. 18 L.R.A.(N.S.) 244.
- for the destruction of property having no market value at the place of destruction. 62 Am. St. Rep. 791.
- for withholding or destroying evidence to which adversary is entitled. 34 L.R.A. 589.
- for enticement of servant. 5 L.R.A.(N.S.) 1100.
- Damages recoverable in action by master for injury to servant or apprentice. 33 L.R.A.(N.S.) 38.
- Wife's right to recovery for loss of consortium resulting from negligent injury to husband. 24 L.R.A.(N.S.) 1024.
- Husband's right at common law to recover for loss of time and funeral expenses necessitated by negligent killing of his wife. 9 L.R.A.(N.S.) 1193.
- Special damages which will sustain an action for libel or slander in charging a woman with unchastity. 24 L.R.A.(N.S.) 577.
- Damages against telegraph company for handling libelous message. 9 L.R.A.(N.S.) 141.
- Condition of place of imprisonment and treatment while in custody as elements of damages for false imprisonment. 33 L.R.A.(N.S.) 291.
- Extent of trespasser's liability for consequential injuries. 53 L.R.A. 626.
- Counsel fees and other expenses of bringing suit as part of compensatory damages recoverable in an action for tort. 28 L.R.A.(N.S.) 761.
- Extent and character of developments following personal injury for which person inflicting the injury is liable. 48 L.R.A.(N.S.) 93.
- Elements of damages recoverable by child for death of mother. 19 L.R.A.(N.S.) 128.
- Is minor's right to damages for negligent killing of parent limited to period of minority. 18 L.R.A.(N.S.) 1205; 39 L.R.A.(N.S.) 1156.
- Recovery of damages for miscarriage. 32 L.R.A. 142.
- Right to recover for miscarriage resulting from fright caused by wrongful act. 3 L.R.A.(N.S.) 49; 22 L.R.A.(N.S.) 1073; 24 L.R.A.(N.S.) 1159.
- Right to recover for mental suffering caused by assault where no bodily injury is inflicted. 25 L.R.A.(N.S.) 976.
- Mental suffering of husband as element of damages for criminal conversation. 16 L.R.A.(N.S.) 674.
- Mental anguish as element of damages for trespass on person of a woman affecting her character or reputation for chastity. 33 L.R.A.(N.S.) 98.
- Loss of profits as element of damages for tort. 52 L.R.A. 33.
- as element of damages for wrongful attachment. 46 L.R.A.(N.S.) 470.
- for infringement of patents, copyrights or trademarks. 51 L.R.A. 801.

**§ 7166. For wrongful occupation of realty.** The detriment caused by the wrongful occupation of real property in cases not embraced in sections 7167, 7173, 7174 and 7175 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. [R. C. 1905, § 6583; Civ. C. 1877, § 1968; R. C. 1899, § 4998.]

Land owner may recover, though there is no agreement to pay rent. *Parkinson v. Shew*, 12 S. D. 171, 80 N. W. 189.

Owner of land may recover for wrongful use. *Hegar v. Degroat*, 3 N. D. 354, 56 N. W. 150; *Olson v. Huntamer*, 6 S. D. 364, 61 N. W. 479.

One who occupies property wrongfully, without lease, is liable for damage or detriment caused by such occupation. *Baldwin v. Bohl*, 23 S. D. 395, 122 N. W. 247.

**§ 7167. 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. [R. C. 1905, § 6584; Civ. C. 1877, § 1969; R. C. 1899, § 4999.]

**§ 7168. 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. [R. C. 1905, § 6585; Civ. C. 1877, § 1970; 1885, ch. 42, § 1; R. C. 1899, § 5000.]

Rule of damages for conversion, highest market value. *Pickert v. Rugg*, 1 N. D. 230, 46 N. W. 446; *Thompson v. Schactzel*, 6 D. 284, 42 N. W. 765; *Town v. Elevator Co.*, 8 N. D. 200, 77 N. W. 608.

There are qualifications of the general rule. *Lovejoy v. Bank*, 5 N. D. 623, 67 N. W. 956.

Unexplained delay of eleven months in commencing action not prosecution with reasonable diligence, and highest market price not recoverable. *First Nat. Bank v. Elevator Co.*, 8 N. D. 430, 79 N. W. 874.

For illegal levy is the value of the property at the time, and fair compensation for its pursuit. *Keith v. Haggart*, 4 D. 438, 33 N. W. 465.

Election to follow first rule by demanding interest. *Rosum v. Hodges*, 1 S. D. 308, 47 N. W. 140, 9 L.R.A. 817; *Torrey v. Peck*, 13 S. D. 538, 83 N. W. 585; *Straw v. Jenks*, 6 D. 414, 43 N. W. 941.

For conversion of notes is amount converted and interest. *Gillespie v. Evans*, 10 S. D. 234, 72 N. W. 576.

Question of reasonable diligence in commencing action one of law. *First Nat. Bank v. Bank*, 9 N. D. 319, 83 N. W. 221.

Proof of value of converted property at time or subsequent to conversion required. *Catlett v. Stokes*, 21 S. D. 108, 110 N. W. 84.

As to when special damages on conversion of property are allowed. *Aronson v. Opegard*, 16 N. D. 595, 114 N. W. 377.

In action for conversion of grain plaintiff must show value of grain as on date of conversion. *Citizens' Nat. Bank v. Osborne-McMillan Elevator Co.*, 21 N. D. 335, 131 N. W. 266.

Measure of damages in trover for injury to, or destruction of, trees. 19 L.R.A. 654.  
—in action in nature of trover, for unlawful cutting or destruction of standing timber. 18 L.R.A. (N.S.) 247.

—in actions of trespass or trover for property taken by mistake. 36 Am. Rep. 770.

Loss of profits as element of damages for conversion. 52 L.R.A. 51.

—for wrongful conversion of logs or timber. 18 L.R.A. (N.S.) 250.

As to similar provision in Cal. Civ. Code, § 3336, see *Fairbanks v. Williams*, 58 Cal. 241; *Arzaga v. Villalba*, 85 Cal. 191, 24 Pac. 656.

**§ 7169. 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. [R. C. 1905, § 6586; Civ. C. 1877, § 1971; R. C. 1899, § 5001.]

**§ 7170. 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 7168 for loss of time and expenses. [R. C. 1905, § 6587; Civ. C. 1877, § 1972; R. C. 1899, § 5002.]

Recoverable by one having special interest in property. *Second Nat. Bank v. Bank*, 8 N. D. 50, 76 N. W. 504.

Measure of damages in trover when the owner of a special interest is the plaintiff. 52 Am. Dec. 678.

Measure of damages for pledgee's conversion of property by invalid sale. 43 L.R.A. 768.

Damages recoverable by conditional vendor of personalty from third person who converts the same after partial payment of the purchase price. 10 L.R.A.(N.S.) 458.

As to similar provision in Cal. Civ. Code, § 3338, see *Irwin v. McDowell*, 91 Cal. 119, 27 Pac. 601.

**§ 7171. For seduction.** The damages for seduction rest in the sound discretion of the jury. [R. C. 1905, § 6588; Civ. C. 1877, § 1973; R. C. 1899, § 5003.]

Mental anguish as element of damages in cases of seduction. 33 L.R.A.(N.S.) 99.

**§ 7172. 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. [R. C. 1905, § 6589; Civ. C. 1877, § 1974; R. C. 1899, § 5004.]

**§ 7173. 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. [R. C. 1905, § 6590; Civ. C. 1877, § 1975; R. C. 1899, § 5005.]

As to similar provision in Cal. Civ. Code, § 3344, see *Jack v. Sinsheimer*, 125 Cal. 563, 58 Pac. 130.

**§ 7174. 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. [R. C. 1905, § 6591; Civ. C. 1877, § 1976; R. C. 1899, § 5006.]

As to similar provision in Cal. Civ. Code, § 3345, see *Jack v. Sinsheimer*, 125 Cal. 563, 58 Pac. 130.

**§ 7175. 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. [R. C. 1905, § 6592; Civ. C. 1877, § 1977; R. C. 1899, § 5007.]

Recovery of three times actual damages. *Olson v. Huntamer*, 6 S. D. 364, 61 N. W. 479.

Inapplicable to one holding possession under claim of right. *Baldwin v. Bohl*, 23 S. D. 395, 122 N. W. 247.

Actual application of physical force unnecessary to constitute forcible entry. *Wegner v. Lubenow*, 12 N. D. 95, 95 N. W. 442.

**§ 7176. 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. [R. C. 1905, § 6593; Civ. C. 1877, § 1978; R. C. 1899, § 5008.]

Damages for injury to, or destruction of trees. 15 L.R.A. 613; 19 L.R.A. 653; 18 L.R.A.(N.S.) 244.

Loss of profits as element of damages for wrongful destruction or conversion of logs or timber. 18 L.R.A.(N.S.) 250.

As to similar provision in Cal. Civ. Code, § 3346, see *Stewart v. Sefton*, 108 Cal. 197, 41 Pac. 293; *Wagoner v. Silva*, 139 Cal. 559, 73 Pac. 433.



## ARTICLE 4.—GENERAL PROVISIONS.

**§ 7177. 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. [R. C. 1905, § 6594; Civ. C. 1877, § 1979; R. C. 1899, § 5009.]

Rule is fixed by this statute, unless vendor proceeds under section 6864. *Stanford v. McGill*, 6 N. D. 536, 72 N. W. 938, 38 L.R.A. 760; *Minn. Thresh. Mach. Co. v. McDonald*, 10 N. D. 408, 87 N. W. 933.

Expense incurred in shipping cattle to market is element of damage in action for breach of agreement to buy them. *Olson v. Rydl*, 25 S. D. 268, 126 N. W. 587.

As to similar provision in Cal. Civ. Code, § 3353, see *Hill v. McKay*, 94 Cal. 5, 29 Pac. 406; *Hewes v. Germain Fruit Co.*, 106 Cal. 441, 39 Pac. 853; *Tustin Fruit Asso. v. Earl Fruit Co.*, 6 Cal. Unrep. 37, 53 Pac. 893; *Peterson Bros. v. Mineral King Fruit Co.*, 140 Cal. 624, 74 Pac. 162.

**§ 7178. What to buyer or owner.** In estimating damages, except as provided by sections 7179 and 7180, 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. [R. C. 1905, § 6595; Civ. C. 1877, § 1980; R. C. 1899, § 5010.]

Not applicable to case where delivery is made and damages result from breach of warranty of fitness. *Needham v. Halverson*, 22 N. D. 594, 135 N. W. 203.

Section does not apply to property without market value. *Patterson v. Plummer*, 10 N. D. 95, 86 N. W. 111.

Statute embodies common-law rule of full compensation without punishment. *Pickert v. Rugg*, 1 N. D. 230, 46 N. W. 446.

As to sufficiency of counterclaim for damages for refusal to deliver goods. *Scully Steel & I. Co. v. Hann*, 18 N. D. 528, 123 N. W. 275.

As to similar provision in Cal. Civ. Code, § 3354, see *Bullard v. Stone*, 67 Cal. 477, 8 Pac. 17; *Marriner v. Dennison*, 91 Cal. 555, 27 Pac. 927, 1091.

**§ 7179. 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. [R. C. 1905, § 6596; Civ. C. 1877, § 1981; R. C. 1899, § 5011.]

Where carrier has no notice of peculiar value to owner of article, only its market value can be recovered for its loss. *Hess v. South Dakota C. R. Co.*, 30 S. D. 538, 139 N. W. 334.

**§ 7180. 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. [R. C. 1905, § 6597; Civ. C. 1877, § 1982; R. C. 1899 § 5012.]

Value of choses in action presumed to be amount due on their face. *Anderson v. Bank*, 6 N. D. 497, 72 N. W. 916; *Holt v. Van Eps*, 1 D. 198, 46 N. W. 689; *Cosand v. Bunker*, 2 S. D. 294, 50 N. W. 84; *Grigsby v. Day*, 9 S. D. 585, 70 N. W. 861; *Wylly v. Grigsby*, 11 S. D. 491, 78 N. W. 957.

So far as applicable to certificate of stock in national bank, presumptive value of stock is its par or nominal value. *Patterson v. Plummer*, 10 N. D. 95, 86 N. W. 111.

**§ 7181. When exclusive of exemplary damages.** The damages prescribed by this chapter are exclusive of exemplary damages and interest except when those are expressly mentioned. [R. C. 1905, § 6598; Civ. C. 1877, § 1983; R. C. 1899, § 5013.]

As to similar provision in Cal. Civ. Code, § 3357, see *Hewes v. Germain Fruit Co.*, 106 Cal. 441, 39 Pac. 853.

**§ 7182. 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 7164, 7171 and 7172. [R. C. 1905, § 6599; 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.

As to measure of damages for deceit. *Beare v. Wright*, 14 N. D. 26, 69 L.R.A. 402, 103 N. W. 632, 8 A. & E. Ann. Cas. 1057.

§ 7183. **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. [R. C. 1905, § 6600; Civ. C. 1877, § 1985; R. C. 1899, § 5015.]

Damages must be reasonable. *Keith v. Haggart*, 4 D. 438, 33 N. W. 465.

§ 7184. **Nominal damages.** When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages. [R. C. 1905, § 6601; Civ. C. 1877, § 1986; R. C. 1899, § 5016.]

Recovery of nominal damages for breach of duty. *Wyly v. Grigaby*, 11 S. D. 491, 78 N. W. 957.

As to when party is entitled to nominal damages on failing to prove actual damages from breach of contract. *Raymond v. Edelbrock*, 15 N. D. 231, 107 N. W. 194.

As to similar provision in Cal. Civ. Code, § 3360, see *Maher v. Wilson*, 139 Cal. 514, 73 Pac. 418.

#### ARTICLE 5.—SPECIFIC AND PREVENTIVE RELIEF.

§ 7185. **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. [R. C. 1905, § 6602; Civ. C. 1877, § 1987; R. C. 1899, § 5017.]

§ 7186. **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. [R. C. 1905, § 6603; Civ. C. 1877, § 1988; R. C. 1899, § 5018.]

By cancellation of instrument. *Nation v. Cameron*, 2 D. 247, 11 N. W. 525.

§ 7187. **How preventive relief given.** Preventive relief is given by prohibiting a party from doing that which ought not to be done. [R. C. 1905, § 6604; Civ. C. 1877, § 1989; R. C. 1899, § 5019.]

§ 7188. **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. [R. C. 1905, § 6605; Civ. C. 1877, § 1990; R. C. 1899, § 5020.]

Neither this nor preceding section applies to 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.

§ 7189. **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. [R. C. 1905, § 6606; Civ. C. 1877, § 1991; R. C. 1899, § 5021.]

§ 7190. **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. [R. C. 1905, § 6607; Civ. C. 1877, § 1992; R. C. 1899, § 5022.]

§ 7191. **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. [R. C. 1905, § 6608; Civ. C. 1877, § 1993; R. C. 1899, § 5023.]

#### ARTICLE 7.—SPECIFIC PERFORMANCE OF OBLIGATIONS.

§ 7192. **When compelled.** Except as otherwise provided in this article the specific performance of an obligation may be compelled. [R. C. 1905, § 6609; 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.

Damages in lieu of specific performance. 20 L.R.A. 752.

Equitable enforcement for limited time to prevent public inconvenience, of contract which is against public policy. 1 L.R.A.(N.S.) 1032.

Effect of incapacity specifically to perform. 12 L.R.A. 240; 16 L.R.A. 614.

Right to specific performance or injunction during lifetime of one who has conveyed, or is about to convey, property in violation of his agreement to leave the same, at his death, to the complainant. 18 L.R.A.(N.S.) 218.

Specific performance of oral contract to devise land in consideration of performing services or furnishing support where no possession is taken or improvements made. 38 L.R.A.(N.S.) 752.

—of oral contract to convey real estate in consideration of making improvements, where possession not taken. 33 L.R.A.(N.S.) 534.

—of contract to provide for intended husband or wife. 12 L.R.A.(N.S.) 232.

—of agreement on part of third person to make provision for parties to contemplated marriage. 7 L.R.A.(N.S.) 734.

—of contract to make will, or to leave property, in consideration of services to continue during promisor's lifetime, as affected by brevity of period elapsing before promisor's death. 9 L.R.A.(N.S.) 157.

—of contract to give child share of estate in consideration of surrender of child to promisor, as affected by noncompliance with statute prescribing mode of adoption. 8 L.R.A.(N.S.) 1130.

—of promise by beneficiary to pay proceeds of life insurance policy to third person. 40 L.R.A.(N.S.) 692.

—of contract between husband and wife to compromise pending or contemplated divorce suit. 60 L.R.A. 412.

—of contracts for the sale of corporate stock. 135 Am. St. Rep. 689; 50 L.R.A. 508; 31 L.R.A.(N.S.) 500.

—of contract to give security. 6 L.R.A.(N.S.) 585.

Sufficiency of possession alone as ground for granting specific performance of parcel gift of, or contract to convey, real property. 8 L.R.A.(N.S.) 870.

Specific performance of oral lease void under statute of frauds after lessee's entry into possession and making improvements. 3 L.R.A.(N.S.) 852.

Tender or payment of consideration as condition precedent to suit to enforce contract to convey realty consummated by vendor's exercise of option. 24 L.R.A.(N.S.) 21.

Inadequacy of consideration as ground for refusing specific performance. 15 Am. Dec. 299; 14 L.R.A.(N.S.) 317.

Lack of consideration as defense to action for specific performance of contract for sale of corporate stock. 50 L.R.A. 507; 31 L.R.A.(N.S.) 498.

Necessity in a complaint for specific performance of alleging facts showing adequacy of consideration for contract sought to be enforced. 19 L.R.A.(N.S.) 178.

Laches or delay as bar to suit for specific performance. 54 Am. Dec. 132; 50 L.R.A. 508; 31 L.R.A.(N.S.) 500.

Delay of infant or feme covert in paying purchase price or bringing suit as bar to action for specific performance of contract for sale of land of which time is not of the essence. 25 L.R.A.(N.S.) 639.

Jurisdiction of equity to decree specific performance of contract affecting real estate in other state or country. 69 L.R.A. 681; 28 L.R.A.(N.S.) 924.

May jurisdiction of suit for specific performance of a contract for conveyance of land within the territorial jurisdiction rest upon constructive service of process against a nonresident. 23 L.R.A.(N.S.) 1135.

As to similar provision in Cal. Civ. Code, § 3384, see *Krouse v. Woodward*, 110 Cal. 638, 42 Pac. 1084.

§ 7193. **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 every-

thing 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. [R. C. 1905, § 6610; Civ. C. 1877, § 1995; R. C. 1899, § 5025.]

In order to give right to enforcement of contract by decreeing specific performance there must be mutuality of remedy. *J. I. Case Threshing Mach. Co. v. Farnsworth*, 28 S. D. 432, 134 N. W. 819.

Specific performance of land contract cannot be enforced unless both parties are bound by contract. *Ugland v. Kolb*, 23 N. D. 158, 134 N. W. 879.

Specific performance only action maintainable where time for delivery of deed has arrived before suit is brought for price. *Shelly v. Mikkelsen*, 5 N. D. 22, 63 N. W. 210.

Written acceptance of offer for withdrawal binds both parties. *Townsend v. Kennedy*, 6 S. D. 47, 60 N. W. 164.

Party must be able to perform "completely or nearly so." *Black Hills Bank v. Kellogg*, 4 S. D. 312, 56 N. W. 1071.

Inapplicable to contract mutual as to obligation and remedy. *Pederson v. Dibble*, 12 N. D. 572, 98 N. W. 411.

Performance by party seeking to enforce specific performance of contract, is prerequisite where there is no mutuality of remedy. *Knudtson v. Robinson*, 18 N. D. 12, 118 N. W. 1051.

Action for specific performance may be maintained upon contract for conveyance of land signed only by vendor. *Beddow v. Flage*, 22 N. D. 53, 132 N. W. 637.

Specific performance will not be decreed unless contract is definite in its terms. *Shumway v. Kitzman*, 28 S. D. 577, 134 N. W. 325.

Necessity of mutuality of remedy and what is. 27 Am. St. Rep. 173.

Enforcement of option contracts. 21 L.R.A. 131; 118 Am. St. Rep. 592.

Right to specific performance of option to purchase as affected by lack of mutuality of obligation. 6 L.R.A.(N.S.) 403.

Tender or payment of consideration as a condition precedent to a suit for the specific performance of a contract to convey realty consummated by the vendee's exercise of an option. 24 L.R.A.(N.S.) 91.

Mutuality of remedy as affecting jurisdiction of action for specific performance of contract for sale of stock. 50 L.R.A. 506; 31 L.R.A.(N.S.) 496.

Mutuality of obligation as a condition of right to specific performance of a continuing contract. 6 L.R.A.(N.S.) 391; 38 L.R.A.(N.S.) 452.

When purchaser at judicial sale compelled to complete purchase. 21 L.R.A. 45.

Specific performance of contract signed by beneficiary but not by holder of legal title. 3 L.R.A.(N.S.) 884.

As to similar provision in Cal. Civ. Code, § 3386, see *Lattin v. Hazard*, 91 Cal. 87, 27 Pac. 515; *Krouse v. Woodward*, 110 Cal. 638, 42 Pac. 1084.

**§ 7194. 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. [R. C. 1905, § 6611; Civ. C. 1877, § 1996; R. C. 1899, § 5026.]

Contract for lease of realty for ninety-nine years is a transfer. *First Nat. Bank v. Spear*, 12 S. D. 108, 80 N. W. 166.

Vendee of land cannot be required to accept deed, unless vendor has title reasonably free from doubt. *Black Hills Bank v. Kellogg*, 4 S. D. 312, 56 N. W. 1071.

Presumption that breach of agreement to transfer real property cannot be adequately relieved by pecuniary compensation, is not conclusive. *Nelson v. Lybeck*, 21 S. D. 223, 111 N. W. 546.

As to action for damages for breach of contract to transfer personalty. *Lumley v. Miller*, 23 S. D. 16, 119 N. W. 1014.

Allegation that remedy at law is inadequate, is unnecessary in complaint for specific performance of contract to sell land. *Stensland v. Noel*, 28 S. D. 522, 134 N. W. 207.

When specific performance of a valid contract will be refused, the refusal not being because the property is of any particular class. 128 Am. St. Rep. 382.

As to similar provision in Cal. Civ. Code, § 3387, see *Glock v. Howard & W. Colony Co.*, 123 Cal. 1, 43 L.R.A. 199, 69 Am. St. Rep. 17, 55 Pac. 713; *Aikman v. Sanborn*, 5 Cal. Unrep. 961, 52 Pac. 729.

**§ 7195. Specific performance compelled though contract signed only by one.** A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed or offers to perform it on his part and the case is otherwise proper for enforcing specific performance. [R. C. 1905, § 6612; Civ. C. 1877, § 1997; R. C. 1899, § 5027.]

Written contract to sell land enforceable against owner, though signed only by him. *Gire v. Harris*, 14 S. D. 537, 86 N. W. 624; *McPherson v. Fargo*, 10 S. D. 611, 74 N. W. 1057, 65 Am. St. Rep. 723.

Action for specific performance may be maintained upon contract for conveyance of land signed only by vendor. *Beddow v. Flage*, 22 N. D. 53, 132 N. W. 637.

Right of party not bound because he did not sign the contract, to enforce specific performance against a party who did sign. 6 L.R.A.(N.S.) 397; 28 L.R.A.(N.S.) 680.

**§ 7196. Compelled though penalty imposed or damages liquidated.** A contract otherwise proper to be specifically enforced may be thus enforced, though a penalty is imposed or the damages are liquidated for its breach and the party in default is willing to pay the same. [R. C. 1905, § 6613; Civ. C. 1877, § 1998; R. C. 1899, § 5028.]

Right to specific performance as affected by provision for liquidated damages. 2 L.R.A.(N.S.) 210.

Stipulation for liquidated damages in contract not to engage in business, as affecting equitable jurisdiction to enjoin breach thereof. 10 L.R.A.(N.S.) 204.

As to similar provision in Cal. Civ. Code, § 3389, see *Glock v. Howard & W. Colony Co.*, 123 Cal. 1, 43 L.R.A. 199, 69 Am. St. Rep. 17, 55 Pac. 713; *Fleishman v. Woods*, 135 Cal. 256, 67 Pac. 276; *Aikman v. Sanborn*, 5 Cal. Unrep. 961, 52 Pac. 729.

**§ 7197. What obligations cannot be enforced.** The following obligations 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 power lawfully to perform when required to do so.
5. An agreement to procure the act or consent of the wife of the contracting party or of any other third person; or,
6. An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable. [R. C. 1905, § 6614; Civ. C. 1877, § 1999; R. C. 1899, § 5029.]

1. Right to mandatory injunction to compel specific performance of contract for services. 20 L.R.A. 167.

Specific performance of contracts of service considered with reference to the general principles which define the limits of equitable jurisdiction. 6 L.R.A.(N.S.) 1115.

Of contracts calling for services of a personal nature. 140 Am. St. Rep. 55.

3. Specific performance of agreement to submit to arbitration. 15 L.R.A. 142.

6. Certainty in contract requisite for specific performance. 26 Am. Dec. 661.

Uncertainty as to time, as affecting right to specific performance. 2 L.R.A.(N.S.) 221.

**§ 7198. When it cannot be enforced against one.** Specific performance cannot be enforced against a party to a contract in any of the following cases:

1. If he has not received an adequate consideration for the contract.
2. If it is not as to him just and reasonable.
3. If his assent was obtained by misrepresentation, concealment, circumvention or unfair practice of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled; or,
4. If his assent was given under the influence of mistake, misapprehension or surprise, except that when the contract provides for compensation in case of mistake, a mistake within the scope of such provision may be compensated for and the contract specifically enforced in other respects, if proper to be so enforced. [R. C. 1905, § 6615; Civ. C. 1877, § 2000; R. C. 1899, § 5030.]

As to similar provision in Cal. Civ. Code, § 3391, see *Kelly v. Central P. R. Co.*, 74 Cal. 557, 5 Am. St. Rep. 470, 16 Pac. 386; *Morrill v. Everson*, 77 Cal. 114, 19 Pac. 190; *Ward v. Yorba*, 123 Cal. 447, 56 Pac. 58.

1. Specific performance of contract for sale of land worth one thousand six hundred dollars for consideration of five hundred and fifty dollars will not be decreed. *Phelean v. Neary*, 22 S. D. 265, 117 N. W. 142.

3. Fraudulent expression of opinion as a defense to specific performance. 35 L.R.A. 433.

Fraud as defense to specific performance of contract for sale of corporate stock. 50 L.R.A. 508; 31 L.R.A.(N.S.) 500.

Specific performance in case of misrepresentation as to location of property. 38 L.R.A.(N.S.) 306.

Effect of concealment or misrepresentation of fact affecting value of real estate by purchaser who seeks specific performance. 30 L.R.A.(N.S.) 755.

4. Effect of mistake of fact by defendant on right to the specific performance of a contract induced thereby. 15 L.R.A.(N.S.) 81.

Right to specific performance as affected by vendor's ignorance of race or character of purchaser. 32 L.R.A.(N.S.) 125.

**§ 7199. Same in favor of one.** Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party, except when his failure to perform is only partial and either entirely immaterial or capable of being fully compensated, in which case specific performance may be compelled upon full compensation being made for the default. [R. C. 1905, § 6616; Civ. C. 1877, § 2001; R. C. 1899, § 5031.]

Substantial performance of building contract entitles to pay, though there are slight omissions. *Aldrich v. Wilmarth*, 3 S. D. 523, 54 N. W. 811.

Builder contractor cannot recover, unless substantial compliance. *Hulst v. Asso.*, 9 S. D. 144, 68 N. W. 200.

Purchaser of 7-foot, not required to receive 6-foot binder. *Osborne & Co. v. Martin*, 4 S. D. 297, 56 N. W. 905.

Contract to convey land "by good and sufficient warranty deed" not complied with by deed containing an exception of a mortgage. *Fletcher v. Arnett*, 4 S. D. 615, 57 N. W. 915.

Failure of purchaser to promptly perform, which is capable of exact compensation, will not prevent specific performance of contract at suit of assignee of purchaser. *J. I. Case Threshing Mach. Co. v. Farnsworth*, 28 S. D. 432, 134 N. W. 819.

**§ 7200. 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. [R. C. 1905, § 6617; Civ. C. 1877, § 2002; R. C. 1899, § 5032.]

Purchaser of land cannot be compelled to accept deed, unless title reasonably clear. *Easton v. Lockhart*, 10 N. D. 181, 86 N. W. 697; *Black Hills Bank v. Kellogg*, 4 S. D. 312, 56 N. W. 1071.

Written contract not expressing agreement may be revised. *Littlejohn v. Creamery Co.*, 14 S. D. 312, 85 N. W. 588.

Reformation of deed of probate judge to lot in town site. *McVeagh v. Burns*, 2 S. D. 83, 48 N. W. 835.

Purchaser under contract for sale of real property not liable in damages for refusing to accept property with cloud on title. *Godfrey v. Rosenthal*, 17 S. D. 452, 97 N. W. 365.

Allowing vendor reasonable time to perfect title by decree for specific performance. 30 L.R.A.(N.S.) 25.

Right of vendee to specific performance with abatement from purchase price, where vendor is unable to convey good and unincumbered title. 10 L.R.A.(N.S.) 117; 35 L.R.A.(N.S.) 1195.

**§ 7201. 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. [R. C. 1905, § 6618; Civ. C. 1877, § 2003; R. C. 1899, § 5033.]

As to similar provision in Cal. Civ. Code, § 3395, see *Blakeman v. Miller*, 136 Cal. 138, 89 Am. St. Rep. 120, 68 Pac. 587.

#### ARTICLE 8.—REVISION AND RESCISSION OF CONTRACTS.

**§ 7202. 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. [R. C. 1905, § 6619; Civ. C. 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.

As to equity revising contract which, by mistake, describes too much land. *Benesch v. Travelers' Ins. Co.*, 14 N. D. 39, 108 N. W. 405.

Jurisdiction of equity to cancel instrument on ground of fraud. 5 L.R.A.(N.S.) 1086.  
 Power of equity to take jurisdiction of suit to cancel insurance policy for fraud, and to enjoin action at law on the policy. 12 L.R.A.(N.S.) 881.  
 Jurisdiction of suit to reform deed of land in another state or country. 69 L.R.A. 685.  
 Reformation of deeds as against persons not in being. 8 L.R.A.(N.S.) 66.  
 Relief from deed prepared by grantees which does not protect the grantor's rights. 13 L.R.A.(N.S.) 1089.  
 Reformation of instruments on the ground of mistake. 30 Am. St. Rep. 621; 117 Am. St. Rep. 227.  
 Reformation of contract because of mistake of law as to its effect. 28 L.R.A.(N.S.) 900.

Reformation of insurance policy for mistake of soliciting agent. 11 L.R.A.(N.S.) 357.  
 Reformation of mortgage after foreclosure. 39 L.R.A.(N.S.) 90.

As to similar provision in Cal. Civ. Code, § 3393, see *Higgins v. Parsons*, 65 Cal. 280, 3 Pac. 881; *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. 179; *Cleghorn v. Zumwalt*, 83 Cal. 155, 23 Pac. 294; *Ward v. Waterman*, 85 Cal. 488, 24 Pac. 930; *West Coast Lumber Co. v. Apfeld*, 86 Cal. 335, 24 Pac. 993; *Wilson v. Moriarty*, 88 Cal. 207, 26 Pac. 85; *Stevens v. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216, 44 Pac. 670; *Holt v. Holt*, 120 Cal. 67, 52 Pac. 119; *Capelli v. Dondero*, 123 Cal. 324, 55 Pac. 1057; *San Jose Ranch Co. v. San Jose Land & Water Co.*, 132 Cal. 582, 64 Pac. 1097; *Gardner v. California Guarantee Invest. Co.*, 137 Cal. 71, 69 Pac. 844; *Eureka v. Gates*, 137 Cal. 89, 68 Pac. 850; *Kee v. Davis*, 137 Cal. 456, 70 Pac. 294; *Enos v. Stewart*, 138 Cal. 112, 70 Pac. 1005; *South Tule Independent Ditch Co. v. King*, 144 Cal. 450, 77 Pac. 1032.

**§ 7203. 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. [R. C. 1905, § 6620; Civ. C. 1877, § 2005; R. C. 1899, § 5035.]

As to similar provision in Cal. Civ. Code, § 3400, see *San Jose Ranch Co. v. San Jose Land & Water Co.*, 132 Cal. 582, 64 Pac. 1097.

**§ 7204. 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. [R. C. 1905, § 6621; Civ. C. 1877, § 2006; R. C. 1899, § 5036.]

As to similar provision in Cal. Civ. Code, § 3401, see *Ward v. Waterman*, 85 Cal. 488, 24 Pac. 930; *San Jose Ranch Co. v. San Jose Land & Water Co.*, 132 Cal. 582, 64 Pac. 1097.

**§ 7205. First revised, then enforced.** A contract may be first revised and then specifically enforced. [R. C. 1905, § 6622; Civ. C. 1877, § 2007; R. C. 1899, § 5037.]

Necessity for reforming insurance policy before recovery in case of mistake. 2 L.R.A.(N.S.) 548.

Action on policy as bar to action to reform it. 12 L.R.A.(N.S.) 907.

As to similar provision in Cal. Civ. Code, § 3402, see *San Jose Ranch Co. v. San Jose Land & Water Co.*, 132 Cal. 582, 64 Pac. 1097; *Gardner v. California Guarantee Invest. Co.*, 137 Cal. 71, 69 Pac. 844; *Kee v. Davis*, 137 Cal. 456, 70 Pac. 294.

**§ 7206. 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 5934; 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.
- [R. C. 1905, § 6623; Civ. C. 1877, § 2008; R. C. 1899, § 5038.]

As to equity rescinding contract which described more land than one of the parties supposed. *Benesh v. Travelers' Ins. Co.*, 14 N. D. 39, 103 N. W. 405.

Right to cancellation of contract made with foreign corporation because it has not complied with the laws entitling it to do business within the state. 21 L.R.A.(N.S.) 707.

As to similar provision in Cal. Civ. Code, § 3406, see *Joshua Hendy Mach. Works v. American Steam Boiler Ins. Co.*, 86 Cal. 248, 21 Am. St. Rep. 33, 24 Pac. 1018; *Toby v. Oregon P. R. Co.*, 98 Cal. 490, 33 Pac. 550; *Kelley v. Owens*, 120 Cal. 502, 47 Pac. 369, 52 Pac. 727; *Smith v. Blandin*, 133 Cal. 441, 65 Pac. 894; *Hartwig v. Clark*, 138 Cal. 668, 72 Pac. 149; *Donnelly v. Rees*, 141 Cal. 56, 74 Pac. 433.

**§ 7207. Not for mere mistake.** Rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to sub-

stantially the same condition as if the contract had not been made. [R. C. 1905, § 6624; Civ. C. 1877, § 2009; R. C. 1899, § 5039.]

On allowing rescission of contract. *Wolfinger v. Thomas*, 22 S. D. 37, 133 Am. St. Rep. 900, 115 N. W. 100.

As to similar provision in Cal. Civ. Code, § 3407, see *Goodrich v. Lathrop*, 94 Cal. 56, 28 Am. St. Rep. 91, 29 Pac. 329; *Toby v. Oregon P. R. Co.*, 98 Cal. 490, 33 Pac. 550; *Maddock v. Russell*, 109 Cal. 417, 42 Pac. 139; *Jurgens v. New York L. Ins. Co.*, 114 Cal. 161, 45 Pac. 1054, 46 Pac. 386; *Kelley v. Owens*, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797.

§ 7208. **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. [R. C. 1905, § 6625; Civ. C. 1877, § 2010; R. C. 1899, § 5040.]

Contract vendor who received check for first payment but neglected to give notice of protest upon nonpayment because of bank's insolvency, was obliged to pay back amount of check before he could cancel contract. *Mankey v. Hoyt*, 27 S. D. 561, 132 N. W. 230.

As to similar provision in Cal. Civ. Code, § 3408, see *Goodrich v. Lathrop*, 94 Cal. 56, 28 Am. St. Rep. 91, 29 Pac. 329; *Toby v. Oregon P. R. Co.*, 98 Cal. 490, 33 Pac. 550; *Kelley v. Owens*, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797.

#### ARTICLE 9.— CANCELLATION OF INSTRUMENTS.

§ 7209. **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. [R. C. 1905, § 6626; Civ. C. 1877, § 2011; R. C. 1895, § 5041.]

Complaint for cancellation of fraudulent deed should state facts showing the plaintiff to be entitled to such relief. *Nation v. Cameron*, 2 D. 347, 11 N. W. 525.

Junior mortgagee has action to cancel prior mortgage voidable as to himself. *Rosenbaum v. Foss*, 4 S. D. 184, 56 N. W. 114.

Cancellation of *lis pendens* improperly filed. *Hale v. Grisby*, 12 S. D. 198, 80 N. W. 199.

Instrument no cloud upon title if invalidity appears on face. *Grant County v. Mortgage Co.*, 3 S. D. 390, 53 N. W. 746; *Morris v. McNight*, 1 N. D. 266, 47 N. W. 375.

Instrument not invalid on its face, when evidence required to show its invalidity. *Rosenbaum v. Foss*, 4 S. D. 184, 56 N. W. 114.

Certificate of sale not void on its face. *Brace v. Van Eps*, 12 S. D. 191, 80 N. W. 197.

Cancellation of instruments for forgery. 92 Am. St. Rep. 272.

Cancellation notwithstanding a defense at law. 9 Am. St. Rep. 859.

Right to cancellation of contract made with foreign corporation because it has not complied with the laws entitling it to do business within the state. 21 L.R.A.(N.S.) 707.

Equity jurisdiction to cancel oil or gas lease for failure to develop the leased premises. 34 L.R.A.(N.S.) 34.

Power of equity to cancel false record. 14 L.R.A.(N.S.) 304.

False statements as to use to which property is to be put as ground for rescission of deed. 32 L.R.A.(N.S.) 127.

Right, as against subsequent bona fide purchaser, to avoid deed because of false impression, induced by fraud, as to contents or character of paper signed. 36 L.R.A.(N.S.) 537.

Mistake of law as to effect of instrument as ground of cancellation of instrument. 28 L.R.A.(N.S.) 785.

May deed of real property executed by an incompetent not judicially declared such be avoided in an action at law. 19 L.R.A.(N.S.) 461.

Power of equity to take jurisdiction of suit to cancel policy for fraud and to enjoin action at law on the policy. 12 L.R.A.(N.S.) 881.

Retention of policy as waiver of insurer's mistake or fraud as to right to cancel. 67 L.R.A. 716.

As to similar provision in Cal. Civ. Code, § 3412, see *Wiard v. Brown*, 59 Cal. 194; *Castro v. Barry*, 79 Cal. 443, 21 Pac. 946; *Ingram v. Smith*, 83 Cal. 234, 28 Pac. 298; *Bradley v. Anglo-American Gas Control Co.*, 102 Cal. 627, 36 Pac. 1011; *Angus v. Craven*, 132 Cal. 691, 64 Pac. 1091.

§ 7210. **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. [R. C. 1905, § 6627; Civ. C. 1877, § 2013; R. C. 1899, § 5042.]

As to similar provision in Cal. Civ. Code, § 3414, see *Joshua Hendy Mach. Works v. American Steam Boiler Ins. Co.*, 86 Cal. 248, 21 Am. St. Rep. 33, 24 Pac. 1018.



## ARTICLE 10.—PREVENTIVE RELIEF.

§ 7211. **How granted.** Preventive relief is granted by injunction, provisional or final. [R. C. 1905, § 6628; Civ. C. 1877, § 2014; R. C. 1899, § 5043.]

Railroad cannot be enjoined from operating road on its own property until payment of damages to other property in neighborhood. *Hyde v. Minnesota, D. & P. R. Co.*, 24 S. D. 386, 123 N. W. 849.

§ 7212. **Provisional injunctions.** Provisional injunctions are regulated by the code of civil procedure. [R. C. 1905, § 6629; Civ. C. 1877, § 2015; R. C. 1899, § 5044.]

§ 7213. **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. [R. C. 1905, § 6630; Civ. C. 1877, § 2016; R. C. 1899, § 5045.]

Railroad cannot be enjoined from operating road on its own property until payment of damages to other property in neighborhood. *Hyde v. Minnesota, D. & P. R. Co.*, 24 S. D. 386, 123 N. W. 849.

Injunction in aid of lowest bidder on public contract. 28 L.R.A. 711; 30 L.R.A.(N.S.) 127.

—against trespasses on real estate. 11 Am. Dec. 498; 53 Am. Rep. 346; 99 Am. St. Rep. 731.

—against repeated trespass. 13 L.R.A.(N.S.) 173; 21 L.R.A.(N.S.) 417.

—to prevent trespass of animals or fowls. 48 L.R.A.(N.S.) 179.

—to protect trees on boundary. 46 L.R.A.(N.S.) 5.

—against breach of agreement by railroad company as to crossing provided for in deed to railroad of right of way. 48 L.R.A.(N.S.) 388.

—to prevent interference by railroad with crossing stipulated for in deed to railroad of right of way. 48 L.R.A.(N.S.) 378.

—against construction or use of crossing provided for in deed to railroad of right of way. 48 L.R.A.(N.S.) 389.

—against waste of oil or gas causing injury to neighboring wells. 48 L.R.A.(N.S.) 170.

—to prevent breach of contract. 90 Am. St. Rep. 634.

—against improper use of leased premises. 59 Am. Dec. 70.

Right to enjoin sale under a power in a mortgage against which the statute of limitations has run. 6 L.R.A.(N.S.) 510.

Doctrine of comparative injury in suit to enjoin nuisance. 31 L.R.A.(N.S.) 881; 39 L.R.A.(N.S.) 580.

As to similar provision in Cal. Civ. Code, § 3422, see *McLaughlin v. Del Re*, 64 Cal. 472, 2 Pac. 244; *Spreckels v. Hawaiian Commercial & Sugar Co.*, 117 Cal. 377, 49 Pac. 353.

1. Irreparable injury, what is within the meaning of the law of. 1 Am. St. Rep. 374. Necessity that injury be irreparable. 43 L.R.A.(N.S.) 262.

Insufficiency of allegation of irreparable injury in action to enjoin trespass to cut timber. 22 L.R.A. 239.

As ground for injunction against collection of illegal taxes. 22 L.R.A. 704.

—as affecting right to injunction against erection, maintenance or removal of fences or gates on ground of nuisance. 7 L.R.A.(N.S.) 78.

Injunction against sale of, or proposal to sell real property to person, or for purpose regarded as undesirable. 44 L.R.A.(N.S.) 228.

—against the publication of letters. 49 Am. Dec. 180.

Injury to one's business or interests as ground for an injunction against an illegal business establishment not directly affecting other property. 45 L.R.A.(N.S.) 827.

2. Effect of stipulation for liquidated damages in contract not to engage in business, upon equitable jurisdiction to enjoin breach thereof. 10 L.R.A.(N.S.) 204.

Injunction to prevent breach of stipulation to handle or use the product of one producer only. 10 L.R.A.(N.S.) 475.

—against breach by employe of agreement not to engage in a competing business. 16 L.R.A.(N.S.) 389.

—against breach of covenant not to enter another's employment as affected by distinction between procuring specific performance of contract and preventing injury to business. 35 L.R.A.(N.S.) 119.

Injunction to prevent employe from entering service of rival in violation of agreement. 31 L.R.A.(N.S.) 249.

3. Injunction against trespass to cut timber on ground of multiplicity of suits. 22 L.R.A. 236.

Multiplicity of suits as ground for injunction against collection of illegal taxes. 22 L.R.A. 703.

—as ground for injunction to compel or prevent erection, maintenance or removal of fences or gates. 7 L.R.A.(N.S.) 55.

Power of equity to take jurisdiction because of multiplicity of actions at law for personal injuries growing out of a single act. 20 L.R.A.(N.S.) 848; 35 L.R.A.(N.S.) 491.

4. Surety's right prior to obtaining a judgment or lien to enjoin principal's transfer of property to defraud him. 15 L.R.A.(N.S.) 484.

Right to injunction during lifetime of one who has conveyed or is about to convey property in violation of agreement to leave same at his death to complainant. 18 L.R.A.(N.S.) 218.

Right to injunction against transfer by husband in fraud of wife's support. 18 L.R.A.(N.S.) 1156.

**§ 7214. 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. [R. C. 1905, § 5631; Civ. C. 1877, § 2017; R. C. 1899, § 5046; 1901, ch. 108.]

Not granted to restrain trespass upon realty except in special cases. *Beatty v. Smith*, 14 S. D. 24, 84 N. W. 208.

Not granted to oust defendant pending action of ejectment. *Cathalicon Co. v. Ferguson*, 7 S. D. 503, 64 N. W. 539; *Cole v. Cady*, 2 D. 29, 3 N. W. 322.

Owner restrained from interfering with another's possession pending appeal cannot maintain other action for possession in justice court. *Dennett v. Reisdorfer*, 15 S. D. 466, 90 N. W. 138.

District court may entertain jurisdiction of action to enjoin pure food commission from destroying plaintiff's business. *State ex rel. Ladd v. District Ct.*, 17 N. D. 285, 15 L.R.A.(N.S.) 331, 115 N. W. 675.

—against pleading the statute of limitations. 51 Am. Dec. 700; 75 Am. Dec. 84.

As to similar provision in Cal. Civ. Code, § 3423, see *People ex rel. Atty-Gen. v. Shasta County*, 75 Cal. 179, 16 Pac. 776; *Payne v. English*, 79 Cal. 540, 21 Pac. 952; *Spreckels v. Hawaiian Commercial & Sugar Co.*, 117 Cal. 377, 49 Pac. 353; *Wright v. Superior Ct.*, 139 Cal. 469, 73 Pac. 145; *Glide v. Superior Ct.*, 147 Cal. 21, 81 Pac. 225.

1. Right to enjoin prosecution of collusive suit in court of co-ordinate jurisdiction. 11 L.R.A.(N. S.) 581.

Application to governing body of municipality for relief, as condition of right of citizen to maintain suit to enjoin action by municipality. 8 L.R.A.(N.S.) 574.

Right to enjoin garnishment of wages because of rule of employer providing for discharge of employes whose wages are garnished. 6 L.R.A.(N.S.) 491.

Injunction against repeated garnishment of exempt wages. 10 L.R.A.(N.S.) 983.

—against criminal proceedings. 21 L.R.A. 84; 2 L.R.A.(N.S.) 631; 25 L.R.A.(N.S.) 193; 34 L.R.A.(N.S.) 454; 35 Am. St. Rep. 670.

—against sale of personal property under execution. 111 Am. St. Rep. 97; 30 L.R.A. 99.

—to prevent clouds on titles by execution sales. 62 Am. Dec. 523.

—to restrain the collection of taxes and assessments. 69 Am. Dec. 198; 23 L.R.A. 699.

—against sale of property for illegal taxes. 69 Am. Dec. 198; 49 Am. Rep. 287; 23 Am. Rep. 622; 53 Am. Rep. 110.

—against enforcement of judgment as aid to equitable set-off against judgment creditor. 35 L.R.A.(N.S.) 142.

—against enforcement of judgment on betting and gambling contracts. 48 L.R.A. 847.

Injunction against enforcement judgment for want of jurisdiction or against judgments which are void. 31 L.R.A. 200.

— for errors and irregularities. 30 L.R.A. 700.

— for defenses existing prior to rendition. 31 L.R.A. 747.

— for matters arising subsequently to rendition. 30 L.R.A. 560.

Power of equity to enjoin enforcement of judgment in action at law, in order to retain the status quo pending an appeal from such judgment. 25 L.R.A. (N.S.) 828.

3. Injunction against action or proceedings in foreign jurisdiction. 21 L.R.A. 71; 25 L.R.A. (N.S.) 267; 56 Am. Rep. 663; 59 Am. St. Rep. 880.

— against action or proceeding in foreign jurisdiction to prevent fraud. 25 L.R.A. (N.S.) 268.

— against suit in another state to evade local exemption laws. 15 L.R.A. (N.S.) 1008.

Jurisdiction to restrain legal proceedings with respect to land in another state or country. 69 L.R.A. 689; 7 L.R.A. (N.S.) 114.

6. One having prima facie title to office will not be restrained from exercising control pending litigation. *State v. Herreid*, 10 S. D. 16, 71 N. W. 319.

Granting of temporary injunction restraining county officers from removing their offices pending determination of contest, in relation thereto was not abuse of discretion. *Shaw v. Circuit Ct.*, 27 S. D. 49, 129 N. W. 907.

7. Not granted to prevent legislative act by municipal corporation. *State v. Thorsen*, 9 S. D. 149, 68 N. W. 202, 33 L.R.A. 532.

Injunction against illegal acts of municipal and other public corporations. 3 Am. St. Rep. 92.

— against enactment of municipal ordinances. 36 Am. St. Rep. 449; 13 L.R.A. 344; 2 L.R.A. (N.S.) 152.

— against enforcement of ordinances. 118 Am. St. Rep. 372.

— against prosecutions under ordinances. 21 L.R.A. 86.

Right of taxpayer, in absence of statute, to enjoin unlawful expenditures by municipality. 36 L.R.A. (N.S.) 1.

## CHAPTER 111.

### SPECIAL RELATIONS OF DEBTOR AND CREDITOR.

ARTICLE 1. GENERAL PRINCIPLES, §§ 7215-7219.

2. FRAUDULENT INSTRUMENTS AND TRANSFERS, §§ 7220-7223.

#### ARTICLE 1.—GENERAL PRINCIPLES.

§ 7215. **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. [R. C. 1905, § 6632; 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.

As to debt and obligation not being synonymous. *Soanesyn v. Akin*, 12 N. D. 227, 97 N. W. 557.

As to similar provision in Cal. Civ. Code, § 3429, see *Melvin v. State*, 121 Cal. 16, 53 Pac. 416.

§ 7216. **Creditor defined.** A creditor within the meaning of this chapter is one whose favor an obligation exists by reason of which he is or may become entitled to the payment of money. [R. C. 1905, § 6633; Civ. C. 1877, § 2019; R. C. 1899, § 5048.]

Should be liberally construed in relation to fraudulent transfers. *Soly v. Aasen*, 10 N. D. 108, 86 N. W. 108.

Vendor, as to whom sale is void by reason of his mental incapacity, is a "creditor." *First Nat. Bank v. Calkins*, 16 S. D. 445, 93 N. W. 646.

"Creditor" includes one existing before chattel mortgage. *Pierson v. Hickey*, 16 S. D. 46, 91 N. W. 389.

§ 7217. **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. [R. C. 1905, § 6634; Civ. C. 1877, § 2020; R. C. 1899, § 5049.]

Transfer of funds made in good faith before judgment not fraudulent. *McLaughlin v. Bank*, 6 D. 406, 43 N. W. 715.

§ 7218. **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. [R. C. 1905, § 6635; Civ. C. 1877, § 2021; R. C. 1899, § 5050.]

In absence of fraud debtor may prefer one creditor to another. Meyer B. & S. Co. v. Shenberg 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, 24 L.R.A. 524; Red River Bank v. Barnes, 8 N. D. 432, 79 N. W. 880; Jewett v. Downs, 6 S. D. 319, 60 N. W. 76; First Nat. Bank v. North, 2 S. D. 480, 51 N. W. 96; Salemonson v. Thompson, 13 N. D. 182, 101 N. W. 320; Wannemacher v. Merrill, 22 N. D. 46, 132 N. W. 412.

Debtor may execute trust deed of all his property for benefit of those who will cancel their claims for proportion received. Joas v. Jordan, 21 S. D. 379, 113 N. W. 73.

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.

Preference by mortgage or sale as an assignment for creditors. 37 L.R.A. 337.

Conveyance or transfer to indemnify sureties or indorsers as a voluntary assignment for creditors. 31 L.R.A.(N.S.) 332.

Right of insolvent debtor to transfer his assets to a third person, who is to apply the proceeds to the claims of such creditors as he sees fit. 21 L.R.A.(N.S.) 513.

Effect of taking an excessive amount of property from debtor in payment of a claim as a fraud against other creditors. 21 L.R.A.(N.S.) 222.

Right of creditor to purchase from debtor. 36 L.R.A. 335.

As to similar provision in Cal. Civ. Code, § 3432, see Merced Bank v. Ivett, 127 Cal. 134, 59 Pac. 393.

**§ 7219. 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. [R. C. 1905, § 6636; 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.

**§ 7220. 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. [R. C. 1905, § 6637; Civ. C. 1877, § 2023; R. C. 1899, § 5052.]

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 D. 167, 28 N. W. 855.

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. Alterton, 151 U. S. 607, 38 L.ed. 286; Burt v. Gotzian & Co., 102 Fed. 937, 43 C. C. A. 59.

Fraudulent grantee cannot hold land as security for advances. Daisy Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271; Shauer v. Alterton, 151 U. S. 607, 38 L.ed. 286; Burt v. Gotzian & Co., 102 Fed. 937, 43 C. C. A. 59.

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. 936.

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, 36 Am. St. Rep. 720.

As to sufficiency of allegations in complaint and answer under this section, see Probert v. McDonald, 2 S. D. 495, 51 N. W. 212.

Complaint to set aside conveyance to defraud creditors and state that debtor has conveyed all his property. Probert v. McDonald, 2 S. D. 495, 51 N. W. 212, 39 Am. St. Rep. 796.

Term "creditor" includes all parties who have demands. Soly v. Aasen, 10 N. D. 108, 86 N. W. 108.

A statement of the law. Young v. Harria, 4 D. 367, 32 N. W. 97.

One who knowingly takes conveyance or assignment to aid or abet scheme to defraud creditors cannot hold fraudulent instrument or any interest under it. *Burt v. C. Gotzian & Co.*, 102 Fed. 937, 43 C. C. A. 59; *Herman v. McKinney*, 47 Fed. 758.

Conveyance of homestead from husband to wife not fraudulent as to creditors. *First State Bank v. O'Leary*, 13 S. D. 204, 83 N. W. 45.

Assignment made to delay or defraud creditors is void as to them. (State) *Enderlin Bank v. Rose*, 4 N. D. 319, 58 N. W. 514, 26 L.R.A. 533.

Whether transfer is fraudulent is question of intent. *Dalrymple v. Loan & Trust Co.*, 9 N. D. 306, 83 N. W. 245; *Cahn v. Bank*, 1 S. D. 237, 46 N. W. 185.

Reservation of exemptions in assignment for creditors not fraudulent. *Red River Valley Bank v. Freeman*, 1 N. D. 196, 46 N. W. 36.

Property fraudulently conveyed is subject to levy under execution. *Salemonson v. Thompson*, 13 N. D. 182, 101 N. W. 320.

Fraudulent intent is vital fact which renders conveyance void. *Stevens v. Meyers*, 14 N. D. 398, 104 N. W. 529.

Bill of sale to son without consideration with secret agreement to pay certain creditors is void as in fraud of creditors. *Hall v. Feeney*, 22 S. D. 541, 21 L.R.A.(N.S.) 513, 18 N. W. 1038.

Verdict may be directed where, upon undisputed facts, instrument on which rights of parties depends, being pledge, chattel mortgage or absolute conveyance of title, with secret reservation of interest, is void. *Walklin v. Horswill*, 24 S. D. 191, 123 N. W. 668.

Redemption of property from execution sale by judgment debtor in name of another is a fraudulent conveyance. *Lynch v. Burt*, 132 Fed. 417.

As to what are voluntary transfers, see notes, 7 Am. Dec. 362; 14 Am. Dec. 703; 28 Am. Rep. 721.

Presumption that voluntary transfers are in fraud of creditors. 119 Am. St. Rep. 556. Pre-existing debt as consideration for bona fide purchase of property not negotiable. 36 L.R.A. 161.

When will a purchaser of property for less than its value, without fraudulent intent, be regarded as a trustee for creditors. 5 L.R.A.(N.S.) 395.

Rights and title of parties under fraudulent conveyance. 34 Am. Dec. 765.

Purchaser's ignorance of debtor's fraudulent intent in conveyance to him. 36 L.R.A. 338.

Effect of vendee's knowledge of fraudulent intent. 34 Am. St. Rep. 395.

Effect of fraudulent conveyance on title of fraudulent grantee as to parties not creditors. 67 L. R.A. 889.

Effect of fraudulent conveyance on title of bona fide purchaser from fraudulent grantee. 67 L.R.A. 891; 28 Am. Dec. 688; 28 Am. Dec. 734.

Effect of fraudulent conveyance on title conveyed by bona fide purchaser to one having knowledge of the fraud. 67 L.R.A. 898.

Invalidation by participation in debtor's fraud of transfer for good consideration. 32 L.R.A. 33.

Participation by purchaser in vendor's fraud which will invalidate transfer for good consideration. 32 L.R.A. 33.

Participation by creditor in fraudulent intent of debtor which will make a transfer to pay or secure his debt invalid as to other creditors. 31 L.R.A. 609.

Effect of relationship to show participation by creditors in debtor's fraudulent intent. 31 L.R.A. 645.

Transfers between husband and wife as fraudulent conveyances. 19 Am. St. Rep. 657; 20 Am. St. Rep. 715; 90 Am. St. Rep. 497.

Burden of proof as to fraud against creditors in transfer from husband to wife. 56 L.R.A. 823.

Validity of arrangement for household finances as against husband's creditors. 43 L.R.A.(N.S.) 685.

Admissibility of declarations by vendor made out of court as to his purpose in making a conveyance or transfer attacked as fraudulent as against creditors. 41 L.R.A.(N.S.) 1.

Federal courts following state decisions as to questions in relation to fraudulent transfers of property. 40 L.R.A.(N.S.) 420.

Recovery of nonexempt property conveyed to avoid nonexistent or unfounded demand. 1 L.R.A.(N.S.) 1007.

Declarations of vendor, as evidence against his vendee to show fraud. 42 Am. Dec. 631.

Transfers of exempt property. 20 Am. Rep. 150.

Right of grantee to avoid actions for the purchase price. 30 Am. Rep. 517.

Proof of fraud. 11 Am. St. Rep. 757.

Relief from fraudulent conveyance after death of grantor. 135 Am. St. Rep. 323.

Relief in equity from fraudulent conveyance at instance of one of the parties. 7 Am. St. Rep. 537.

Right of grantor to obtain relief from fraudulent conveyance. 15 Am. Dec. 599.

Right of client to recover property placed in name of his attorney in order to defraud creditors. 37 L.R.A.(N.S.) 161.

As to similar provision in Cal. Civ. Code, § 3439, see *Windhaus v. Bootz*, 3 Cal. Unrep. 351, 25 Pac. 404; *Francisco v. Aguirre*, 94 Cal. 180, 29 Pac. 495; *Salisbury v. Burr*, 114

Cal. 451, 46 Pac. 270; *Murray v. Murray*, 115 Cal. 266, 37 L.R.A. 626, 53 Am. St. Rep. 97, 47 Pac. 57; *First Nat. Bank v. Menke*, 128 Cal. 103, 60 Pac. 675; *Tuers v. Tuers*, 131 Cal. 625, 83 Pac. 1008; *Greer v. Greer*, 135 Cal. 121, 67 Pac. 20; *Roberts v. Burr*, 135 Cal. 156, 67 Pac. 46.

§ 7221. **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. [R. C. 1905, § 6638; Civ. C. 1877, § 2024; 1893, ch. 78, § 1; R. C. 1895, § 5053.]

Assignment free from fraud in inception is not invalidated by subsequent fraudulent acts. *Wright v. Lee*, 10 S. D. 263, 72 N. W. 895.

Possession may be by agent, and that agent may be vendor. *Grady v. Baker*, 3 D. 296, 19 N. W. 417.

Filing chattel mortgage is equivalent to actual delivery and continued change of possession. *Reichert v. Simons*, 6 D. 239, 42 N. W. 657.

Transfer of personal property must be accompanied by open and visible change in possession, or it will be void as to creditors. *Shauer v. Alterton*, 151 U. S. 607, 38 Led. 286, 14 S. Ct. R. 442; *Conrad v. Smith*, 2 N. D. 408, 51 N. W. 720; *Howard v. Dwight*, 8 S. D. 398, 66 N. W. 935; *Greeley v. Winsor*, 1 S. D. 117, 45 N. W. 325, 36 Am. St. Rep. 720; *Longley v. Daly*, 1 S. D. 257, 46 N. W. 247; *Black Hills Mercantile Co. v. Gardiner*, 5 S. D. 246, 58 N. W. 557; *Noyes v. Belding*, 6 S. D. 629, 62 N. W. 953; *First Nat. Bank v. Comford*, 4 D. 167, 28 N. W. 855; *Conrad v. Smith*, 6 N. D. 337, 70 N. W. 815; *State v. Elevator Co.*, 6 N. D. 41, 68 N. W. 81; *Morrison v. Oium*, 3 N. D. 76, 54 N. W. 288.

Question of change of possession is one for jury. *Rosenbaum v. Hayes*, 8 N. D. 461, 79 N. W. 987; *Rosenbaum v. Hayes*, 10 N. D. 311, 86 N. W. 973.

Assignment accompanied by immediate change of possession not fraudulent. *Wright v. Lee*, 10 S. D. 263, 72 N. W. 895.

Question of fraudulent intent is one of fact and not law. *First Nat. Bank v. Calkins*, 12 S. D. 411, 81 N. W. 732; *First Nat. Bank v. McMillan*, 9 S. D. 227, 68 N. W. 537.

Recording of mortgage answers purpose of immediate delivery. *Pierson v. Hickey*, 16 S. D. 46, 91 N. W. 339.

Where there is transfer of title as well as of possession this section has no application. *Walklin v. Horawill*, 24 S. D. 191, 123 N. W. 668.

Has no application to pledge of corporate stock any more than it would to any chose in action evidenced by writing. *State Bkg. & T. Co. v. Taylor*, 25 S. D. 577, 29 L.R.A.(N.S.) 523, 127 N. W. 590.

Retention of possession by grantor as showing fraudulent intent. 31 L.R.A. 635.

Sufficiency of change of possession as regards creditors by delivery to carrier. 22 L.R.A. 425.

Estoppel of one who permits title to real property to stand in another's name to assert title as against latter's creditors. 30 L.R.A.(N.S.) 1.

Rights of purchaser of personal property who temporarily leaves it in possession of vendor, because of inconvenience of taking immediate possession, as against subsequent purchasers from, or attaching creditors of, the vendor. 25 L.R.A.(N.S.) 604.

Change of possession sufficient as against creditors and subsequent purchasers. 97 Am. Dec. 340.

Is failure to take immediate possession upon sale of chattels cured by taking possession before attachment of the particular right or lien of the person attacking the sale. 28 L.R.A.(N.S.) 214.

Necessity of delivery to protect purchaser against creditors of seller of an undivided interest in personalty not in his possession. 31 L.R.A.(N.S.) 1162.

Overcoming presumption of fraud flowing from retention of possession. 24 L.R.A.(N.S.) 1131.

Law governing necessity of change of possession. 64 L.R.A. 355, 361.

Necessity for change of possession to uphold sale under chattel mortgage as against creditors of former owner. 36 L.R.A.(N.S.) 1018.

Setting aside pledged or mortgaged property retained by pledgor or mortgagor on his own premises, or under his own control, as a delivery or change of possession. 25 L.R.A.(N.S.) 525.

Effect of chattel mortgages taking possession before any specific right or lien of creditors has attached to cure original defect in mortgage as against creditors. 28 L.R.A.(N.S.) 110.

Validity of a chattel mortgage of stock of merchandise as affected by a provision or agreement giving the mortgagor the possession with power of sale. 18 L.R.A. 604; 36 L.R.A. (N.S.) 1181.

As to similar provision in Cal. Civ. Code, § 3440, see *Watson v. Rodgers*, 53 Cal. 401; *Hesthal v. Myles*, 53 Cal. 628; *Merrill v. Hurlburt*, 63 Cal. 494; *Kelly v. Murphy*, 70 Cal. 560, 12 Pac. 467; *Newell v. Desmond*, 74 Cal. 46, 16 Pac. 369; *Tregear v. Etiwanda Water Co.*, 76 Cal. 537, 9 Am. St. Rep. 245, 18 Pac. 658; *Brown v. Bank of Napa*, 77 Cal. 544, 20 Pac. 71; *Morgan v. Ball*, 81 Cal. 93, 5 L.R.A. 579, 15 Am. St. Rep. 34, 22 Pac. 331; *Bunting v. Saltz*, 84 Cal. 168, 24 Pac. 167; *Bull v. Bray*, 89 Cal. 286, 13 L.R.A. 576, 26 Pac. 873; *Brown v. O'Neal*, 93 Cal. 262, 29 Am. St. Rep. 111, 30 Pac. 538; *Freeman v. Hensley*, 3 Cal. Unrep. 536, 30 Pac. 792; *Kirk v. Roberts*, 3 Cal. Unrep. 671, 31 Pac. 620; *Porter v. Bucher*, 98 Cal. 454, 33 Pac. 335; *Banning v. Marleau*, 101 Cal. 238, 35 Pac. 772; *Howe v. Johnson*, 107 Cal. 67, 40 Pac. 42; *Brown v. Cline*, 109 Cal. 156, 41 Pac. 862; *Bank of Ukiah v. Gibson*, 109 Cal. 197, 41 Pac. 1008, 1010; *Dubois v. Spinks*, 114 Cal. 289, 46 Pac. 95; *Lillenthal v. Ballou*, 6 Cal. Unrep. 179, 55 Pac. 251; *Matteucci v. Whelan*, 123 Cal. 312, 63 Am. St. Rep. 60, 55 Pac. 990; *Feeley v. Boyd*, 143 Cal. 282, 65 L.R.A. 943, 78 Pac. 1029.

§ 7222. 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. [R. C. 1905, § 6639; 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.

As to similar provision in Cal. Civ. Code, § 3441, see *Blanc v. Paymaster Min. Co.*, 96 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765.

§ 7223. When fraudulent intent question of fact. In all cases arising under section 5599 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 adjudged fraudulent solely on the ground that it was not made for a valuable consideration. [R. C. 1905, § 6640; 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. W. 243.

Transfer not fraudulent solely for absence of valuable consideration. *First State Bank v. O'Leary*, 13 S. D. 204, 83 N. W. 45.

Section not prevent court from directing verdict. *First Nat. Bank v. North*, 2 S. D. 480, 51 N. W. 96.

Conveyance from husband to wife while deeply in debt not necessarily fraudulent. *First State Bank v. O'Leary*, 13 S. D. 204, 83 N. W. 45.

Assignment for benefit of creditors; change of possession. *Wright v. Lee*, 10 S. D. 263, 72 N. W. 895.

Question of fraudulent intent is one of fact and not law. *Probert v. McDonald*, 2 S. D. 495, 51 N. W. 212, 39 Am. St. Rep. 796; *Dalrymple v. Trust Co.*, 9 N. D. 306, 83 N. W. 245; *Gaines v. White*, 1 S. D. 484, 47 N. W. 524; *Bergman v. Jones*, 10 N. D. 520, 88 N. W. 284; *Stevens v. Meyers*, 14 N. D. 398, 104 N. W. 529.

Fraud as to creditors may be question of law where facts are undisputed. *Hall v. Feeney*, 22 S. D. 541, 21 L.R.A. (N.S.) 513, 18 N. W. 1038.

Verdict may be directed where upon undisputed facts instrument on which rights of parties depends, being pledge, chattel mortgage or absolute conveyance of title, with secret reservation of interest, is void. *Walklin v. Horswill*, 24 S. D. 191, 123 N. W. 668.

Effect of statutes making fraud a question for the jury where mortgagor of merchandise is left in possession with power of sale. 18 L.R.A. 611.

As to similar provision in Cal. C. Code, § 3442, see *Roberts v. Burr*, 6 Cal. Unrep. 154, 54 Pac. 849; *Poulson v. Stanley*, 122 Cal. 655, 68 Am. St. Rep. 73, 55 Pac. 605; *Wolters v. Rossi*, 126 Cal. 644, 59 Pac. 143; *Gray v. Brunold*, 140 Cal. 615, 74 Pac. 303; *Re Vance*, 141 Cal. 624, 75 Pac. 823.

## CHAPTER 112.

### SALES AND ASSIGNMENTS.

The title of the act of 1913 constituting this chapter reads as follows: "An act to amend and re-enact chapter 221 of the Session Laws of North Dakota for 1907, entitled 'An act providing for the giving of notice by merchants to their creditors before making sale of their entire stock or business.'" Laws 1907, ch. 221, above mentioned, consisted of two sections, the first of which was evidently amended to make section 7224 here. The second section read as follows: "Present rule of evidence continued. Except as expressly provided in this act, nothing therein contained nor any act thereunder shall change or affect the present rules of evidence or the present presumptions of law."

§ 7224. **Fraud to sell entire stock of goods, when.** The sale, transfer or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller, transferrer or assignor, shall be void as against the creditor of the seller, transferrer or assignor, unless the seller, transferrer, assignor and purchaser, transferee and assignee, shall, at least five days before the sale, make a full detailed inventory, showing the quality and, so far as possible with exercise of reasonable diligence, the cost price to the seller, transferrer and assignor of each article to be included in the sale; and unless the purchaser, transferee and assignee demand and receive from the seller, transferrer and assignor a written list of names and addresses of the creditors of the seller, transferrer and assignor with the amount of indebtedness due or owing each, and certified by the seller, transferee and assignor, under oath, to be a full, accurate and complete list of his creditors, and of his indebtedness; and unless the purchaser, transferee and assignee shall, at least five days before taking possession of such merchandise, or merchandise and fixtures, or paying therefor, notify personally or by registered mail every creditor whose name and address are stated in said list, or of which he has knowledge, of the proposed sale and of the price, terms and conditions thereof. [1913, ch. 247, § 2; 1907, ch. 221, § 1.]

§ 7225. **Parties to whom this chapter applies.** Sellers, transferrers and assignors, purchasers, transferees and assignees, under this chapter, shall include corporations, associations, copartnerships and individuals. But nothing contained in this chapter shall apply to sales by executors, administrators, receivers, trustees in bankruptcy or by any public officer under judicial process. [1913, ch. 247, § 3.]

§ 7226. **Accountability of purchasers not conforming hereto.** Any purchaser, transferee or assignee, who shall not conform to the provisions of this chapter shall, upon application of any of the creditors of the seller, transferrer or assignor, become a receiver and be held accountable to such creditors for all the goods, wares, merchandise and fixtures that have come into his possession by virtue of such sale, transfer or assignment. [1913, ch. 247, § 4.]

§ 7227. **Purchasers conforming hereto protected.** Provided, however, that any purchaser, transferee or assignee, who shall conform to the provisions of this chapter shall not in any way be held accountable to any creditor of the seller, transferrer or assignor for any of the goods, wares, merchandise or fixtures that have come into the possession of said purchaser, transferee or assignee by virtue of such sale, transfer or assignment. [1913, ch. 247, § 5.]

Constitutionality of bulk-sale legislation. 2 L.R.A.(N.S.) 331; 20 L.R.A.(N.S.) 160.

Statutory requirements on sale of stock of goods in bulk. 2 L.R.A.(N.S.) 331.

Applicability of statutes relating to sales of stocks of goods in bulk to transfer in payment of a creditor. 12 L.R.A.(N.S.) 174.

Applicability of bulk-sales law to exempt property. 45 L.R.A.(N.S.) 497.

What kind or classes of property are within the operation of bulk-sale statutes. 25 L.R.A.(N.S.) 758; 45 L.R.A.(N.S.) 495.

Is chattel mortgage within meaning of sales in bulk law. 12 L.R.A.(N.S.) 178.

What are "fixtures" within meaning of bulk-sale law. 34 L.R.A.(N.S.) 218.

Effect of misrepresentations in statement seller is required to make as a condition of a valid sale in bulk. 45 L.R.A.(N.S.) 492.

Remedy of creditors where sale is made in violation of bulk-sales law. 39 L.R.A.(N.S.) 374.



## CHAPTER 113.

## NUISANCE.

- ARTICLE 1. GENERAL PRINCIPLES, §§ 7228-7233.  
 2. PUBLIC NUISANCE, §§ 7234-7239.  
 3. PRIVATE NUISANCES, §§ 7240, 7241.

## ARTICLE 1.—GENERAL PRINCIPLES.

**7228. 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. [R. C. 1905, § 6641; 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.

Railway stockyards in residence district of town may be prohibited as nuisance, irrespective of condition in which kept. *Colton v. South Dakota Central Land Co.*, 25 S. D. 309, 28 L.R.A.(N.S.) 122, 126 N. W. 507.

Person contracting with drainage board is liable in tort for placing obstruction in street and not upon contract. *Solberg v. Schlosser*, 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91.

Auction as a nuisance. 20 L.R.A.(N.S.) 972.

Auction in street as a nuisance, subject to city control. 39 L.R.A. 678.

Driving foul air against a neighbor's windows as a nuisance. 9 L.R.A.(N.S.) 695.

Stable for horses as a nuisance. 17 L.R.A.(N.S.) 1025; 32 Am. Rep. 141.

Storage of explosives as a nuisance. 16 L.R.A.(N.S.) 691; 38 L.R.A. 306.

Hospital as a nuisance. 29 L.R.A.(N.S.) 49.

Insane asylum or hospital for insane as a nuisance. 40 L.R.A.(N.S.) 647.

Undertaker's establishment as a nuisance. 31 L.R.A.(N.S.) 608.

Cemetery as a nuisance. 31 L.R.A.(N.S.) 945; 34 L.R.A.(N.S.) 565.

Dancing as a nuisance. 18 L.R.A.(N.S.) 699.

Pool selling as a nuisance. 10 L.R.A.(N.S.) 992; 21 L.R.A.(N.S.) 836.

Coasting as a nuisance. 42 L.R.A.(N.S.) 867.

Bees as a nuisance. 62 L.R.A. 133.

Spring guns, traps and other dangerous instruments on premises as a nuisance. 29 L.R.A. 158.

Projection of building or other structure over the boundary as a nuisance. 32 L.R.A.(N.S.) 1010.

Trees near boundary as a nuisance. 2 B. R. C. 901.

Noise with or without vibration incident to lawful industrial business as a nuisance. 17 L.R.A.(N.S.) 287.

Keeping of barking dogs as a nuisance. 7 L.R.A.(N.S.) 349.

Bowling alley as a nuisance. 40 L.R.A.(N.S.) 75.

Noise on street as a nuisance subject to municipal control. 39 L.R.A. 672.

Liability of railroad for creating a nuisance by noise. 32 L.R.A.(N.S.) 371.

Use of soft coal as a nuisance. 13 L.R.A.(N.S.) 465.

Coal yards as a nuisance. 32 L.R.A.(N.S.) 522.

Operation of brick kiln as a nuisance. 2 L.R.A.(N.S.) 92.

Gas plant as a nuisance. 20 L.R.A.(N.S.) 466.

Authority of the legislature to declare what are nuisances. 47 Am. St. Rep. 544.

Businesses and machinery which may be enjoined as nuisances. 51 Am. Rep. 467.

Debris in streams as nuisance. 30 Am. St. Rep. 551.

Offensive trades and manufactures as nuisance. 42 Am. Rep. 540.

Percolating of filthy water nuisance. 39 Am. Rep. 16.

**§ 7229. 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. [R. C. 1905, § 6642; Civ. C. 1877, § 2048; R. C. 1899, § 5057.]

Twenty years' maintenance of an obstruction in public street will not ripen into right. *Deadwood v. Hursh*, 30 S. D. 450, 138 N. W. 1122.

What are public nuisances. 107 Am. St. Rep. 193.

Municipal control over smoke as a public nuisance. 39 L.R.A.(N.S.) 551; 18 L.R.A.(N.S.) 156; 32 L.R.A.(N.S.) 554.

§ 7230. **Private nuisance.** Every nuisance not included in the definition of the last section is private. [R. C. 1905, § 6643; Civ. C. 1877, § 2049; R. C. 1899, § 5058.]

§ 7231. **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. [R. C. 1905, § 6644; Civ. C. 1877, § 2050; R. C. 1899, § 5059.]

Effect of legislative authority upon liability for private nuisance. 1 L.R.A.(N.S.) 49.

Legislative authority to manufacture gas as affecting nuisance. 20 L.R.A.(N.S.) 469.

Statutory authority to commit nuisance not to be presumed. 70 L.R.A. 579.

§ 7232. **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. [R. C. 1905, § 6645; Civ. C. 1877, § 2051; R. C. 1899, § 5060.]

Liabilities of erectors and continuers of nuisance. 14 Am. Dec. 336.

Liability for nuisance though due to the act or negligence of an independent contractor. 76 Am. St. Rep. 399.

Liability of property owner for a nuisance which he did not create. 86 Am. St. Rep. 508.

Liability of vendee of property for nuisance. 59 Am. Rep. 351.

When a nuisance will support but one recovery and when it may support several. 128 Am. St. Rep. 959.

As to similar provision in Cal. Civ. Code, § 3483, see *Castle v. Smith*, 4 Cal. Unrep. 561, 36 Pac. 859.

§ 7233. **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. [R. C. 1905, § 6646; Civ. C. 1877, § 2052; R. C. 1899, § 5061.]

#### ARTICLE 2.—PUBLIC NUISANCE.

§ 7234. **Not legalized by lapse of time.** No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right. [R. C. 1905, § 6647; Civ. C. 1877, § 2053; R. C. 1899, § 5062.]

Twenty years' maintenance of an obstruction in public street will not ripen into right. *Deadwood v. Hursh*, 30 S. D. 450, 138 N. W. 1122.

Prescriptive right to maintain nuisance. 30 Am. St. Rep. 556.

— to maintain a public nuisance. 53 L.R.A. 831.

— to maintain nuisance caused by gas plant. 20 L.R.A.(N.S.) 472.

— of municipality or individual to pollute stream with sewage or other harmful substance. 25 L.R.A.(N.S.) 589.

§ 7235. **Remedies against.** The remedies against a public nuisance are:

1. Indictment.

2. A civil action; or,

3. Abatement. [R. C. 1905, § 6648; 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, 59 Am. St. Rep. 769.

Municipality may enjoin illegal sale of intoxicating liquor. *Britton v. Guy*, 17 S. D. 588, 97 N. W. 1045.

Power of municipal corporations to determine what is a nuisance and to remove the same. 27 Am. Dec. 98; 120 Am. St. Rep. 372.

Remedy for obstruction or destruction of rights of navigation. 59 L.R.A. 91.

Remedy for protection from pollution of source of municipal water supply. 11 L.R.A.(N.S.) 1166.

1. Criminal responsibility of corporation for nuisance. 2 B. R. C. 251.

— of municipality for maintaining or permitting a nuisance. 39 L.R.A.(N.S.) 411.

— for maintenance of dam in nonnavigable stream which creates a nuisance injurious to public health. 22 L.R.A.(N.S.) 1259.

— for maintenance of nuisance by servant, agent or partner. 41 L.R.A. 655.

2. How far property right necessary to sustain action for nuisance. 15 L.R.A. 689.  
 Private right of action for public nuisance. 31 Am. Dec. 132; 25 Am. Rep. 533.  
 Who may obtain injunction against a public nuisance. 67 Am. Dec. 203; 52 Am. Rep. 574.  
 Private right of action for obstruction of navigable stream. 3 L.R.A.(N.S.) 1126;  
 28 L.R.A.(N.S.) 763.  
 Doctrine of comparative injury in suit to enjoin nuisance. 31 L.R.A.(N.S.) 881.  
 Theory of nuisance as basis of recovery by abutter for injury to property from railroad in street. 36 L.R.A.(N.S.) 756.  
 Obstructions in highway preventing access to property except by a circuitous route as a special injury entitling owner to maintain action for damages or to abate the nuisance. 8 L.R.A.(N.S.) 227; 21 L.R.A.(N.S.) 75.  
 Interference with one's use of a highway as a special damage which will sustain an action by him against the wrongdoer. 28 L.R.A.(N.S.) 1053.  
 Right of owner to recover damages to property from nuisance, not of a permanent character, existing before the commencement or at time of the renewal of the tenancy. 3 L.R.A.(N.S.) 1060.  
 Right of a municipality to maintain suit to enjoin a public nuisance. 51 L.R.A. 657.  
 Injunction against nuisances in water and water courses. 40 L.R.A. 465.  
 Injunction against nuisances affecting public morals, peace and good order and health and safety. 41 L.R.A. 321.  
 Injunction against nuisances upon highways and streets. 42 L.R.A. 814.  
 Injunction against nuisances by railroads and electrical companies. 44 L.R.A. 565.  
 Right of owner or occupant of neighboring property to enjoin maintenance of house of prostitution. 11 L.R.A.(N.S.) 1060; 42 L.R.A.(N.S.) 1041.  
 3. Right to abate nuisances by destruction. 26 Am. Dec. 443; 44 Am. Rep. 111.  
 Right to abate nuisance by interference with fishing rights. 60 L.R.A. 524.  
 Right of municipality to maintain suit to abate nuisance. 51 L.R.A. 657.  
 State as proper party to maintain bill to abate nuisance in city street. 19 L.R.A.(N.S.) 1172.

§ 7236, Indictment. The remedy by indictment is regulated by the penal code and the code of criminal procedure. [R. C. 1905, § 6649; Civ. C. 1877, § 2055; R. C. 1899, § 5064.]

§ 7237, Civil action. A private person may maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise. [R. C. 1905, § 6650; Civ. C. 1877, § 2056; R. C. 1899, § 5065.]

Private action for public nuisance. 31 Am. Dec. 132; 25 Am. Rep. 533.

§ 7238, Abated by public officer. A public nuisance may be abated by any public body or officer authorized thereto by law. [R. C. 1905, § 6651; Civ. C. 1877, § 2057; R. C. 1899, § 5066.]

Power of health authorities to require alterations of private property in a particular manner. 24 L.R.A.(N.S.) 341.

§ 7239, 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. [R. C. 1905, § 6652; Civ. C. 1877, § 2058; R. C. 1899, § 5067.]

Abatement of public nuisance by a private person without suit. 124 Am. St. Rep. 591.

Right of private citizen to destroy liquor illegally kept for sale. 26 L.R.A.(N.S.) 996.

Special damage from awning or structure overhanging street which will sustain action by private person to abate it. 48 L.R.A.(N.S.) 173.

### ARTICLE 3.—PRIVATE NUISANCES.

§ 7240, Remedies against. The remedies against a private nuisance are:

1. A civil action; or,

2. Abatement. [R. C. 1905, § 6653; Civ. C. 1877, § 2059; R. C. 1899, § 5068.]

Right of one in possession to maintain action for nuisance without proving title. 24 L.R.A.(N.S.) 560.

Right of lessee to maintain suit to abate a nuisance affecting possession. 3 L.R.A.(N.S.) 448.

Nuisances that will be enjoined as interfering with the comfortable enjoyment of real property. 10 Am. Rep. 674.

Injunction against threatened nuisance. 73 Am. Dec. 113.

Right of property owner to damages or injunction for maintenance of electric light plant in vicinity of his property. 27 L.R.A.(N.S.) 237.

Respective liabilities of landlord and tenant for nuisances to each other and to third persons. 50 Am. Dec. 776.

Judgment in suit to abate nuisance as bar to action for damages therefor. 58 L.R.A. 735.

Effect of legislative authority on remedy for private nuisance. 1 L.R.A.(N.S.) 131.

§ 7241. 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. [R. C. 1905, § 6654; Civ. C. 1877, § 2060; R. C. 1899, § 5069.]

Right of injured person to abate nuisance. 26 Am. Dec. 443; 43 Am. Rep. 24; 44 Am. Rep. 111.

§ 7242. 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. [R. C. 1905, § 6655; Civ. C. 1877, § 2061; R. C. 1899, § 5070.]

## CHAPTER 114.

### MAXIMS OF JURISPRUDENCE.

§ 7243. How to be used and applied. The maxims of jurisprudence herein-after set forth are intended not to qualify any of the foregoing provisions of this code, but to aid in their just application. [R. C. 1905, § 6656; Civ. C. 1877, § 2062; R. C. 1877, § 2078; R. C. 1899, § 5071.]

Instruction defining terms "negligence" and "negligently" in exact language of code is sufficient, where no more specific instruction was asked. *Zilke v. Johnson*, 22 N. D. 75, 132 N. W. 640, Ann. Cas. 1913E, 1005.

§ 7244. When the reason of a rule ceases, so should the rule itself. [R. C. 1905, § 6657; Civ. C. 1877, § 2063; R. C. 1899, § 5072.]

Reason for a rule ceasing, rule itself ceases. *Troy Min. Co. v. White*, 10 S. D. 73, 74 N. W. 236, 42 L.R.A. 549; *Trotter v. Life Ass.*, 9 S. D. 596, 70 N. W. 843, 62 Am. St. Rep. 887; *Meade County v. Hoeft*, 12 S. D. 468, 81 N. W. 886; *Braithwaite v. Aiken*, 2 N. D. 57, 49 N. W. 419; *Sherwood v. Barnes County*, 22 N. D. 310, 134 N. W. 38.

§ 7245. When the reason is the same the rule should be the same. [R. C. 1905, § 6658; Civ. C. 1877, § 2064; R. C. 1899, § 5073.]

On second mortgagee acting under mistake of fact in paying and releasing first mortgage, being entitled to restore same. *Home Invest. Co. v. Clarson*, 21 S. D. 72, 100 N. W. 507.

As applied to purchaser of mortgaged property paying outstanding debt. *Barry v. Stover*, 20 S. D. 459, 129 Am. St. Rep. 941, 107 N. W. 672.

Purchaser holds mortgaged property free from mortgage, where record showed satisfaction by mortgagee but not prior assignment to another. *McVay v. Tousley*, 20 S. D. 258, 129 Am. St. Rep. 927, 105 N. W. 932.

Applied in *Lothian v. Western U. Teleg. Co.*, 25 S. D. 319, 126 N. W. 621; *Shearer v. Hutterische*, 28 S. D. 509, 134 N. W. 63; *State v. Carlisle*, 30 S. D. 475, 139 N. W. 127.

§ 7246. One must not change his purpose to the injury of another. [R. C. 1905, § 6659; Civ. C. 1877, § 2065; R. C. 1899, § 5074.]

§ 7247. 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. [R. C. 1905, § 6660; Civ. C. 1877, § 2066; R. C. 1899, § 5075.]

Register of deeds may waive payment of fees. *Parrish v. Mahaney*, 10 S. D. 276, 73 N. W. 97, 65 Am. St. Rep. 715.

Bond on appeal from justice court not waived by agreement of parties. *Brown v. Ry. Co.*, 10 S. D. 633, 75 N. W. 198, 65 Am. St. Rep. 730; *Smith v. Coffin*, 9 S. D. 503, 70 N. W. 636.

Accused may withdraw affidavit of prejudice filed and thus waive disqualification of judge which was created by filing such affidavit. *State v. Ham*, 24 S. D. 639, 124 N. W. 955, Ann. Cas. 1912A, 1070.

§ 7248. One must so use his own rights as not to infringe upon the rights of another. [R. C. 1905, § 6661; Civ. C. 1877, § 2067; R. C. 1899, § 5076.]

One shall not so use his own property as to "injure" another. *Carroll v. Rye Twp.*, 13 N. D. 458, 101 N. W. 894.

Expression "rights of others" means legal rights and does not include all rights determined by our moral and ethical standards. *Langer v. Goode*, 21 N. D. 462, 131 N. W. 258, Ann. Cas. 1913D, 429, 1 N. C. C. A. 772.

Railway stockyards in residence district of town may be prohibited as nuisance, irrespective of condition in which kept. *Colton v. South Dakota Central Land Co.*, 25 S. D. 309, 28 L.R.A.(N.S.) 122, 126 N. W. 507.

The application of the maxim *sic utere tuo ut alienum non laedas* to injuries by blasting. 6 L.R.A.(N.S.) 570.

§ 7249. He who consents to an act is not wronged by it. [R. C. 1905, § 6662; Civ. C. 1877, § 2068; R. C. 1899, § 5077.]

Accused cannot object to bias of officer summoning jury where he consented to his appointment. *State v. Hayes*, 23 S. D. 596, 122 N. W. 652.

On applicability of section to procure accounting as to partnership affairs. *Gorman v. Madden*, 27 S. D. 319, 131 N. W. 290.

§ 7250. Acquiescence in error takes away the right of objecting to it. [R. C. 1905, § 6663; Civ. C. 1877, § 2069; R. C. 1899, § 5078.]

Applicable to errors in procedure. *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359.

As to irregularity in directing verdict after receiving additional evidence without renewal of motion therefor, without objection being disregarded. *Dring v. St. Lawrence Twp.*, 23 S. D. 624, 122 N. W. 664.

"Acquiescence" means "to rest apparently satisfied without objection; a silent or passive assent." *Farr v. Semmler*, 24 S. D. 290, 123 N. W. 835.

One who expressly consents to redundant bill cannot insist as matter of right that it shall be stricken out. *Whaley v. Vidal*, 26 S. D. 300, 128 N. W. 381.

§ 7251. No one can take advantage of his own wrong. [R. C. 1905, § 6664; Civ. C. 1877, § 2070; R. C. 1899, § 5079.]

As to taking advantage of one's own wrong. 5 L.R.A. 344.

—how far abrogated by statute. 25 L.R.A. 564.

Homicide as affecting devolution of property. 3 L.R.A.(N.S.) 726; 39 L.R.A.(N.S.) 1088.

Murder of insured as affecting right to insurance. 3 L.R.A.(N.S.) 727; 28 L.R.A.(N.S.) 875.

Effect of homicide on right to probate will of fact that legatee is murderer of testator. 34 L.R.A.(N.S.) 967.

§ 7252. He who has fraudulently dispossessed himself of a thing may be treated as if he still had possession. [R. C. 1905, § 6665; Civ. C. 1877, § 2071; R. C. 1899, § 5080.]

§ 7253. He who can and does not forbid that which is done on his behalf is deemed to have bidden it. [R. C. 1905, § 6666; Civ. C. 1877, § 2072; R. C. 1899, § 5081.]

§ 7254. No one should suffer by the act of another. [R. C. 1905, § 6667; Civ. C. 1877, § 2073; R. C. 1899, § 5082.]

Relates only to law of evidence. *Carroll v. Rye Twp.*, 13 N. D. 458, 101 N. W. 894.

§ 7255. He who takes the benefit must bear the burden. [R. C. 1905, § 6668; Civ. C. 1877, § 2074; R. C. 1899, § 5083.]

No one should be allowed to rely on what is beneficial to him and repudiate what is not, in any instrument or transaction. *Christiernson v. Hendrie & B. Mfg. & Supply Co.*, 26 S. D. 519, 128 N. W. 603.

§ 7256. One who grants a thing is presumed to grant also whatever is essential to its use. [R. C. 1905, § 6669; Civ. C. 1877, § 2075; R. C. 1899, § 5084.]

§ 7257. For every wrong there is a remedy. [R. C. 1905, § 6670; Civ. C. 1877, § 2076; R. C. 1899, § 5085.]

As authorizing wife to maintain action in her own name. *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085.

§ 7258. Between those who are equally in the right or equally in the wrong the law does not interpose. [R. C. 1905, § 6671; Civ. C. 1877, § 2077; R. C. 1899, § 5086.]

§ 7259. Between rights otherwise equal the earliest is preferred. [R. C. 1905, § 6672; Civ. C. 1877, § 2078; R. C. 1899, § 5087.]

§ 7260. No man is responsible for that which no man can control. [R. C. 1905, § 6673; Civ. C. 1877, § 2079; R. C. 1899, § 5088.]

§ 7261. The law helps the vigilant before those who sleep on their rights. [R. C. 1905, § 6674; Civ. C. 1877, § 2080; R. C. 1899, § 5089.]

§ 7262. The law respects form less than substance. [R. C. 1905, § 6675; Civ. C. 1877, § 2081; R. C. 1899, § 5090.]

Form less respected than substance. *Henderson v. Hughes County*, 13 S. D. 576, 83 N. W. 682.

§ 7263. 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. [R. C. 1905, § 6676; Civ. C. 1877, § 2082; R. C. 1899, § 5091.]

Equity looks upon that as done which ought to have been done. 5 L.R.A. 104.

§ 7264. That which does not appear to exist is to be regarded as if it did not exist. [R. C. 1905, § 6677; Civ. C. 1877, § 2083; R. C. 1899, § 5092.]

§ 7265. The law never requires impossibilities. [R. C. 1905, § 6678; Civ. C. 1877, § 2084; R. C. 1899, § 5093.]

Requirement of impossibilities. *Woods v. Sheldon*, 9 S. D. 392, 69 N. W. 602; *Lyons v. Chicago, M. & St. P. R. Co.*, 28 S. D. 31, 35 L.R.A.(N.S.) 1219, 132 N. W. 679.

§ 7266. The law neither does nor requires idle acts. [R. C. 1905, § 6679; Civ. C. 1877, § 2085; R. C. 1899, § 5094.]

Idle acts not required. *Kirby v. Telegraph Co.*, 7 S. D. 623, 65 N. W. 37, 30 L.R.A. 612; *Troy Min. Co. v. White*, 10 S. D. 475, 74 N. W. 236, 42 L.R.A. 549; *Loftus v. Shipping Asso.*, 8 S. D. 201, 65 N. W. 1076; *Magowan v. Groneweg*, 16 S. D. 29, 91 N. W. 335; *Hyde v. Minnesota, D. & P. R. Co.*, 24 S. D. 386, 123 N. W. 849.

Sale of bank's assets by receiver to another bank in which he is interested will not be vacated, where bank permitted it or was not thereby injured. *Jackson v. First State Bank*, 21 S. D. 484, 113 N. W. 876.

As to when it would be requiring idle acts to require stockholders to formally meet and authorize sale. *Magowan v. Groneweg*, 16 S. D. 29, 91 N. W. 335.

As to delivery of warehouse receipt as pledge of property without formality of transfer of possession. *State use of Hart-Parr Co. v. Robb-Lawrence Co.*, 17 N. D. 257, 16 L.R.A.(N.S.) 227, 115 N. W. 846.

Failure to find essential fact will not justify reversal where its existence would not change ultimate result. *McPherson v. Swift*, 22 S. D. 165, 133 Am. St. Rep. 907, 116 N. W. 76.

No tender is necessary before suit is brought for specific performance of contract to convey land, where party insists that he is not bound by contract. *Beddow v. Flage*, 22 N. D. 53, 132 N. W. 637.

§ 7267. The law disregards trifles. [R. C. 1905, § 6680; Civ. C. 1877, § 2086; R. C. 1899, § 5095.]

Error of nine cents in computing penalty and interest against land sold for taxes will not invalidate sale. *Bandow v. Wolven*, 20 S. D. 445, 107 N. W. 204.

As to requiring bond without sureties as condition precedent. *Ex parte Hawley*, 22 S. D. 23, 15 L.R.A.(N.S.) 138, 115 N. W. 93.

§ 7268. Particular expressions qualify those which are general. [R. C. 1905, § 6681; Civ. C. 1877, § 2087; R. C. 1899, § 5096.]

Construction of conflicting statutes. *Phenix Ins. Co. v. Perkins*, 19 S. D. 59, 101 N. W. 1110.

§ 7269. Contemporaneous exposition is in general the best. [R. C. 1905, § 6682; Civ. C. 1877, § 2088; R. C. 1899, § 5097.]

§ 7270. The greater contains the less. [R. C. 1905, § 6683; Civ. C. 1877, § 2089; R. C. 1899, § 5098.]

§ 7271. Superfluity does not vitiate. [R. C. 1905, § 6684; Civ. C. 1877, § 2090; R. C. 1899, § 5099.]

Where claim complied with statute and contained error as to matter which need not have been mentioned, it was sufficient as against subsequent purchaser and incumbrancer. *H. C. Behrens Lumber Co. v. Lager*, 26 S. D. 160, 128 N. W. 698, Ann. Cas. 1913A, 1128.

§ 7272. That is certain which can be made certain. [R. C. 1905, § 6685; Civ. C. 1877, § 2091; R. C. 1899, § 5100.]

That is certain which can be made certain. *Coughran v. Sundback*, 9 S. D. 483, 70 N. W. 644.

Construction which gives effect to, rather than one which defeats, instrument will be adopted. *Henniges v. Pasehke (Johnson)*, 9 N. D. 489, 84 N. W. 350.

Where one of two innocent persons must suffer by act of third, he by whose negligence it happened must be the sufferer. *Sweatman v. Deadwood*, 9 S. D. 380, 69 N. W. 582; *Reid v. Kellogg*, 8 S. D. 596, 67 N. W. 687; *Carrroll v. Nisbet*, 9 S. D. 497, 70 N. W. 634.

As to sufficiency of description in executory contract for sale of interest in land. *Schuyler v. Wheelon*, 17 N. D. 161, 115 N. W. 259.

Office of description in deed is not to identify premises, but to furnish means of identification. *Ford v. Ford*, 24 S. D. 644, 124 N. W. 1108.

§ 7273. Time does not confirm a void act. [R. C. 1905, § 6686; Civ. C. 1877, § 2092; R. C. 1899, § 5101.]

§ 7274. The incident follows the principal, not the principal the incident. [R. C. 1905, § 6687; Civ. C. 1877, § 2093; R. C. 1899, § 5102.]

§ 7275. An interpretation which gives effect is preferred to one which makes void. [R. C. 1905, § 6688; Civ. C. 1877, § 2094; R. C. 1899, § 5103.]

As to validity of election law of 1907. *Morrow v. Wipf*, 22 S. D. 146, 115 N. W. 1121.

Agreement by husband to deed land in return for mutual settlement and bill is not collusive and void. *Burgess v. Burgess*, 17 S. D. 44, 95 N. W. 279.

Statute susceptible of more than one interpretation must be given one which renders statute constitutional. *Bekker v. White River Valley R. Co.*, 28 S. D. 84, 132 N. W. 797.

§ 7276. Interpretation must be reasonable. [R. C. 1905, § 6689; Civ. C. 1877, § 2095; 1899, § 5104.]

Interpretation must be reasonable. *Redwater L. & Canal Co. v. Reed*, 26 S. D. 466, 138 N. W. 702; *State v. Donovan*, 28 S. D. 136, 36 L.R.A.(N.S.) 167, 132 N. W. 698.

§ 7277. When one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer. [R. C. 1905, § 6690; Civ. C. 1877, § 2096; R. C. 1899, § 5105.]

Payment of interest and principal to trustee in trust deed secured by note after he has secretly transferred note and acts as agent for transferee, discharges indebtedness. *McVay v. Bridgman*, 21 S. D. 374, 112 N. W. 1138.

Purchaser holds mortgaged property free from mortgage, where record showed satisfaction by mortgagee but not prior assignment to another. *McVay v. Tousley*, 20 S. D. 258, 129 Am. St. Rep. 927, 105 N. W. 932.

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 115.

### DEFINITIONS AND GENERAL PROVISIONS.

§ 7278. Words to be understood in their ordinary sense. Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears and except also that the words hereinafter explained are to be understood as thus explained. [R. C. 1905, § 6691; Civ. C. 1877, § 2097; R. C. 1899, § 5106.]

Words to be understood in their ordinary sense. *Kennedy v. Hull*, 14 S. D. 234, 85 N. W. 223; *State v. Taylor*, 7 S. D. 533, 64 N. W. 548; *Grunow v. Simonitsch*, 21 N. D. 277, 130 N. W. 835.

As to construction of statute giving "farm laborer" lien for wages. *Lowe v. Abrahamson*, 18 N. D. 182, 19 L.R.A.(N.S.) 1039, 119 N. W. 241.

As to "cause of action" against which statute of limitations does not run while party is without the state, applying to mortgage foreclosure action. *Colonial & U. S. Mortg. Co. v. Northwest Thresher Co.*, 14 N. D. 147, 70 L.R.A. 814, 116 Am. St. Rep. 642, 103 N. W. 915, 8 A. & E. Ann. Cas. 1160.

"Business college" was not such school as is referred to in section 2859, Pol. Code, in relation to sale of liquor near school. *Granger v. Lorenzen*, 28 S. D. 295, 133 N. W. 259.

It is not enough, that, through strained construction of words of ordinance in relation to wooden buildings, violation of its terms may be predicated. *Mayville v. Rosing*, 19 N. D. 98, 26 L.R.A.(N.S.) 120, 123 N. W. 393.

§ 7279. Word defined by statute has always same meaning. Whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs, except when a contrary intention plainly appears. [R. C. 1905, § 6692; Civ. C. 1877, § 2098; R. C. 1899, § 5107.]

Word defined by statute has always same meaning. *Grunow v. Simonitsch*, 21 N. D. 277, 130 N. W. 835; *State ex rel. Dillman v. Weide*, 29 S. D. 109, 135 N. W. 696.

§ 7280. Degrees of care. There are three degrees of care and of diligence mentioned in this code, namely, slight, ordinary and great. The latter include the former. [R. C. 1905, § 6693; Civ. C. 1877, § 2099; R. C. 1899, § 5108.]

§ 7281. Degrees defined. Slight care or diligence is such as persons of ordinary prudence usually exercise about their own affairs of slight importance; ordinary care or diligence is such as they usually exercise about their own affairs of ordinary importance; and great care or diligence is such as

they usually exercise about their own affairs of great importance. [R. C. 1905, § 6694; Civ. C. 1877, § 2100; R. C. 1899, § 5109.]

As to what constitutes ordinary care in care of live stock. *McBride v. Wallace*, 17 N. D. 495, 117 N. W. 857.

Negligence for injury to stock trespassing upon railway track is negligence of railway after discovery of stock in place of danger. *Reinke v. Minneapolis, St. P. & S. Ste. M. R. Co.*, 23 N. D. 182, 135 N. W. 779.

§ 7282. **Degrees of negligence.** There are three degrees of negligence mentioned in this code, namely, slight, ordinary and gross. The latter include the former. [R. C. 1905, § 6695; Civ. C. 1877, § 2101; R. C. 1899, § 5110.]

§ 7283. **Degrees defined.** Slight negligence consists in the want of great care and diligence; ordinary negligence, in the want of ordinary care and diligence; and gross negligence, in the want of slight care and diligence. [R. C. 1905, § 6696; Civ. C. 1877, § 2102; R. C. 1899, § 5111.]

As to negligence in any degree consisting of want of care. *Hart v. Hanson*, 14 N. D. 570, 3 L.R.A. (N.S.) 438, 105 N. W. 942.

§ 7284. **What children includes.** The term children includes children by birth and by adoption. [R. C. 1905, § 6697; Civ. C. 1877, § 2103; R. C. 1899, § 5112.]

Definition of child. 27 L.R.A. (N.S.) 1158; 30 L.R.A. (N.S.) 914.

§ 7285. **Debtor and creditor.** Except as defined and used in chapter 111 of this code every one who owes to another the performance of an obligation is called a debtor and the one to whom he owes it is called a creditor. [R. C. 1905, § 6698; Civ. C. 1877, § 2104; R. C. 1899, § 5113.]

As to debt and obligation not being synonymous. *Sonnesyn v. Akin*, 12 N. D. 227, 97 N. W. 557.

§ 7286. **Good faith.** Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another even through the forms or technicalities of law together with an absence of all information or belief of facts which would render the transaction unconscientious. [R. C. 1905, § 6699; Civ. C. 1877, § 2105; R. C. 1899, § 5114.]

Good faith, question of fact to be determined. *Friedrich v. Fergen*, 15 S. D. 541, 91 N. W. 328; *Dunn v. Bank*, 15 S. D. 454, 90 N. W. 1045; *Wood v. Conrad*, 2 S. D. 334, 50 N. W. 95; *Merchant v. Pielke*, 10 N. D. 48, 84 N. W. 574; *State v. Stewart*, 9 N. D. 409, 83 N. W. 869.

Purchase made in good faith. *Gress v. Evans*, 1 D. 371, 46 N. W. 1132; *Thompson v. Bank*, 150 U. S. 231, 37 L.ed. 1063, 14 S. Ct. R. 94.

Actual notice consists in express information of fact. *La Crosse B. & S. Co. v. Anderson*, 9 S. D. 560, 70 N. W. 877; *Shauer v. Alterton*, 151 U. S. 607, 38 L.ed. 286, 14 S. Ct. R. 442.

As to who is purchaser in good faith. *Hunter v. Coe*, 12 N. D. 505, 97 N. W. 869.

§ 7287. **Notice classified.** Notice is either actual or constructive. [R. C. 1905, § 6700; Civ. C. 1877, § 2106; R. C. 1899, § 5115.]

§ 7288. **Actual notice.** Actual notice consists in express information of a fact. [R. C. 1905, § 6701; Civ. C. 1877, § 2107; R. C. 1899, § 5116.]

On notice to insurance agent as to other insurance while agent at a place other than his place of business as "actual notice." *Chaplin v. Mutual Cash Guaranty F. Ins. Co.*, 26 S. D. 632, 129 N. W. 238.

§ 7289. **Constructive notice.** Constructive notice is notice imputed by the law to a person not having actual notice. [R. C. 1905, § 6702; Civ. C. 1877, § 2108; R. C. 1899, § 5117.]

As to what constitutes constructive notice. *Mee v. Carlson*, 22 S. D. 365, 29 L.R.A. (N.S.) 351, 117 N. W. 1033.

Purchaser at foreclosure of second mortgage being informed that first mortgage is paid, has constructive notice of second mortgagee's rights under redemption. *Malmberg v. Peterson*, 20 S. D. 587, 108 N. W. 339.

§ 7290. **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. [R. C. 1905, § 6703; Civ. C. 1877, § 2109; R. C. 1899, § 5118.]

Knowledge of circumstances sufficient to put prudent man upon inquiry. *Shauer v. Alterton*, 151 U. S. 607, 38 L.ed. 286, 14 S. Ct. R. 442; *Doran v. Dazey*, 5 N. D. 167, 64



N. W. 1023, 57 Am. St. Rep. 550; Meyer v. Elevator Co., 12 S. D. 172, 80 N. W. 189; Weber v. Tschetter, 1 S. D. 205, 46 N. W. 201.

Every dealer in municipal bonds which upon their face refer to statute under which issued is bound to take notice of statute. 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; People's Bank v. School Dist., 3 N. D. 496, 57 N. W. 787, 28 L.R.A. 642.

Notice of prior unrecorded conveyance impeaches good faith. Betts v. Letcher, 1 S. D. 182, 46 N. W. 193.

As to when party has not offered constructive notice. Hunter v. Coe, 12 N. D. 505, 97 N. W. 863.

On notice to agent to put purchaser of note on inquiry. Rochford v. Barrett, 22 S. D. 83, 115 N. W. 522.

As to bank having notice of holder's defective title to check. Drinkall v. Movius State Bank, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 341, 88 N. W. 724.

Insertion of clause in second mortgage "subject to any incumbrance held by first mortgagee" was sufficient to put second mortgagee upon inquiry as to whether first mortgage was paid. Aultman Engine & Thresher Co. v. Young, 25 S. D. 212, 126 N. W. 245, Ann. Cas. 1912B, 1101.

That a note was not offered for sale to indorsee thereof until shortly before its maturity and nearly three years after its date is a circumstance sufficient to put him upon inquiry. Union Nat. Bank v. Mailloux, 27 S. D. 543, 132 N. W. 168.

Transactions on negotiable instruments in hands of indorsees before maturity are not governed by this section. American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99.

Do not operate to alter rule that negotiable instrument law, section 6368, permits buyer to be holder in good faith, without requiring him to make inquiries. McCarty v. Kepreta, 24 N. D. 395, 48 L.R.A. (N.S.) 65, 139 N. W. 992.

What constitutes "constructive notice." 23 Am. Dec. 47; 45 Am. Rep. 184.

**§ 7291. False notice cannot become valid.** A notice which is false when given is not valid by the subsequent happening of the event. [R. C. 1905, § 6704; Civ. C. 1877, § 2110; R. C. 1899, § 5119.]

**§ 7292. 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. [R. C. 1905, § 6705; 1903, ch. 203.]

**§ 7293. "Paper."** The word "paper" means any flexible material upon which it is usual to write. [R. C. 1905, § 6706; Civ. C. 1877, § 2111; R. C. 1899, § 5120.]

**§ 7294. "Person."** The word "person" except when used by way of contrast, includes not only human beings, but bodies politic or corporate. [R. C. 1905, § 6707; Civ. C. 1877, § 2112; R. C. 1899, § 5121.]

Corporation is liable in action at law for deceit to same extent as is natural person. Gunderson v. Havana-Clisde Min. Co., 22 N. D. 329, 133 N. W. 554.

Foreign corporation is incompetent to receive letters of administration upon estate of deceased person. Grunow v. Simonitsch, 21 N. D. 277, 130 N. W. 835.

**§ 7295. "Several."** The word "several" in relation to number means two or more. [R. C. 1905, § 6708; Civ. C. 1877, § 2113; R. C. 1899, § 5122.]

**§ 7296. "Third persons."** The words "third persons" include all who are not parties to the obligation or transaction concerning which the phrase is used. [R. C. 1905, § 6709; Civ. C. 1877, § 2114; R. C. 1899, § 5123.]

**§ 7297. 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; the first Monday in September, which is labor 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. [1909, ch. 140; R. C. 1905, § 6710; 1897, ch. 86, § 1; R. C. 1899, § 5124.]

Township election day not a holiday. State v. Currie, 8 N. D. 545, 80 N. W. 475.

That thirtieth day before election falls on Sunday does not change time within which nominations must be filed. State v. Falley, 9 N. D. 464, 83 N. W. 913.

Redemption from foreclosure sale may be made on Monday when last day of year allowed therefor falls on Sunday. Styles v. Dickey, 22 N. D. 515, 134 N. W. 702.

Validity of court business transacted on legal holiday. 10 L.R.A.(N.S.) 791.

How far the law of holidays extends to matters other than those relating to negotiable paper. 19 L.R.A. 316.

Service of pleading on holidays. 19 L.R.A. 319.

Validity of sale partially made on Sunday and perfected on secular day. 4 L.R.A.(N.S.) 1151.

Delivery on week day pursuant to contract made on Sunday. 20 L.R.A.(N.S.) 86.

Signing or delivering replevin bond on Sunday as a defense. 29 L.R.A.(N.S.) 750.

Procuring subscriptions on Sunday. 14 L.R.A. 194.

Effect of payment of debt on Sunday. 15 L.R.A.(N.S.) 243.

Effect upon validity of contract of ignorance of one party that it was executed by the other on Sunday. 18 L.R.A.(N.S.) 1176.

Remedy of party as to rescission of Sunday contract. 17 L.R.A. 779.

Return of consideration as condition of defense against contract made on Sunday. 5 L.R.A.(N.S.) 295.

**§ 7298. 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. [R. C. 1905, § 6711; 1897, ch. 86, § 2; R. C. 1899, § 5125.]

**§ 7299. Business days.** All other days than those mentioned in the last two sections are to be deemed business days for all purposes. [R. C. 1905, § 6712; Civ. C. 1877, § 2117; R. C. 1899, § 5126.]

**§ 7300. 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. [R. C. 1905, § 6713; 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.

**§ 7301. 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. [R. C. 1905, § 6714; Civ. C. 1877, § 2119; R. C. 1899, § 5128.]

Existence of usage or custom as to payment of labor claims by elevator operators. *First Nat. Bank v. Minneapolis & N. Elevator Co.*, 11 N. D. 280, 91 N. W. 436.

Admissibility of evidence of custom to create an exception to written contract. 3 L.R.A.(N.S.) 248.

Extrinsic evidence of custom or usage as to time for delivery of goods where none is specified in written contract. 31 L.R.A.(N.S.) 619.

Admissibility of evidence of custom and usage on question of negligence or contributory negligence. 41 L.R.A.(N.S.) 683.

Banking customs. 21 L.R.A. 440.

Validity of custom to send paper to drawee for collection. 2 L.R.A.(N.S.) 194.

Payment of former bills drawn by agent without authority as ground of implied authority to draw others. 34 L.R.A.(N.S.) 440.

Effect of clearing-house rules and customs. 25 L.R.A. 830.

Custom and usage as to right to cut timber on public land. 70 L.R.A. 879.

— as to allowing stop over by carrier. 28 L.R.A. 776.

— as affecting liability of baggage transfer company. 34 L.R.A. 140.

— as to prior appropriation of water. 30 L.R.A. 669.

— as to right of way on shore. 4 L.R.A.(N.S.) 880.

— as to right to fish. 60 L.R.A. 498.

— as affecting performance of real estate broker's contract. 44 L.R.A. 600.

— as to receipt of double commissions by real estate broker. 45 L.R.A. 48.

— of real estate agents to take rebates or commissions from other party as affecting right to compensation from employer. 34 L.R.A.(N.S.) 1047.

— as affecting waiver by officer of subordinate lodge of forfeiture for nonpayment of assessments. 38 L.R.A.(N.S.) 573.

— to pay certain class of losses as affecting liability of insurer for such a loss not covered by the policy. 19 L.R.A.(N.S.) 421.

— to give insured notice of maturity of premium where insured is not otherwise entitled to notice. 29 L.R.A.(N.S.) 1037.

§ 7302. "Usual." "Customary." The words "usual" and "customary" mean "according to usage." [R. C. 1905, § 6715; Civ. C. 1877, § 2120; R. C. 1899, § 5129.]

§ 7303. 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." [R. C. 1905, § 6716; Civ. C. 1877, § 2121; R. C. 1899, § 5130.]

Definition of "valuable consideration." 2 L.R.A. 530.

§ 7304. "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. [R. C. 1905, § 6717; Civ. C. 1877, § 2122; R. C. 1899, § 5131.]

Findings of court constitute part of judgment roll. Colonial Mortg. Co. v. Bradley, 4 S. D. 158, 53 N. W. 1108.

Counsel need not take exceptions to findings of fact for purposes of appeal. Kelly v. Wheeler, 22 S. D. 611, 119 N. W. 994; Lone Tree Ditch Co. v. Rapid City Electric & Gaslight Co., 16 S. D. 451, 93 N. W. 650.

§ 7305. "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. [R. C. 1905, § 6718; Civ. C. 1877, § 2123; R. C. 1899, § 5132.]

§ 7306. Official newspaper defined. An official newspaper is one designated by a state or municipal legislative body, or an agent empowered by it, in which the public acts, resolves, advertisements and notices are required to be published; and wherever in the statutes of this state the term "official paper" is used in lieu of the term "official newspaper," this definition shall apply. [1909, ch. 179.]

§ 7307. Masculine includes what. Words used in the masculine gender include the feminine and neuter. [R. C. 1905, § 6719; Civ. C. 1877, § 2124; R. C. 1899, § 5133.]

Deed signed and sealed "Patrick M., Atty. in fact for Amelia B.," is deed of Amelia, although the words "he," "his," etc., are used in deed. Donovan v. Welch, 11 N. D. 113, 90 N. W. 262.

§ 7308. Singular includes what. Words used in the singular number include the plural and the plural the singular, except when a contrary intention plainly appears. [R. C. 1905, § 6720; Civ. C. 1877, § 2125; R. C. 1899, § 5134.]

As to thresher's lien being executed in duplicate and filed in two counties where grain is grown. Gorthy v. Jarvis, 15 N. D. 509, 108 N. W. 39.

Cumulative voting in election of city commissioners is not authorized where statute governing such election is purposely framed in plural to prevent cumulative voting. State ex rel. Shaw v. Thompson, 21 N. D. 426, 131 N. W. 231.

§ 7309. 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 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. [R. C. 1905, § 6721; Civ. C. 1877, § 2126; R. C. 1899, § 5135.]

Term "personal property" includes judgments. *McLaughlin v. Alexander*, 2 S. D. 226, 49 N. W. 92.

"Wills" defined. 89 Am. St. Rep. 486.

§ 7310. "Compound interest." The words "compound interest" mean interest added to the principal as the former becomes due and thereafter made to bear interest. [R. C. 1905, § 6722; Civ. C. 1877, § 2127; R. C. 1899, § 5136.]

§ 7311. "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. [R. C. 1905, § 6723; Civ. C. 1877, § 2128; R. C. 1899, § 5137.]

§ 7312. 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 subject 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. [R. C. 1905, § 6724; Civ. C. 1877, § 2129; R. C. 1899, § 5138.]

Statutes are to be liberally construed. *Pinkerton v. Le Beau*, 3 S. D. 440, 54 N. W. 97; *Kingman v. O'Callaghan*, 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. 519, 74 N. W. 447.

As to construction of statute giving "farm laborer" lien for wages. *Lowe v. Abrahamson*, 18 N. D. 182, 19 L.R.A. (N.S.) 1039, 119 N. W. 241.

As to inheritance by illegitimate child. *Moen v. Moen*, 16 S. D. 210, 92 N. W. 13.

Officers and stockholders of foreign corporation are liable on implied contracts of corporation to return everything received under express contract which has been rescinded by party making claim because of breach by corporation. *Chesley v. Soo Coal Co.*, 19 N. D. 18, 121 N. W. 73.

§ 7313. 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. [R. C. 1905, § 6725; Civ. C. 1877, § 2130; R. C. 1899, § 5139.]

§ 7314. 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. [R. C. 1905, § 6726; Civ. C. 1877, § 2131; R. C. 1899, § 5140.]

Approval of bond by two of three officers required by statute sufficient. *State v. Kipp*, 10 S. D. 495, 74 N. W. 440.

Majority of members of board constitutes legal quorum. *Turnquist v. Cass County*, 11 N. D. 514, 92 N. W. 852.

Proceedings by majority of board of drain commissioners are valid. *Turnquist v. Cass County Drain Comrs.*, 11 N. D. 514, 92 N. W. 852.

§ 7315. 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. [R. C. 1905, § 6727; Civ. C. 1877, § 2132; R. C. 1899, § 5141.]

Repeal of statute repealing statute which repealed statute providing for obtaining of highway by prescription does not revive such former statute. *Burleigh County v. Rhud*, 23 N. D. 362, 136 N. W. 1082.

§ 7316. 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. [R. C. 1905, § 6728; Civ. C. 1877, § 2133; R. C. 1899, § 5142.]

Penalties prescribed by statute not extinguished by its repeal. *Nat. Bank v. Lemke*, 3 N. D. 154, 54 N. W. 919; *Wells County v. McHenry*, 7 N. D. 246, 74 N. W. 241.

Meaning of the term "successive weeks." *Finlayson v. Peterson*, 5 N. D. 587, 67 N. W. 953, 57 Am. St. Rep. 584, 33 L.R.A. 532.

As to similar provision in Ind. Rev. Stat. 1881, § 248, see *Western U. Teleg. Co. v. Brown*, 108 Ind. 542, 8 N. E. 171.

§ 7317. **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. [R. C. 1905, § 6729; 1889, ch. 38, § 1; R. C. 1895, § 5143.]

"Successive weeks" construed. *Finlayson v. Peterson*, 5 N. D. 587, 67 N. W. 953.

Publication once in each week covering thirty-seven days is for six successive weeks. *Thomas v. Issenhuth*, 18 S. D. 303, 100 N. W. 436.

§ 7318. **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. [R. C. 1905, § 6730; 1893, ch. 67, § 1; R. C. 1895, § 5144.]

See further as to annual or biennial reports, sections 95, 97, 98, 632.