ground for five years, with the consent of the owner, and without a reservation of his right, is presumptive evidence of his intention to dedicate it to the public for that purpose;

39. That there was a good and sufficient consideration for a written contract;

40. When two persons perish in the same calamity, such as a wreck, battle or conflagration, and it is not shown who died first, and there is no particular circumstance from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, sex, according to the following rules;

41. If both of those who have perished were under the age of fifteen years, the older is presumed to have survived;

42. If both were above the age of sixty, the younger is presumed to have survived;

43. If one be under fifteen and the other above sixty, the former is presumed to have survived;

44. If both be over fifteen and under sixty, and sexes be different, the male is presumed to have survived; if the sexes be the same then the older;

45. If one be under fifteen or over sixty, and the other between those ages, the latter is presumed to have survived;

46. That the foreign law will be presumed to be the common law in the absence of rebutting evidence;

47. A domicile once acquired is presumed to continue until it is shown to have been changed.

Approved March 3rd, 1897.

PROBATE CODE.

CHAPTER 111.

[S. B. 150.]

AMENDING THE PROBATE CODE.

AN ACT to Amend the Probate Code of the State of North Dakota.

Be it Enacted by the Legislative Assembly of the State of North Dakota:

§ 1. AMENDMENT.] That an act passed by the fourth legislative assembly of the State of North Dakota and approved March 1, 1895, entitled, "An act to establish a probate code for the State of North Dakota," and comprising section 6160 and following sections up to and including section 6587 of the Revised Codes of said state be and the same is hereby amended as hereinafter prescribed.

§ 2. That section 6168 of the Revised Codes of said state,

being section 9 of said act, be and is hereby amended so as to read as follows:

§ 6168. TERMS OF.] The county court shall be always open for the transaction of probate business, and there shall be a regular term of the county court held at the county seat in each organized county, commencing at 9 o'clock in the forenoon of the first Monday of each calendar month and continuing from day to day so long as shall be necessary.

§ 3. That section 6174 of the Revised Codes, being section 14 of said act, be and the same is hereby amended so as to read as follows:

§ 6174. CLERK, POWERS OF.] A clerk may exercise concurrently with the judge the following powers:

1. He may certify and sign as clerk any of the records of the court, except such as require the signature of the judge.

2. He may certify and sign as clerk and affix the seal of the court to a transcript or exemplification of any record of the court.

3. He may sign as clerk and affix the seal of the court to a subpœna, citation or notice, and issue the same with the same effect as if issued by the judge.

4. He may administer oaths authorized or required in any proceeding in the court and certify the same under the seal of the court.

5. He may postpone for a definite time not exceeding thirty days any hearing or other matter when the judge is absent from his office and cannot attend court; and in counties where the county courts have civil and criminal jurisdiction the duties and powers of the clerks of the county courts shall be as nearly as may be, the same as those of the clerks of the district courts.

§ 4. That section 6193 of the Revised Codes, being section 34 of said act, be and is hereby amended so as to read as follows:

§ 6193. RECORDS TO BE KEPT.] There shall be kept in each county court the following books of record:

1. A journal, in which there shall be entered under the proper dates and in the order in which the transactions takes place, respectively, a brief statement of the nature and object of each proceeding; a minute or statement of each act of the judge or of the parties therein, except the filing of a paper; a minute of each hearing or postponement; the facts appearing by the return to each process or mandate issued from the court; and each decision or direction given by the court in the progress of a proceeding, and such other matters as are specially required to appear of record; but these provisions do not require a minute of the issuance of the return of the subpœna or a statement of the evidence or any particulars relating to the introduction of testimony, except the names of the witnesses sworn and examined; such minutes to be signed by the judge at the close of the entries for each day.

2. A docket in which there shall be set apart at least two pages to each case by entering thereon its title and number, underneath

which there shall be entered the following particulars, relating to that case: On the first page, a register containing the name of each party to any proceeding therein; each guardian or other person having the custody of a party who is under any legal disability; each special guardian appointed for a party and each attorney appearing for a party; together with the postoffice address of each and word or words describing his relation to the case, if a party as for example "heir," "devisee," or "ward," or his relation to the party as "attorney" or otherwise, according to the fact. The name of the attorney, guardian or custodian must immediately follow that of the party whom he represents; and there shall be left sufficient space below the name of each party to admit of such entries from time to time as occasion requires. New parties ,including persons to whom letters testamentary, of administration or of guardianship are issued shall be registered in like manner. In the margin on the left there shall be entered opposite the name of each special guardian or attorney the date of his appointment or appearance and opposite the name of each new party, the date on which he became a party; and in the margin on the right, when the relation of a party, attorney or other person ceases, a minute to that effect. On the page following, a chronological index or minute of all the proceedings in that case from the beginning until the final disposition thereof, including a brief statement of the object of each proceeding and a minute of the filing of each pleading or other paper, each preliminary act of the court or judge, the issuance and return of each citation or other process, each hearing or postponement, each intermediate or final order or decree and each act done to carry the same into effect. There shall be entered on the left hand margin the date of each transaction, and in the margin on the right a reference to the book and page of the journal or record, where the same appears.

3. Record books in which there shall be transcribed in full every order affecting a substantial right or directing the performance of a duty and every final order or decree, all wills which are admitted to probate and all bonds of executors, administrators, guardians and surviving partners of deceased persons, which are accepted and approved; and all letters issued to executors, administrators and guardians.

4. There shall be appended to each docket a numerical index referring to each case by number and title, containing the number of each case progressively, its title and the number of the page on which it is docketed; also an alphabetical index arranged with reference to the first letter of the family name in the title of each case and containing, in addition to each title, the number of the page on which the docket entries begin. When the cases are not docketed in one book, there shall be kept in a separate book a general index, both numerical and alphabetical, of similar character, referring in each instance to the book and page of the

docket. The general index shall include all cases heretofore commenced in the county court or appearing on the records of the probate court conforming in relation thereto as nearly as may be to the above requirements.

§ 5. That section 6211 of the Revised Codes, being section 52 of said act, be amended so as to read as follows:

§ 6211. SERVICE BY MAIL—HOW MADE AND PROVED.] Service by mail is effected by depositing in the postoffice a true copy of the citation or notice to be served, enclosed in a plain sealed envelope with the postage thereon fully paid, directed to the person to be served at his postoffice address; and is proved by the affidavit of any person having knowledge of the facts, or by a statement thereof in the journal when the mailing is done by the judge.

§ 6. That section 6220 of the Revised Codes, being section 61 of said act, be and is hereby amended so as to read as follows:

§ 6220. SPECIAL PROCEEDINGS—HOW COMMENCED.] A special proceeding in the county court is commenced by the voluntary appearance and pleadings of all the parties, or by the presentation of a petition by a competent party and the issuance of a citation to the other parties.

§ 7. That subdivision 1 of section 6225 of the Revised Codes, being subdivision 1 of section 66 of said act, be amended so as to read as follows:

1. The caption, which shall contain the name of the county and court and title of the case, as for example, "Estate of A. B., deceased," or "Guardianship of C. D., minor," and the names of the parties to the special proceedings, distinguishing them as petitioner and respondent, followed by a word or words descriptive of the pleading, as for example, "petitions for probate of will."

§ 8. That section 6232 of the Revised Codes. being section 73 of said act, be amended so as to read as follows:

§ 6232. DEPOSITION— WHEN TAKEN.] When it is satisfactorily shown by affidavit that a material witness within the county is so aged, sick or infirm that his attendance cannot be compelled without endangering his life or health and there is no good reason to suppose that he will be able to attend within a reasonable time to which the hearing may be postponed, the judge shall proceed to the place where the witness is and there take his testimony as in open court; but if an interested party so requests, the testimony of such witness must be taken in the form of a deposition.

§ 9. That section 6255 of the Revised Codes, being section 96 of said act, be amended so as to read as follows:

§ 6255 APPEAL—PARTIES TO.] Each person who was a party to the proceeding in the county court and each other person, who has or claims in the subject matter of the decree or order, a right

or interest which is affected by an appeal may take an appeal and all parties interested must be made a party to the appeal.

§ 10 That section 6262 of the Revised Codes, being section 103 of said act, be amended so as to read as follows:

§ 6262. SPECIFICATION OF ERRORS ON APPEAL.] A specification of errors must contain a reference to each particular error appearing of record in the decree or order in the proceedings on which it is founded to which the appellant objects.

§ 11. That section 6320 of the Revised Codes, being section 161 of said act, be amended so as to read as follows:

§ 6320. PROOF OF INTESTACY AND VALUE OF PROPERTY REQUISITE.] Before granting administration the court must be satisfied by competent testimony of the death of the person whose estate is in question, and must require proof as to whether or not he left a will and of the time, place and circumstances of his death, his residence at the time, the character, situation and value of the property, the fact of the intestacy or any other material fact.

§ 12. That section 6332 of the Revised Codes, being section 173 of said act, be amended so as to read as follows:

§ 6332. PROBATE OF FOREIGN WILLS.] Every will duly proved and allowed in any of the territories, or in any other of the United States or the District of Columbia, or in any foreign country or state, may be allowed and recorded in the county court of any county in which the testator shall have left any estate, or any estate for which claim is made. When a copy of the will and the probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will. with a petition for letters, the same must be filed, and the court or judge must appoint a time for the hearing, notice whereof must be given as provided for an original petition for the probate of a will. If, on the hearing, it appears upon the face of the record that the will has been proved, allowed and admitted to probate in any of the territories, or any other of the states of the United States, the District of Columbia, or in any foreign country or state, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this State, it must be admitted to probate, be certified in like manner according to the facts, and recorded, and have the same force and effect as a will first admitted to probate in this State, and letters testamentary or of administration with the will annexed issued thereon.

§ 13. That section 6293 of the Revised Codes, being section 134 of said act, be amended so as to read as follows:

§ 6296. CONTESTING PROBATE OF WILL.] If any one appears to contest the will, he must file written grounds of opposition to the probate thereof, and serve a copy on the petitioner and other residents of the county interested in the estate, any one or more of whom may demur thereto upon any of the grounds of demurrer allowed by law in civil actions. If the demurrer be sustained, the

court must allow the contestant a reasouable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may jointly or separately answer the contestant's grounds, traversing or otherwise obviating or avoiding the objections. Any issues of the fact thus raised involving:

1. The competency of the decedent to make a last will and testament.

2. The freedom of the decedent at the time of the execution of the will from duress, menace, fraud or undue influence.

3. The due execution and attestation of the will by the decedent or subscribing witnesses; or,

4. Any other questions substantially affecting the validity of the will must be tried and determined by the court. On the trial the contestant is plaintiff, and the petitioner is defendant.

The court, after hearing the case, must give in writing the findings of fact and conclusions of law upon the issues submitted, and upon these the court must render judgment, either admitting the will to probate or rejecting it. In either case, the proofs of the subscribing witnesses must be reduced to writing. If the will be admitted to probate, the judgment, will and proofs must be recorded.

If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined; and the death, absence or insanity of any of them must be satisfactorily shown to the court. If none of the subscribing witnesses reside in the county, and are not present at the time appointed for proving the will, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and as evidence of the execution, .t may admit proof of the handwriting of the testator and the subscribing witnesses or any of them.

The testimony of each witness, reduced to writing and signed by him, shall be taken, kept and filed by the judge, and shall be good evidence in any subsequent contests or trials concerning the validity of the will, or of the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this State.

If the court be satisfied upon the proof taken that the will was duly executed, and that the testator was at the time of the execution thereof of sound and disposing mind, and not acting under duress, menace, fraud or undue influence, a certificate of the proof and the facts so found, signed by the judge and attested by the seal of the court, must be attached to the will.

The will and the certificate of the proof thereof, together with all the evidence taken, must be filed by the judge and recorded by him.

§ 14. That section 6304 of the Revised Codes, being section 145 of said act, be amended so as to read as follows:

§ 6304. CONTESTING WILL AFTER PROBATE.] When a will has been admitted to probate, any person interested therein may at any time, within one year after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved, a sworn petition in writing containing his allegations, that evidence discovered since the probate of the will, the material facts of which must be set forth, shows:

1. That a will of later date than the one proved by the decedent, revoking or changing the former will, has been discovered and is offered; or

2. That some jurisdictional fact was wanting in the former probate; or

3. That the testator was not competent, free from duress, menace, fraud, or undue influence when the will allowed was made; or

4. That the former will was not duly executed and attested.

Upon filing the petition, a citation must be issued to the executors of the will, or to the administrators with the will annexed, and to all the legatees and devisees [mentioned] in the will, and heirs residing in the state, so far as known to the petitioner, or to their guardian, if any of them are minors, or their personal representatives, if any of them are dead, requiring them to appear before the court on some day of a regular term therein specified, to show cause why the probate of the will should not be revoked.

If another will be offered by the petition, it must show all that is required in the original case of a petition for the probate of a will, and like notices must be served in the same manner, and upon all the parties as required before the hearing of proof of any will originally; provided, that such notices need not be served on any persons upon whom the citation heretofore required has been served.

At the time appointed for showing cause, or at any time to which the hearing is postponed, personal service of the citations having been made upon the persons named therein, and the required publication, and service of the notices having been made and all duly proved, the court must proceed to try the issues joined in the same manner as in an original contest of a will. If upon hearing the proofs of the parties the court shall decide that the will is, for any of the reasons alleged, invalid, or that it is not proved to be the last will of the testator, the probate must be revoked and annulled; and if the court shall decide that the new will is valid, it may admit the same to probate in the same manner as originally upon the probate of a contested will. Upon the revocation being made, the powers of the executor or administrator with the will annexed, must cease; but such executor or administrator shall not be liable for any act done in good faith previous to the revocation.

The fees and expenses must be paid by the party contesting

the validity or probate of the will, if the will in probate be confirmed. If the probate be annulled and revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs.

§ 15 That section 6298 of the Revised Codes, being section 139 of said act, be amended so as to read as follows:

§ 6298. PROBATE OF LOST OR DESTROYED WILLS.] Whenever any will is lost or destroyed, the county court must take proof of the execution and validity thereof, and establish the same, notice to all persons interested being first given, as prescribed in regard to proofs of wills in other cases. All the testimony given must be reduced to writing, signed by the witnesses, filed and recorded.

No will shall be proved as a lost or destroyed will unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.

When a lost will is established the provisions thereof must be distinctly stated and certified by the judge of the county court, under his hand and seal of the court, and the certificate must be filed and recorded as other wills are filed and recorded, and letters testamentary or of administration with the will annexed must be issued thereon in the same manner as upon wills produced and duly proved; the testimony must be reduced to writing, signed, certified and filed as in other cases, and shall have the same effect as evidence as provided in the proof of other wills.

If before or during the pendency of an application to prove a lost or destroyed will, letters of administration are granted on the estate of the testator, or letters testamentary of any previous will of the testator are granted, the court may restrain the administrators or executors so appointed from any acts or proceedings which would be injurious to the legatees, or devisees claiming under the lost or destroyed will.

§ 16. That section 6286 of the Revised Codes, being section 139 of said act, be amended so as to read as follows:

§ 6286. PROBATE OF NUNCUPATIVE WILLS.] Nuncupative wills may at any time within six months after the testamentary words are spoken by the decedent, be admitted to probate on petition and notice as provided for the probate of wills executed in writing. The petition, in addition to the jurisdictional facts, must allege that the testamentary words or the substance thereof, were reduced to writing within thirty days after they were spoken, which writing must accompany the petition and be duly verified.

The county court must not receive or entertain a petition for the probate of a nuncupative will until the lapse of fourteen days from the death of the testator, nor must such petition be at any

time acted on, unless the testamentary words are, or their substance is reduced to writing and filed with the petition, nor until the surviving husband or wife, if any, and all other persons resident in the county and state interested in the estate, are notified, as provided for the probate of wills.

Contests of the probate of nuncupative wills and appointments of executors and administrators with the will annexed of the estate devised thereby must be had, conducted and made as provided in cases of the probate of written wills; *Provided*, that double the period allowed for the petition of revocation of the probate of a written will shall be allowed in which to petition for the revocation and annulling of a nuncupative will.

§ 17. That section 6306 of the Revised Codes, being section 147 of said act, be amended so as to read as follows:

§ 6306. LETTERS TESTAMENTARY AND OF ADMINISTRATION WITH THE WILL ANNEXED—HOW AND TO WHOM ISSUED.] The court admitting the will to probate after the same is proved and allowed, must issue letters thereon to the persons named therein as executors, who are competent to discharge the trust, who may appear and qualify unless objection be made as provided hereinafter. No person is competent to serve as executor who at the time the will is admitted to probate, is:

1. Under the age of majority.
2. Convicted of infamous crime.
3. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.

If the sole executor or all of the executors are incompetent, or renounce or fail to apply for letters, or to appear and qualify, or if there is no executor named in the will, letters of administration with the will annexed must be issued.

Any person interested in a will may file objections in writing, to granting letters testamentary to persons named as executors, or to any of them; and the objections must be heard and determined by the court. A petition may, at the same time, be filed for letters of administration, with the will annexed.

When an unmarried woman, appointed executrix, marries, her authority is extinguished. When a married woman is named as executrix she may be appointed and serve in every respect as a *femme sole*.

No executor of an executor shall, as such, be authorized to administer on the estate of the first testator, but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed, of the estate of the first testator, left unadministered, must be issued.

Where a person absent from the state, or a minor, is named executor, and there is another executor who accepts the trust and qualifies, the latter may have letters testamentary and administer the estate until the return of the absentee, or the majority of the

minor, who may then be admitted as joint executor. If there is no other executor, letters of administration with the will annexed, must be granted; but the court may, in its discretion, revoke them on the return of the absent executor, or the arrival of the minor at the age of majority.

When all the executors named are not appointed by the court, those appointed have the same authority to perform all acts and discharge the trust required by the will, as effectually for every purpose as if all were appointed and should act together; when there are two executors or administrators, the act of one alone shall be effectual, if the other is absent from the state, or laboring under any legal disability from serving, or if he has given his co-executor or co-administrator authority in writing, to act for both; and when there are more than two executors or administrators, the act of a majority of them is valid.

§ 18. That section 6315 of the Revised Codes, being section 156 of said act, be amended so as to read as follows:

§ 6315. LETTERS OF ADMINISTRATION—WHO ENTITLED TO.] Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectfully entitled thereto in the following order:

1. The surviving husband or wife, or some competent person whom he or she may request to have appointed.
2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate.
8. The creditors.
9. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate.

If any person entitled to administration is a minor, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court.

No person is competent to serve as administrator or administratrix, who, when appointed, is:

1. Under the age of majority.
2. Convicted of an infamous crime.
3. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.

A married woman must not be appointed administratrix. When an unmarried woman, appointed administratrix, marries, her authority is extinguished.

§ 19. That section 6317 of the Revised Codes, being section 158 of said act, be amended so as to read as follows:

§ 6317. PETITIONS FOR LETTERS OF ADMINISTRATION.] Petition for letters of administration must be in writing, signed and duly verified by the applicant or his counsel, and filed with the judge or clerk of the county court, stating therein the facts essential to give the court jurisdiction of the case, and when known to the applicant, he must state the names, ages, residence and post office address of all the heirs of the decedent, and the description and value of the property. If the jurisdictional facts existed, but were not fully set forth in the petition, and are afterward proved in the course of administration, the decree or order of administration and subsequent proceedings are not void on account of such want of jurisdictional averments. When a petition for letters of administration is filed the court must by due order set a day for hearing the same, and cause due notice thereof to be given to all persons interested; the notice being served in the same manner and for the same time as required in the probate of wills.

§ 20. That section 6345 of the Revised Codes, being section 186 of said act, be amended so as to read as follows:

§ 6345. COSTS—HOW PAID.] The costs of such proceeding is the same as required to be paid by petitioners for letters testamentary or administration and must in every case be paid by the petitioner.

§ 21. That section 6346 of the Revised Codes, being section 187 of said act, be amended so as to read as follows:

§ 6346. EXECUTOR—ADMINISTRATOR—GUARDIAN—WHO COMPETENT FOR.] No person under twenty-one years or other person who is incapable by law of making a contract or has been convicted of a felony, is competent to serve as executor, administrator or guardian; and no person shall be appointed as such, who is not in good faith a resident of this state or was a partner of the decedent at the time of his death or is by the court found unfit to discharge the duties of the trust by reason of drunkenness, improvidence, mental or physical infirmity or lack of integrity. A married woman must not be appointed administratrix or guardian, nor shall the husband of the widow of a deceased man be appointed guardian of such deceased man's children, *Provided*, however, that the court may in its discretion upon the probate of a foreign will issue letters testamentary to the executor named in the will.

§ 22. That section 6359 of the Revised Codes, being section 200 of said act, be amended so as to read as follows:

§ 6359. JUDGES ISSUES CITATION AS TO INSUFFICIENCY OF BOND.] When it comes to the knowledge of the county judge that the bond of an executor, administrator or guardian is inadequate or that a surety therein is insufficient, is dead, or has removed or is about to remove from the state and no application is made, as provided in the last section, an order shall be made requiring

such executor, administrator or guardian to show cause why he should not be required to give further security upon which he shall be cited as upon the application of a party.

§ 23. That section 6377 of the Revised Codes, being section 218 of said act, be amended so as to read as follows:

§ 6377. INVENTORY BY SURVIVING PARTNERS.] In case of the death of one partner the surviving partner or partners must make a full, true and complete inventory of the property of the co-partnership with a list of all the liabilities thereof at the time of the death of the deceased partner and deliver the same to the executor or administrator of such deceased partner, or to the county court. and must give a good and sufficient bond to such executor or administrator to be approved by the county court. Such surviving partner or partners have the right to continue in possession of the effects of the partnership, pay its debts out of the same and settle its business; but must proceed thereto without delay and account with the executor or administrator and pay over such balance as may from time to time be payable to him in the right of the decedent. Upon the application of the administrator or executor the county court may, whenever it appears necessary after citation, order such surviving partner to deliver an inventory or render an account, and may enforce the order as in other cases.

§ 24. That section 6385 of the Revised Codes, being section 226 of said act, be amended so as to read as follows:

§ 6385. DECEDENT'S LIFE INSURANCE.] The avails of a life insurance policy or of a contract payable by any mutual aid or benevolent society, when made payable to the personal representatives of a deceased, his heirs or estate upon the death of a member of such society or of such insured shall not be subject to the debts or the decedent except by special contract, but shall be inventoried and distributed to the heirs or the heirs at law of such decedent.

§ 25. That section 6389 of the Revised Codes, being section 230 of said act, be amended so as to read as follows:

§ 6389. HOMESTEAD EXEMPT FROM DEBT OR LIABILITY—DELIVERY OF.] Upon the death of either husband or wife the survivor, so long as he or she do not again marry, may continue to possess and occupy the whole homestead, and upon the death of both husband and wife the children may continue to possess and occupy the same until otherwise disposed of according to law. Such homestead, as defined in section 3605 of the Civil Code, must be ascertained and set apart as hereinafter prescribed upon the selection of the person or persons entitled to possession thereof, and shall not be subject to the payment of any debt or liability contracted by or existing against the husband or wife or either of them previous to or at the time of the death of such husband or wife.

§ 26. That all of article 5 of chapter 6 of said act, being sections numbered 6399 to and including 6416 of the Revised Codes, be amended so as to read as follows:

ARTICLE 5, CLAIMS, PRESENTATION, PROOF AND ALLOWANCE.

1. Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper of the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice. Such notice must be published as often as the judge shall direct, but not less than once a week for four weeks. The judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his successor must give notice only for the expired time allowed for such presentation.

2. The time expressed in the notice must be six months after its first publication, when the estate exceeds in value the sum of five thousand dollars and four months when it does not.

3. After the notice is given, as required by the preceding section, a copy thereof, with the affidavit of due publication [or of publication] and posting must be filed and upon such affidavits or other testimony to the satisfaction of the court, an order or decree showing that due notice to creditors has been given, must be made by the court and entered in the minutes and recorded.

4. If a claim arising upon a contract heretofore made be not presented within the time limited in the notice, it is barred forever, except as follows: If it be not then due, or if it be contingent, it may be presented within one month after it becomes due or absolute; if it be made to appear by the affidavit of the claimant, to the satisfaction of the executor or administrator and the judge of the county court, that the claimant had no notice as provided in this chapter by reason of being out of the state, it may be presented at any time before a decree or distribution is entered; a claim for a deficiency remaining unpaid after a sale of property of the estate mortgaged or pledged must be presented within one month after such deficiency is ascertained. All claims arising upon contracts hereafter made, whether the same be due, not due or contingent, must be presented within the time limited in the notice; and any claim not so presented is barred forever; *Provided, however*, that when it is made to appear by the affidavit of the claimant as above provided, that he had no notice by reason of being out of the state, it may be presented as herein provided; *Provided, further*, that nothing in this section nor in this act contained shall be construed to prohibit the right or limit the time of foreclosure of mortgages upon real property of decedents,

whether heretofore or hereafter executed, but every such mortgage may be foreclosed within the time and in the mode prescribed by the code of civil procedure, except that no balance of the debts secured by such mortgage remaining unpaid after foreclosure shall be a claim against the estate, unless such debts were presented as required by this code.

5. Every claim which is due when presented to the executor or administrator must be supported by the affidavit of the claimant or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the claimant or affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated. When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the estate is insolvent, no greater rate of interest shall be allowed upon any claim, after the first publication of notice to creditors, than is allowed by law on judgments obtained in the district court.

6. When it shall appear, upon the settlement of the accounts of any executor or administrator, that debts against the deceased have been paid without the affidavit and allowance prescribed by the preceding section, and shall be proven by competent evidence to the satisfaction of the county court that such debts were justly due, were paid in good faith, that the amount paid was a true amount of such indebtedness over and above all payments and setoffs, and that the estate is solvent, it shall be the duty of the said court to allow the said sums so paid in the settlement of said account.

7. Any judge of the county court may present a claim against the estate of a decedent, for allowance to the executor or administrator thereof; and if the executor or administrator allows or rejects the claim, he must, in writing, present the same to the judge of an adjoining county who shall thereupon be substituted in the allowance and settlement of such claim as provided by article 3 of chapter 2 of the Probate Code; and the judge of the county court presenting such claim, in case of its rejection by the executor or administrator, or by the county judge, to whom the same has been transferred, has the same right to sue in a proper court for its recovery as other persons have when their claims against an estate are rejected.

8. When a claim accompanied by the affidavit required in this chapter is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim, it must be presented to the county judge for his approval, who, must, in the same manner, indorse

upon it his allowance or rejection. If the executor or administrator, or the judge refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect is equivalent to a rejection on the tenth day; and if the presentation be made by a notary, the certificate of such notary, under seal, is *prima facie* evidence of such presentation and rejection. If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time.

9. Every claim allowed by the executor or administrator, and approved by the judge, or a copy thereof, as hereinafter provided, must, within thirty days thereafter, be filed in the county court and be ranked among the acknowledged debts of the estate, to be paid in due course of administration. If the claim is founded on a bond, bill, note, or any other instrument, a copy of such instrument must accompany the claim, and the original instrument must be exhibited if demanded, unless it is lost or destroyed, in which case the claimant must accompany his claim by his affidavit, containing a copy or particular description of such instrument, and stating its loss or destruction. If the claim or any part thereof is secured by a mortgage or other lien which has been recorded or filed according to law in the office of the register of deeds of the county in which the land affected by it lies, it is sufficient to describe the mortgage or lien, and refer to the date of its filing and volume, and page of its record. If, in any case, the claimant has left any original voucher in the hands of the executor or administrator, or suffered the same to be filed in court, he may withdraw the same when a copy of the same has been already, or is then, attached to his claim. A brief description of every claim filed must be entered by the judge in a register provided for that purpose, showing the name of the claimant, the amount and character of the claim, rate of interest, and date of allowance.

10. When a claim is rejected, either by the executor or administrator, or the county judge, the holder must bring suit in the proper court, to-wit: Before a justice of the peace, or in the district court, according to its amount, against the executor or administrator, within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim is barred forever.

11. No claim must be allowed by the executor or administrator, or by the judge, which is barred by the statute of limitations. When a claim is presented to the judge for his allowance, he may, in his discretion, examine the claimant and others, on oath, and hear any legal evidence touching the validity of the claim.

12. No holder of any claim against an estate shall maintain

any action thereon, unless the claim is first presented to the executor or administrator.

13. The time during which there shall be a vacancy in the administration, or in the office of the county judge, must not be included in any limitation herein prescribed.

14. If any action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator, for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentation required.

15. Whenever any claim is presented to an executor or administrator, or to the county judge, and he is willing to allow the same in part, he must state in his endorsement the amount he is willing to allow. If the creditor refuse to accept the amount allowed in satisfaction of his claim, he shall recover no costs in an action therefor, brought against the executor or administrator, unless he recovers a greater amount than that offered to be allowed.

16. A judgment rendered against an executor or administrator, in the district court or before a magistrate, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator, and the judge of the county court, and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the judgment must be filed in the county court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment.

17. When any judgment has been rendered for or against the testator or intestate in his lifetime, no execution shall issue thereon after his death except:

(a). In case of the death of the judgment creditor, upon the application of his executor or administrator, or successor in interests.

(b). In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon.

A judgment against the decedent for the recovery of money must be presented to the executor or administrator like any other claim. If the execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof, and the officer making the sale must account to the executor or administrator for any surplus in his hands.

18. A judgment rendered against a decedent, dying after verdict or decision on an issue of fact, but before judgment is rendered thereon, is not a lien on the real property of the decedent, but is payable in due course of administration.

19. If the executor or administrator doubts the correctness of any claim presented to him, he may enter into an agreement, in

writing, with the claimant to refer the matter in controversy to some disinterested person, to be approved by the judge of the county court. Upon filing the agreement and approval of the judge of the county court, in the office of the clerk of the district court for the county or judicial subdivision in which the letters testamentary or of administration were granted, the clerk must, either in vacation or in term, enter a minute of the order referring the matter in controversy to the person so selected or, if the parties consent, a reference may be had in the county court, and the report of the referee, if confirmed, establishes or rejects the claim, the same as if it had been allowed or rejected by the executor or administrator and the county judge.

20. The referee must hear and determine the matter, and make his report thereon to the court in which his appointment is entered. The same proceedings shall be had in all respects, and the referee shall have the same powers, be entitled to the same compensation, and subject to the same control as in other cases of reference. The court may remove the referee, appoint another in his place, set aside or confirm his report, and adjudge costs, as in actions against executors or administrators and the judgment of the court thereon shall be as valid and effectual in all respects as if the same had been rendered in a suit commenced by ordinary process.

21. When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause.

22. If the executor or administrator is a creditor of the decedent, his claim, duly authenticated by affidavits, must be presented for allowance or rejection to the judge of the county court, and its allowance by the judge is sufficient evidence of its correctness, and it must be paid as other claims, in due course of administration. If, however, the judge rejects the claim, action thereon may be had against the estate by the claimants, and summons must be served upon the judge of the county court, who may appoint an attorney at the expense of the estate to defend the action. If the claimant recover no judgment he must pay all costs, including defendant's attorney's fees.

23. If an executor or administrator neglect for two months after his appointment to give notice to creditors as prescribed by this chapter, the court must revoke his letters and appoint some other person in his stead, equally or next in order, entitled to the appointment.

24. At the same term at which he is required to return his inventory, the executor or administrator must also return a statement of all claims against the estate which have been presented to him, if so required by the court; and from term to term there-

after he must present a statement of claims subsequently presented to him. In all such statements he must designate the names of the creditors, the nature of each claim, when it became due or will become due, and whether it was allowed or rejected by him.

25. If there be any debt of the decedent bearing interest, whether presented or not, the executor or administrator, may, by order of the county court pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid. This applies only to claims the payment of which is secured by a mortgage or lien upon some parts of the estate.

§ 27. That all of article 7 of chapter 6 of said act, being sections numbered 6428 to and including 6460 of the Revised Codes, be amended so as to read as follows:

ARTICLE 7, SALES BY EXECUTORS AND ADMINISTRATORS.

1. All the property of the decedent, except as otherwise provided for the homestead and personal property set apart for the the surviving wife or husband and minor child or children, shall be chargeable with the payment of the debts of the deceased, the expenses of administration, and the allowance to the family, and the property, personal and real, may be sold as the court may direct, in the manner hereinafter prescribed. There shall be no priority as between personal and real property for the above purposes.

2. No sale of any property of an estate of a decedent is valid unless made under order of the county court, except as otherwise hereinafter provided. All sales must be reported under oath, and confirmed by the county court, before the title to the property sold passes.

3. All petitions for orders of sale must be in writing, setting forth the facts showing the sale to be necessary, and upon the hearing, any person interested in the estate may file his written objections, which must be heard and determined. A failure to set forth the facts showing the sale to be necessaay will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing the necessity be stated in the order directing the sale.

4. When it appears to the court that the estate is insolvent, or that it will require a sale of all the property of the estate, of every character, chargeable therewith, to pay the family allowance, expenses of administration, and debts, there need be but one petition filed, but one order of sale made, and but one sale had, except in cases of perishable property, which may be sold as provided in the next section. The county court, when a petition for the sale of any property, for any of the purposes herein named, is presented, must inquire fully into the probable amount

required to make all such payments, and if there be no more estate chargeable therewith than sufficient to pay the same, may require but one proceeding for the sale of the entire available estate. In such case the petition must set forth all the facts hereinafter required.

5. At any time after receiving letters, the executor, administrator or special administrator may apply to the county judge and obtain an order to sell perishable and other personal property likely to depreciate in value, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to pay the allowance made to the family of the decedent. The order for the sale may be made without notice; but the executor, administrator or special administrator is responsible for the property, unless, after making a sworn return, and on a proper showing; the court shall approve the sale.

6. If claims against the estate have been allowed, and a sale of property is necessary for their payment, or the expenses of administration, or for the payment of legacies, the executor or administrator may apply for an order to sell so much of the personal property as may be necessary therefor. Upon filing his petition, notice of at least five days must be given of the hearing of the application. He may also make a similar application, either in vacation or in term, from time to time, so long as any personal property remains in his hands, and sale thereof is necessary. If it appear for the best interests of the estate, he may at any time after filing the inventory, in like manner and after giving like notice apply for and obtain an order to sell the whole of the personal property belonging to the estate, remaining and not set apart whether necessary to pay debts or not.

7. Partnership interest or interests belonging to any estate by virtue of any partnership formerly existing, interest in personal property pledged, and choses in action, may be sold in the same manner as other personal property, when it appears to be for the best interest of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or to any other person, the judge must carefully inquire into the condition of the partnership affairs and must examine the surviving partner, if in the county and able to be present in court.

8. If it appears that a sale is necessary for the payment of debts or the family allowance, or for the best interest of the estate and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the court must order it to be made. In making orders and sales for the payment of debts or family allowance, such articles as are not necessary for the support and sustenance of the decedent, or are not specially bequeathed, must be first sold, and the court must so direct.

9. The sale of personal property must be made at public auction, and after public notice given for a least fifteen days, by

notices posted in three public places in the county, or by publication in a newsaper, or both, containing the time and place of sale, and a brief description of the property to be sold; unless for good reasons shown, the court orders a private sale or a shorter notice. Public sales of such property must be made at the court house door, or at the residence of the decedent or at some other public place, but no sale shall be made of any personal property which is not present at the time of sale, unless the court otherwise orders.

10. When a sale of property of the estate is necessary to pay the allowance of the family, or the debts outstanding, against a decedent, or the debts, expenses or charges of administration, or legacies, the executor or administrator may also sell any real, as well as personal, property of the estate in his hands and chargeable for that purpose, upon the order of the county court; and an application for the sale of real property may also embrace the sale of personal property.

11. To obtain an order for the sale of real property, the executor or administrator must present a verified petition to the county court setting forth the amount of personal property that has come into his hands as assets, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or determined; the amount due upon the family allowance, or that will be due after the same has been in force for one year; the debts, expenses and charges of administration already accrued, and an estimate of what will or may accrue during the administration; a general description of all the real property, except the homestead of which the decedent died seized, or in which he had any interest, or in which the estate had acquired any interest, and the conditions and value thereof; the names of the legatees and devisees, if any, and the heirs of the decedent, so far as known to the petitioner. If any of the matters here enumerated cannot be ascertained, it must be so stated in the petition; but a failure to set forth the facts showing the sale to be necessary, will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing such necessity be stated in the decree.

12. If it appears to the court, from such petition, that it is necessary to sell the whole or some portion of such real estate for the purposes and reasons mentioned in the preceding section, or any of them, such petition must be filed and an order thereupon made directing all persons interested in the estate to appear before the court at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell so much of the real estate of decedent as is necessary.

13. A copy of the order to show cause must be personally served on all persons interested in the estate, any general or

special guardian of a minor, insane or incompetent person so so interested, and any legatee or devisee, or heir of the decedent provided they are residents of the county at least ten days before the time appointed for hearing the petition, or be published four successive weeks in such newspaper of the county as the court or judge shall direct. If all persons interested in the estate join in the petition for the sale, or signify in writing their assent thereto the notice may be dispensed with and the hearing may be had at any time.

14. The county court, at the time and place appointed in such order, or at such other time to which the hearing may be postponed, upon satisfactory proof or personal service or publication of a copy of the order, by affidavit or otherwise if the consent in writing to such sale by all parties interested is not filed, must proceed to hear the petition and hear and examine the allegations and proof of the petitioners, and of persons interested in the estate who may oppose the application. All claims against the decedent not before presented, if the period of presentation has not elapsed, may be presented and passed upon after hearing.

15. The executor, administrator and witnesses may be examined on oath by either party, and process to compel them to attend and testify may be issued by the judge of the county court in the same manner and with like effect as in other cases.

16. If it appear necessary to sell part of the real estate and that by a sale thereof the residue of the estate, real or personal, or some specific part thereof, would be greatly injured or diminished in value, or subjected to expense, or rendered unprofitable, or that after such sale the residue would be so small in quantity or value, or would be of such a character with reference to its future disposition among the heirs or devisees, as clearly to render it for the best interests of all concerned that the same should be sold, the court may authorize the sale of the whole estate, or any part thereof necessary for the best interest of all concerned.

17. If the court be satisfied, after a full hearing upon the petition and an examination of the proofs and allegations of the parties interested, that a sale of the whole or some portion of the real estate is necessary, for any of the causes mentioned in this article, or if such sale be assented to by all the persons interested, an order must be made to sell the whole or so much and such parts of the real estate described in the petition as the court shall judge necessary or beneficial.

18. The order of sale must describe the lands to be sold and the terms of sale, which may be for cash, or may be for one-third cash and the balance on a credit not exceeding two years, payable in gross or in installments within that time, with interests, as the court may direct. The land may be sold in one parcel or in subdivisions, as the executor or administrator shall judge most beneficial to the estate, unless the court otherwise specially directs. If it appears that any part of such real estate has been

devised and not charged in such devise with the payment of debts or legacies, the court must order the remainder to be sold before that so devised. Every such sale must be ordered to be made at public auction, unless in the opinion of the court it would benefit the estate to sell the whole or some part of such real estate at private sale; the court may if the same is asked for in the petition order or direct such real estate or any part thereof, to be sold at either public or private sale, as the executor or administrator shall deem to be most beneficial for the estate. If the executor or administrator neglects or refuses to make a sale under the order and as directed therein, he may be compelled to sell, by the order of the court, made on motion, after due notice, by any party interested.

19. If the executor or administrator neglects to apply for any order of sale when it is necessary, any person may make application therefor in the same manner as the executor or administrator and notice thereof, must be given to the executor or administrator, before the hearing. The petition of such applicant must contain as many of the matters required for the petition of the executor or administrator as he can ascertain, and the decree of sale must fix the period of time within which the executor or administrator must make the sale.

20. When a sale is ordered and is to be made at public auction notice of the time and place of sale must be posted in three of the most public places in the county in which the land is situated and published in a newspaper, if there be one printed in the same county, but if none, than in such paper as the court may direct, four times, once each week successively, next before the sale. The lands and tenements to be sold must be described with common certainty in the notice.

21. Sales at public auction must be made in the county where the land is situated; but when the land is situated in two or more counties, it may be sold in either. The sale must be made between the hours of nine o'clock in the morning and five o'clock in the afternoon of the same day, and must be made on the day named in the notice of sale, unless the same is postponed. If at the time appointed for the sale the executor or administrator deems it for the interest of the estate that the sale be postponed he may postpone it from time to time not exceeding in all three months. In case of a postponement, notice thereof must be given by a public declaration at the time and place first appointed for the sale, and if the postponement is for more than one day further notice must be given by posting notices in three or more public places in the county where the land is situated or by publishing the same, or both, as the time and circumstances will admit.

22. When a sale of real estate is ordered to be made at private sale, notice of the same must be posted up in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county,

if none, then in such paper as the court may direct, for three successive weeks next before the day on or after which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state a day on or after which the sale will be made, and a place where the offers will be received. The day last referred to must be at least twenty-two days from the first publication of notice, and the sale must not be made before that day, but must be made within six months thereafter. The bids or offers must be in writing, and may be left at the place designated in the notice, or delivered to the executor or administrator personally, or may be filed with the judge of the county court, to whom the return of sale must be made. If it is shown that it will be for the best interest of the estate, the court may, by an order, shorten the time of notice, which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than twenty-one but not less than eight days from the first publication of the notice, in which case the notice of sale and the sale may be made to correspond with such order.

23. No sale of real estate at private sale shall be confirmed by the court unless the sum offered is at least ninety per cent of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or too low, appraisers must be appointed, and they must make an appraisement thereof, in the same manner as in case of an original appraisement of an estate. This may be done at any time before the sale or the confirmation thereof.

24. The executor or administrator must when a sale is made upon a credit, take the notes of the purchaser for the purchase money with a mortgage on the property to secure their payment.

25. The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the county court, which must be filed at any time subsequent to the sale either in term or vacation. If the sale be made at public auction, and the return is made and filed on or before the first day of the next term thereafter, no notice is required of such return or of the hearing thereof, but the hearing may be had upon the first day of the term, or any subsequent day to which the same may be postponed. If the sale be not made at public auction, or if made at public auction a hearing upon the return of proceedings be asked for in return, or is brought on for a hearing upon a day before the first day of the next term thereafter, or upon any other day than the first day of the next term after such sale, the court or judge must fix the day for the hearing, of which notice of at least ten days must be given by the judge, by notices posted in at least three public places in the county, and personally served upon all persons interested in said estate residing within the county, at

least five days prior to said day of hearing and if deemed necessary by publication in a newspaper published within the county as the court may deem best, and must briefly indicate the lands sold, the sum for which it was sold, and must refer to the return for further particulars. Upon the hearing the court must examine the return and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent, exclusive of the expenses of a new sale, may be obtained the court may vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place; if an offer ten per cent more than the amount than that named in the return be made to the court in writing by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person or to order a new sale.

26. When a return of the sale is made and filed, any person interested in the estate may file written objections to the confirmation thereof, and may be heard thereon when the return is heard by the court or judge, and may produce witnesses in support of his objection.

27. If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum as above specified, cannot be obtained, or if the increased bid mentioned heretofore be made and accepted by the court, the court must make an order confirming the sale, and directing conveyances to be executed. The sale from that time is confirmed and valid, and a certified copy of the order confirming it and directing conveyances to be executed must be recorded in the office of the register of deeds of the county within which the land sold is situated. If, after the confirmation, the purchaser neglects or refuses to comply with the terms of sale, the court may on motion of the executor or administrator and after notice to the purchaser order a resale to be made of the property. If the amount realized on such resale does not cover the bid and the expenses of the previous sale, such purchaser is liable for the deficiency to the estate.

28. Conveyances must thereupon be executed to the purchaser by the executor or administrator, and they must refer to the orders of the county court authorizing and confirming the sale of the property of the estate, and directing convenance thereof to be executed, and to the record of the order of confirmation in the office of the register of deeds, by the date, volume and page of the record, and such reference shall have the same effect as if the orders were at large inserted in the conveyance. Conveyances so made convey all the right, title, interest and estate of the decedent, in the premises, at the time of his death; if, prior to the sale, by operation of law or otherwise, the estate

has acquired any right, title or interest in the premises other than, or in addition to, that of the decedent at the time of his death, such right, title or interest also passes by such conveyance.

29. Before any order is entered confirming the sale, it must be proved to the satisfaction of the court that notice was given of the sale as prescribed, and the order of confirmation must show that such proof was made.

30. If the testator makes provisions by his will or designates the estate to be appropriated for the payment of his debts, the expenses of administration, or family expenses, they must be paid according to such provisions or designation, out of the estate thus appropriated, so far as the same is sufficient.

31. When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without the order of the county court, and at either public or private sale, and with or without notice, as the executor may determine, but the executor must make return of such sales as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case no title passes unless the sale is confirmed by the court.

32. If the provision made by the will, or the estate appropriated therefor, is insufficient to pay the debts, expenses of administration, and family expenses, that portion of the estate not devised or disposed of by will, if any, must be appropriated and disposed of for that purpose according to the provisions of this article.

33. The estate, real and personal, given by will to legatees and devisees, is liable for the debts, expenses of administration, and family expenses, in proportion to the value or amount of the several devises or legacies, but specific devises or legacies are exempt from such liability if it appear to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate.

34. When an estate given by will has been sold for the payment of debts or expenses, all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been taken therefor, and the county court, when distribution is made, must, by decree for that purpose, settle the amount of the several liabilities, and decree the amount each person shall contribute, and reserve the same from their distributive shares respectively, for the purpose of paying such contributions.

35. If a decedent, at the time of his death, was possessed of a contract for the purchase of land, his interests in such land and under such contracts may be sold on the application of his executor or administrator, in the same manner as if he had died seized of such land, and the same proceedings may be had for that purpose as are prescribed herein for the sale of the lands of which he died seized except as hereinafter provided.

36. The sale must be made subject to all payments that may hereinafter become due on such contracts, and if there are any such the sale must not be confirmed by the county court until the purchasers execute a bond to the executor or administrator, for the benefit and indemnity of himself and of the persons entitled to the interest of the decedent in the lands so contracted for, in double the whole amount of payments thereafter to become due on such contract, with such sureties as the county judge shall approve.

37. The bond must be conditioned that the purchaser will make all payments for such lands that become due after the date of the sale, and will fully indemnify the executor or administrator and the persons so entitled against all demands, costs, charges and expenses by reason of any covenant or agreement contained in such contract.

38. Upon the confirmation of the sale, the executor or administrator must execute to the purchaser an assignment of the contract, which vests in the purchaser, his heirs and assigns, all the right, title and interest of the estate, or of the persons entitled to the interest of the decedent in the lands sold at the time of the sale, and the purchaser has the same rights and remedies against the vendor of such land as the decedent would have had if he were living.

39. When any sale is made by an executor or administrator, pursuant to the provisions of this title, of lands subject to any mortgage or other lien, which is a valid claim against the estate of the decedent, and has been presented and allowed, the purchase money must be applied, after paying the necessary expenses of the sale, first to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course of administration. The application of the purchase money to the satisfaction of the mortgage or lien must be made without delay; and the land is subject to such mortgage or lien until the purchase money has been actually so applied. No claim against any estate which has been presented and allowed is affected by the statute of limitations, pending the proceedings of the settlement of the estate. The purchase money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest, and any lawful costs and charges thereon, may be paid into the county court, to be received by the judge thereof, whereupon the mortgage or lien upon the land must cease, and the purchase money must be paid over by the judge without delay, in payment of the expenses of the sale and in satisfaction of the debt, to secure which the mortgage or other lien was taken, and the surplus, if any, at once returned to the executor or administrator, unless, for good cause shown, after notice to the executor or administrator, the judge otherwise directs.

40. At any sale under order of the county court, of lands upon which there is a mortgage or lien, the holder thereof may become

the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment pro tante. If the amount for which he purchased the property is insufficient to defray the expenses and discharge his mortgage or lien, he must pay to the judge an sufficient sum to pay such expenses.

41. If there is any neglect or misconduct in the proceedings of the executor or administrator in relation to any sale, by which any person interested in the estate suffer damage, the party aggrieved may recover the same in an action upon the bond of the executor or administrator, or otherwise.

42. Any executor or administrator who fraudulently sells any real estate of a decedent, contrary to or otherwise than under the provisions of this article, is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein.

43. No action for the recovery of any estate sold by an executor or administrator, under the provisions of this title, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the sale. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud or other grounds upon which the action is based.

44. This shall not apply to minors, or others under any legal disability to sue at the time when the right of action first accrues; but all such persons may commence an action at any time within three years after the removal of the disability.

45. When a sale has been made by an executor or administrator, of any property of the estate, real or personal, he must return to the county court, at its next term thereafter, an account of sales, verified by his affidavit. If he neglects to make such return he may be punished by attachment, or his letters may be revoked, one day's notice having been first given him to appear and show cause why such attachment should not issue or such revocation should not be made.

46. No executor or administrator must, directly or indirectly, purçhase any property of the estate he represents, nor must he be interested in any sale.

§ 28. That all of article 11, of chapter 6, of said act, being section 6493 to and including 6503, of the Revised Codes, be amended so as to read as follows:

ARTICLE 11—ACCOUNTING AND SETTLEMENT BY EXECUTORS AND ADMINISTRATORS.

1. At the expiration of six months after letters testamentary or of administration are issued, and thereafter at any time when required by the court, either upon its own motion or upon the application of any person interested in the estate, the executor or administrator must render for the information of the court, an exhibit under oath, showing the amount of money received and

expended by him, the amount of all claims against the estate and the names of the claimants, and all other matters necessary to show the condition of its affairs.

2. If the executor or administrator fail to render an exhibit at the expiration of six months after letters are issued, the judge of the county court must issue a citation requiring him to appear and render it.

3. Any person interested in the estate may at any time before the final settlement of accounts, present his petition to the county judge, praying that the executor or administrator be required to appear and render such exhibit, setting forth the facts showing that it is necessary and proper that such an exhibit should be made.

4. If the judge be satisfied, either from the oath of the applicant or from any other testimony offered, that the facts alleged are true, and considers the showing of the applicant sufficient, he must issue a citation to the executor or administrator, requiring him to appear at some day named in the citation, which must be during a term of the court, and render an exhibit as prayed for.

5. When an exhibit is rendered by an executor or administrator, any person interested may appear and, by objections in writing, contest any account or statement therein contained. The court may examine the executor or administrator, and if he has been guilty of neglect, or has wasted, embezzled, or mismanaged the estate, his letters must be revoked.

6. If any executor or administrator neglects or refuses to appear and render an exhibit, after having been duly cited, an attachment may be issued against him and such exhibit enforced, or his letters may be revoked in the discretion of the court.

7. Every executor or administrator must render a full account and a report of his administration at the expiration of one year from the time of his appointment. If he fail to present his account, the court must compel the rendering of the account by attachment, and any person interested in the estate may apply for and obtain an attachment, but no attachment must issue unless a citation has been first issued, served and returned. requiring the executor or administrator to appear and show cause why an attachment should not issue. Every account rendered must exhibit not only the debts which have been paid, but also a statement of all the debts which have been duly presented and allowed during the period embraced in the account.

8. When the authority of an executor or administrator ceases or is revoked for any reason, he may be cited to account before the county court at the instance of the person succeeding to the administration of the same estate, in like manner as he might have been cited by any person interested in the estate during the time he was executor or administrator.

9. If the executor or administrator resides out of the county, or absconds, or conceals himself, so that the citations cannot be

personally served, and neglects to render an account within thirty days after the time prescribed in this article, or if he neglects to render an account within thirty days after being committed where the attachment has been executed, his letters must be revoked.

10. In rendering an account the executor or administrator must produce and file vouchers for all charges, debts, claims and expenses which he has paid, which must remain in the court; and he may be examined on oath touching such payments, and also touching such property and effects of the decedent, and the disposition thereof. When any voucher is required for other purposes it may be withdrawn on leaving a certified copy on file; if a voucher is lost, or for other good reason cannot be produced on the settlement, the payment may be proved by the oath of any competent witness.

11. On the settlement of his account he may be allowed any item of expenditure not exceeding fifteen dollars, for which no voucher is produced, if such item be supported by his own uncontradicted oath reduced to writing and certified by the judge, positive to the fact of payment, specifying when, where and to whom it was made; but such allowances in the whole must not exceed three hundred dollars against any one estate, nor over ten per cent. of the inventory appraised value of any estate under three thousand dollars.

12. When any account is rendered for settlement the judge must appoint a day for the settlement thereof; the judge must thereupon give notice thereof by citation to all persons interested in said estate residing within the county to be served at least ten days prior to the day of hearing, and by causing notices to be posted ten days prior to the day of hearing in at least three public places in the county, setting forth the name of the estate, the executor or administrator and the day appointed for the settlement of the account, which must be on some day of a term of the court. The court may order such further notice to be given as may be proper.

13. If such account be for a final settlement, and the estate be ready for distribution, the notice of the settlement must state these facts, and must be served, published or waived in the same manner as provided for hearing petitions for sales of real property and interests therein; and on confirmation of the final account distribution and partition of the estate to all entitled thereto may be immediately had without further notice or proceedings. If from any cause the hearing of the account, or the partition and distribution be postponed, the order postponing the same to a day certain is notice to all persons interested therein.

14. On the day appointed, or any subsequent day to which the hearing may be postponed by the court, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same.

15. All matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, may be contested by the heirs for cause shown. The hearings and allegations of the respective parties may be postponed from time to time, when necessary, and the court may appoint one or more referees to examine the accounts and make report thereon, subject to confirmation; and may allow a reasonable compensation to the referees, to be paid out of the estate of the decedent.

16. The settlement of the account and the allowance thereof by the court, of upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, their right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator, either individually or upon his bond, at any time before final settlement; and in any action brought by any such person, the allowance and settlement of such account is prima facie evidence of its correctness.

17. The account must not be allowed by the court until it is first proved that notice has been given as required by this article, and the decree must show that such proof was made to the satisfaction of the court, and is conclusive evidence of the fact.

18. Whenever it appears to the court on any heariug of an application for the sale of real property, that it would be for the interest of the estate that personal property of the estate, or some part of such property, should be first sold, the court may decree the sale of such personal property, or any part of it, and the sale thereof shall be conducted in the same manner as if the application had been made for the sale of such personal property in the first instance.

19. Pending the settlement of any estate on the petition of any party interested therein, the county court may order any monies in the hands of the executor or administrator to be invested for the benefit of the estate. Such order can only be made after publication of notice of the petition in some newspaper to be designated by the judge.

§ 29. That section 6469 of the Revised Codes, being section 310 of said act, be amended so as to read as follows:

§ 6469. ACTION FOR WASTE—TRESPASS AND CONVERSION.] Executors and administrators may maintain actions against any person who has wasted, destroyed, taken, carried away or converted to his own use the goods of their testator or intestate in his lifetime. They may also maintain actions for trespass committed on the real estate of the decedent in his lifetime. If any person before the granting of letters testamentary or of administration, embezzles or alienates any of the monies, goods, chattels or effects of a decedent, he is chargeable therewith, and liable to an action by the executor or administrator of the estate, for double

the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.

If any executor, administrator, or other person interested in the estate of a decedent, complains to the county court, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away or disposed of monies, goods or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings which contain evidences of, or tend to disclose the right, title, interest or claim of the decedent to any real or personal estate, or any claim or demand, or any lost will, the judge may cite such person to appear before the county court, and may examine him on oath upon the matter of such complaint, if he can be found in the state. But if cited from another county, and he appears and is found innocent, his necessary expenses must be allowed him out of the estate. If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court or is discharged according to law. If, upon such examination, it appears that he has concealed, embezzled, smuggled, conveyed away, or disposed of any monies, goods or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts or other writings tending to disclose the right, title, interest or claim of the decedent to any real or personal estate, claim or demand, or any lost will of the decedent, the county court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with, or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the county court. The order for such disclosure made upon such examination is prima facie evidence of the right of such administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the district court or jury, or for return of the property, and damages in addition thereto, equal to the value of such property, in addition to the examination of the party, witnesses may be produced and examined on either side. The county judge, upon complaint, on oath, of any executor or administrator, may cite any person who has been entrusted with any part of the estate of the decedent, to appear before such court and require him to render a full account, on oath, of any monies, goods, chattels, bonds, accounts, or other property or papers belonging to the estate, which have come to his possession in trust for the executor or administrator, and of proceedings thereon; and if the person so cited refuses to appear and render

such account, the court may proceed against him as provided herein.

§ 30. Each of the following sections, to-wit: Sections 85, 148, 150, 155, 170, 171, 174, 175, 176, 177, 178, 179, 194, 216, and 266 of said act, being sections 6244, 6307, 6309, 6314, 6329, 6330, 6333, 6334, 6335, 6336, 6337, 6338, 6353, 6375 and 6425, of the Revised Codes, are hereby repealed.

§ 31. All acts and parts of acts in conflict with this act or any part thereof are hereby repealed.

§ 32. EMERGENCY.] *Whereas*, an emergency exists in this that the Probate Code of this State is in part inadequate and many estates cannot be settled and distributed as the probate law now is, therefore, this act shall take effect and be in force from and after its passage and approval.

Approved March 13th, 1897.

PUBLIC HIGHWAYS.

CHAPTER 112.

[H. B. 83.]

OPENING AND VACATING HIGHWAYS.

AN ACT Relating to Opening and Vacating Highways, Prescribing the Duties of Supervisors and County Commissioners in Relation Thereto and Regulating Appeals from the Awards Thereof, and for the Repeal of Sections 1050 to 1075, Both Inclusive, of the Revised Codes of North Dakota.

Be it Enacted by the Legislative Assembly of the State of North Dakota:

§ 1. WHAT ARE PUBLIC ROADS.] All public roads and highways within this state which have been open and in use as such, and included in a road district in the town in which the same are respectively situated during twenty years next preceding the time when this act shall take effect, are hereby declared to be public roads or highways and confirmed and established as such whether the same have been lawfully laid out, established and opened or not.

§ 2. WHAT ROADS ARE PUBLIC HIGHWAYS.] Every road laid out by the proper authorities, as provided for in this chapter, from which no appeal has been taken within the time limited for taking such appeal is hereby declared a public highway to all intents and purposes, and all persons having refused or neglected to take an appeal, as provided for in this chapter, shall forever be debarred from any further redress.