PROBATE CODE.

SPECIAL PROCEEDINGS OF A CIVIL NATURE.

TITLE I.

PROCEEDINGS IN PROBATE COURTS.

CHAPTER I.

JURISDICTION.

§ 1. JURISDICTION AND POWERS.] *Be it enacted by the Legislative Assembly of the Territory of Dakota*, That the probate court has jurisdiction, and the judge thereof power, which must be exercised in the cases, and in the manner prescribed by statute:

1. To open and receive proof of last wills and testaments, and to admit them to proof, and to revoke the probate thereof, and to allow and record foreign wills.
2. To grant letters testamentary, of administration and of guardianship, and to revoke the same.
3. To appoint appraisers of estates of deceased persons.
4. To compel executors, administrators and guardians to render accounts.
5. To order the sale of property of estates, or belonging to minors.
6. To order the payment of debts due from estates.
7. To order and regulate all distributions of property or estates of deceased persons.
8. To compel the attendance of witnesses and the production of title deeds, papers and other property of an estate, or of a minor.
9. To exercise all the powers conferred by this chapter or by other law.
10. To make such orders as may be necessary to the exercise of the powers conferred upon it.

11. To appoint and remove guardians for infants, and for persons insane or otherwise incompetent; to compel payment and delivery by them of money or property belonging to their wards, to control their conduct and settle their accounts.

§ 2. CONSTRUCTION AND EFFECT OF PROCEEDINGS.] The proceedings of this court are construed in the same manner, and with like intendments, as the proceedings of courts of general jurisdiction, and to its records, orders, judgments and decrees, there are accorded like force, effect, and legal presumptions as to the records, orders, judgments and decrees of district courts.

§ 3. SERVICE OF PROCESS.] All process issued by the probate court shall be served in the same manner, and by the persons and officers as provided for the service of process of the district court, with the same fees.

§ 4. WHEN JUDGE DISQUALIFIED.] When the judge of the probate court is a party to any proceeding therein, or connected by blood or affinity to any person so interested nearer than the fourth degree, or is personally interested in the conduct or event of any probate matter or proceeding, or when he is named as a legatee or devisee, or executor, or trustee in a will, or is a witness thereto, he shall be disqualified to act therein, and it shall be disposed of as follows:

1. He shall call the county clerk, who shall in such cases be substituted for and have power to act in place of the judge of the probate court; and such acts of the county clerk while acting as judge of the probate court, shall be binding upon all parties interested therein, and the record shall set forth the occasion of his substitution, and show by his official signature the proceedings had, and the acts done by and before him.

2. Whenever in such cases the probate of any will, the appointment of any executor, administrator or guardian, or any other probate act, is resisted, and any issue of law or fact is joined, the said issue, and all the papers and records relating thereto, shall be sent to the district court for the county or judicial subdivision which shall have full jurisdiction of the same, and it shall be tried and determined and the necessary judgment and order made by that court, and all the proceedings had and the judgments and orders made therein shall be entered by the clerk of said court in the record of the probate court, and returned, together with all the papers, to the probate court; and the clerk of the district court is entitled to charge and receive the same fees as for like services in the district court, and the county clerk the same fees as the judge of the probate court in like cases.

§ 5. JURISDICTION RESUMED.] Under the substitution or transfer of jurisdiction provided in the last section, the law and the rights of parties shall in all other respects be and remain the same; and if, before the issues so transferred are decided, or the administration of such estate is closed, another person be elected or appointed and qualified as judge of the probate court, who is not disqualified to act in the settlement of the estate, he must resume full jurisdiction of the case, and upon notice to that effect from the judge of the probate court, the clerk of the district court must return all papers and records to the probate court.

§ 6. JUDGE'S POWERS.] A judge of the probate court, as contra-distinguished from the probate court, may exercise out of court all the powers expressly conferred upon him as a judge.

§ 7. VENUE OF PROBATE ACTS.] Wills must be proved, and letters testamentary or of administration granted:

1. In the county of which the decedent was a resident at the time of his death, in whatever place he may have died.

2. In the county in which the decedent may have died, leaving estate therein, he not being a resident of the territory.

3. In the county in which any part of the estate may be, the decedent having died out of the territory, and not resident thereof at the time of his death.

4. In the county in which any part of the estate may be, the decedent not being a resident of the territory, but dying within it, and not leaving estate in the county in which he died.

5. In all other cases, in the county where application for letters is first made.

§ 8. IN EITHER COUNTY.] When the estate of the decedent is in more than one county, he having died out of the territory, and not having been a resident thereof at the time of his death, or being such non-resident and dying within the territory, and not leaving estate in the county where he died, the probate court of that county in which application is first made for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate.

§ 9. TERRITORIAL EXCLUSIVE JURISDICTION.] The probate court of the county in which application is first made for letters testamentary or of administration in any of the cases above mentioned, shall have jurisdiction co-extensive with the territory in the settlement of the estate of the decedent and the sale and distribution of his real estate, and excludes the jurisdiction of the probate court of every other county.

CHAPTER II.

PROBATE OF WILLS.

ARTICLE I.—PETITION, NOTICE AND PROOF.

§ 10. CUSTODIAN MUST DELIVER.] Every custodian of a will, within thirty days after receipt of information that the maker thereof is dead, must deliver the same to the probate court having jurisdiction of the estate, or to the executor named therein. A failure to comply with the provisions of this section makes the person failing responsible for all damages sustained by any one injured thereby.

§ 11. WHO MAY PETITION.] Any executor, devisee or legatee named in any will, or any other person interested in the estate, may at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same be in writing, in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the territory, or a nuncupative will.

§ 12. REQUISITES OF PETITION.] A petition for the probate of a will must show:

1. The jurisdictional facts.

2. Whether the person named as executor consents to act, or renounces his right to the letters testamentary.

3. The names, ages and residence of the heirs and devisees of the decedent so far as known to the petitioner.

4. The probable value and character of the property of the estate.

5. The name of the person for whom letters testamentary are prayed.

No defect of form, or in the statement of jurisdictional facts actually existing, shall make void the probate of a will.

§ 13. PRESUMED RENUNCIATION.] If the person named in a will as executor, for thirty days after he has knowledge of the death of the testator, and that he is named as executor, fails to petition the proper court for the probate of the will, and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and the court may appoint any other competent person administrator, unless good cause for delay is shown.

§ 14. COMPULSORY PRODUCTION OF WILL.] If it be alleged in any petition that any will is in the possession of a third person and the court is satisfied that the allegation is correct, an order must be issued and served upon the person having possession of the will, requiring him to produce it in the court at the time named in the order. If he has possession of the will and neglects or refuses to produce it in obedience to the order, he may by warrant of the court be committed to the jail of the county, and kept in close confinement until he produces it.

§ 15. HEARING—NOTICE.] When the petition is filed and the will produced, the judge of the probate court must fix a day for hearing the petition, not less than ten nor more than thirty days from the production of the will. Notice of the hearing shall be given by the judge by publishing the same in a newspaper of the county; if there is none, then by three written or printed notices posted at three of the most public places in the county. If the notice be published in a weekly newspaper, it must appear therein on at least three different days of publication, and if in a newspaper published oftener than once a week, it shall be so published that there must be at least ten days from the first to the last day of publication, both the first and the last days being included. If the notice is by posting, it must be given at least ten days before the hearing.

§ 16. HEIRS NOTICED BY MAIL.] Written or printed copies of the notice of the time appointed for the probate of the will, must be addressed to the heirs of the testator resident in the territory, at their places of residence, if known to the petitioner, and deposited in the post-office, with the postage thereon prepaid by the petitioner, at least ten days before the hearing: the notice must be issued by the judge over the seal of the court. Proof of the mailing of the notice must be made at the hearing; the same notice and proof of service thereof on the person named as executor must be made if he be not the petitioner; also on any person named as co-executor, not petitioning, if their place of residence be known.

§ 17. POWERS AT CHAMBERS.] The judge of the probate court may, out of term time or at chambers, receive petitions for the probate of wills, and make and issue all necessary orders and writs to enforce the production of wills, and the attendance of witnesses, and may appoint special terms of his court for hearing the petitions, trials of issues, and admitting wills to probate.

§ 18. PROOF OF NOTICE—WAIVER.] At the time appointed for the hearing, or at the time to which the hearing may have been postponed, the court, unless the parties appear, must require proof that the notice has been given, which being made, the court must hear testimony in proof of the will. If such notice is not proved to have been given, or if from any other cause it is necessary, the hearing may be postponed to a day certain, and notice to absentees given thereof, as original notice is required to be given. The appearance in court of parties interested is a waiver of notice.

§ 19. CONTESTANTS.] Any person interested may appear and contest the will. Devisees, legatees or heirs of an estate may contest the will through their guardians, or attorneys appointed by themselves, or by the court, for that purpose; but a contest made by an attorney appointed by the court, does not bar a contest, after probate, by the party so represented, if commenced within one year after such probate; nor does the non-appointment of an attorney by the court of itself invalidate the probate of a will.

§ 20. REQUISITES WHEN NO CONTEST.] If no person appears to contest the probate of a will, the court may admit it to probate on the testimony of one of the subscribing witnesses only, if he testifies that the will was executed in all particulars as required by law, and that the testator was of sound mind at the time of its execution.

§ 21. OLOGRAPHIC—HOW PROVED.] An olographic will may be proved in the same manner that other private writings are proved.

ARTICLE II.—CONTESTING PROBATE OF WILLS.

§ 22. PROCEEDINGS—ISSUES—TRIAL.] 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 reasonable 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 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.

§ 23. FINDINGS AND CONCLUSIONS—RECORD.] 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.

§ 24. WITNESSES ON CONTEST.] 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, it may admit proof of the hand writing of the testator and of the subscribing witnesses, or any of them.

§ 25. TESTIMONY PRESERVED.] 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 the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this territory.

§ 26. CERTIFICATE OF PROBATE.] 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.

§ 27. RECORD OF SAME.] 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 in a book to be provided, at the charge of the county, for that purpose.

ARTICLE III.—PROBATE OF FOREIGN WILLS.

§ 28. WHERE ESTATE CLAIMED.] Every will duly proved and allowed in any other of the territories, or in any of the United States, or the District of Columbia, or in any foreign country or state, may be allowed and recorded in the probate court of any county in which the testator shall have left any estate or any estate for which claim is made.

§ 29. PETITION.] 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.

§ 30. REQUISITES OF PROOF.] If, on the hearing, it appears upon the face of the record that the will has been proved, allowed and admitted to probate in any other of the territories, or any state 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 territory, 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 territory, and letters testamentary or of administration issued thereon.

ARTICLE IV.—CONTESTING WILL AFTER PROBATE.

§ 31. CAUSES—LIMITATIONS.] 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, show:

1. That a will of a 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.

§ 32. CITATION TO WHOM.] 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 territory so far as known to the petitioner, or to their guardians 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.

§ 33. OTHER WILL—NOTICE.] 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 required in the preceding section is to be served.

§ 34. HEARING—PROOFS.] 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, posting 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 annulled and revoked; 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.

§ 35. EFFECT OF REVOCATION.] 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.

§ 36. COSTS.] 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.

§ 37. PROBATE WHEN CONCLUSIVE.] If no person within one year after the probate of a will, contests the same or the validity thereof the probate of the will is conclusive, saving to infants and persons of unsound mind, a like period of one year after their respective disabilities are removed.

ARTICLE V.—PROBATE OF LOST OR DESTROYED WILL.

§ 38. PROCEEDINGS.] Whenever any will is lost or destroyed, the probate 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 preserved.

§ 39. SPECIAL REQUISITES.] 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.

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

§ 41. RESTRAINT OF OTHER ACTS.] If before or during the pendency of an application to prove a lost or destroyed will, letters of adminstration 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.

ARTICLE VI.—PROBATE OF NUNCUPATIVE WILLS.

§ 42. SPECIAL ADDITIONAL FACTS.] 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.

§ 43. LIMITATION OF TIME AND FACT.] The probate 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 territory or county, interested in the estate, are notified, as provided in article I of chapter II.

§ 44. DOUBLE TIME FOR REVOCATION.] Contests of the probate of nuncupative wills and appointments of executors and administrators of the estate devised thereby must be had, conducted and made as hereinbefore 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.

CHAPTER III.

EXECUTORS AND ADMINISTRATORS, THEIR LETTERS, BONDS, REMOVALS AND SUSPENSIONS.

ARTICLE I.—LETTERS TESTAMENTARY AND OF ADMINISTRATION WITH THE WILL ANNEXED, HOW AND TO WHOM ISSUED.

§ 45. EXECUTORS BY THE WILL.] 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 must appear and qualify unless objection be made as provided in the second section following.

§ 46. INCOMPETENCY DEFINED.] 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 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.

If the sole executor or all the executors are incompetent, or renounce or fail to apply for letters, or to appear and qualify, letters of administration with the will annexed must be issued.

§ 47. OBJECTIONS TO EXECUTORS.] Any person interested in a will may

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

§ 48. WOMAN'S MARRIAGE ANNULS.] 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.

§ 49. EXECUTOR'S DEATH.] 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.

§ 50. DISQUALIFICATION REMOVED.] Where a person absent from the territory, 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.

§ 51. APPOINTMENT OR ACT OF PART.] 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 territory, 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.

§ 52. ADMINISTRATORS SAME POWER.] Administrators with the will annexed have the same authority over the estates which executors named in the will would have, and their acts are as effectual for all purposes. Their letters must be signed by the judge of the probate court, and bear the seal thereof.

ARTICLE II.—FORM OF LETTERS.

§ 53. TESTAMENTARY.] Letters testamentary must be substantially in the following form:

TERRITORY OF DAKOTA, }
COUNTY OF..... }

The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the probate court of the county of ....., C. D., who is named therein, is hereby appointed executor.

Witness, G. H., judge of the probate court of the county of ....., with the seal of the court affixed, the ..... day of ....., A. D., 18..

[Seal, and the official signature of the judge.]

§ 54. OF ADMINISTRATION WITH WILL.] Letters of administration with the will annexed must be substantially in the following form:

TERRITORY OF DAKOTA, }
COUNTY OF..... }

The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the probate court of the county of ....., and there being no executor named in the will [or, as the case may be], C. D. is hereby appointed administrator, with the will annexed.

Witness, G. H., judge of the probate court of the county of ....., with the seal of the court affixed, the ..... day of ....., A. D., 18..

[Seal, and the official signature of the judge.]

§ 55. OF ADMINISTRATION.] Letters of administration must be signed by the judge, under the seal of the court, and substantially in the following form:

TERRITORY OF DAKOTA, }
COUNTY OF..... }

C. D. is hereby appointed administrator of the estate of A. B, deceased.

Witness, G. H., judge of the probate court of the county of ....., with the seal thereof affixed, the ..... day of ....., A. D. 18..

[Seal, and official signature of the judge.]

ARTICLE III.—LETTERS OF ADMINISTRATION—TO WHOM AND THE ORDER IN WHICH THEY ARE GRANTED.

§ 56. WHO ENTITLED—ORDER.] 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 respectively 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.

§ 57. PREFERENCES REQUIRED.] Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole blood to those of the half blood.

§ 58. EQUALLY ENTITLED.] When there are several persons equally entitled to the administration, the court may grant letters to one or more of them; and when a creditor is claiming letters, the court may, in its discretion, at the request of another creditor, grant letters to any other person legally competent.

§ 59. TO GUARDIAN OF MINOR.] 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.

§ 60. INCOMPETENCY DEFINED.] 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.

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

ARTICLE IV. — PETITION AND CONTEST FOR LETTERS AND ACTION THEREON.

§ 62. REQUISITES OF PETITION.] Petition for letters of administration must be in writing, signed by the applicant or his counsel, and filed with the judge of the court stating the facts essential to give the court jurisdiction of the case, and when known to the applicant, he must state the names, ages and residence of the heirs of the decedent, and the value and character of the property. If the jurisdictional facts existed, but are not fully set forth in the petition, and are afterwards 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.

§ 63. WHEN GRANTED.] Letters of administration may be granted at a regular term of the court or at a special term appointed by the judge for the hearing of the application.

§ 64. NOTICE OF HEARING.] When a petition praying for letters of administration is filed, the judge must give notice thereof containing the name of the decedent, the name of the applicant for letters, and the day and term of the court at which the application will be heard, which notice must be published by posting, or printing in a newspaper, the same as required for notice of the probate of a will.

§ 65. WHO MAY CONTEST—GROUNDS.] Any person interested may contest the petition by filing written opposition thereto on the ground of the incompetency of the applicant, or may assert his own rights to the administration and pray that letters be issued to himself. In the latter case the contestant must file a petition and give the notice required for an original petition, and the court must hear the two petitions together.

§ 66. HEARING.] On the hearing, it being first proved that notice has been given as herein required, the court must hear the allegations and proofs of the parties, and order the issuing of letters of administration to the party best entitled thereto.

§ 67. PROOF OF NOTICE.] An entry in the minutes of the court, that the required proof was made and notice given, shall be conclusive evidence of the fact of such notice.

§ 68. WAIVER OF BETTER RIGHT.] Letters of administration must be granted to any applicant, though it appears that there are other persons

having better rights to the administration when such persons fail to appear and claim the issuing of letters to themselves.

§ 69. PROOF OF INTESTACY, PROPERTY, ETC.] Before letters of administration are granted on the estate of any person who is represented to have died intestate, the fact of his dying intestate must be proved by the testimony of the applicant or others; and the court may also examine any other person concerning the time, place and manner of his death, the place of his residence at the time, the value and character of his property, and whether or not the decedent left any will, and may compel any person to attend as a witness for that purpose.

§ 70. OTHER APPOINTEES—NON-RESIDENTS.] Administration may be granted to one or more competent persons, although not entitled to the same, at the written request of the person entitled, filed in the court. When the person entitled is a non-resident of the territory, affidavits or depositions taken ex-parte before any officer authorized by the laws of this territory to take acknowledgments and administer oaths out of this territory, may be received as prima facie evidence of the identity of the party, if free from suspicion, and the fact is established to the satisfaction of the court.

ARTICLE V.—REVOCATION OF LETTERS AND PROCEEDINGS THEREFOR.

§ 71. WHEN ALLOWED.] When letters of administration have been granted to any person other than the surviving husband or wife, child, father, mother, brother, or sister of the intestate, any one of them may obtain the revocation of the letters and be entitled to the administration, by presenting to the probate court a petition praying the revocation, and that letters of administration may be issued to him.

§ 72. ADDITIONAL NOTICE.] When such petition is filed, the judge must, in addition to the notice provided upon petition for letters, issue a citation to the administrator to appear and answer the same at the time appointed for the hearing.

§ 73. HEARING.] At the time appointed, the citation having been duly served and returned, the court must proceed to hear the allegations and proofs of the parties; and if the right of the applicant is established, and he is competent, letters of administration must be granted to him, and the letters of the former administrator revoked.

§ 74. PRIOR RIGHTS ASSERTED.] The surviving husband or wife, when letters of administration have been granted to a child, father, mother, brother or sister of the intestate, or any of such relatives when letters have been granted to any other of them, may assert his prior right, and obtain letters of administration, and have the letters before granted revoked in the manner prescribed in the three preceding sections.

ARTICLE VI.—OATHS AND BONDS OF EXECUTORS AND ADMINISTRATORS.

§ 75. OATH—RECORD.] Before letters testamentary or of administration are issued to the executor or administrator, he must take and subscribe an oath, before some officer authorized to administer oaths, that he will

perform, according to law, the duties of executor or administrator, which oath must be attached to the letters. All letters testamentary and of administration issued to, and all bonds executed by executors or administrators, with the affidavits and certificates thereon must be forthwith recorded by the judge in books to be kept by him in his office for that purpose.

§ 76. BOND—FORM—PENALTY.] Every person to whom letters testamentary or of administration are directed to issue, must, before receiving them, execute a bond to the territory of Dakota, with two or more sufficient sureties, to be approved by the judge of the probate court. In form the bond must be joint and several, and the penalty must not be less than twice the value of the personal property and twice the probable value of the annual rents, profits and issues of the real property belonging to the estate, which values must be ascertained by the probate judge, by examining on oath the party applying, and any other persons.

§ 77. ADDITIONAL BOND.] The judge must require an additional bond whenever the sale of any real estate belonging to an estate is ordered by him; but no such additional bond must be required when it satisfactorily appears to the court that the penalty of the bond given before receiving letters, or any bond given in place thereof is equal to twice the value of the personal property remaining in, or that will come into the possession of the executor or administrator, including the annual rents, profits, and issues of real estate still belonging to the estate, and twice the probable amount to be realized on the sale of the real estate ordered to be sold.

§ 78. CONDITION OF BOND.] The bond must be conditioned that the executor or administrator, shall faithfully execute the duties of the trust according to law.

§ 79. SEPARATE BONDS.] When two or more persons are appointed executors or administrators, the judge of the probate court must require and take a separate bond from each of them.

§ 80. SUCCESSIVE RECOVERIES.] The bond shall not be void upon the first recovery, but may be sued and recovered upon from time to time, by any person aggrieved, in his own name, until the whole penalty is exhausted.

§ 81. JUSTIFICATION—APPROVAL—RECORD.] In all cases where bonds are required to be given, under this title, the officer taking the same must require the sureties to accompany it with an affidavit that they are each residents and householders or freeholders within the territory, and are each worth the sum specified in the bond, over and above all their just debts and liabilities, exclusive of property exempt from execution; but when the amount specified in the bond exceeds one thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than that expressed in the bond, if the whole amount be equivalent to that of two sufficient sureties, and the affidavits thereof must be attached to, and filed and recorded with the bond. All such bonds must be approved by the judge of the probate court before being filed and recorded.

Before the judge of the probate court approves any bond required under this title, and after its approval he may of his own motion, or upon

the motion of any person interested in the estate, supported by affidavit that the sureties or some one or more of them are not worth as much as they have justified to, issue a citation, requiring such sureties to appear before him, at a designated time and place, to be examined touching their property and its value; and the judge must, at the same time issue a notice to the executor or administrator, requiring his appearance on the return of the citation; and on its return he may examine the sureties and such witnesses as may be produced, touching the property of the sureties and its value; and if, upon such examination he is satisfied that the bond is insufficient, he must require sufficient additional security.

§ 82. EXAMINATION OF SURETIES.] If sufficient security be not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who will execute a sufficient bond, must be appointed to the administration.

§ 83. BOND WAIVED BY WILL.] When it is expressly provided in the will that no bond shall be required of the executor, letters testamentary may issue and sales of real estate be made and confirmed without any bond, unless the court, for good cause, require one to be executed; but the executor may, at any time afterward, if it appears from any cause necessary or proper, be required to file a bond as in other cases.

§ 84. BOND BECOMING INSUFFICIENT.] Any person interested in an estate may, by verified petition, represent to the judge of the probate court that the sureties of the executor or administrator thereof have become or are becoming insolvent, or that they have removed or are about to remove from this territory, or that from any other cause the bond is insufficient, and ask that further security be required.

§ 85. SERVICE OF CITATION.] If the judge is satisfied that the matter requires investigation, a citation must be issued to the executor or administrator, requiring him to appear, at a time and place to be therein specified, to show cause why he should not give further security. The citation must be served personally on the executor or administrator, at least five days before the return day. If he has absconded or cannot be found, it may be served by leaving a copy of it at his last place of residence, or by such publication as the judge may order.

§ 86. HEARING AND ORDER.] On the return of the citation, or at such other time as the judge may appoint, he must proceed to hear the proofs and allegations of the parties. If it satisfactorily appears that the security is, from any cause, insufficient, he may make an order requiring the executor or administrator to give further security, or to file a new bond in the usual form within a reasonable time, not less than five days.

§ 87. REVOCATION FOR DISOBEDIENCE.] If the executor or administrator neglects to comply with the order within the time prescribed, the judge must, by order, revoke his letters, and his authority must thereupon cease.

§ 88. SUSPENSION OF POWERS.] When a petition is presented praying that an executor or administrator be required to give further security, or

to give bond where by the terms of the will no bond was originally required, and it is alleged on oath, that the executor or administrator is wasting the property of the estate, the judge may, by order, suspend his powers until the matter can be heard and determined.

§ 89. JUDGE MUST INQUIRE.] When it comes to his knowledge that the bond of any executor or administrator is, from any cause, insufficient, the judge of the probate court, without any application, must cite him to appear and show cause why he should not give further security, and must proceed thereon as upon the application of any person interested.

§ 90. RELEASE OF SURETY.] When a surety of any executor or administrator desires to be released from responsibility on account of future acts, he may make application by petition to the judge of the probate court for relief. The judge must issue a citation to the executor or administrator, to be served personally upon him, requiring him to appear at a time and place to be therein specified, and give other security. If he has absconded, left, or removed from the territory, or cannot be found after due diligence and inquiry, service may be made as provided when the citation is to require further security.

§ 91. WHEN ALLOWED.] If new sureties be given to the satisfaction of the judge, he may thereupon make and enter an order that the sureties who applied for relief shall not be liable on their bond for any subsequent act, default or misconduct of the executor or administrator.

§ 92. REVOCATION.] If the executor or administrator neglects or refuses to give new sureties, to the satisfaction of the judge, on the return of the citation, or within such reasonable time as the judge shall allow, unless the surety making the application shall consent to a longer extension of time, the judge must, by order, revoke his letters.

§ 93. HEARINGS OUT OF TERM.] The applications authorized by the nine preceding sections of this chapter, may be heard and determined out of term time; and all orders made therein must be entered upon the minutes of the court.

ARTICLE VII.—SPECIAL ADMINISTRATORS, THEIR POWERS AND DUTIES.

§ 94. WHEN MAY BE APPOINTED.] When there is delay in granting letters testamentary or of administration, from any cause, or when such letters are granted irregularly, or no sufficient bond is filed as required, or when no application is made for such letters, or when an administrator or executor dies, or is suspended or removed, the judge of the probate court must appoint a special administrator to collect and take charge of the estate of the decedent, in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate.

§ 95. HOW APPOINTED.] The appointment may be made out of term time, and without notice, and must be made by entry upon the minutes of of the court, specifying the powers to be exercised by the administrator. Upon such order being entered, and after the person appointed has given

bond, the judge must issue letters of administration to such person, in conformity with the order in the minutes.

§ 96. PREFERENCE.] In making the appointment of a special administrator, the judge must give preference to the person entitled to letters testamentary or of administration, but no appeal must be allowed from the appointment.

§ 97. BOND.] Before any letters issue to any special administrator, he must give bond in such sum as the judge may direct, with sureties to the satisfaction of the judge, conditioned for the faithful performance of his duties; and he must take the usual oath and have the same indorsed on his letters.

§ 98. DUTIES OF SPECIAL ADMINISTRATOR.] The special administrator must collect and preserve for the executor or administrator, all the goods, chattels, debts and effects of the decedent, all incomes, rents, issues and profits, claims and demands, of the estate, must take the charge and management of, enter upon and preserve from damage, waste and injury, the real estate, and for such and all necessary purposes may commence and maintain, or defend, suits and other legal proceedings, as an administrator; he may sell such perishable property as the probate court may order to be sold and exercise such other powers as are conferred upon him by his appointment, but in no case is he liable to an action by any creditor on a claim against the decedent.

§ 99. SUPERCEDED.] When letters testamentary or of administration on the estate of the decedent have been granted, the powers of the special administrator cease, and he must forthwith deliver to the executor or administrator all the property and effects of the decedent in his hands; and the executor or administrator may prosecute to final judgment any suit commenced by the special administrator.

§ 100. ACCOUNT.] The special administrator must render an account, on oath, of his proceedings, in like manner as other administrators are required to do.

ARTICLE VIII.—WILLS FOUND AFTER LETTERS OF ADMINISTRATION GRANTED, AND MISCELLANEOUS PROVISIONS.

§ 101. ADMINISTRATION REVOKED.] If, after granting letters of administration on the ground of intestacy, a will of the decedent is duly [proved and allowed by the court, the letters of administration must be revoked, and the power of the administrator ceases, and he must render an account of his administration within such time as the court shall direct.

§ 102. SUCCESSION TO DUTIES.] In such case, the executor or the administrator with the will annexed, is entitled to demand, sue for, recover, and collect, all the rights, goods, chattels, debts, and effects of the decedent remaining unadministered, and may prosecute to final judgment any suit commenced by the administrator before the revocation of his letters of administration.

§ 103. ONE REMAINING COMPLETES DUTY.] In case any one of several executors or administrators, to whom letters are granted, dies, becomes lunatic,

is convicted of an infamous crime, or otherwise becomes incapable of executing the trust, or in case the letters testamentary or of administration are revoked or annulled, with respect to any one executor or administrator, the remaining executor or administrator must proceed to complete the execution of the will or administration.

§ 104. SUCCESSOR APPOINTED.] If all such executors or administrators die or become incapable, or the power and authority of all of them are revoked, the probate court must issue letters of administration with the will annexed, or otherwise, to the widow, or next of kin, or others, in the same order and manner as is directed in relation to original letters of administration. The administrators so appointed must give bond in the like penalty, with like sureties and conditions, as hereinbefore required of administrators, and shall have the like power and authority.

§ 105. RESIGNATION—LIABILITY.] Any executor or administrator may, at any time, by writing, filed in the probate court, resign his appointment, having first settled his accounts and delivered up all the estate to the person whom the court shall appoint to receive the same. If, however, by reason of any delays in such settlement and delivering up of the estate, or for any other cause, the circumstances of the estate or the rights of those interested therein require it, the court may, at any time before settlement of accounts and delivering up of the estate is completed, revoke the letters of such executor or administrator, and appoint in his stead an administrator, either special or general, in the same manner as is directed in relation to original letters of administration. The liability of the outgoing executor or administrator, or of the sureties on his bond, shall not be in any manner discharged, released or affected, by such appointment or resignation.

§ 106. PREVIOUS ACTS VALID.] All acts of an executor or administrator, as such, before the revocation of his letters testamentary or of administion, are as valid to all intents and purposes, as if such executor or administrator had continued lawfully to execute the duties of his trust.

§ 107. PROOF OF APPOINTMENT.] A transcript from the minutes of the court, showing the appointment of any person as executor or administrator, together with the certificate of the judge under his hand and the seal of his court, that such person has given bond and qualified, and that letters testamentary or of administration have been issued to him and have not been revoked, shall have the same effect in evidence as the letters themselves.

ARTICLE IX.—REMOVALS AND SUSPENSIONS IN CERTAIN CASES.

§ 108. EMBEZZLEMENT.] Whenever the judge of the probate court has reason to believe, from his own knowledge or from credible information, that any executor or administrator has wasted, embezzled or mismanaged, or is about to waste or embezzle the property of the estate committed to his charge, or has committed or is about to commit a fraud upon the estate, or is incompetent to act, or is permanently removed from the territory, or has wrongfully neglected the estate, or has long neglected to per-

form any act as such executor or administrator, he must, by an order entered upon the minutes of the court, suspend the powers of such executor or administrator, until the matter is investigated.

§ 109. SUSPENSION—CITATION.] When such suspension is made, notice thereof must be given to the executor or administrator, and he must be cited to appear and show cause why his letters should not be revoked. If he fail to appear in obedience to the citation, or, if appearing, the court is satisfied there exists cause for his removal, his letters must be revoked, and letters of administration granted anew as the case may require.

§ 110. HEARING ISSUES.] At the hearing, any person interested in the estate may appear and file his allegations in writing, showing that the executor or administrator should be removed; to which the executor or administrator may demur or answer, as hereinbefore provided, and the court must hear and determine the issues raised.

§ 111. NOTICE BY PUBLICATION.] If the executor or administrator has absconded or conceals himself, or has removed or absented himself from the territory, notice may be given him of the pendency of the proceedings by publication, in such manner as the court may direct, and the court may proceed upon such notice as if the citation had been personally served.

§ 112. COMPULSORY ATTENDANCE.] In the proceedings authorized by the preceding four sections, for the removal of an executor or administrator, the court may compel his attendance by attachment, and may compel him to answer questions, on oath, touching his administration, and upon his refusal to do so, may commit him until he obey, or may revoke his letters, or both.

CHAPTER IV.

OF THE INVENTORY AND COLLECTION OF THE EFFECTS OF DECEDENTS.

ARTICLE I.—INVENTORY, APPRAISEMENT AND POSSESSION OF ESTATE.

§ 113. INVENTORY OF ESTATE.] Every executor or administrator must make and return to the court, at its first term after his appointment, a true inventory and appraisement of all the estate of the decedent, except the homestead, if any, which has come to his possession or knowledge.

§ 114. APPRAISER'S DUTIES—FEES.] To make the appraisement, the judge must appoint three disinterested persons, any of whom may act, who are entitled to receive a reasonable compensation for their services, not to exceed two dollars per day, to be allowed by the court. The appraisers must, with the inventory, file a verified account of their services and disbursements. If any part of the estate is in any other county, the same appraisers may proceed to view and appraise the same, or other appraisers in that county may be appointed to perform that duty, by the judge of the probate court of the county in which the letters were issued, as he may deem best, and the like report must be made in each case direct to the probate court of the county which issued the letters.

§ 115. OATH—INVENTORY—CONTENTS.] Before proceeding to the execution of their duty, the appraisers must take and subscribe an oath, to be at-

tached to the inventory, that they will truly, honestly and impartially appraise the property exhibited to them, according to the best of their knowledge and ability. They must then proceed to estimate and appraise the property; each article must be set down separately, with the value thereof in dollars and cents, in figures, opposite to the articles respectively; the inventory must contain all the estate of the decedent, real and personal, except the homestead, a statement of all debts, partnerships and other interests, bonds, mortgages, notes and other securities for the payment of money belonging to the decedent, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon, if any, with their dates, and the sum which, in the judgment of the appraisers, may be collected on each debt, interest or security.

§ 116. MONEY RECEIVED.] The inventory must also contain an account of all moneys belonging to the decedent which have come to the hands of the executor or administrator, and if none, the fact must be so stated in the inventory. If the whole estate consists of money, there need not be an appraisement, but an inventory must be made and returned as in other cases.

§ 117. EXECUTOR'S PERSONAL DEBT.] The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due.

§ 118. BEQUEST TO—CONSTRUED.] The discharge or bequest in a will of any debt or demand of the testator against the executor named, or any other person, is not valid against the creditors of the decedent, but is a specific bequest of the debt or demand. It must be included in the inventory, and, if necessary, applied in the payment of the debts. If not necessary for that purpose, it must be paid in the same manner and proportion as other specific legacies.

§ 119. RETURN OF INVENTORY.] The inventory must be signed by the appraisers, and the executor or administrator must take and subscribe an oath, before an officer authorized to administer oaths, that the inventory contains a true statement of all the estate of the decedent which has come to his knowledge and possession, and particularly of all money belonging to the decedent, and of all just claims of the decedent against the affiant. The oath must be indorsed upon or annexed to the inventory.

§ 120. REFUSAL—REVOCATION.] If an executor or administrator neglects or refuses to return the inventory within the time prescribed, or within such further time, not exceeding two months, which the judge shall, for a reasonable cause, allow, the court may, upon notice, revoke the letters testamentary or of administration, and the executor or administrator is liable on his bond for any injury to the estate, or any person interested therein, arising from such failure.

§ 121. ADDITIONAL INVENTORY.] Whenever property not mentioned in an inventory that is made and filed, comes to the possession or knowledge of an executor or administrator, he must cause the same to be appraised in

the manner prescribed in this article, and an inventory thereof to be returned within two months after the discovery; and the making of such inventory may be enforced, after notice, by attachment or removal from office.

§ 122. POSSESSION BY REPRESENTATIVE.] The executor or administrator s entitled to the possession of all the real and personal estate of the decedent, and to receive the rents and profits of the real estate, except the realty and improvements thereon properly belonging to the homestead, and such personal property as is reserved by law to the widow and children of the decedent, or either of them, until the estate is settled or until delivered over by order of the probate court to the heirs or devisees; and must keep in good tenantable repair all houses, buildings, and fixtures thereon, which are under his control. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator.

§ 123. TERM OF POSSESSION.] Unless it satisfactorily appears to the probate court that the rents, issues and profits of the real estate for a longer period are necessary to be received by the executor or administrator wherewith to pay the debts of the decedent, or that it will probably be necessary to sell the real estate for the payment of such debts, at the end of ten months from the first publication of the notice to creditors, the court must direct the executor or administrator to deliver possession of all the real estate to the heirs at law, or devisees.

ARTICLE II.—EMBEZZLEMENT AND SURRENDER OF PROPERTY OF THE ESTATE.

§ 124. EMBEZZLEMENT BEFORE LETTERS.] If any person before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, 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.

§ 125. COMPLAINT—EXAMINATION.] If any executor, administrator, or other person interested in the estate of a decedent, complains to the probate court, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, 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 probate court, and may examine him, on oath, upon the matter of such complaint, if he can be found in the territory. But if cited from another county. and he appears and is found innocent, his necessary expenses must be allowed him out of the estate.

§ 126. COMMITMENT—DISCLOSURE.] 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 moneys, 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 probate 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 probate 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.

§ 127. ACCOUNT BY THIRD PERSONS.] The probate judge, upon the 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 moneys, 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 in the preceding section.

CHAPTER V.

OF THE HOMESTEAD, AND OF THE ALLOTMENT OF PERSONAL PROPERTY.

§ 128. PROPERTY IMMEDIATELY DELIVERED TO FAMILY.] Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law; and upon the death of both husband and wife the children may continue to possess and occupy the whole homestead until the youngest child becomes of age. [See chapter 38 of the political code, page 183.] And in addition thereto the following personal property must be immediately delivered by the executor or administrator to such surviving wife or husband, and child or children, and is not to be deemed assets, namely:

1. All family pictures.
2. A pew or other sitting in any house of worship.
3. A lot or lots in any burial ground.

4. The family bible and all school books used by the family; and all other books used as a part of the family library not exceeding in value one hundred dollars.

5. All wearing apparel and clothing of the decedent and his family.

6. The provisions for the family necessary for one year's supply, either provided or growing, or both; and fuel necessary for one year.

The executor or administrator must make a separate and distinct inventory of all the personal property specified in this section, by articles, and opposite each article give the appraised value of the same, in dollars and cents, as given in the general inventory of the appraisers appointed by the court and return the same to the probate court, and no such property shall be liable for any prior debts or claims whatever.

§ 129. ADDITIONAL ALLOTMENT.] In addition to the property mentioned in the preceding section, there shall also be allowed and set apart to the surviving wife or husband, or the minor child or children of the decedent, all such personal property or money as is exempt by law from levy and sale on execution or other final process from any court, to be, with the homestead, possessed and used by them; and the executor or administrator must make and return a separate and distinct inventory thereof in the same manner as required for the property mentioned in the preceding section, and no such property shall be liable for any prior debts or claims against the decedent, except when there are no assets thereunto available for the payment of the necessary expenses of his last illness, funeral charges and expenses of administration.

§ 130. SELECTION OF HOMESTEAD.] If no homestead has been selected, marked out, platted and recorded, as provided by the homestead law, the judge of the probate court must cause the same to be done according to the provisions of said law.

§ 131. SAME EXEMPT.] The homestead is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except as provided in the law relating to homesteads.

§ 132. FAMILY ALLOWANCE.] If the amount so as aforesaid set apart be less than that allowed, and insufficient for the support of the widow and children, or either, or, if there be no such personal property to be set apart, and if there be other estate of the decedent, the court may in its discretion make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate, which in case of an insolvent estate, must not be longer than one year after granting letters testamentary or of administration.

§ 133. SAME—PREFERRED CLAIM.] Any allowance made by the court in accordance with the provisions of this chapter must be paid in preference to all other charges, except funeral charges or expenses of administration; and any such allowance, whenever made, may, in the discretion of the court, take effect from the death of the decedent.

§ 134. WHO RECEIVES PROPERTY.] When personal property is set apart

for the use of the family, in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband, and no minor child, such property is the property of the widow or surviving husband. If the decedent left also a minor child, the one-half of such property shall belong to the widow or surviving husband, and the other half to the minor child; and if the decedent left more than one minor child, the one-third of such property shall belong to the widow or surviving husband and the remainder in equal shares to the minor children, and if the decedent left no widow or surviving husband, such property shall belong to the minor child, or, if more than one minor child, to them in equal parts.

§ 135. SUMMARY ADMINISTRATION.] If, upon the return of the inventory of the personal estate of an intestate, it appears that the value of the whole personal estate does not exceed the sum of fifteen hundred dollars, the probate court, by a decree for that purpose, must assign for the use and support of the widow and minor child or children, if there be a widow or minor child, and if no widow, then for the children if there be any, the whole of the estate, after the payment of the funeral expenses, the expenses of the last sickness, and expenses of the administration, and there must be no further proceedings in the administration unless further estate be discovered; and when it so appears that the value of the whole estate does not exceed the sum of three thousand dollars, it is in the discretion of the probate court to dispense with the regular proceedings or any part thereof prescribed in this chapter, and there must be had a summary administration of the estate, and an order of distribution thereof at the end of six months after the issuing of letters; the notice to creditors must be given to present their claims within four months after the first publication of such notice, and those not so presented are barred as in other cases.

§ 136. WIDOW'S SEPARATE PROPERTY.] If the widow has a maintenance derived from her own property equal to the portion set apart to her by the preceding sections of this subdivision, the whole property so set apart, other than her right in the homestead, must go to the minor children.

CHAPTER VI.

OF CLAIMS AGAINST THE ESTATE.

§ 137. NOTICE TO CREDITORS.] 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 unexpired time allowed for such presentation.

§ 138. PERIODS ALLOWED.] 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.

§ 139. PROOF, APPROVAL AND RECORD OF NOTICE.] 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 affidavit 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.

§ 140. CLAIMS NOT PRESENTED BARRED—EXCEPTIONS.] 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 probate court, that the claimant had no notice as provided in this chapter, by reason of being out of the territory, it may be presented at any time before a decree of 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 territory, it may be presented as therein provided.

§ 141. PROOF OF CLAIMS.] Every claim which is due when presented to the 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.

§ 142. HOW ALLOWED NOT PROVED.] 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 probate court that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-offs, and that the estate is

solvent, it shall be the duty of the said court to allow the said sums so paid in the settlement of said accounts.

§ 143. CLAIM BY PROBATE JUDGE.] Any judge of the probate 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 county clerk of the county, who shall thereupon be substituted in the settlement of said estate in place of the probate judge, as provided by law, and the judge of the probate court presenting such claim, in case of its rejection by the executor or administrator, or by such county clerk, acting as judge, 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.

§ 144. ALLOWANCE AND REJECTION OF CLAIMS.] When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim, it must be presented to the 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.

§ 145. CLAIMS FILED IN COURT.] 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 probate 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 the register, showing the name of the claimant, the amount and character of the claim, rate of interest, and date of allowance.

§ 146. SUIT ON REJECTED CLAIM.] When a claim is rejected, either by the executor or administrator, or the judge of the probate court, 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 forever barred.

§ 147. CLAIMS BARRED—EXAMINATION.] 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 other legal evidence touching the validity of the claim.

§ 148. PRESENTMENT REQUIRED.] No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator.

§ 149. VACANCY IN ADMINISTRATION.] The time during which there shall be a vacancy in the administration, must not be included in any limitation herein prescribed.

§ 150. ACTIONS PENDING AT DEATH.] If an action is pending against the decedent at 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.

§ 151. PARTIAL ALLOWANCE.] Whenever any claim is presented to an executor or administrator, or to the judge of the probate court, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow. If the creditor 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.

§ 152. EFFECT OF JUDGMENT.] 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 probate 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 probate 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.

§ 153. JUDGMENTS BEFORE DEATH—HOW COLLECTED.] 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:

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

2. 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.

§ 154. DEATH AFTER VERDICT.] 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.

§ 155. REFERENCE OF CLAIM.] 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 probate court, upon filing the agreement and approval of the judge of the probate 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 probate 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 probate judge.

§ 156. REFEREE'S DUTIES.] 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 theron shall be as valid and effectual, in all respects, as if the same had been rendered in a suit commenced by ordinary process.

§ 157. COSTS AGAINST REPRESENTATIVE.] 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.

§ 158. CLAIM BY.] 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 probate 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 claimant, and summons must be served upon the judge of the probate

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 fee.

§ 159. NEGLECT TO GIVE CREDITORS NOTICE.] If an executor or administrator neglect for two months after his appointment to give notice to creditors, as prescribed by this subdivision, the court must revoke his letters, and appoint some other person in his stead, equally, or next in order, entitled to the appointment.

§ 160. STATEMENT OF CLAIMS.] 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 thereafter 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.

§ 161. PAYMENT OF CLAIMS NOT DUE.] If there be any debt of the decedent bearing interest, whether presented or not, the executor or administrator may, by order of the probate 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 section does not apply to debts existing at the date this law goes into effect, unless the creditor consent to accept the amount.

CHAPTER VII.

OF SALES AND CONVEYANCES OF PROPERTY OF DECEDENTS.

ARTICLE I.—OF SALES IN GENERAL.

§ 162. PROPERTY CHARGEABLE.] All the property of a decedent, except as otherwise provided for the homestead and personal property set apart for 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.

§ 163. COURT ORDERS ALL SALES.] No sale of any property of an estate of a decedent is valid unless made under order of the probate court, except as otherwise hereinafter provided. All sales must be reported under oath, and confirmed by the probate court, before the title to the property sold passes.

§ 164. PETITIONS FOR ORDERS.] 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 necessary 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.

§ 165. BUT ONE SALE.] 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 probate 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 required by section 172.

ARTICLE II.—SALES OF PERSONAL PROPERTY.

§ 166. WHAT SOLD WITHOUT NOTICE.] At any time after receiving letters, the executor, administrator, or special administrator may apply to the 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.

§ 167. PRE-REQUISITES TO SALES.] 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, notce of at least five days must be given of the hearing of the application, either by posting notices or by advertising. He may also make a similar application, either in vacation or 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 interest of the estate, he may, at any time after filing the inventories, 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.

§ 168. PARTNERSHIP AND CLAIMS.] Partnership interests, 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 per-

son, 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.

§ 169. CAUSES FOR SALES—WHAT SOLD.] If it appear 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 or judge 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 subsistence of the family of the decedent, or are not specially bequeathed, must be first sold and the court or judge must so direct.

§ 170. METHOD AND NOTICE OF SALE.] The sale of personal property must be made at public auction, and after public notice given for at least fifteen days, by notices posted in three public places in the county, or by publication in a newspaper, 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 or judge 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 or judge otherwise order.

ARTICLE III.—SALES OF REAL ESTATE, INTERESTS THEREIN, AND CONFIRMATIONS THEREOF.

§ 171. WHEN SALE NECESSARY.] 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 probate court; and an application for the sale of real property may also embrace the sale of personal property.

§ 172. REQUISITES OF PETITION FOR SALE.] To obtain an order for the sale of real property, he must present a verified petition to the probate court, or to the judge thereof, 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 estimated; the amount due upon the family allowance, or that will be due after the same has been in force for one year; the debts, expenses and charges of administration already accrued, and an estimate of what will or may accrue during the administration; a general description of all the real property, except the homestead, of which the decedent died seized, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof; 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.

§ 173. ORDER FOR HEARING.] If it appears to the court or judge, 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 the decedent as is necessary.

§ 174. SERVICE ON WHOM—WAIVER.] A copy of the order to show cause must be personally served on all persons interested in the estate, any general guardian of a minor 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.

§ 175. HEARING, UNLESS WRITTEN CONSENT.] The probate 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 of personal service or publication of a copy of the order, by affidavit or otherwise, if the consent in writing to such sale of 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 at the hearing.

§ 176. COMPULSORY ATTENDANCE.] 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 probate court in the same manner and with like effect as in other cases.

§ 177. ALL REALTY MAY BE SOLD.] If it appear necessary to sell a 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 of any part thereof necessary and for the best interest of all concerned.

§ 178. ORDER OF SALE.] 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.

§ 179. CONTENTS OF ORDER—TERMS AND METHOD OF SALE.] 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 interest, 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 judge 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 order of the court, made on motion, after due notice, by any party interested.

§ 180. PETITION FOR SALE BY OTHERS.] 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.

§ 181. NOTICE OF SALE.] 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, then in such paper as the court may direct, for three weeks successively next before the sale. The lands and tenements to be sold must be described with common certainty in the notice.

§ 182. PLACE AND TIME OF SALE.] 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 the setting of the sun on the same day, and must be made on the day named in the notice of sale, unless the same is postponed.

§ 183. PRIVATE SALE—NOTICE—BIDS.] 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 two weeks successively 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 offers or bids will be received. The day last referred to must be at least fifteen 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 in the office of the judge of the probate court, to which the return of sale must be made, at any time after the first publication of notice, and before the making of the sale. If it is shown that it will be for the best interest of the estate, the court or judge 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 fifteen, 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.

§ 184. LIMIT OF PRICE—REAPPRAISEMENT.] 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.

§ 185. SECURITY FOR CREDIT.] The executor or administrator must, when the 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.

§ 186. RETURN OF SALE—HEARING—RESALE.] The executor or administrator after making any sale of real estate, must make a return of his proceedings to the probate court, which must be filed by the judge, 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 the 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 three public places in the county, or by publication in a newspaper, or

both, as he may deem best, and must briefly indicate the land 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 in 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.

§ 187. OBJECTIONS TO SALE.] When 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 objections.

§ 188. CONFIRMING ORDER—RESALE.] If it appear 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 in section 231 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.

§ 189. CONVEYANCE AND RECORD—EFFECT OF.] Conveyances must thereupon be executed to the purchaser by the executor or administrator, and they must refer to the orders of the probate court authorizing and confirming the sale of the property of the estate, and directing conveyances 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.

§ 190. PROOF BEFORE ORDER.] 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.

§ 191. POSTPONEMENT OF SALE.] If at the time appointed for the sale the executor or administrator deems it for the interest of the persons concerned therein that the same be postponed, he may postpone it from time to time, not exceeding in all three months.

§ 192. NOTICE OF SAME AT PLACE.] 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 be 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 publishing the same, or both, as the time and circumstances will admit.

§ 193. WILL MUST BE FOLLOWED.] If the testator makes provision 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 provision or designation, out of the estate thus appropriated, so far as the same is sufficient.

§ 194. SALES UNDER WILL—CONFIRMATION.] 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 probate 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.

§ 195. PREFERRED PROPERTY.] 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.

§ 196. PROPERTY LIABLE FOR DEBTS, ETC.] The estate, real and personal, given by will to legatees or 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 appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate.

§ 197. CONTRIBUTION FROM ALL.] 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 probate court, when distribution is made, must, by decree for that purpose, settle the amount of the several liabilities, and decree the amount each person shall contribute, and reserve the same from their distributive shares respectively, for the purpose of paying such contribution.

§ 198. CONTRACT TO PURCHASE LAND.] If a decedent, at the time of his death was possessed of a contract for the purchase of lands, his interest

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 in this chapter for the sale of lands of which he died seized, except as hereinafter provided.

§ 199. TERMS OF SUCH SALE.] The sale must be made subject to all payments that may thereafter become due on such contracts, and if there are any such, the sale must not be confirmed by the probate 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 probate judge shall approve.

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

§ 201. TRANSFER OF TITLE.] 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.

§ 202. LIENS ON REALTY PAID.] When any sale is made by an executor or administrator, pursuant to the provisions of this chapter, of lands subject to any mortgage or other lien, which is a valid claim against the estate of the decedent, and has been presented and allowed, the purchase money must be applied, after paying the necessary expenses of the sale, first to the payment and satisfaction of the mortgage or lien, and the residue if any in due course of administration. The application of the purchase money to the satisfaction of the mortgage or lien must be made without delay; and the land is subject to such mortgage or lien until the purchase money has been actually so applied. No claim against any estate which has been presented and allowed is affected by the statute of limitations, pending the proceedings for the settlement of the estate. The purchase money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest, and any lawful costs and charges thereon, may be paid into the probate 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 case shown, after notice to the executor or administrator, the judge otherwise directs.

§ 203. LIENOR MAY PURCHASE.] At any sale under order of the probate

court, of lands upon which there is a mortgage or lien, the holder thereof may become the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment pro tanto. If the amount for which he purchased the property is insufficient to defray the expenses and discharge his mortgage or lien, he must pay to the judge an amount sufficient to pay such expenses.

§ 204. MISCONDUCT OF SALE.] If there is any neglect or misconduct in the proceedings of the executor or administrator in relation to any sale, by which any person interested in the estate suffers damage, the party aggrieved may recover the same in an action upon the bond of the executor or administrator, or otherwise.

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

§ 206. ACTIONS TO RECOVER LIMITED.] No action for the recovery of any estate, sold by an executor or administrator under the provisions of this chapter, 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.

§ 207. LEGAL DISABILITIES.] The preceding section 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.

§ 208. ACCOUNT OF SALES.] 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 probate court, at its next term thereafter, an account of sales, verified by his affidavit. If he neglect 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.

§ 209. REPRESENTATIVE NOT PURCHASER.] No executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale.

CHAPTER VIII.

OF THE POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS, AND OF THE MANAGEMENT OF ESTATES.

§ 210. POSSESSION, POWERS AND DUTIES.] The executor or administrator must take into his possession all the estate of the decedent, real and personal, except the homestead and personal property not assets, and collect all debts due to the decedent or to the estate. For the purpose of bringing suits to quiet title or for partition of such estate, the possession of the

executors or administrators is the possession of the heirs or devisees: such possession by the heir or devisees is subject, however, to the possession of the executor or administrator, for the purposes of administration, as provided in this title.

§ 211. ACTIONS BY AND AGAINST.] Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators, in all cases and in the same courts in which the same might have been maintained by or against their respective testators or intestates.

§ 212. WASTE AND CONVERSION.] Executors and administrators may in like manner maintain actions against any person who has wasted, destroyed, taken, or 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.

§ 213. SAME AGAINST REPRESENTATIVES.] Any person, or his personal representatives, may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person.

§ 214. INVENTORY AND BOND BY SURVIVING PARTNER.] When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner shall immediately, in company with the executor or administrator, or some other person or persons, to be appointed by the judge of the probate court, take and furnish to said executor or administrator a correct and full inventory, and a fair and just appraisement, of all partnership property and assets held and belonging to himself and the deceased partner, after which the surviving partner shall settle the business of the co-partnership. The surviving partner shall settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him in right of the decedent. Upon the application of the executor or administrator, the judge of the probate court shall in all cases require the surviving partner to give a good and sufficient bond, to be approved by the judge of the probate court, for the honest and faithful disposal of the interest of the decedent in the co-partnership, and the prompt payment of the proceeds thereof over to the executor or administrator, and, in case of neglect or refusal, may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained.

§ 215. ACTIONS AGAINST PREDECESSOR.] An administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any former administrator of the same estate.

§ 216. JOINDER OF PARTIES.] In actions by or against executors, it is not necessary to join those as parties to whom letters were issued, but who have not qualified.

§ 217. COMPOUNDING DEBTS.] Whenever a debtor of a decedent is unable to pay all his debts, the executor or administrator, with the approbation of the probate judge, may compound with him, and give him a discharge upon receiving a fair and just dividend of his effects. A compromise may also be authorized, when it appears to be just, and for the best interest of the estate.

§ 218. RECOVERY OF FRAUDULENT CONVEYANCES.] When there is a deficiency of assets in the hands of an executor or administrator, and when the decedent, in his lifetime, has conveyed any real estate, or any rights or interests therein, with intent to defraud his creditors, or to avoid any right, debt or duty of any person, or has so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same; and may recover for the benefit of the creditors all such real estate so fraudulently conveyed; and may also, for the benefit of the creditors, sue and recover all goods, chattels, rights or credits which have been so conveyed by the decedent in his lifetime, whatever may have been the manner of such fraudulent conveyance.

§ 219. CREDITORS MAY REQUIRE SAME.] No executor or administrator is bound to sue for such estate as mentioned in the preceding section, for the benefit of the creditors, unless on application of creditors, who must pay such part of the costs and expenses of the suit, or give such security therefor to the executor or administrator, as the judge shall direct.

§ 220. SALE OF SUCH REALTY.] All real estate so recovered must be sold for the payment of debts, in the same manner as if the decedent had died seized thereof, upon obtaining an order therefor from the probate court; and the proceeds of all goods, chattels, rights, and credits so recovered must be appropriated in payment of the debts of the decedent, in the same manner as other property in the hand of the executor or administrator.

CHAPTER IX.

OF THE CONVEYANCE OF REAL ESTATE BY EXECUTORS AND ADMINISTRATORS IN CERTAIN CASES.

§ 221. DEEDS BY DECEDENT'S CONTRACT.] When a person who is bound by contract in writing to convey any real estate, dies before making the conveyance, and in all cases when such decedent, if living, might be compelled to make such conveyance, the probate court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto.

§ 222. PETITION FOR AND NOTICE.] On the presentation of a verified petition by any person claiming to be entitled to such conveyance from an executor or administrator, setting forth the facts upon which the claim is predicated, the probate judge must appoint a time and place for hearing the petition, at a regular term of court, and must order notice thereof to be published at least four successive weeks before such hearing, in such newspaper in this territory as he may designate.

§ 223. HEARING.] At the time and place appointed for the hearing, or at such other time to which the same may be postponed, upon satisfactory proof, by affidavit or otherwise, of the due publication of the notice, the court must proceed to a hearing, and all persons interested in the estate may appear and contest such petition, by filing their objections in writing, and the court may examine, on oath, the petitioner and all who may be produced before him for that purpose.

§ 224. DECREE.] If, after a full hearing upon the petition and objections, and examination of the facts and circumstances of the claim, the court is satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, a decree authorizing and directing the executor or administrator to execute a conveyance thereof to the petitioner must be made, entered on the minutes of the court, and recorded.

§ 225. DEED AND RECORD—EFFECT.] The executor or administrator must execute the conveyance according to the directions of the decree, a certified copy of which must be recorded with the deed in the office of the register of deeds of the county where the lands lie, and is prima facie evidence of the correctness of the proceedings and of the authority of the executor or administrator to make the conveyance.

§ 226. DISMISSAL AND APPEAL.] If, upon hearing in the probate court, as hereinbefore provided, the right of the petitioner to have a specific performance of the contract is found to be doubtful, the court must dismiss the petition without prejudice to the rights of the petitioner, who may, at any time within six months thereafter, proceed in the district court to enforce a specific performance thereof.

§ 227. EFFECT OF CONVEYANCE.] Every conveyance made in pursuance of a decree of the probate court, as provided in this chapter, shall pass the title to the estate contracted for as fully as if the contracting party himself was still living and executed the conveyance.

§ 228. DECREE GIVES POSSESSION.] A copy of the decree for a conveyance, made by the probate court, and duly certified and recorded in the office of the register of deeds of the county where the lands lie, gives the person entitled to the conveyance a right to the possession of the lands contracted for, and to hold the same according to the terms of the conveyance, in like manner as if they had been conveyed in pursuance of the decree.

§ 229. ENFORCING DECREE.] The recording of any decree, as provided in the preceding section, shall not prevent the court making the decree from enforcing the same by other process.

§ 230. DEATH OF CLAIMANT.] If the person entitled to the conveyance die before the commencement of proceedings therefor under this chapter, or before the completion of the conveyance, any person entitled to succeed to his rights in the contract, or the executor or administrator of such decedent may, for the benefit of the person so entitled, commence such proceedings, or prosecute any already commenced, and the conveyance must be so made as to vest the estate in the persons entitled to it, or in the executor or administrator, for their benefit.

§ 231. SURRENDER ORDERED BY DECREE.] The decree provided for in this chapter may direct the possession of the property therein described to be surrendered to the person entitled thereto, upon his producing the deed, and a certified copy of the decree, when, by the terms of the contract, possession is to be surrendered.

CHAPTER X.

OF ACCOUNTS RENDERED BY EXECUTORS AND ADMINISTRATORS, AND OF THE PAYMENT OF DEBTS.

ARTICLE I.—LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS.

§ 232. REQUISITES OF CONTRACT BY REPRESENTATIVE.] No executor or administrator is chargeable upon any special promise to answer damages or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing and signed by such executor or administrator, or by some other person by him thereunto specially authorized.

§ 233. WITH WHAT PROPERTY CHARGED.] Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession, at the value of the appraisement contained in the inventory, except as provided in the following sections, and with all the interest, profit and income of such estate.

§ 234. NEITHER PROFIT NOR LOSS.] He shall not make profit by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the estate. He must account for the excess when he sells any part of the estate for more than the appraisement, and if any part be sold for less than the appraisement, he is not responsible for the loss, if the sale has been justly made.

§ 235. UNCOLLECTED DEBTS.] No executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault.

§ 236. PAY FOR SERVICES AND EXPENSES.] He shall be allowed all necessary expenses in the care, management and settlement of the estate, and for his services such fees as are provided in this chapter; but when the decedent, by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless by a written instrument, filed in the probate court, he renounces all claim for compensation provided by the will.

§ 237. NOT PURCHASE CLAIMS.] No administrator or executor shall purchase any claim against the estate he represents; and if he pays any claim for less than its nominal value, he is only entitled to charge in his account the amount he actually paid.

§ 238. FEES AND COMMISSIONS.] When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of the whole estate accounted for by him,

excluding all property not ranked as assets, as follows: For the first thousand dollars, at the rate of five per cent.; for all above that sum, and not exceeding five thousand dollars, at the rate of four per cent.; for all above that sum, at the rate of two and one-half per cent.; and the same commission must be allowed adminstrators. In all cases such further allowance may be made as the probate judge may deem just and reasonable, for any extraordinary service. The total amount of such allowance must not exceed the amount of commissions allowed by this section.

ARTICLE II.—ACCOUNTING AND SETTLEMENT BY EXECUTORS AND ADMINISTRATORS.

§ 239. FULL STATEMENT.] At the third term of the court after his appointment, 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 presented against the estate and the names of the claimants, and all other matters necessary to show the condition of its affairs.

§ 240. CITATION UPON FAILURE.] If the executor or administrator fail to render an exhibit at the third term of the court, the judge of the probate court must issue a citation requiring him to appear and render it.

§ 241. PETITION FOR BY THIRD PERSON.] Any person interested in the estate may, at any time before the final settlement of accounts, present his petition to the probate 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.

§ 242. ACTION UPON SAME.] 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.

§ 243. CONTEST OF EXHIBIT.] 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.

§ 244. COMPULSORY ATTENDANCE.] 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.

§ 245. FULL ACCOUNT IN ONE YEAR.] 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.

§ 246. ACCOUNT TO SUCCESSOR.] When the authority of an executor or administrator ceases or is revoked for any reason, he may be cited to account before the probate 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.

§ 247. REVOCATION.] If the executor or administrator resides out of the county, or absconds, or conceals himself, so that the citation 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.

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

§ 249. ITEMS WITHOUT VOUCHERS.] 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.

§ 250. NOTICE FOR SETTLEMENT.] When any account is rendered for settlement, the court or judge must appoint a day for the settlement thereof; the judge must thereupon give notice thereof, by causing notices to be posted 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 or judge may order such further notice to be given as may be proper.

§ 251. REQUISITES FOR NOTICE OF FINAL SETTLEMENT.] If the account mentioned in the preceding section 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 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.

§ 252. EXCEPTIONS TO ACCOUNT.] 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.

§ 253. WHAT HEIRS MAY CONTEST—HEARING.] 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 hearing 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.

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

§ 255. PROOF OF NOTICE—DECREE.] The account must not be allowed by the court until it is first proved that notice has been given as required by this chapter, and the decree must show that such proof was made to the satisfaction of the court, and is conclusive evidence of the fact.

§ 256. PERSONALTY SOLD WHEN.] Whenever it appears to the court on any hearing 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.

§ 257. INVESTMENTS OF FUNDS.] Pending the settlement of any estate on the petition of any party interested therein, the probate court may order any moneys in the hands of the executor or administrators to be invested for the benefit of the estate, in securities of the United States. Such order can only be made after publication of notice of the petition in some newspaper to be designated by the judge.

ARTICLE III.—THE PAYMENT OF DEBTS OF THE ESTATE.

§ 258. ORDER OF PAYMENT.] The debts of the estate must be paid in the following order:

1. Funeral expenses.
2. The expenses of the last sickness.
3. Debts having preference by the laws of the United States.
4. Judgments rendered against the decedent in his lifetime, and mortgages, in the order of their date.
5. All other demands against the estate.

§ 259. LIMIT AS TO MORTGAGE.] The preference given in the preceding section to a mortgage only extends to the proceeds of the property mortgaged. If the proceeds of such property be insufficient to pay the mortgage, the part remaining unsatisfied must be classed with other demands against the estate.

§ 260. EQUAL WITHIN CLASSES.] If the estate be insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim; and no creditor of any class shall receive any payment until all those of the preceding class are fully paid.

§ 261. WHEN CERTAIN EXPENSES PAID.] The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses, and the expenses of the last sickness, and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or any legacy until, as prescribed in this article, the payment has been ordered by the court.

§ 262. ORDER FOR PAYMENT OF DEBTS.] Upon the settlement of the accounts of the executor or administrator, at the end of the year, as required in this chapter, the court must make an order for the payment of the debts, as the circumstances of the estate require. If there be not sufficient funds in the hands of the executor or administrator, the court must specify in the decree the sum to be paid to each creditor. If the whole assets of the estate be exhausted by such payment or distribution, such account must be considered as a final account, and the executor or administrator is entitled to his discharge, on producing and filing the necessary vouchers and proofs showing that such payments have been made, and that he has fully complied with the decree of the court.

§ 263. ADVANCE PAYMENTS—SOLVENCY.] If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established or absolute, must be paid into the court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require. If any creditor whose claim has been allowed, but is not yet due, appears and assents to a deduction therefrom of the legal interest for the time the claim has yet to run, he is entitled to be paid immediately. The payments provided for in this section are not

to be made when the estate is insolvent, unless a pro rata distribution is ordered.

§ 264. LIABLE FOR DEBTS ORDERED PAID.] When a decree is made by the probate court for the payment of creditors, the executor or administrator is personally liable to each creditor for his allowed claim, or the dividend thereon, and execution may be issued on such decrees, as upon judgment in the district court, in favor of each creditor, and the same proceeding may be had under such execution as if it had been issued from the district court. The executor or administrator is liable therefor, on his bond, to each creditor.

§ 265. OTHER LIABILITY.] When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors who have been paid, or upon the heirs, devisees, or legatees, to contribute to the payment of his claim; but if the executor or administrator has failed to give the notice to creditors as required in the first and second sections of chapter VI, such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he would have been entitled to had it been allowed. This section shall not apply to any creditor whose claim was not due ten months before the day of settlement, or whose claim was contingent and did not become absolute ten months before such day.

§ 266. EXTENSION OF TIME.] If the whole of the debts have been paid by the first distribution, the court must direct the payment of legacies and the distribution of the estate among the heirs, legatees, or other persons entitled as provided in the next chapter; but if there be debts remaining unpaid, or if, for other reasons, the estate be not in a proper condition to be closed, the court must give such extension of time as may be reasonable for a final settlement of the estate.

§ 267. FINAL ACCOUNT AND SETTLEMENT.] At the time designated in the last section, or sooner, if within that time all the property of the estate has been sold, or there are sufficient funds in his hands for the payment of all debts due by the estate, and the estate be in a proper condition to be closed, the executor or administrator must render a final account, and pray a settlement of his administrator.

§ 268. PROVISIONS APPLYING TO.] If he neglect to render his account, the same proceedings may be had as prescribed in this chapter in regard to the first account to be rendered by him; and all the provisions of this chapter relative to the last mentioned account, and the notice and settlement thereof, apply to his account presented for final settlement.

CHAPTER XI.

OF THE PARTITION, DISTRIBUTION, AND FINAL SETTLEMENT OF ESTATES.

ARTICLE I.—PARTIAL DISTRIBUTION PRIOR TO FINAL SETTLEMENT.

§ 269. PETITION FOR LEGACY OR SHARE.] At any time after the lapse of four months from the issuing of letters testamentary or of administration.

any heir, devisee or legatee may present his petition to the court for the legacy or share of the estate to which he is entitled, to be given to him upon his giving bond, with security, for the payment of his proportion of the debts of the estate.

§ 270. NOTICE TO REPRESENTATIVE.] Notice of the application must be given to the executor or administrator, personally, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator.

§ 271. WHO MAY RESIST.] The executor or administrator, or any person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee or legatee may make a similar application for himself.

§ 272. WHEN PETITION ALLOWED—CONDITIONS—PARTITION.] If at the hearing it appears that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the applicant, requiring:

1. Each heir, legatee or devisee obtaining such order, before receiving his share or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as shall be designated by the probate judge, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the value or amount of the legacy or portion of the estate to which he is entitled.

2. The executor or administrator to deliver to the heir, legatee or devisee the whole portion of the estate to which he may be entitled, or only a part thereof, designating it.

If, in the execution of the order, a partition is necessary between two or more of the parties interested, it must be made in the manner hereinafter prescribed. The costs of these proceedings to be paid by the applicant, or if there be more than one, to be apportioned equally amongst them.

§ 273. ASSESSMENT AGAINST LEGATEE OR DEVISEE.] When any bond has been executed and delivered, under the provisions of the preceding section, and it is necessary for the settlement of the estate to require the payment of any part of the money thereby secured, the executor or administrator must petition the court for an order requiring the payment, and have a citation issued and served on the party bound, requiring him to appear and show cause why the order should not be made. At the hearing, the court, if satisfied of the necessity of such payment, must make an order accordingly, designating the amount and giving a time within which it must be paid. If the money be not paid within the time allowed, an action may be maintained by the executor or administrator on the bond.

ARTICLE II.—DISTRIBUTION AND FINAL SETTLEMENT.

§ 274. COURT DISTRIBUTES—DECEASED HEIR—SETTLEMENT.] Upon the final settlement of the accounts of the executor or administrator, or at any sub-

sequent time, upon the application of the executor or administrator, or of any heir, legatee or devisee, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto; and if the decedent has left a surviving child, and the issue of other children, and any of them, before the close of administration, have died while under age and not having been married, no administration on such deceased child's estate is necessary, but all the estate which such deceased child was entitled to by inheritance, must, without administration, be distributed to the other heirs at law. A statement of any receipts and disbursements of the executor or administrator, since the rendition of his final accounts, must be reported and filed at the time of making such distribution, and a settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court and included in the order or decree; or the court or judge may order notice of the settlement of such supplementary account, and refer the same as in other cases of the settlement of accounts.

§ 275. DECREE OF DISTRIBUTION—CONTENTS—EFFECT.] In the order or decree, the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal.

§ 276. DELIVERY TO EXECUTOR UNDER FOREIGN WILL.] Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a non-resident of this territory, leaving a will which has been duly proved or allowed in the state, territory or district of his residence, and an authenticated copy thereof has been admitted to probate in this territory, and it is necessary, in order that the estate or any part thereof may be distributed according to the will, that the estate in this territory should be delivered to the executor or administrator in the state or place of his residence, the court may order such delivery to be made, and, if necessary, order a sale of the real estate, and a like delivery of the proceeds. The delivery, in accordance with the order of the court, is a full discharge of the executor or administrator with the will annexed in this territory, in relation to all property embraced in such order, which, unless reversed on appeal, binds and concludes all parties in interest. Sales of real estate ordered by virtue of this section must be made in the same manner as other sales of real estate of decedents by order of the probate court.

§ 277. PETITION AND NOTICE FOR DECREE.] The order or decree may be made on the petition of the executor or administrator, or of any person interested in the estate. Notice of the application must be given by posting or publication, as the court may direct, and for such time as may be ordered. If partition be applied for, as provided in this chapter, the decree of distribution shall not divest the court of jurisdiction to order partition, unless the estate is finally closed.

§ 278. TAXES PAID BEFORE DECREE.] Before any decree of distribution of an estate is made, the probate court must be satisfied, by the oath of the executor or administrator, or otherwise, that all territorial, county, school and municipal taxes, legally levied upon personal property of the estate, have been fully paid.

ARTICLE III.—DISTRIBUTION AND PARTITION.

§ 279. PARTITION BY THREE COMMISSIONERS.] When the estate, real or personal, assigned by the decree of distribution to two or more heirs, devisees or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition or distribution may be made by three disinterested persons, to be appointed commissioners for that purpose by the probate court or judge, who must be duly sworn to the faithful discharge of their duties. A certified copy of the order of their appointment, and of the order or decree assigning and distributing the estate, must be issued to them as their warrant, and their oath must be indorsed thereon. Upon consent of the parties, or when the court deems it proper and just, it is sufficient to appoint one commissioner only, who has the same authority, and is governed by the same rules as if three were appointed.

§ 280. PETITION FOR AND NOTICE.] Such partition may be ordered and had in the probate court, on the petition of any person interested. But before commissioners are appointed, or partition ordered by the probate court as directed in this subdivision, notice thereof must be given to all persons interested, who reside in this territory, or their guardians, and to the agents, attorneys, or guardians, if any in this territory, of such as reside out of the territory, either personally or by public notice, as the probate court may direct. The petition may be filed, attorneys, guardians, and agents appointed, and notice given, at any time before the order or decree of distribution, but the commissioners must not be appointed until the order or decree is made distributing the estate.

§ 281. REALTY IN DIFFERENT COUNTIES.] If the real estate is in different counties, the probate court may, if deemed proper, appoint commissioners for all, or different commissioners for each county. The whole estate, whether in one or more counties, shall be divided among the heirs, devisees, or legatees as if it were all in one county, and the commissioners must, unless otherwise directed by the probate court, make division of such real estate, wherever situated within this territory.

§ 282. WHEN PART CONVEYED.] Partition or distribution of the real estate may be made as provided in this chapter, although some of the original heirs, legatees, or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees.

§ 283. HOW SHARES SET APART.] When both distribution and partition are made, the several shares in the real and personal estate must be set out to each individual in proportion to his right, by metes and

bounds, or description, so that the same can be easily distinguished, unless two or more of the parties interested consent to have their shares set out so as to be held by them in common and undivided.

§ 284. JOINT SHARES—PREFERENCES—DIFFERENCE PAID.] When the real estate cannot be divided without prejudice or inconvenience to the owners, the probate court may assign the whole to one or more of the parties entitled to shares therein, who will accept it, always preferring the males to the females, and among children preferring the elder to the younger. The parties accepting the whole must pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, or, in case of the minority of such party, then to the satisfaction of his guardian, and the true value of the estate must be ascertained and reported by the commissioners. When the commissioners appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to court, and recommend that the whole be assigned as herein provided, and must find and report the true value of such real estate. On filing the rereport of the commissioners, and on making or securing the payment as before provided, the court, if it appears just and proper, must confirm the report, and thereupon the assignment is complete, and the title to the whole of such real estate vests in the person to whom the same is so assigned.

§ 285. WHOLE TO ONE PARTY—EXCESS PAID.] When any tract of land or tenement is of greater value than any one's share in the estate to be divided, and cannot be divided without injury to the same, it may be set off by the commissioners appointed to make partition to any of the parties who will accept it, giving preference as prescribed in the preceding section. The party accepting must pay or secure to the others such sums as the commissioners shall award to make the partition equal, and the commissioners must make their award accordingly; but such partition must not be established by the court until the sums awarded are paid to the parties entitled to the same, or secured to their satisfaction.

§ 286. SALE OF WHOLE.] When it appears to the court, from the commissioners' report that it cannot be otherwise fairly divided, and should be sold, the court may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a commission appointed for that purpose, and the proceeds distributed. The sale must be conducted, reported and confirmed in the same manner and under the same requirements as provided in article III, chapter VII of this title.

§ 287. NOTICE TO ALL BEFORE PARTITION.] Before any partition is made, or any estate divided, as provided in this chapter, notice must be given to all persons interested in the partition, their guardians, agents, or attorneys, by the commissioners, of the time and place when and where they shall proceed to make partition. The commissioners may take testimony, order surveys, and take such other steps as may be necessary, to enable them to form a judgment upon the matters before them.

§ 288. REPORT BY COMMISSIONERS—CONFIRMATION—RECORD.] The commis-

sioners must report their proceedings and the partition agreed upon by them, to the probate court, in writing, and the court may, for sufficient reasons, set aside the report and commit the same to the same commissioners, or appoint others; and when such report is finally confirmed, a certified copy of the judgment or decree of partition made thereon, attested by the judge, under the seal of the court, must be recorded in the office of the register of deeds of the county where the lands lie.

§ 289. RESIDUE ASSIGNED.] When the probate court makes a judgment or decree assigning the residue of any estate to one or more persons entitled to the same, it is not necessary to appoint commissioners to make partition or distribution thereof, unless the parties to whom the assignment is decreed, or some of them, request that such partition be made.

§ 290. ADVANCEMENTS—CONTENTS OF DECREE.] All questions as to advancements made, or alleged to have been made, by the decedent to his heirs, may be heard and determined by the probate court, and must be specified in the decree assigning and distributing the estate; and the final judgment or decree of the probate court, or in case of an appeal, of the district court or supreme court, is binding on all parties interested in the estate.

ARTICLE IV.—AGENTS FOR ABSENT PARTIES—DISCHARGE OF EXECUTOR OR ADMINISTRATOR.

§ 291. AGENT FOR NON-RESIDENT.] When any estate is assigned or distributed by a judgment or decree of the probate court, to any person residing out of and having no agent in this territory, and it is necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose, and authorize him to take charge of such estate as well as to act for such absent person in the distribution.

§ 292. BOND BY AGENT—PAY.] The agent must first give a bond to the probate judge, to be approved by him, conditioned that he shall faithfully manage and account for the estate. The court appointing such agent may allow a reasonable sum out of the profits of the estate for his services and expenses.

§ 293. SALE OF SUCH PROPERTY.] When personal property remains in the hands of the agent unclaimed for a year, and it appears to the court that it is for the benefit of those interested, it shall be sold under the order of the court, and the proceeds, after deducting the expenses of the sale allowed by the court must be paid into the territorial treasury. When the payment is made, the agent must take from the treasury duplicate receipts, one of which he must file in the office of the territorial auditor, and the other in the probate court.

§ 294. AGENTS ACCOUNT—REQUISITES.] The agent must render to the probate court appointing him, annually, an account, showing:

1. The value and character of the property received by him, what portion thereof is still on hand, what sold, and for what.
2. The income derived therefrom.

3. The taxes and assessments imposed thereon, for what, and whether paid or unpaid.

4. Expenses incurred in the care, protection and management thereof, and whether paid or unpaid.

When filed the probate court may examine witnesses and take proofs in regard to the account; and if satisfied from such accounts and proofs that it will be for the benefit and advantage of the persons interested therein, the court may, by order, direct a sale to be made of the whole or such parts of the real or personal property as shall appear to be proper, and the purchase money to be deposited in the territorial treasury, to be receipted for and the receipts filed as in like cases before provided.

§ 295. LIABILITY ON BOND.] The agent is liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the proceeds of the sale as required in the preceding sections, and may be sued thereon by any person interested.

§ 296. CLAIMANT FOR PROPERTY.] When any person appears and claims the money paid into the treasury, the probate court making the distribution must inquire into such claim, and, being first satisfied of his right thereto, must grant him a certificate to that effect, under its seal; and upon the presentation of the certificate to him the territorial auditor must draw a warrant on the treasurer for the amount.

§ 297. DECREE DISCHARGING REPRESENTATIVE.] When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up under the order of the court, all the property of the estate to the parties entitled, and performed all the acts lawfully required of him, the court must make a judgment or decree discharging him from all liability to be incurred thereafter.

§ 298. SUBSEQUENT PROPERTY DISCOVERED.] The final settlement of an estate as hereinbefore provided, shall not prevent a subsequent issue of letters testamentary or of administration, or of administration with the will annexed, if other property of the estate be discovered, or if it become necessary or proper for any cause that letters should be again issued.

CHAPTER XII.

OF ORDERS, DECREES, PROCESS, MINUTES, RECORDS, TRIALS, AND APPEALS

ARTICLE I.—ORDERS, DECREES, PROCESS, MINUTES, RECORDS AND TRIALS.

§ 299. REQUISITES—RECORD.] Orders and decrees made by the probate court, or the judge thereof, need not recite the existence of facts, or the performance of acts upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered or adjudged, except as otherwise provided in this title. All orders and decrees of the court or judge must be entered at length in the minute book of the court, and upon the close of each regular or special term the judge must sign the same.

§ 300. PUBLICATION—HOW.] When any publication is ordered, such publication must be made daily or otherwise, as often during the prescribed period as the paper is regularly issued, unless otherwise provided in this title. The court or judge may, however, order a less number of publications during the period.

§ 301. NOTICE IMPARTED BY RECORDED DECREE.] When it is provided in this title that any order or decree of a probate court or judge, or a copy thereof, must be recorded in the office of the county register of deeds, from the time of filing the same for record notice is imparted to all persons of the contents thereof.

§ 302. CITATIONS—REQUISITES OF.] Citations must be directed to the person to be cited, signed by the judge, and issued under the seal of the court, and must contain:

1. The title of the proceeding.
2. A brief statement of the nature of the proceeding.
3. A direction that the person cited appear at a time and place specified.

§ 303. SERVICE OF.] The citation must be served in the same manner as a summons in a civil action.

§ 304. PERSONAL NOTICE.] When a personal notice is required, and no mode giving it is prescribed in this title, it must be given by citation.

§ 305. TIME OF SERVICE.] When no other time is specially prescribed in this title, citations must be served at least five days before the return day thereof.

§ 306. DESCRIPTION OF REALTY.] When a complete description of the real property of an estate sought to be sold has been given and published in a newspaper, as required in the order to show cause why the sale should not be made, such description need not be published in any subsequent notice of sale, or notice of a petition for the confirmation thereof. It is sufficient to refer to the description contained in the publication of the first notice, as being proved and on file in the court.

§ 307. TRIALS—FINDINGS—JUDGMENTS—EXECUTIONS.] All issues of facts joined in the probate court must be tried by said court, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. After the hearing the court shall give, in writing, the findings of fact and conclusions of law. Judgments thereon, as well as for costs, may be entered and enforced by execution or otherwise, by the probate court, as in civil actions. If the issues are not sufficiently made up by the written pleadings on file, the court, on due notice to the opposite party, must settle and frame the issues to be tried, and upon which the court may render judgment.

§ 308. ATTORNEYS APPOINTED BY COURT.] At or before the hearing of petitions and contests for the probate of wills; for letters testamentary or of administration; for sales of real estate and confirmations thereof; settlements, petitions, and distributions of estates; and all other proceedings where all the parties interested in the estate are required to be notified thereof, the court may, in its discretion, appoint some competent attorney

at law to represent in all such proceedings the devisees, legatees, heirs, or creditors of the decedent, who are minors and have no general guardian in the county, or who are non-residents of the territory, and those interested, who, though they are neither such minors or non-residents, are unrepresented. The order must specify the names of the parties for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The attorney may receive a fee to be fixed by the court for his services, which must be paid out of the funds of the estate as necessary expenses of administration, and upon distribution may be charged to the party represented by the attorney. If, for any cause it become necessary, the probate court may substitute another attorney for the one first appointed, in which case the fee must be proportionately divided. The non-appointment of an attorney will not affect the validity of any of the proceedings.

§ 309. DECREE RECORDED IN REGISTER'S OFFICE.] When a judgment or decree is made, setting apart and defining the homestead, confirming a sale, making distribution of real property, or determining any other matter affecting the title to real property, a certified copy of the same must be recorded in the office of the register of deeds of the county in which the real property is situated.

§ 310. REVOCATION FOR CONTUMACY.] Whenever an executor, administrator, or guardian is committed for contempt, in disobeying any lawful order of the probate court or the judge thereof, and has remained in custody for thirty days without obeying such order or purging himself otherwise of the contempt, the probate court may, by order reciting the facts, and without further showing or notice, revoke his letters and appoint some other person, entitled thereto, executor, administrator or guardian, in his stead.

§ 311. SERVICE UPON GUARDIAN.] Whenever an infant, insane or incompetent person, has a guardian of his estate residing in this territory, personal service upon the guardian of any process, notice, or order of the probate court concerning the estate of a deceased person, in which the ward is interested, is equivalent to service upon the ward; and it is the duty of the guardian to attend to the interests of the ward in the matter. Such guardian may also appear for his ward, and waive any process, notice, or order to show cause which an adult or a person of sound mind might do.

ARTICLE II.—OF APPEALS AND BONDS.

§ 312. DECISIONS FROM WHICH APPEALS LIE.] An appeal may be taken to the district court from a judgment, decree or order of the probate court:

1. Granting, or refusing, or revoking letters testamentary or of administration, or of guardianship.
2. Admitting, or refusing to admit, a will to probate.
3. Against or in favor of the validity of a will, or revoking the probate thereof.
4. Against or in favor of setting apart property, or making an allowance for a widow or child.

5. Against or in favor of directing the petition, sale or conveyance of real property.

6. Settling an account of an executor or administrator, or guardian.

7. Refusing, allowing or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, legacy or distributive share; or,

8. From any other judgment, decree or order of the probate court, or of the judge thereof, affecting a substantial right.

§ 313. WHO MAY APPEAL.] Any party aggrieved may appeal as aforesaid, except where the decree or order of which he complains, was rendered or made upon his default.

§ 314. SAME.] A person interested in the estate or fund affected by the decree or order, who was not a party to the special proceeding in which it was made, but who was entitled by law to be heard therein, upon his application; or who has acquired, since the decree or order was made, a right or interest which would have entitled him to be heard, if it had been previously acquired; may also appeal as prescribed in this article. The facts, which entitle such a person to appeal, must be shown by an affidavit, which must be filed with the notice of appeal.

§ 315. PERIOD IN WHICH APPEAL TAKEN.] An appeal by a party, or by a person interested who was present at the hearing, must be taken within ten days, and an appeal by a person interested, who was not a party and not present at the hearing, within thirty days, from the date of the judgment, decree, or order appealed from.

§ 316. APPEAL HOW TAKEN.] The appeal must be made:

1. By filing a written notice thereof with the judge of the probate court stating the judgment, decree, or order appealed from, or some specific part thereof, and whether the appeal is on a question of law, or of fact, or of both, and, if of law alone, the particular grounds upon which the party intends to rely on his appeal; and,

2. By executing and filing, within the time limited in the preceding section, such bond as is required in the following sections.

It shall not be necessary to notify or summon the appellee or respondent to appear in the district court, but such respondent shall be taken and held to have notice of such appeal in the same manner as he had notice of the pendency of the proceedings in the probate court.

§ 317. BOND—REQUISITES OF.] The appeal bond shall be in such sum as the judge of the probate court shall require and deem sufficient, with at least two sufficient sureties to be approved by the judge, conditioned that the appellant will prosecute his appeal with due diligence to a determination, and will abide, fulfill and perform whatever judgment, decree or order may be rendered against him in that proceeding by the district court, and that he will pay all damages which the opposite party may sustain by reason of such appeal, together with all costs that may be adjudged against him.

§ 318. STAY—EFFECT OF APPEAL.] If the judgment, decree or order appealed from be for, or direct, the payment of money, or the delivery of any

property, or grant leave to issue an execution, the appeal shall not stay the execution thereof, unless the appeal bond be furthermore conditioned to the effect that if the judgment, decree or order, or any part thereof be affirmed, or the appeal be dismissed, the appellant shall pay the sum so directed to be paid or levied, or, as the case may require, shall deliver the property so directed to be delivered, or the part thereof as to which the judgment, decree or order shall be affirmed.

§ 319. SAME—BOND.] An appeal from any judgment, decree or order directing the commitment of any person, does not stay the execution thereof unless the appeal bond be also to the effect that if the judgment, decree or order appealed from be affirmed, or the appeal be dismissed, the appellant shall, within twenty days after such affirmance or dismissal, surrender himself in obedience to the judgment, decree or order, to the custody of the sheriff to whom he was committed. If the condition of such bond be violated, it may be prosecuted in the same manner and with the same effect as an administrator's official bond; and the proceeds of the action must be paid or distributed, as directed by the probate court, to or among the persons aggrieved, to the extent of the pecuniary injuries sustained by them, and the balance, if any, must be paid into the county treasury.

§ 320. JUSTIFICATION BY SURETIES—NEW BOND.] The sureties in every appeal bond must justify in the manner required in article VI of chapter III of this title; and the respondent may apply to the appellate court or the judge thereof, upon notice, for an order requiring the appellant to increase the sum fixed by the judge of the probate court, or to give additional security; and if the applicant make default in giving a new bond, pursuant to an order to increase the same, or to give additional security, the appeal may be dismissed.

§ 321. FORM OF BOND—ACTION UPON.] Every appeal bond must be to the territory of Dakota; must contain the name and residence of each of the sureties thereto; and must be filed in the probate court. The judge of the probate court may, at any time, in his discretion, make an order, authorizing any person aggrieved to bring an action on the bond in his own name or in the name of the territory. When it is brought in the name of the territory the damages collected must be paid over to the probate court and therein distributed as justice may require.

§ 322. LETTERS ISSUE NOTWITHSTANDING APPEAL.] An appeal from a decree or order admitting a will to probate, or granting letters testamentary, or letters of administration, does not stay the issuing of letters, where, in the opinion of the probate judge, manifested by an entry upon the minutes of the court, the preservation of the estate requires that such letters should issue. But the letters so issued do not confer power to sell real property by virtue of any provision in the will, or to pay or satisfy legacies, or to distribute the property of the decedent among the next of kin, until the final determination of the appeal.

§ 323. APPEAL DOES NOT STAY—WHEN.] An appeal from a decree or order revoking probate of a will, letters testamentary, letters of administration,

or letters of guardianship; or from a decree or order suspending or removing an executor, administrator or guardian, or removing or suspending a testamentary trustee, or a person appointed by the probate court, or appointing an appraiser of personal property, does not stay the execution of the decree or order appealed from.

§ 324. TRANSCRIPT TO DISTRICT COURT—NON-APPEARANCE.] The judge of the probate court must, within ten days from the filing of the notice of appeal and the giving of the required bond, cause a certified copy thereof, and of the judgment decree, or order, or specific part thereof appealed from, and of the minutes, records, papers, and proceedings in the case, to be transmitted to the clerk of the district court of the county or judicial subdivision to be filed in his office; and the appeal may be heard and determined at any day thereafter by said court, at any general, special or adjourned term; and if the appellant make no appearance when the case is called for trial, or otherwise fail to prosecute his appeal, the respondent may, on motion, have the appeal dismissed, or may open the record and move for an affirmance.

§ 325. PARTIES NAMED—POWERS OF APPELLATE COURT.] The plaintiff in the probate court shall be the plaintiff in the district court; and when the appeal is on questions of law alone, the appellate court may reverse, affirm or modify the judgment, decree or order, or the part thereof appealed from, and every intermediate order which it is authorized by law to review, in any respect mentioned in the notice of appeal, and as to any or all of the parties, and it may order a new hearing. Upon such appeal, so much of the evidence as may be necessary to explain the grounds, and no more, may be certified into the appellate court.

§ 326. TRIAL DE NOVO OF FACT BY COURT.] When the appeal is on questions of fact, or on questions of both law and fact, the trial in the district court must be de novo, and shall be conducted in the same manner as if the case and proceedings had lawfully originated in that court; and such appellate court has the same power to decide the questions of fact which the probate court, or judge, had; and it may, in its discretion, as in suits in chancery, and with like effect, make an order for the trial by a jury of any or all the material questions of fact, arising upon the issues between the parties; and such an order must state distinctly and plainly the questions of fact to be tried.

§ 327. NEGLECT OF PROBATE RECORD.] If the judge of the probate court neglect or refuse to make or transmit such certified copies as are hereinbefore required to be transmitted to the clerk of the district court in cases of appeal, he may be compelled by the district court by an order entered, upon motion, to do so, and he may be fined as for contempt for any such neglect or refusal. A certified copy of such order may be served upon the probate judge by the party or his attorney.

§ 328. DISMISSAL IS AFFIRMANCE—AMENDMENT.] The dismissal of an appeal by the district court, is in effect an affirmance of the judgment, decree or order, appealed from; and when an appellant shall have given, in good faith, notice of appeal, but omits, through mistake, to do any other

act necessary to perfect the appeal or to stay proceedings, the appellate court may permit an amendment on such terms as may be just.

§ 329. COSTS—HOW PAYABLE.] Such appellate court may award to the successful party the costs of the appeal; or it may direct that such costs abide the event of a new hearing, or of the subsequent proceedings in the probate court. In either case, the costs may be made payable out of the estate or fund, or personally by the unsuccessful party, as directed by the appellate court; or, if no such direction be given, as directed by the probate court.

§ 330. ENFORCEMENT BY PROBATE COURT.] When a judgment, decree or order, from which an appeal has been taken, is wholly or partly affirmed, or is modified by the judgment rendered by the district court upon such appeal, it must be enforced, to the extent authorized by the latter judgment, by the probate court, in like manner as if no appeal therefrom had been taken; and the district court must direct the proceedings to be remitted for that purpose to the probate court, or to the judge thereof.

§ 331. OFFICIAL BONDS GOOD ON APPEAL.] When an executor or administrator who has given an official bond appeals from a judgment, decree or order, of the probate court or judge, made in the proceedings had upon the estate of which he is administrator or executor, his said bond stands in the place of an appeal bond, and the sureties therein are liable as on such appeal bond.

§ 332. LAWFUL ACTS VALID—WHEN.] When the order or decree appointing an executor, or administrator, or guardian, is reversed on appeal for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate, performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such order or decree had been affirmed.

CHAPTER XIV.

OF GUARDIAN AND WARD.

ARTICLE I.—GUARDIANS OF MINORS.

§ 333. OF PERSONS AND ESTATES.] The probate court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either, or both of them, of minors who have no guardian legally appointed by will, or deed, and who are inhabitants or residents of the county, or who reside without the territory and have estate within the county. Such appointment may be made on the petition of a relative or other person in behalf of such minor. Before making the appointment, the judge must cause such notice as he deems reasonable to be given to the relatives of the minor residing in the county, and to any person having care of such minor.

§ 334. WHEN MINOR MAY NOMINATE.] If the minor is under the age of fourteen years, the probate judge may nominate and appoint his guard-

ian. If he is above the age of fourteen years he may nominate his own guardian, who, if approved by the judge, must be appointed accordingly. And the probate court, in appointing a guardian, is to be guided by the considerations named in section 127 of the civil code.

§ 335. WHEN JUDGE MAY APPOINT.] If the guardian nominated by the minor be not approved by the judge, or if the minor resides out of the territory, or if, after being duly cited by the judge, he neglects for ten days to nominate a suitable person, the judge may nominate and appoint the guardian, in the same manner as if the minor was under the age of fourteen years.

§ 336. MINOR MAY APPOINT.] When a guardian has been appointed by the court for a minor under the age of fourteen years, the minor, at any time after he has attained that age, may appoint his own guardian, subject to the approval of the probate judge.

§ 337. FATHER OR MOTHER ENTITLED.] The father of the minor, if living, and in case of his decease, the mother, while she remains unmarried, being themselves respectively competent to transact their own business, and not otherwise unsuitable, must be entitled to the guardianship of the minor.

§ 338. GUARDIAN HAS CUSTODY.] If the minor has no father or mother living competent to have the custody and care of his education, the guardian appointed shall have the same.

§ 339. SAME UNTIL MARRIAGE.] Every guardian appointed shall have the custody and care of the education of the minor, and the care and management of his estate, until such minor arrives at the age of majority, or marries, or until the guardian is legally discharged.

§ 340. BOND TO MINOR—REQUISITES—LETTERS—OATH.] Before the order appointing any person guardian under this chapter takes effect, and before letters issue, the judge must require of such person a bond to the minor, with sufficient sureties, to be approved by the judge, and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law; and the following conditions shall form and constitute a part of every such bond without being expressed therein:

1. To make an inventory of all the estate, real and personal, of his ward that comes to his possession or knowledge, and to return the same within such time as the judge may order.

2. To dispose of and manage the estate according to law and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the care, custody and education of the ward.

3. To render an account, on oath, of the property, estate and moneys of the ward in his hands, and all proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court directs; and at the expiration of his trust to settle his accounts with the probate judge, or with the ward, if he be of full age, or his legal representatives, and to pay

over and deliver all the estate moneys and effects remaining in his hands, or due from him on such settlement, to the person who is lawfully entitled thereto.

Upon filing the bond, duly approved, letters of guardianship must issue to the person appointed. In form the letters of guardianship must be substantially the same as letters of administration; and the oath of the guardian must be indorsed thereon that he will perform the duties of his office, as such guardian, according to law.

§ 341. ADDITIONAL CONDITIONS.] When any person is appointed guardian of a minor, the probate judge may, with the consent of such person, insert in the order of appointment conditions not otherwise obligatory, providing for the care, treatment, education and welfare of the minor. The performance of such conditions is a part of the duties of the guardian, for the faithful performance of which he and the sureties on his bond are responsible.

§ 342. RECORD OF LETTERS AND BOND.] All letters of guardianship issued, and all guardians' bonds executed under the provisions of this chapter, with the affidavits and certificates thereon, must be recorded by the judge of the probate court having jurisdiction of the persons and estates of the wards.

§ 343. EXTRA EXPENSES.] If any minor, having a father living, has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family, and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property, in whole or in part, as judged reasonable, and must be directed by the probate court; and the charges therefor may be allowed accordingly in the settlement of the accounts of his guardian.

§ 344. TESTAMENTARY GUARDIAN.] Every testamentary guardian must give bond and qualify, and has the same powers and must perform the same duties with regard to the person and estate of his ward, as guardians appointed by the probate court, except so far as their powers and duties are legally modified, enlarged, or changed by the will by which such guardian was appointed.

§ 345. GUARDIAN AD LITEM.] Nothing contained in this chapter affects or impairs the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein.

ARTICLE II.—GUARDIANS OF INSANE AND INCOMPETENT PERSONS.

§ 346. PETITION AND NOTICE.] When it is represented to the probate court, upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, the judge must cause notice to be given to the supposed insane or incompetent person, of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced before him on the hearing.

§ 347. HEARING—APPOINTMENT.] If after a full hearing and examination upon such petition, it appears to the judge of the probate court that the person in question is incapable of taking care of himself and managing his property, he must appoint a guardian of his person and estate, with the powers and duties in this chapter specified.

§ 348. POWERS—BOND.] Every guardian appointed as provided in the preceding section, has the care and custody of the person of his ward, and the management of all his estate, until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions, as before prescribed with respect to the guardian of a minor.

§ 349. PROCEEDINGS TO DECLARE RESTORATION.] Any person who has been declared insane, or the guardian or any relative of such person, within the third degree, or any friend may apply by petition to the probate court of the county in which he was declared insane, to have the fact of his restoration to capacity judicially determined. The petition shall be verified, and shall state that such person is then sane. Upon receiving the petition, the judge must appoint a day for the hearing, and cause notice of the trial to be given to the guardian of the petitioner, if there be a guardian, and to his or her husband or wife, if there be one, and to his or her father or mother, if living in the county. On the trial, the guardian or relative of the petitioner, and in the discretion of the judge, any other person, may contest the right of the petitioner to the relief demanded. Witnesses may be required to appear and testify, as in other cases, and may be called and examined by the judge on his own motion. If it be found that the petitioner be of sound mind and capable of taking care of himself and his property, his restoration to capacity shall be adjudged, and the guardianship of such person, if such person be not a minor, shall cease.

ARTICLE III.—THE POWERS AND DUTIES OF GUARDIANS.

§ 350. PAYMENT OF DEBTS—SALES.] Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, must pay all just debts due from the ward out of his personal estate and income of his real estate, if sufficient; if not, then out of his real estate, upon obtaining an order for the sale thereof, and disposing of the same in the manner provided by law for the sale of real estate of decedents.

§ 351. COLLECT AND PAY DEBTS—APPEAR IN COURTS.] Every guardian must settle all accounts of the ward, and demand, sue for, and receive all debts due to him, or may, with the approbation of the probate judge, compound for the same and give discharges to the debtors on receiving a fair and just dividend of his estate and effects; and he must appear for and represent his ward in all legal suits and proceedings, unless another person is appointed for that purpose as guardian or next friend.

§ 352. RULES GOVERNING MANAGEMENT.] Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance and support of the ward, and his family, if there be any; and if such income and profits be insufficient for that purpose, the

guardian may sell the real estate, upon obtaining an order of the probate court therefor, as provided, and must apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any.

§ 353. MANTENANCE AND SUPPORT.] When a guardian has advanced, for the necessary maintenance, support and education of his ward, an amount not disproportionate to the value of his estate or his condition of life, and the same is made to appear to the satisfaction of the court, by proper vouchers and proofs, the guardian must be allowed credit therefor in his settlement. Whenever a guardian fails, neglects, or refuses to furnish suitable and necessary maintenance, support, or education, for his ward, the court may order him to do so, and enforce such order by proper process Whenever any third person, at his request, supplies a ward with such suitable and necessary maintenance, support or education, and it is shown to have been done after refusal or neglect of the guardian to supply the same, the court may direct the guardian to pay therefor out of the estate, and enforce such payment by due process.

§ 354. ASSENT TO PARTITION.] The guardian may join in and assent to a partition of the real estate of the ward, whenever such assent may be given by any person.

§ 355. INVENTORY AND ACCOUNT.] Every guardian must return to the probate court an inventory of the estate of his ward within three months after his appointment, and annually thereafter. When the value of the estate exceeds the sum of twenty thousand dollars, semi-annual returns must be made to the probate court. The court may, upon application made for that purpose by any person, compel the guardian to render an account to the probate court of the estate of his ward. The inventories and accounts so to be returned or rendered, must be sworn to by the guardian. All the estate of the ward described in the first inventory must be appraised by appraisers appointed, sworn, and acting in the manner provided for regulating the settlement of the estate of decedents. Such inventory, with the appraisement of the property therein described, must be recorded by the judge of the probate court, in a proper book kept in his office for that purpose. Whenever any other property of the estate of any ward is discovered, not included in the inventory of the estate already returned, and whenever any other property has been succeeded to or acquired by any ward, or for his benefit, the like proceedings must be had for the return and appraisement thereof that are herein provided in relation to the first inventory and return.

§ 356. SETTLEMENT AT END OF YEAR.] The guardian must, upon the expiration of a year from the time of his appointment, and as often thereafter as he may be required, present his accounts to the probate court for settlement and allowance.

§ 357. ACCOUNT BY ONE OF JOINT GUARDIANS.] When an account is rendered by two or more joint guardians, the probate judge may, in his discretion, allow the same upon oath of any of them.

§ 358. EXPENSES AND PAY.] Every guardian must be allowed the amount

of his reasonable expenses incurred in the execution of his trust, and he must also have such compensation for his services as the court in which his accounts are settled deems just and reasonable.

ARTICLE IV.—THE SALE OF PROPERTY AND DISPOSITION OF THE PROCEEDS.

§ 359. CAUSES FOR SALE.] When the income of an estate under guardianship is insufficient to maintain the ward and his family, or to maintain and educate the ward when a minor, his guardian may sell his real or personal estate for that purpose, upon obtaining an order therefor.

§ 360. SALE FOR INVESTMENT.] When it appears to the satisfaction of the court, upon the petition of the guardian, that for the benefit of his ward his real estate, or some part thereof, should be sold, and the proceeds thereof put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his guardian may sell the same for such purpose, upon obtaining an order therefor.

§ 361. PROCEEDS—HOW APPLIED.] If the estate is sold for the purposes mentioned in this article, the guardian must apply the proceeds of the sale to such purposes, as far as necessary, and put out the residue, if any, on interest, or invest it in the best manner in his power, until the capital is wanted for the maintenance of the ward and his family, or the education of his children, or for the education of the ward when a minor, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward.

§ 362. INVESTMENT—HOW MADE.] If the estate be sold for the purpose of putting out or investing the proceeds, the guardian must make the investment according to his best judgment, or in pursuance of any order that may be made by the probate court.

§ 363. PETITION FOR SALE.] To obtain an order for such sale, the guardian must present to the probate court of the county in which he was appointed guardian, a verified petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale.

§ 364. HEARING AND ORDER.] If it appear to the court or judge, from the petition, that it is necessary or would be beneficial to the ward that the real estate, or some part of it, should be sold, or that the real and personal estate should be sold, the court or judge must thereupon make an order directing the next of kin of the ward, and all persons interested in the estate, to appear before the court, at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order should not be granted for the sale of such estate. If it appear that it is necessary or would be beneficial to the ward to sell the personal estate or some part of it, the court must order the sale to be made.

§ 365. SERVICE OF ORDER ON WHOM.] A copy of the order must be personally served on the next of kin of the ward, and on all persons inter

ested in the estate, at least fourteen days before the hearing of the petition, or must be published at least three successive weeks in a newspaper printed in the county, or if there be none printed in the county, then in such newspaper as may be specified by the court or judge in the order. If written consent to making the order of sale is subscribed by all persons interested therein, and the next of kin, notice need not be served personally or by publication.

§ 366. HEARING UPON ORDER.] The probate court, at the time and place appointed in the order, or such other time to which the hearing is postponed, upon proof of the service or publication of the order, must hear and examine the proofs and allegations of the petitioner and of the next of kin, and of all other persons interested in the estate who oppose the application.

§ 367. WITNESSES ATTENDANCE.] On the hearing the guardian may be examined on oath, and witnesses may be produced and examined by either party, and process to compel their attendance and testimony may be issued by the probate court or judge, in the same manner and with like effect as in cases provided for in the settlement of the estates of decedents.

§ 368. COSTS.] If any person appears and objects to the granting of any order prayed for under the provisions of this article, and it appears to the court that either the petition or the objection thereto is sustained, the court may, in granting or refusing the order, award costs to the party prevailing, and enforce the payment thereof.

§ 369. ORDER FOR SALE—CONTENTS.] If, after a full examination, it appears necessary, or for the benefit of the ward, that his real estate, or some part thereof, should be sold, the court may grant an order therefor, specifying therein the causes or reasons why the sale is necessary or beneficial, and may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale.

§ 370. BOND BY GUARDIAN.] Every guardian authorized to sell real estate, must, before the sale, give bond to the probate judge, with sufficient surety, to be approved by him, with condition to sell the same in the manner and to account for the proceeds of the sale as provided for in this chapter and chapter VII of this title.

§ 371. REFERENCE TO LAW GOVERNING.] All the proceedings under petition of guardians for sales of property of their wards, giving notice and the hearing of such petitions, granting and refusing an order of sale, directing the sale to be made at public or private sale, reselling the same property, return of sale and application for confirmation thereof, notice and hearing of such application, making orders, rejecting or confirming sales and reports of sales, ordering and making conveyances of property sold, accounting and the settlement of accounts, must be had and made as provided and required by the provisions of law concerning the estates of decedents unless otherwise specially provided in this chapter.

§ 372. TIME ORDER IN FORCE.] No order of sale granted in pursuance of this article continues in force more than one year after granting the same, without a sale being had.

§ 373. TERMS OF SALE—SECURITY.] All sales of real estate of wards must be for cash, or for part cash and part deferred payments, not to exceed three years, bearing date from date of sale, as, in the discretion of the probate judge is most beneficial to the ward. Guardians making sales must demand and receive from the purchasers bond and mortgage on the real estate sold, with such additional security as the judge deems necessary and sufficient to secure the faithful payment of the deferred payments and the interest thereon.

§ 374. ORDERS TO INVEST.] The probate court, on the application of a guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein; and the probate court may make such other orders and give such directions as are needful for the management, investment and disposition of the estate and effects, as circumstances require.

ARTICLE V.—NON-RESIDENT GUARDIANS AND WARDS.

§ 375. GUARDIANS FOR NON-RESIDENT WARD.] When a person liable to be put under guardianship, according to the provisions of this chapter, resides without this territory, and has estate therein, any friend of such person, or any one interested in his estate, in expectancy or otherwise, may apply to the probate judge of any county in which there is any estate of such absent person, for the appointment of a guardian; and if, after notice given to all interested, in such manner as the judge orders, and a full hearing and examination, it appears proper, a guardian for such absent person may be appointed.

§ 376. POWERS.] Every guardian, appointed under the preceding section, has the same powers and performs the same duties, with respect to the estate of the ward found within the territory, and with respect to the person of the ward, if he shall cease to reside therein, as are prescribed with respect to any other guardian appointed under this chapter.

§ 377. BOND—EXCEPTIONS.] Every such guardian must give bond to the ward, in the manner and with the like conditions as hereinbefore provided for other guardians, except that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardian, must be confined to such estate and effects as come to his hands in this territory.

§ 378. FIRST APPOINTMENT EXCLUSIVE.] The guardianship which is first lawfully granted, of any person residing without this territory, extends to all the estate of the ward within the same, and excludes the jurisdiction of the probate court of every other county.

§ 379. REMOVAL OF PROPERTY.] When the guardian and ward are both non-residents, and the ward is entitled to property in this territory which may be removed to another territory, state or foreign country without conflict with any restriction or limitation thereupon, or impairing the

right of the ward thereto, such property may be removed to the territory, state or foreign country of the residence of the ward, upon the application of the guardian to the judge of the probate court of the county in which the estate of the ward, or the principal part thereof, is situated.

§ 380. APPLICATION FOR—PROOFS—ORDER.] The application must be made upon ten days' notice to the resident executor, administrator or guardian, if there be such, and upon such application the non-resident guardian must produce and file a certificate, under the hand of the clerk, judge, surrogate or other authorized officer and the seal of the court from which his appointment was derived, showing:

1. A transcript of the record of his appointment.
2. That he has entered upon the discharge of his duties.
3. That he is entitled, by the laws of the territory, state or country of his appointment to the possession of the estate of the ward; or must produce and file a certificate under the hand and seal of the clerk, judge, surrogate or other authorized officer of the court having jurisdiction in the country of his residence, of the estates of persons under guardianship, or of the highest court of such territory, state or country, that by the laws of such country the applicant is entitled to the custody of the estate of his ward without the appointment of any court.

Upon such application, unless good cause to the contrary be shown, the judge of the probate court must make an order granting to such guardian leave to take and remove the property of his ward to the territory, state or place of his residence, which is authority to him to sue for and receive the same in his own name, for the use and benefit of his ward.

§ 381. EFFECT OF ORDER.] Such order is a discharge of the executor, administrator, local guardian, or other person in whose possession the property may be at the time the order is made, on filing with the probate court the receipt therefor of the foreign guardian of such absent ward.

ARTICLE VI.—GENERAL AND MISCELLANEOUS PROVISIONS.

§ 382. COMPLAINT AGAINST GUARDIAN.] Upon complaint made to him by any guardian, ward, creditor, or other person interested in the estate, or having a prospective interest therein as heir or otherwise, against any one suspected of having concealed, or conveyed away any of the money, goods, or effects or an instrument in writing, belonging to the ward or to his estate, the judge of the probate court may cite such suspected person to appear before him, and may examine and proceed with him on such charge in the manner provided by law with respect to persons suspected of, and charged with, concealing or embezzling the effects of a decedent.

§ 383. CAUSE FOR REMOVAL.] When a guardian appointed either by the testator or the probate court or judge, becomes insane or otherwise incapable of discharging his trust, or unsuitable therefor, or has wasted or mismanaged the estate, or failed for thirty days to render an account or make a return, the probate court may, upon such notice to the guardian as the court may require, remove him and compel him to surrender the es-

tate of the ward to the person found to be lawfully entitled thereto. Every guardian may resign when it appears proper to allow the same; and upon the resignation or removal of a guardian, as herein provided the probate court may appoint another in the place of the guardian who has resigned or has been removed.

§ 384. EVENTS TERMINATE GUARDIANSHIP.] The marriage of a minor ward terminates the guardianship; and the guardian of an insane or other person may be discharged by the judge of the probate court when it appears to him, on the application of the ward or otherwise, that the guardianship is no longer necessary.

§ 385. NEW BONDS.] The judge of the probate court may require a new bond to be given by a guardian whenever he deems it necessary, and may discharge the existing sureties from further liability, after due notice given as he may direct, when it shall appear that no injury can result therefrom to those interested in the estate.

§ 386. BONDS PRESERVED—ACTIONS UPON.] Every bond given by a guardian must be filed and preserved in the office of the probate judge of the county; and in case of a breach of a condition thereof, may be prosecuted for the use and benefit of the ward or of any person interested in the estate.

§ 387. WITHIN THREE YEARS—DISABILITIES.] No action can be maintained against the sureties on any bond given by a guardian, unless it be commenced within three years from the discharge or removal of the guardian; but if at the time of such discharge the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed.

§ 388. RECOVERY OF ESTATE SOLD.] No action for the recovery of any estate, sold by a guardian, can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof.

§ 389. MORE THAN ONE GUARDIAN.] The court in its discretion, whenever necessary, may appoint more than one guardian of any person subject to guardianship, who must give bond and be governed and liable in all respects as a sole guardian.

§ 390. POWERS EXERCISED BY JUDGE OR COURT.] The power conferred upon the probate judge in relation to guardians and wards may be exercised by him at chambers or as the act of the probate court, when holding such: and any order appointing a guardian must be entered as and become a decree of the court. The provisions of this title relative to the estates of decedents, so far as they relate to the practice in the probate or the district courts, apply to proceedings under this chapter.

Approved, January 27, 1877.